Chapter 27

Trial: General Characteristics; The Opening Stage

Part A. General Characteristics of the Trial

§ 27.01 THE RESPONDENT'S PRESENCE DURING THE TRIAL

Under ordinary circumstances a criminal trial cannot be held *in absentia, see Drope v. Missouri,* 420 U.S. 162, 182 (1975), and the same rule applies to juvenile prosecutions, *see, e.g., R.L.R. v. State,* 487 P.2d 27, 42-43 (Alaska 1971); *In the Matter of Rodney R.,* 119 A.D.2d 677, 500 N.Y.S.2d 805 (N.Y. App. Div., 2d Dep't 1986). The accused "has a right to be present at all important stages of trial." *McKaskle v. Wiggins,* 465 U.S. 168, 178 (1984) (dictum); *See*, *e.g.*, *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner"); *Insyxiengmay v. Morgan*, 403 F.3d 657, 669 (9th Cir. 2005); *State v. Lopez*, 271 Conn. 724, 859 A.2d 898 (2004); *State v. Bird*, 308 Mont. 75, 43 P.3d 266 (2002); *State v. Irby*, 170 Wash. 2d 874, 246 P.3d 796 (2011); *State v. Harris*, 229 Wis. 2d 832, 601 N.W.2d 682 (Wis. App. 1999); *cf. Rushen v. Spain,* 464 U.S. 114, 117 (1983) (per curiam) (dictum). *See also United States v. Salim*, 690 F.3d 115, 122 (2d Cir. 2012) (the accused's "right to be present during sentencing," which "extends to resentencing," "requires physical presence and is not satisfied by participation through videoconference"); *United States v. Crandall*, 748 F.3d 476, 481 (2d Cir. 2014) ("the Sixth Amendment right to participate in one's own trial encompasses the right to reasonable accommodations for impairments to that participation, including hearing impairments").

In most jurisdictions the right derives from several sources. It is often conferred by statute or rule of court (*see, e.g.*, *Crosby v. United States*, 506 U.S. 255 (1993)); it is held to be protected by the common state constitutional guarantees of due process and of confrontation; and it is protected by the Due Process Clause of the Fourteenth Amendment and by the Confrontation Clause of the Sixth Amendment to the federal Constitution. The latter two components of the right overlap but are not coextensive. "The [Supreme] Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Kentucky v. Stincer,* 482 U.S. 730, 745 (1987) (dictum); *see also United States v. Gagnon,* 470 U.S. 522, 526 (1985) (per curiam) (dictum) (same, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (dictum) ("an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Justice Kennedy, concurring in the judgment) (an accused's "right to be present at trial . . . derives from the right to testify and rights under the Confrontation Clause").

In the *Stincer* opinion, the Court elaborates the scope of this Due Process right by saying that it is a "right to be present at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] . . . presence would contribute to the fairness of the procedure." 482 U.S. at 745. The same opinion seems to treat the measure of the Confrontation Clause right as "whether there has been any interference with the defendant's opportunity for effective cross-examination," *id.* at 744-45 n.17, as a result of the defendant's exclusion during a stage of the trial at which the testimony of prosecution witnesses is received, *see id.* at 739-40. But the latter right is clearly broader than that because the Court has squarely held that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact" in at least one situation in which the right of effective cross-examination was not significantly implicated. *Coy v. Iowa,* 487 U.S. 1012, 1016 (1988) (holding that the Confrontation Clause was violated by a procedure under which a screen was placed between the defendant and child complainants while they testified in a sex case, with no "individualized findings" that the "particular witnesses needed special protection," *id.* at 1021). *See also Maryland v. Craig,* 497 U.S. 836, 850 (1990) (dictum) ("our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured"); *State v. Rogerson*, 855 N.W.2d 495, 500, 506, 507-08 (Iowa 2014) (*Maryland v. Craig*'s standard for the permissibility of using "a one-way video system in which the witness could not see or hear the defendant, but the defendant, judge, and jury could see and hear the witness" also applies to "two-way video systems . . . [which] allow both the defendant and the witness to see and hear one another simultaneously during the testimony": "Because face-to-face confrontation is constitutionally preferable to remote testimony of any kind, . . . two-way video testimony . . . should be acceptable only upon a showing of necessity to further an important public interest and only when the testimony's reliability can be otherwise assured."; "the State failed to meet the necessity prong of that standard," either with respect to witnesses who "resided a significant distance from Iowa and had suffered serious injuries" but who had not been shown by the State to be "beyond the court's subpoena power or . . . unable to travel because of their injuries," or with respect to state lab employees, because "the State's justifications of mere distance, cost, and efficiency are insufficient to overcome Rogerson's Sixth Amendment rights, and there is no evidence that the witnesses are unable to travel."); *State v. Schwartz*, 327 P.3d 1108, 1111-14 (N.M. App. 2014) (holding that the defendant's "rights under the confrontation clauses of the United States and New Mexico Constitutions were violated when the district court permitted four witnesses to testify by two-way video over the Internet [via Skype] without the necessary findings that use of video was necessary"; the requisite necessity was not established by the circumstance that three of the witnesses resided out of the state; and a doctor's letter stating that one of them "is suffering from severe stress, anxiety[,] and depression and is physically and psychologically unable to travel out of the state [of Florida] for the for[e]seeable future . . . ¶ . . . was inadequate as a matter of law to support a conclusion that . . . [this witness – the defendant's mother –] could not testify in person."); *State v. Ulestad*, 127 Wash. App. 209, 215, 111 P.3d 276, 279 (2005) ("The court failed to provide Ulestad with constant communication with his attorney as required by subsection (h) of RCW 9A.44.150 [during the child-molestation

complainant's testimony by one-way television hookup]. Instead, the court allowed Ulestad to communicate with his attorney only by stopping the proceedings. But this is delayed, not constant communication. Moreover, to talk with his attorney, Ulestad had to signal his intent to do so in front of the jury and interrupt the trial. Such a procedure carries substantial risk that the defendant will be intimidated from exercising even this limited communication with his attorney. We hold that the trial court erred in failing to strictly follow the constant communication requirement of RCW 9A.44.150. The error is reversible without a showing of prejudice.").

