

# MEDIA MEMORANDUM

David Montenegro

May 19, 2009

## 1 Background

The judicial system of the State of New Hampshire has historically, and as a matter of law, been open to public scrutiny. “The public right of access to court proceedings and records pre-dates the State and Federal Constitutions and is firmly grounded in the common law. See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 & n.6 (6th Cir. 1983).” *The Associated Press & A. v. The State of New Hampshire*, 153 N.H. 120, 888 A.2d 1236 (2005). From the courts of England, to the Constitutions of the United States and New Hampshire, to the recent petition of WMUR Channel 9 et al., the courts have consistently upheld a public right of access to proceedings in New Hampshire’s courts. *Richmond Newspapers, Inc., et al. v. Virginia et al.*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *Donald C. Renkel, Appellant, v. State of Alaska, Appellee*, 807 P.2d 1087 (1991).

## 2 General Rule

“The right to open courtrooms and access to court records related to court proceedings is firmly supported by New Hampshire practice and common law

principles, Part I, Articles 8 and 22 of our State Constitution and our guidelines for public access. See *Thomson v. Cash*, 117 N.H. 653, 654, 377 A.2d 135 (1977); *Petition of Keene Sentinel*, 136 N.H. at 126-28;” *Petition of Union Leader Corporation*, 147 N.H. 603, 809 A.2d 752 (2002). “In determining whether the right to public access under our constitution applies to particular proceedings, we have adopted the ‘experience and logic test’ of the United States Supreme Court. *Associated Press*, 153 N.H. at 133. Under this test, a court must determine: (1) ‘whether the place and process have historically been open to the press and general public,’ and (2) ‘whether public access plays a significant positive role in the functioning of the particular process in question.’ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press Enterprise II*); see *Associated Press*, 153 N.H. at 131.” *The State of New Hampshire v. William Decato*, 156 N.H. 570, 938 A.2d 898 (2007).

“The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees; the First Amendment right to receive information and ideas means, in the context of trials, that the guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted. Moreover, the right of assembly is also relevant, having been regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. A trial courtroom is a public place where the people generally – and representatives of the media – have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.” *Richmond*, *supra*. “public access to court proceedings is one of the numerous ‘checks and balances’ of our system, because ‘contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power,’” *Id.*

Thus, it is an expressed purpose of the First Amendment of the U.S. Constitution; Part I, Articles 8 and 22 of the New Hampshire Constitution; and common law, that members of the public have the right to scrutinize court proceedings, that conduct in courts be subject to public critique, and that such critique enhances “the integrity and quality” of the judicial system.

### **3 Criminal Trials**

The same doctrine of transparency attaches to criminal trials as to civil trials. “historically both civil and criminal trials have been presumptively open.” Richmond, *supra*. “A trial is a public event. What transpires in the court room is public property.” Craig et al. v. Harney, Sheriff, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947). “a trial is by very definition a proceeding open to the press and to the public.” *Op. cit.* “the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.” *Id.*

In cases, such as criminal trials, in which the state is plaintiff, the right of public access to court proceedings, as a check upon judicial power, is all the more important. Accordingly, the right of public access to criminal trials is guaranteed as a right of the accused by the Sixth Amendment, which reads in part, “the accused shall enjoy the right to a speedy and public trial”. U.S. Const.

### **4 Judicial Integrity**

In addition to protecting the rights of the accused, public scrutiny serves to protect the integrity of the courts. “Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to

the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.” *Globe Newspaper Co. v. Superior Court For The County of Norfolk*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). “Such access is critical to ensure that court proceedings are conducted fairly and impartially, see *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993), and that the judicial process is open and accountable. See N.H. CONST. pt. I, arts. 8, 22.” *Union Leader*, *supra*.

“One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.” *Maryland v. Baltimore Radio Show, Inc. et al.*, 338 U.S. 912, 70 S. Ct. 252, 94 L. Ed. 562 (1950). “The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings.” *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).

“With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).” *Cox Broadcasting Corp. et al. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). “Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.” *In Re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

## 5 Interest of the Accused

All extant prohibitions or limitations on the use of electronic media in courtrooms are concerned with protecting the Sixth Amendment guarantee of due process for the accused. The right to object to any media coverage, electronic or otherwise, is therefore a privilege enjoyed by the accused. This privilege cannot, and should not, be afforded the state, for the state is at all times subject to public scrutiny. cf. §GENERAL RULE, §CRIMINAL TRIALS, §JUDICIAL INTEGRITY.

