

**RESPONSE OF THE UNITED STATES OF AMERICA
TO THE
THIRD STUDY COMMISSION QUESTIONNAIRE 2019**

By the Honorable Charles R. Simpson, III
Senior Judge, United States District Court for the Western District of Kentucky

A. Protecting the integrity of the proceedings

1. Are there regulations about how the media work inside the courthouse and the courtroom? If yes, please explain.

Yes. The media in federal courts are bound by procedures promulgated by the Judicial Conference of the United States, by the Federal Rules of Criminal Procedure, and by local court rules. The media in state courts are bound by rules promulgated by the supreme court of each state.

2. Are the media permitted to transmit directly from the courtroom, or make a record of the proceedings? If no, how does the court prevent such transmission (for example by using Twitter) or record taking? If yes, do you think that direct transmission from a criminal courtroom can be damaging for the case? Please explain in what way, and which situations you find the most at risk?

The media is permitted to observe most court proceedings, including criminal hearings and trials. During such proceedings, they are generally permitted to take notes. However, some proceedings (like the grand jury, jury deliberations, and attorney-client meetings) are entirely closed to the public and the media. Generally, in the federal courts, the media is not permitted to take photographs or broadcast criminal proceedings. FED. R. CRIM. P. 53. However, artists are permitted to make sketches of court proceedings. The use of electronic devices is governed by local rules and varies from court to court. Many courts prohibit the use of electronic devices entirely. Even when permitted to be present, recording and broadcasting is prohibited by the Federal Rules. In contrast, many state courts digitally record procedures and make those recording available to the media and the public. Some courts, including state trial and appellate courts, live-stream court proceedings.

3. May the media talk to the judge(s), the jury members, the prosecutor, the defence lawyer, the accused, the witness etc. before, during and/or after the hearing? If yes, are any conditions attached to this?

Federal judges “should not make public comment on the merits of a matter pending or impending in any court.” CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3A(6) (USJC 2019). Another ethical rule states that judges “shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.” MODEL CODE OF JUDICIAL CONDUCT r. 2.10 (AM. BAR ASS’N 2014). These rules apply with equal force to a judge’s staff. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3A(6) (USJC 2019).

As for a jury, once they have been empaneled, the judge will instruct the jury not to discuss the case with anyone or use the media to learn more about the case for the duration of the trial. However, once the trial concludes, jurors are generally free to speak on their experience (absent a contrary court order) but are not compelled to.

The prosecutor and defense counsel are permitted to speak to the media but have an ethical obligation to avoid making “an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” MODEL RULES OF PROF'L CONDUCT r. 3.6(a) (AM. BAR ASS'N 2018). There are several explicit situations in which media statements are permissible. *See Id.* at r. 3.6(b)–(c). In rare cases, a judge may issue a gag order. Such an order prohibits the parties or their lawyers from commenting on the case publicly.

Finally, witnesses (including the accused) are generally permitted (in the absence of a contrary court order) to speak to the media if they desire, though they are under no obligation to do so.

4. Are there any restrictions on what the media may report before/ during the case, and/or after the verdict? If yes, please explain. Do these restrictions apply in every case?

The First Amendment to the United States Constitution permits wide latitude for the news media to publish details regarding criminal trials. Even information that is confidential or classified may usually be published. *New York Times Co. v. Sullivan*, 403 U.S. 713, 714 (1971) (per curiam) (permitting publication of the then-classified government documents known as the Pentagon Papers). *See also The Florida Star v. B.J.F.*, 491 U.S. 524, 532–33 (1989) (permitting publication of the name of a rape victim despite the fact that such publication was prohibited by a state law). There are extraordinarily limited scenarios, described by the court as a “single, narrow class of cases” where publication would be so dangerous to fundamental government interests that restraining the media would be permitted. *New York Times*, 403 U.S. at 726 (Brennan, J., concurring).

5. Have you ever experienced a situation where a party in a case has been influenced by the media in a manner that was damaging for the case? For example a juror/jury who wants to find the defendant guilty due to a media report that suggests the accused is guilty, or a witness who says, as a result of reading about the case in the media, something quite different when giving evidence to that which they said during the investigation? If yes, how did you handle the problem?

No, I have not.

6. What can a judge do to ensure that the members of the court or the jury remain unbiased and are not influenced by the media? Is there anything you view as being particularly important, or essential?

Juries are directed to avoid researching the case, including the law, the facts, or the parties. This is generally a self-policing restriction. In extreme cases, however, the judge may order the jury sequestered. In such a case, the jury is kept separated, often in a hotel, and is forbidden from watching or reading news or speaking with others or the news media about the case until deliberations have concluded.

When a judge or members of the judge's staff feel they cannot be unbiased, there are methods for recusal or screening-off. *See* 28 U.S.C. § 455 (recusal statute); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3A (USJC 2019). Refusal to do so is only remediable by an appellate court.

B. Communication with the media:

7. Do the media, during a hearing, have special privileges compared to others in court? If yes, which do you find the most relevant or significant?

No. Regulations governing presence and decorum in the courtroom are applied universally regardless of whether individuals are ordinary citizens or members of the news media. In cases of great public interest, however, members of the media may receive priority seating in the courtroom.

8. Do the courts communicate the content of a verdict to the media and the public and, if yes, in what way? Do you have, for example, a court spokesman or a media judge or do you give press releases or have some other form of communication with the media? If yes, which do you find the most relevant or effective?

Most court records, including jury verdicts, are available to the public through the Public Access to Court Electronic Records service ("PACER") or by inquiring at the Clerk's office. PACER requires a fee to access and view documents. News media who seek court documents are required to pay the fee in the same way other individuals would. The Court itself does not publicize verdicts or communicate the information directly to the media.

9. Do the courts cooperate in any other way with the media and, if yes, in what way? If yes, which do you find the most relevant or effective?

No. Courts generally operate independently from media organizations during criminal trials.