Whatever the exact scope of these several rights in esoteric situations, their effect in the ordinary case is to require the respondent's physical presence in court during all proceedings in which factual matters are at issue or in which dispositive rulings are made by the court, but not during arguments of purely legal questions or discussions of matters of trial administration at sidebar or in chambers. *Cf. United States v. Gagnon*, 470 U.S. at 526-29 (the Constitution was not violated by defendants' absence from chambers proceedings in which a juror who had expressed concern that one defendant appeared to be sketching jury members in the courtroom was questioned by court and counsel); *Kentucky v. Stincer*, 482 U.S. at 739-47 (the Constitution was not violated by the defendant's absence from chambers proceedings in which prospective child witnesses were examined by the court and counsel to determine their competency to testify; the Court notes that the same questions asked of the witnesses in chambers could have been repeated in open court and that the trial court's ruling that the witnesses were competent was subject to reconsideration during their courtroom testimony.). Many trial judges routinely permit the respondent to be present during even chambers conferences on minor matters, and counsel should ordinarily request that his or her client be allowed to attend every proceeding in the case. This will reassure the client that counsel is not "selling out" in private conversations with the judge and prosecutor and will forestall postconviction allegations of covert "deals" between counsel and the court.

Proceedings that the respondent has a right to attend may be held in his or her absence only when:

(a) the respondent has personally waived the right to be present, *see Taylor v. Illinois,* 484 U.S. 400, 418 n.24 (1988) (dictum), citing *Cross v. United States,* 325 F.2d 629 (D.C. Cir. 1963), or

(b) the court finds that the respondent has chosen voluntarily not to attend the proceedings, *see Taylor v. United States,* 414 U.S. 17 (1973) (per curiam); *cf. Tacon v. Arizona,* 410 U.S. 351 (1973), *or*

(c) the respondent is engaging in disruptive courtroom conduct which makes it impossible to carry on the trial, *see Illinois v. Allen*, 397 U.S. 337 (1970); *United States v. Ward*, 598 F.3d 1054, 1057-60 (8th Cir. 2010); *Gray v. Moore*, 520 F.3d 616, 622-25 (6th Cir. 2008).

In *United States v. Gagnon,* 470 U.S. at 528-29, the Supreme Court held that the defendant's right to attend court proceedings guaranteed by Federal Criminal Rule 43 could also be waived simply by tacit acquiescence on the part of defendants who had knowledge that proceedings were being conducted in their absence; but the Court's consideration of these same defendants' Due Process contentions on the merits implies that a *constitutional* right to attend proceedings could not be so waived. *See Taylor v. Illinois*, 484 U.S. at 417-18 (dictum); *cf. Brookhart v. Janis,* 384 U.S. 1 (1966). (It is hornbook law that the standard for waiver of constitutional rights is more exacting than that for ordinary waivers. *E.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").)

The respondent has a right to be free of handcuffs and other physical restraints in the courtroom. Only when a respondent "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," does the court have discretion to order the respondent shackled as an alternative to trial *in absentia. Illinois v. Allen,* 397 U.S. at 343; *see also Estelle v. Williams,* 425 U.S. 501, 505-06 (1976) (dictum); *United States v. Haynes*, 729 F.3d 178, 188-90 (2d Cir. 2013). In a jury trial it is "inherently prejudicial" to require the respondent to appear before the jury in fetters, *Deck v. Missouri*, 544 U.S. 622, 635 (2005); *Holbrook v. Flynn,* 475 U.S. 560, 568 (1986) (dictum), since "the sight of shackles and gags might have a significant effect on the jury's feelings about the [respondent]." *Illinois v. Allen,* 397 U.S. at 344. And even in a bench trial it has been recognized that physical restraints undermine the presumption of innocence and the dignity of the proceedings and may also impair the respondent's ability to communicate effectively with counsel in presenting a defense. *Tiffany A. v. Superior Court*, 150 Cal. App. 4th 1344, 1348, 1361-62, 59 Cal. Rptr. 3d 363, 364-65, 374-75 (2007) (granting a writ of prohibition to "preclude the use of physical restraints upon . . . minors who appear in juvenile court proceedings . . . absent an individualized determination of need for the restraints": court distinguishes the use of shackles in juvenile proceedings from the shackling of adults in criminal cases because "[t]he objectives of the juvenile justice system differ from those of the adult criminal justice system, and thus justify a less punitive approach to those who stand accused (and not yet to be found criminally culpable) before the court"; "The use of shackles in a courtroom absent a case-by-case, individual showing of need creates the very tone of criminality juvenile proceedings were intended to avoid."); *In re Amendments to the Florida Rules of Juvenile Procedure*, 26 So. 3d 552, 556, 562-63 (2009) (per curiam) ("We find the indiscriminate shackling of children . . . repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice"; rules are amended to prohibit the use of "[i]nstruments of restraint, such as handcuffs, chains, irons, or straitjackets, . . . on a child during a court proceeding . . . unless the court finds both that: (1) The use of restraints is necessary due to one of the following factors: (A) Instruments of restraint are necessary to prevent physical harm to the child or another person; (B) The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents

a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or (C) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and (2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs."); *In re Staley,* 67 Ill. 2d 33, 364 N.E.2d 72, 7 Ill. Dec. 85 (1977) (reversing a delinquency adjudication in a bench trial because the respondent was handcuffed during the trial, and rejecting the argument that the rule prohibiting restraints applies only to jury trials); WASH. JUV. CT. RULE 1.6 (2014) ("Juveniles shall not be brought before the court wearing any physical restraint devices except when ordered by the court during or prior to the hearing" based upon a finding that the "use of restraints is necessary" to prevent harm to the respondent or others or due to "a substantial risk of flight from the courtroom," and furthermore that "[t]here are no less restrictive alternatives to restraints that will prevent flight or physical harm to the respondent or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs"). *See also In the Interest of R.W.S.*, 728 N.W.2d 326, 330 (N.D. 2007) ("With respect to a juvenile court proceeding, we recognize the concerns about the effect of visible physical restraints on a jury do not apply. However, we agree with those courts holding that juveniles have the same rights as adult defendants to be free from physical restraints.").

For similar reasons a respondent who is in custody is entitled to attend the trial in civilian attire rather than institutional garb. In a jury trial this is a matter of constitutional right if the respondent makes a timely request, because "the constant reminder of the accused's condition implicit in . . . distinctive, identifiable [institutional] attire may affect a juror's judgment." *Estelle v. Williams,* 425 U.S. at 504-05. *See, e.g., Bentley v. Crist,* 469 F.2d 854 (9th Cir. 1972), and cases cited. *See also Deck v. Missouri*, 544 U.S. at 635 (dictum). And although a judge in a bench trial is ordinarily presumed to be capable of ignoring this kind of prejudicial influence, "[p]rison attire [is] . . . offensive even when there is no jury." AMERICAN BAR ASSOCIATION. STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-3.1 (3d ed. 1996).

If the respondent is unable to speak English or is hearing-impaired, s/he is entitled to an interpreter in order to effectuate his or her rights to be present at all proceedings and to confront witnesses. *See, e.g.,United States* ex rel. *Negron v. New York*, 434 F.2d 386, 389-90 (2d Cir. 1970); INSTITUTE OF JUDICIAL ADMINISTRATION-AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ADJUDICATION, Standard 2.7(B) & Commentary (1980).

§ 27.02 DEFENSE COUNSEL'S PRESENCE

Defense counsel is required to be present at all stages of the trial, in the courtroom or in chambers. *See*, *e.g.*, *United States v. Russell*, 205 F.3d 768 (5th Cir. 2000); *Green v. Arn*, 809 F.2d 1257 (6th Cir. 1987), *subsequent history in* 839 F.2d 300 (6th Cir. 1988)*; McKnight v. State*, 320 S.C. 356, 465 S.E.2d 352 (1995); *Commonwealth v. Johnson*, 574 Pa. 5, 828 A.2d 1009 (2003); *see Davis v. Ayala*, 135 S. Ct. 2187, 2199-2200 (2015) (dissenting opinion of

Justice Sotomayor, joined by Justices Ginsburg, Breyer and Kagan); *but see Woods v. Donald*, 135 S. Ct. 1372 (2015). If counsel has reason to believe that the prosecutor has communicated with the judge *ex parte* about the case during a recess, counsel should insist that the communication be placed on the record. This is especially important in bench trials, in which the disclosure of inadmissible evidence, such as the respondent's prior record, can bias the judge's factfinding.

In jury trials, counsel must also be alert for any indications that the judge has communicated orally or in writing with the jury outside of counsel's presence. These communications may provide the basis for a mistrial motion, no matter how innocuous the message. *See, e.g., Rogers v. United States,* 422 U.S. 35 (1975); *cf. United States v. United States Gypsum Co.,* 438 U.S. 422, 459-62 (1978); *but see United States v. Gagnon,* 470 U.S. 522 (1985) (per curiam). If counsel learns that any communication or message was conveyed between the judge and jury, counsel should ordinarily object and request that a record be made before a stenographer of the contents and circumstances of the occurrence. *See Rushen v. Spain,* 464 U.S. 114 (1983) (per curiam).

Attempts by the court to impose restrictions upon communication between defense counsel and the respondent during trial should be challenged under the Sixth and Fourteenth Amendments to the federal Constitution. *See In re Gault,* 387 U.S. 1, 36 (1967) ("[t]he child 'requires the guiding hand of counsel at every step in the proceedings against him'"). In *Geders v. United States,* 425 U.S. 80 (1976), the Supreme Court held that a trial court order forbidding a criminal defendant to consult with his attorney during an overnight recess taken while the defendant was on the witness stand violated the Sixth Amendment right to counsel. However, in *Perry v. Leeke,* 488 U.S. 272 (1989), the Court upheld an order forbidding the defendant to consult with his attorney during a 15-minute recess taken at the end of the defendant's direct examination and before cross. *Leeke* distinguished *Geders* on the ground that:

> "the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony – matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. . . . The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the [defendant's ongoing] testimony will be discussed, the testifying defendant does not have a constitutional right to advice." (*Perry v. Leeke,* 488 U.S. at 284).

Compare Martin v. United States, 991 A.2d 791, 793-96 (D.C. 2010) ("Martin claims the trial court violated his Sixth Amendment right to counsel by ordering him not to speak to his attorney about his testimony over a weekend recess that interrupted his cross-examination. . . .¶ The

government argues, and appellant elects not to dispute, that the order in this case was narrower than the flat prohibition in *Geders* and *Perry* because – understood in context – the judge's instruction 'not to speak to anyone' forbade only discussion of appellant's testimony. Even if that is so, the order still 'went further than the law permits.'").