Furthermore, in a criminal trial, it is the accused whose liberties are in jeopardy. By comparison to the accused, the state has comparatively little to lose at a criminal trial. Accordingly, it is the accused that has the most to gain from a fair and impartial trial, and the most to gain from an open and public trial. Therefore, it is the interest of accused which must control whether any particular matter before the court should be open or closed to the public.

There is nothing in constitutional law, and little by way of statutory and case law, to suggest that the state has a right to object to media coverage. cf. §EXCEPTIONS, *infra*. To the contrary, the overwhelming body of evidence points to the state's obligation to public exposure.

## 6 Exceptions

While the public right of access to criminal trials has been consistently upheld, “such right is not absolute, since various considerations may sometimes justify limitations upon the unrestricted presence of spectators in the courtroom;” Richmond, *supra*. “Our State Constitution gives the press a presumptive right of access to judicial proceedings and court records, limited, however, by the necessity that it be balanced against a criminal defendant's fundamental right to a fair trial. See Keene Publishing Corp. v. Cheshire County Super. Ct., 119 N.H. 710, 711, 406 A.2d 137 (1979); Keene Pub. Corp. v. Keene Dist. Ct., 117 N.H. 959, 961, 380 A.2d 261 (1977); N.H. CONST. pt. I, art. 15.” Petition of

WMUR Channel 9 & a., 148 N.H. 644, 813 A.2d 455 (2002).

For example, “Superior Court Rule 78(a) created a presumption against having cameras in the courtroom because, in the 1960s and 1970s, such technology was considered bulky and distracting, and detracted from the integrity of court proceedings.” WMUR, *supra*. In *Estes*, the court observed, “the courtroom was a mass of wires, television cameras, microphones and photographers” *Estes*, *supra*. In the case of *Sheppard v. Maxwell*, the court noted that “bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial” *Sheppard v. Maxwell*, Warden, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

Other circumstances in which the state is justified in limiting public access to court proceedings include proceedings involving confidential personal or business information such trade secrets, financial information, medical information, etc.; proceedings involving witnesses who have not yet reached the age of majority; and national security interests such as those under the state secrets privilege or the USA PATRIOT Act. *United States v. Reynolds*, 345 U.S. 1 (1953); Pub.L. 107-56.

## 6.1 The Stringent Test

In order to discern whether, and to what degree, closure of a trial is in the best interest of justice, the “stringent test” is applied. *United States v. Lukesha Y. Anderson*, 46 M.J. 728, (1997 CCA). As the stringent test applies to exclusion of electronic media, “Complete closure of trial proceedings to the electronic media, however, should occur only if four requirements are met: (1) closure advances an overriding interest that is likely to be prejudiced; (2) the closure ordered is no broader than necessary to protect that interest; (3) the judge considers reasonable alternatives to closing the proceeding; and (4) the judge makes particularized findings to support the closure on the record. See, e.g., *Com. v. Clark*, 432 Mass. 1, 730 N.E.2d 872, 881 (Mass. 2000).” WMUR, *supra*.

## 6.2 Presumption of Access

In the case of uncertainty about whether or not a proceeding should be open to electronic media, the presumption is one of right to access. *Id.*

## 7 Modern Media Technology

While the concurring opinion in *Estes* held that television equipment was a distraction in court, “Advances in modern technology, however, have eliminated any basis for presuming that cameras are inherently intrusive. In fact, the increasingly sophisticated technology available to the broadcast and print media today allows court proceedings to be photographed and recorded in a dignified, unobtrusive manner, which allows the presiding justice to fairly and impartially conduct court proceedings.” *WMUR, supra*. “many of the negative factors found in *Estes* – cumbersome equipment, cables, distracting lighting, numerous camera technicians – are less substantial factors today than they were at that time.” *Chandler et al. v. Florida*, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740, (1981).