§ 27.03 THE PRESENCE OF THE RESPONDENT'S PARENT OR GUARDIAN

It is the customary practice in all jurisdictions to permit the respondent's parent or guardian to attend the trial. In some jurisdictions the juvenile code or caselaw explicitly confers upon the respondent the right to have his or her parent present during trial, and a violation of that right has been held sufficient to require the reversal of an adjudication of delinquency. *See, e.g., In the Matter of John D.,* 104 A.D.2d 885, 480 N.Y.S.2d 390 (N.Y. App. Div., 2d Dep't 1984) (judge's denial of a respondent's request for a continuance for the purpose of arranging his mother's presence at trial violated the statutory requirement that a parent be notified of trial and given a reasonable opportunity to attend); *In the Interest of Hopkins,* 227 So. 2d 282 (Miss. 1969) (application of the rule on witnesses to exclude a respondent's mother from the courtroom violated the statute requiring parental presence); *State in the Interest of V.M.*, 363 N.J. Super. 529, 535, 833 A.2d 692, 696 (2003) (trial court abused its discretion by applying the rule on witnesses to exclude the respondent's parent, given that "the parent's right to be present in the courtroom" outweighs "the acknowledged goals of sequestration").

The respondent has a due process right to have his or her parent or guardian notified of the trial. *In re Gault,* 387 U.S. 1, 33-34 (1967). However, it has been held that the respondent does not have a due process right to a continuance when a parent, who has been notified of the hearing date, fails to appear because of illness. *Ronald M. v. Dunston,* 628 F. Supp. 1200 (S.D.N.Y. 1986).

§ 27.04 BENCH TRIALS: THEIR NATURE AND IMPLICATIONS FOR DEFENSE STRATEGIES AND TECHNIQUES

§ 27.04(a) Nature of Bench Trials

As explained in § 21.01 *supra,* most States provide that delinquency cases are to be tried to a judge rather than a jury. In the remaining States the respondent has the option of electing or waiving a jury trial. See § 21.02 *supra.*

Bench trials tend to be less formal than jury trials. In many jurisdictions it is customary for defense counsel to waive opening statement. See § 29.03(a) *infra* for discussion of factors to consider in deciding whether to follow this practice. Rules of evidence are often more lax in bench trials, since both the trial judge and the appellate courts like to believe that a judicial factfinder is capable of ignoring inadmissible and even prejudicial information. See §§ 18.10(a), 21.02(b) subdivision (3) *supra.* In some jurisdictions, judges seem to feel freer in a bench trial than in a jury trial to intervene in a lawyer's direct or cross-examination by posing questions

directly to the witness, but counsel can (and – if the matter is sufficiently important – should) press for the application of constraints upon judicial intervention similar to those that govern jury trials. See § 20.05 penultimate paragraph *supra*. *See, e.g.*, *In the Matter of Yadiel Roque C.*, 17 A.D.3d 1168, 793 N.Y.S.2d 857 (N.Y. App. Div., 4th Dep't 2005). *See generally* Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243 (2000).

As indicated in § 21.02(b), a judge is likely to react to the facts and the law in ways that a jury would not. Judges tend to credit the testimony of police officers and other professionals, and many judges are skeptical of the testimony of the respondent and his or her family and friends. Judges tend to be far less likely than juries to decide cases on the basis of emotion. This can be damaging when the equities favor the respondent (for example, when the respondent reacted to extreme provocation that is not legally exonerating), but it can be helpful in cases in which the victim is personable. Judges are capable of understanding complex legal defenses that a jury would not, and judges may also be more willing than jurors to apply legal doctrines that favor the defense such as the requirement of proof beyond a reasonable doubt and the prohibition against drawing adverse inferences from the accused's failure to take the stand.

As indicated in § 20.05, bench trials may be complicated by the fact that the judge has learned inadmissible information about the case or the respondent from a variety of sources. If the judge's knowledge of this information derives from presiding over the detention hearing or a suppression hearing in the case, counsel will at least be aware of the nature of the information. But if the judge's source of knowledge is a hearing in the case of of a co-respondent at which counsel was not present or a prior case of the respondent's in which s/he was represented by a different attorney or scuttlebutt around the courthouse, counsel will not even be apprised of the facts that are potentially influencing the judge.

Judges also are affected by their experience in having presided over numerous prior trials and having observed certain fact patterns recur. Occasionally, this can be helpful to the defense – for example, (1) when a judge has learned to overcome his or her incredulity about assertions of outrageous misconduct by the police during interrogations and searches because s/he has heard enough credible witnesses testify to them, or (2) when a judge has learned to discredit certain standard police fabrications like the "dropsie" scenario described in § 23.13 *supra*, or (3) when a judge has become skeptical of snitches after hearing enough of their standard perjurious spiel.. Far more often, however, the judge's history is likely to hurt the respondent by making the judge dubious of a defense that s/he has heard too often. For example, a judge who has heard numerous respondents claim that, at the time of their arrest for possession of a firearm or drugs, they had just "found" the contraband item and innocently picked it up to examine it is likely to disbelieve a respondent's testimony to that effect even when it is supported by the facts and circumstances.