According to the Chandler opinion, “Other courts that have been asked to examine the impact of television coverage on the participants in particular trials have concluded that such coverage did not have an adverse impact on the trial participants sufficient to constitute a denial of due process. See, e. g., *Bradley v. Texas*, 470 F.2d 785 (CA5 1972); *Bell v. Patterson*, 279 F.Supp. 760 (Colo.), *aff’d*, 402 F.2d 394 (CA10 1968), *cert. denied*, 403 U.S. 955 (1971); *Gonzales v. People*, 165 Colo. 322, 438 P. 2d 686 (1968).” *Id.* In the high-profile case of *State of N.H. v. Pamela Smart*, the presiding justice told the jury, “this is not the first time that has been done in New Hampshire where there has been press coverage and cameras in the courtroom. You’ll find if there are – the jury, the final jury is among you here, that within a half an hour you pay no attention to the fact that cameras are there or that the press is in the courtroom. It’s just they’re there.” *The State of New Hampshire v. Pamela Smart*, 136 N.H. 639,

622 A.2d 1197 (1993).

“Numerous States have conducted studies on the physical effects cameras and electronic media have on courtrooms, finding minimal, if any, physical disturbance to the trial process. See Chandler, 449 U.S. at 565 n. 6;” WMUR, *supra*. “Additionally, these States have found that the psychological effect of cameras in the courtroom on trial participants is no greater than when reporters wait outside on the courthouse steps with cameras.” *Id.* “In contrast, these studies have found that the advent of cameras in the courtroom improves public perceptions of the judiciary and its processes, improves the trial process for all participants, and educates the public about the judicial branch of government.” *Id.*

“Radio and television broadcasts are important ways by which citizens receive news. They are effective channels of news transmission because they can carry the unfiltered content of proceedings directly to the public.” *Id.* “It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges v. California*, 314 U.S. 252 (1941), and *Pennekamp v. Florida*, 328 U.S. 331 (1946), which we reaffirm.” *Estes*, *supra*. “We conclude that media access to judicial proceedings includes the technological advances applicable to the media profession.” *Op. cit.*

“A trial judge should permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public.” *Id.* “The practice is buttressed by the practical reality of the twenty-first century, which gives people instant access to information through all forms of electronic media.” *Id.*

## **8 Superior Court Rule 78**

Superior Court Rule 78(a), authored at a time when television technology was bulky and obtrusive, embodied a presumption that cameras would not be allowed

in any courtroom except by order of the presiding justice. In 2002, at a time when technology had advanced sufficiently to overcome the difficulties described in *Estes*, WMUR Channel 9 filed a petition for writ of certiorari seeking review of Superior Court Rule 78. As a result of *WMUR*, Superior Court Rule 78 was invalidated and referred to the Advisory Committee on Rules for repair.

## 9 District Court Rule 1.4

District Court Rule 1.4(a) is similar to Superior Court Rule 78(a), in that it embodies a presumption that media activity can be expected to disrupt court proceedings. As was demonstrated in §MODERN MEDIA TECHNOLOGY, above, this presumption is no longer true. So long as such activity is conducted in accordance with the general media guidelines of District Court Rule 1.4.(c)-(h), no substantial harm may be expected from *any* individual electronically recording a trial. Just as any individual may take written notes during a trial without disruption, so may any individual use today's technology to make electronic records of a trial without disruption.

Interestingly, District Court Rule 1.4.(a) fails to account for individuals who are not members of the media per se, but who document court proceedings for purposes of dissemination to media outlets. Insofar as the function of the media is to report court proceedings to the public, non-media individuals acting in a media capacity are effectively media, and must be considered de facto media for the purposes of this rule.

It should also be noted that Rule 1.4.(a) does not place an absolute ban on recording or broadcast by individuals who are not representatives of commercial media. Rather, it leaves such recording at the discretion of the trial judge. Thus, a judge is free to permit any individual to record any trial so long as such activity does not encumber the defendant's right to a fair trial.

In accordance with *WMUR*, the language of Rule 1.4.(a), "Except as specifically provided in this rule, or by order of the presiding justice, no person shall . . ."

cannot be construed to segregate members of the media from other members of the public. Rather, the rule serves to segregate individuals *who follow the media guidelines of the rule* from those who would indiscriminately use electronic recording devices in violation of these guidelines. Stated differently, any individual making a recording or broadcast in accordance with the guidelines of Rule 1.4.(c)-(h), is operating “as specifically provided in this rule”.