§ 27.04(b) Implications for Defense Strategies and Techniques

Because so many judges are prone to disfavor the defense in fact-finding – particularly when a case boils down to a swearing contest between the respondent and police witnesses or

"respectable" complainants – and because most judges are relatively receptive to legal theories supported by appellate caselaw, defense counsel in a bench trial is usually advised to develop defenses that involve the application of some legal doctrine. A motion for a judgment of acquittal (see §§ 32.01, 35.01-35.04 *infra*) that relies upon appellate opinions to demonstrate that the prosecution's proof of a certain element of the crime is insufficient as a matter of law will often be more effective in a bench trial than an affirmative defense that depends upon the judge's crediting defense witnesses. *See generally* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, in *Symposium on Juvenile Justice Reform*, 33 WAKE FOREST L. REV. 553, 586-93 (1998); Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 CLIN. L. REV. 195 (2009).

Accordingly, in preparing for a bench trial, counsel should comprehensively research the appellate caselaw on each element of the crime or crimes that the prosecution has charged. In particular, counsel should look for appellate decisions holding the prosecution's proof of a certain element to be insufficient as a matter of law. (In many jurisdictions, favorable precedents of this sort are more likely to come from intermediate appellate courts than from the State's highest court: High-court judges – particularly those in States where their jurisdiction in criminal and delinquency appeals is discretionary – often disdain to decide issues of evidentiary sufficiency.) Thus, for example, in an assault case in which a specified amount of physical injury must be proved in order to make out the degree of assault that is charged (such as "great bodily harm"), counsel should collect and be prepared to cite appellate decisions requiring a more serious type of injury than the prosecution is likely to be able to prove. As § 35.02 *infra* suggests, when the law is particularly extensive or complex, counsel should consider preparing a written memorandum of points and authorities to submit in support of a motion for a judgment of acquittal.

Given the likelihood that legal doctrines will be influential in a bench trial, counsel should also particularly research the caselaw recognizing and defining potentially applicable inferences and presumptions, both those that favor the defense and those that favor the prosecution. Thus, for example, counsel should be prepared to cite caselaw supporting a "missing witness" inference when the prosecution fails to present a witness under its control (see § 10.08 *supra*) and should be prepared to document the immunity of the defense to such an inference when, for example, the appellate opinions establish a prerequisite for its application (such as that the witness be peculiarly available to the defense (see, *e.g.*, *Lawson v. United States*, 514 A.2d 787, 790-92 (D.C. 1980)) that is lacking in the case at hand.

Whenever counsel intends to present an "affirmative defense" (see § 35.05 *infra*), counsel should exhaustively research the standards that the defense must satisfy, as well as the prosecution's obligation to disprove the defense. To the extent possible, counsel will want to frame the factual testimony to precisely fit the fact patterns of prior cases in which the defense prevailed and then to cite those cases in closing argument.

Counsel should consult other defense attorneys who have appeared before the judge, to

find out whether s/he applies a stringent standard of proof beyond a reasonable doubt. If so, it may be advisable to rest the defense solely on the theory that the prosecution has failed to meet its burden of proof rather than presenting defense witnesses and taking the chance that the judge will find them incredible and will use their incredibility as a basis for convicting.

In a bench trial, counsel will have to calculate the judge's patience and equanimity. As §§ 29.03(a) and 34.07 *infra* suggest, it may be advisable to acquiesce in a local custom of waiving opening statement in order to avoid straining the judge's tolerance from the get-go. Similarly, counsel is often well advised to forgo objections to inadmissible evidence and procedural irregularities that are not sufficiently damaging and demonstrably out of bounds so that there is a serious prospect of appellate reversal if the objections are overruled and the client is convicted. Insisting upon time-consuming formal procedures (such as technical completion of the foundations for admission of items of prosecution evidence) and making formalistic points (such as obvious arguments that particular items of prosecution evidence are admissible for limited purposes and cannot be considered for other purposes) will only serve to irritate a harried or self-complacent judge and to jaundice his or her reactions to the defense case.

Before moving for recusal or disqualification of a judge, counsel should carefully consider the possibility that the judge will deny the motion, with the net result that the judge will still preside over the case but have reason to resent counsel and the respondent. See § 20.07 *supra.*

Finally, it is important for counsel to keep in mind that the same judge who tries the facts will ordinarily also preside at sentencing. If the judge is likely to view the respondent's testimony as perjurious and to punish it by a stiff sentence, counsel may be wise to keep the respondent off the stand and to rely upon other defense witnesses and/or cross-examination of the state's witnesses to lay the foundation for an argument that the prosecution has failed to sustain its burden of proof. If the judge is likely to believe that the respondent persuaded relatives or friends to perjure themselves, these witnesses should also be kept off the stand unless their testimony is crucial to establish a defense theory of the case that is by far the respondent's best hope of acquittal.

§ 27.05 JURY TRIALS: CONDUCT OF THE JURY DURING TRIAL; ADJUSTING STRATEGY AND TECHNIQUES TO THE IDIOSYNCRASIES OF JURIES

§ 27.05(a) Conduct of the Jury During Trial

§ 27.05(a)(1) Sequestration

In adult criminal court, it is customary in capital cases – although no longer invariably required in all jurisdictions – to sequester the jury from the time when the jurors are selected until they are discharged at the end of the trial. They eat and sleep at a hotel or a court facility under the supervision of court officers. In other cases, on request of the prosecution or defense, this

same procedure may be ordered in the court's discretion.

Counsel could seek sequestration of the jury in a delinquency case in which community attitudes are hostile to the respondent or if media coverage of the trial is expected to be extensive and prejudicial. Such a request may be based upon the respondent's federal constitutional right to a fair trial by an impartial jury (see §§ 20.03(b), 21.03(a), 28.03(a) *supra*). *See Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 564 (1976) (dictum); *Gannett Co. v. DePasquale*, 443 U.S. 368, 378-79 & n.5 (1979) (dictum); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (plurality opinion) (dictum); *cf. Chandler v. Florida*, 449 U.S. 560, 574 (1981) (dictum). However, except when local hostility or prejudicial publicity is extreme, sequestration should usually not be requested. It inconveniences and irritates jurors and often forces them into close and continuing contact with a deputy marshal, sheriff, or other law enforcement official.

Whether or not the jury is sequestered overnight and during lunch recesses, it is ordinarily kept together in the courthouse throughout the court day and is accompanied by a court or law enforcement officer whenever it is out of the jury box. If the jury is placed in the charge of any officer having law enforcement duties, counsel should ask the judge at the outset of trial (and in the absence of the jury) to question the officer to make certain that s/he had no contact with the investigation of the case or apprehension of the respondent and has not talked about the case with officers involved. *See Turner v. Louisiana*, 379 U.S. 466 (1965); *Gonzales v. Beto*, 405 U.S. 1052 (1972) (per curiam). The judge should be requested to instruct the officer not to discuss any aspect of the case with any juror.

§ 27.05(a)(2) Jury Misconduct; Contacts Between Jurors and Other Persons

The jurisdictions vary with regard to whether and under what circumstances they require mistrials or new trials on account of jury misconduct such as consulting the Bible or discussing media reportage during deliberations. After verdict, the questioning of jurors on these subjects is effectively barred in many jurisdictions by a broad interpretation of the common-law prohibition against jurors impeaching their verdicts by testimony concerning the thinking or deliberative processes underlying the verdict. Codifications of that prohibition in statutes or rules of court (such as FED. RULE EVID. 606(b) (2016)) may or may not permit post-verdict interrogation of jurors regarding various sorts of jury misconduct. *Compare Tanner v. United States*, 483 U.S. 107 (1987), *and Warger v. Shauers*, 135 S. Ct. 521 (2014), *with People v. Harlan*, 109 P.3d 616 (Colo. 2005), *and People v. Budzyn*, 456 Mich. 775, 66 N.W.2d 229 (1997). Federal Rule 606(b) explicitly provides that jurors "may testify about whether: ¶ (A) extraneous prejudicial information was improperly brought to the jury's attention; ¶ (B) an outside influence was improperly brought to bear on any juror; or ¶ (C) a mistake was made in entering the verdict on the verdict form"; and many parallel state provisions similarly distinguish between juror testimony regarding the deliberative process and juror testimony regarding improper "extraneous prejudicial information." *See, e.g., James v. State*, 912 So. 2d 940, 949-50 (Miss. 2005); *State v. Yang*, 196 Wis. 2d 359, 538 N.W.2d 817 (Wis. App. 1995). Some States additionally authorize testimony about other sorts of jury misconduct. *E.g.*, IND. RULE EVID. 606(b) (2016) ("a juror

may testify . . . to drug or alcohol use by any juror"); MONT. RULE EVID. 606(b) (2016) ("a juror may testify . . . as to . . . whether any juror has been induced to assent to any general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance"); VT. RULE EVID. 606(b) (2016) ("a juror may testify . . . about . . . whether any juror discussed matters pertaining to the trial with persons other than fellow jurors").

Before verdict, counsel who has reason to suspect that jurors are misbehaving will seldom want to risk angering them by precipitating a judicial inquiry unless (1) the trial appears pretty clearly to be going badly for the defense, and (2) local law very clearly requires a mistrial for the kind of juror misconduct in question, and (3) counsel is very sure that s/he can prove the misconduct. Less controversial problems, such as a juror's appearing to doze off or to be distracted or indisposed during trial, can usually be handled by calling the matter to the court's attention at sidebar (*cf. Tanner v. United States*, 483 U.S. at 127 (noting that counsel's observations of jurors during trial plays an important part in spotting incapacitation of individual jurors and thereby safeguarding the accused's "Sixth Amendment interests in an unimpaired jury")) – or, if proceedings have been going on for quite a while without a recess, simply suggesting to the court that a bathroom break might serve everyone's convenience at this time. When counsel takes the former tack and names a particular juror as a potential problem, s/he should ask the judge, in dealing with the problem, not to identify counsel as the whistleblower.

In most courtrooms the jury is admonished by the judge, in his or her opening remarks to the panel and again before every recess, not to discuss the case with anyone or among themselves until they are sent out to deliberate and reach a verdict. The jurors are told that if anyone approaches them about the case or if they overhear any conversation or comment about the case, they are to report that fact to the court immediately. Once a trial has begun and it comes to the court's attention that a juror may have had improper contacts with non-jurors, the juror in question is usually interrogated by the judge (either in chambers or in open court with the other jurors sent out during the process) about the occurrence and the details of the episode. *See People v. Moore*, 321 P.3d 510, 514 (Colo. App. 2010) ("A trial court should deal with juror exposure to prejudicial publicity during trial as follows: ¶ 1) the trial court must determine whether the publicity is inherently prejudicial; ¶ 2) if so, the court should canvass the jury to determine whether the jury learned of the prejudicial publicity; and ¶ 3) the trial court should individually examine exposed jurors to determine how much they know of the publicity and what effect, if any, the publicity will have on their deliberations"); *and see*, *e.g.*, *People v. Hillsman*, 1999 WL 33437900 (Mich. App. 1999); *State v. Stigger*, 2006 WL 2194507 (N.J. Super. 2006); *State v. Smith*, 418 S.W.3d 38 (Tenn. 2013); *cf. Remmer v. United States*, 347 U.S. 227 (1954); *Smith v. Phillips*, 455 U.S. 209, 215-17 (1982). Other sorts of pre-deliberation incidents of jury misbehavior that are brought to the court's attention are similarly handled. *See, e.g.*, *State v. Brown*, 442 N.J. Super. 153, 121 A.3d 878 (2015). If the court then decides that the juror ought to be withdrawn from the jury, s/he may be excused, even over the objection of a party. If dismissal of a juror leaves a number less than that prescribed by law to hear the case, both sides must agree to allow the submission of the case to this lesser number of jurors, or a mistrial is declared.