To deny this interpretation of Rule 1.4.(a) would be to instill in District Court Rule 1.4.(a) the same defect as the old Superior Court Rule 98. Specifically, an assumption that this rule is intended to segregate the media from other members of the public would leave recording, at least for some members of the public, at the unqualified discretion of the trial judge. By the logic of *WMUR*, the trial judge would have to apply the same stringent test to members of the media as to other members of the public. Therefore, distinguishing between members of the media and members of the public, for purposes of this rule, would be moot.

Finally, it should be noted that *WMUR* was decided by the Supreme Court of N.H. As a result, the court’s finding applies equally to the District Courts of the State of N.H. as well as to the Superior Courts.

## **10 Press Distinction**

### **10.1 Segregation**

The matter of what distinction, if any, can be made between members of the press and other members of the public, concerning access to the courts, deserves special attention. As stated in *Estes*, “Instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media whose representatives ‘are entitled to the same rights [to attend trials] as the general public.’ *Estes v. Texas*, 381 U.S., at 540.” *Richmond*, *supra*.

If any law or rule is to segregate members of the press from the remainder of the

public, and to confer upon the press any greater right of access to proceedings in court, then such segregation must be firmly supported by an overriding interest. Otherwise, such discrimination would inherently deny non-press members of the public equal access to court proceedings—a patent unconstitutionality.

As it happens, there are some circumstances when press may justifiably be granted preferential access to courtrooms. As expressed in *Richmond*, “every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so. ... In such situations, representatives of the press must be assured access. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16” *Id.*

Absent practical considerations such as seating capacity, however, there is no legal basis for conferring to members of paid press any greater right of access than to any other member of the public.

## 10.2 Technological Capability

As communications technology advances, the means to effectively distinguish between the press and the public becomes ever more difficult. Increasingly, private individuals have been publishing news information through blogs, online newspapers and news depots, RSS/ATOM feeds, YouTube<sup>TM</sup> channels, and all manners of web-enabled technology. Even television news stations make frequent use of online content in modern television newscasts.

In addition to increasingly sophisticated publishing technology, recording technology which was once only affordable to the professional media is increasingly becoming affordable to the average citizen. A prime example of this trend is the technology provided by Qik, Inc. (<http://www.qik.com>). Qik can be used to broadcast video from personal communications devices to the Internet, live and in real-time. Previously, such technology was accessible only to well-funded corporate media. Today, it is within the reach of the average citizen.

Thus, as the technological capability of the public has been approaching that

of the for-profit media, the role of the public in reporting news has also been approaching that of the media.

### **10.3 Democratization**

Allowing non-paid press access to court proceedings serves an additional prophylactic purpose: the democratization of news information. As members of the paid press are answerable to for-profit employers, members of the paid press are limited in what they are able to report to the public. Non-paid press, however, are under no such constraints and may report what occurs in the courtroom, free from censorship. Therefore, members of the non-paid press have greater latitude to report events which may be politically unpopular or financially unprofitable. This serves to enhance exposure of courts to the public, and further the “the integrity and quality” of the system, more effectively even than the reporting of for-profit media outlets.

## **11 Summary**

In summary. . .

1. The press and public, alike, enjoy a right of access to court records and proceedings, both civil and criminal.
2. Absent a clear overriding interest, this right of access cannot constitutionally be denied.
3. In deciding whether any part of a proceeding should be closed to the public, or any segment thereof, the “stringent test” must be satisfied. Namely:
  - (a) the closure must advance an overriding interest,
  - (b) the closure ordered must be no broader than necessary to protect that interest,

- (c) reasonable alternatives to closure must be considered, and
- (d) the judge must make particularized findings to support the closure on the record.

4. In case of doubt, the presumption is one of openness.
  5. Both public access to a criminal trial and fairness of the trial are primarily rights of the accused, and secondarily rights of the people. A balance between openness and fairness must be struck which assures the accused due process.
  6. In almost all cases, the rights of the accused control the decision to open or close any matter before the court.
  7. In addition to protecting the rights of the accused, public trials serve as a check on the judicial system and engender public confidence in the courts.
  8. Electronic media, subject to certain guidelines concerning operation of equipment, enjoy the same rights of access as other forms of media.
  9. In almost all circumstances, members of the public enjoy the same rights of access as the media.
  10. Not-for-profit media serve a valid and special media purpose, with unique social advantages over those of for-profit media.
-