§ 27.05(a)(3) Contacts Between Defense Counsel or the Respondent and Jurors

If counsel encounters the jury or individual jurors in or around the courthouse or elsewhere during trial, s/he should say a polite good morning or good afternoon and nothing else. The respondent and his or her parent or guardian should be instructed by counsel to do the same. Counsel, the respondent, and the respondent's family must scrupulously avoid talking to jurors about anything, even things unrelated to the case. If conversation is observed, the juror is likely to be called into chambers to explain it, and s/he will feel that counsel has gotten him or her into trouble with the court. Conversation observed by counsel between the prosecutor and jurors should be reported to the court.

§ 27.05(b) Adjusting Strategies and Techniques to the Idiosyncrasies of Jury Trials

The nuances of effective jury work depend to a large extent upon fact-specific variables pertaining to the case (the type of crime; age, race, and gender of the accused; age, race, and gender of the victim; prejudicial evidence like gory photographs; extenuating facts like the provocation that caused the respondent to act; and sympathy-arousing facts like police mistreatment of the respondent) and pertaining to the jury that has been selected (age, race, gender, social class, and occupations of the jurors). The few generalizations that can be offered about jury work must be applied cautiously, considering these specifics.

It is advisable, whenever possible, to prove the respondent's innocence rather than relying on the hope of persuading the jury to acquit an apparently guilty respondent because the prosecution has failed to prove its case beyond a reasonable doubt. To this end, counsel should ordinarily seize the initiative early in the case, presenting the defense theory in an opening statement unless its disclosure at the outset would enable the prosecutor to rebut it more effectively in the prosecution's case-in-chief. See § 29.03(b), (c) *infra.* Since most jurors expect an innocent person to testify and since many of them will be incapable of following the judge's instruction to disregard the respondent's failure to take the stand, it is usually preferable for the respondent to testify in a jury trial. The exceptions are cases in which the respondent's story is inherently incredible or s/he presents it incredibly (see § 33.06 subdivision (D) *infra*) or in which s/he can be impeached with evidence of prior crimes (see §§ 33.05-33.09 *infra*) that are particularly likely to convince the jury that the respondent committed the present crime or is despicable even if s/he did not. Other considerations will sometimes warrant keeping the respondent off the stand (see § 33.06 subdivisions (G) through (K) *infra*), but only if they trump the typical reluctance of juries to acquit respondents who don't "come clean."

A crucial difference between a jury trial and a bench trial is that jurors are not familiar with criminal law and criminal procedure. Accordingly, the jury will often be baffled by the directions that defense counsel is taking in cross-examination. Although counsel will have an opportunity in closing argument to weave together points made during cross-examination, the argument may come too late to win over some jurors, who will already have made up their minds that counsel is fighting over irrelevant points because s/he cannot contest the major incriminating

facts. In addition, even when a juror follows the points that counsel is making, there will often be so much material covered that the juror will forget much of it. Therefore, when possible, counsel should use his or her opening statement to familiarize the jury with the key points in the defense theory of the case and should then explicitly develop those points in cross-examination of prosecution witnesses and direct examination of defense witnesses.

Jurors tune out quickly when things get tedious. In examining witnesses, counsel should present the crucial facts in the simplest and most straightforward manner possible. When s/he has to make a lengthy closing argument, counsel should modulate the volume of his or her voice and use dramatic pauses to attract the jury's attention at crucial points, as well as using verbal cues like "the most important thing for you to remember is . . . ."

Exhibits are very important in a jury trial. They can be used during examinations and during closing argument as props to hold the jury's attention and to make it easier for the jurors to follow and remember testimony. Thus, for example, a lengthy oral recitation of where the respondent walked is far less comprehensible and memorable than a poster on which the respondent draws his or her path, particularly if the poster is then introduced into evidence so that it can be examined by the jurors in the jury room.

Appearances also are important in a jury trial. The jurors are likely to be impressed by a respondent who dresses well and testifies in a forthright, coherent style. They are likely to be swayed by character witnesses and alibi witnesses who are respectable members of the community. In most cases, counsel should periodically confer with the client at the defense table throughout the trial as the evidence emerges and tactical decisions need to be made, so that the jury can see that the respondent is a reasoning, concerned human being rather than a mindless brute. (Obvious exceptions to this performative style apply in prosecutions for crimes of calculation: fraud, insider trading, masterminding a criminal enterprise, and so forth.) Counsel should prepare the client not to laugh, look bored, or make angry remarks during trial; the jury must not get the impression either that the respondent is not taking the charges seriously or that the respondent is prone to losing his or her temper.

In conducting a jury trial, counsel must always keep in mind the jurors' prerogative of acquitting on the basis of sympathetic facts that do not amount to a legal defense. Counsel should ordinarily present any mitigating facts that are admissible, even if they do not form a part of counsel's defense theory and even if counsel does not intend to rely on them in closing argument.

§ 27.06 PREPARATION OF A TRIAL FOLDER OR "TRIAL BRIEF" AND AN EXHIBIT FILE

Orderly examination of witnesses and quick citation of relevant authority impress judges and jurors. In addition, a well-presented case is easier for the trier of fact to grasp. Counsel will ordinarily find that an indispensable aid to the orderly presentation of a case at trial is a trial folder or, as it is sometimes called, a trial brief. This folder is for counsel's own use in the

courtroom. Arranged to suit counsel's taste, it may helpfully contain:

(1) all significant documents filed in the case (the Petition; any written defensive pleas; motions and supporting memoranda; and so forth);
(2) reproductions of relevant statutes and cases;
(3) [*in a jury trial:*] a checklist of questions for *voir dire*;
(4) a checklist of questions for each witness;
(5) a checklist of the exhibits that counsel intends to proffer, indicating through which witness each exhibit will be introduced;
(6) reproductions of all documentary exhibits;
(7) [*in a jury trial:*] proposed jury instructions with supporting citations;
(8) statements taken from prosecution witnesses;
(9) statements taken from defense witnesses;
(10) any reports prepared by defense experts;
(11) documents obtained from the prosecution through discovery;
(12) transcripts of all pretrial hearings;
(13) copies of defense subpoenas and their returns; and
(14) any other documents and all materials gathered by investigators.

A separate file should be maintained of the original documents that counsel will put into evidence, in their proper order. Counsel should ascertain before trial whether it is the court's custom to have counsel mark (that is, number) their own exhibits or whether this is done by the clerk. If the former, counsel should save possible trial fumbling by marking the exhibits in advance. Each should be designated "Respondent's Exhibit No. _____" or by some similar form, so that they can be numbered before trial without reference to the possible number of prosecution exhibits.

§ 27.07 DECIDING WHETHER TO CALL THE RESPONDENT BY FIRST NAME OR LAST NAME AT TRIAL

In juvenile court in most jurisdictions, the normal practice is to refer to the respondent by first name rather than as Mr. or Ms. _____. During pretrial proceedings and bench trials, counsel should follow local custom in calling a respondent by first name or last name. It makes no sense to irritate the judge by rejecting the procedure the judge views as customary and appropriate.

In jury trials, however, counsel is freer to deviate, since jurors do not come into trial with any expectations or knowledge of customary juvenile court practice. Usually, the respondent gains some advantage from being called by his or her first name, especially in cases in which s/he is charged with a crime of violence. The first-name usage emphasizes the respondent's youthfulness, making him or her appear less menacing and culpable. On the other hand, calling the respondent by his or her last name lends an air of formality that may bring home to the jurors the gravity of the proceedings and the magnitude of their decision. There are no hard-and-fast

rules here; counsel should be guided by what s/he believes will be best with the particular jury, what s/he feels comfortable with, and what the respondent prefers. Of course, much will depend on the age of and size of the respondent: It would be ludicrous for counsel to call a diminutive 12-year-old "Mr." or "Ms."

§ 27.08 PUBLIC TRIAL

Traditionally, delinquency proceedings have been closed to the public and the press in order to effectuate the juvenile courts' policies of confidentiality. *See Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 107-08 (1979). Although some jurisdictions remain rigorous in excluding the public and the press, there has been an increasing trend toward opening delinquency proceedings to both. *See generally* Linda A. Szymanski, *Confidentiality of Juvenile Delinquency Hearings (2008 Update)*, 13:5 NATIONAL CENTER FOR JUVENILE JUSTICE (NCJJ) SNAPSHOT (May 2008) (surveying state statutes on "confidentiality of juvenile delinquency hearings" and reporting that,"[c]urrently, 14 states have statutes and/or court rules that permit or require juvenile delinquency hearings to be open to the general public," and "[a]nother 21 states open delinquency hearings to the public but place certain age/offense requirements on the openness of the hearing"; and "[f]ifteen jurisdictions have statutes and/or court rules that generally close delinquency hearings to the public"). *But see, e.g.*, *In the Matter of M.C.*, 527 N.W.2d 290, 292 (S.D. 1995) (describing the South Dakota legislature's 1991 repeal of a statute that had afforded general public access to juvenile court hearings and the legislature's substitution of a statute requiring that such hearings be "'closed unless the court finds compelling reasons to require otherwise'"). Some States authorize public access in all cases except when the likely prejudice to a juvenile respondent outweighs the public interest, *see, e.g.,* IOWA CODE ANN. § 232.39 (2016); other States permit access in cases involving respondents over a certain age or crimes of a certain magnitude, *see, e.g.,* CAL. WELF. & INST. CODE § 676 (2016); MINN. STAT. ANN. § 260B.163(1)(c) (2016); and still other States permit press access while continuing to exclude the general public, *see, e.g.,* D.C. CODE ANN. § 16-2316(e)(2) (2016); ILL. COMP. STAT. ANN. ch. 705, § 405/1-5(6) (2016).

The state's power to regulate access to juvenile proceedings is circumscribed both by constitutional rights of the respondent and by First Amendment rights of the press and public. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 7 (1986) [*Press-Enterprise II*].

An adult criminal defendant has a Sixth Amendment right to a public trial. *In re Oliver,* 333 U.S. 257, 266-73 (1948); *Waller v. Georgia,* 467 U.S. 39 (1984); *Presley v. Georgia*, 558 U.S. 209, 211-15 (2010) (per curiam); *Herring v. New York,* 422 U.S. 853, 856-57 (1975) (dictum); *Gannett Co. v. DePasquale,* 443 U.S. 368, 379-81 (1979) (dictum). *See also People v. Alvarez*, 20 N.Y.3d 75, 78-79, 81, 979 N.E.2d 1173, 1174, 1176, 955 N.Y.S.2d 846, 847, 849 (2012) (ordering a new trial because of the violation of Alvarez's right to a public trial: "Upon returning from the lunch recess, defense counsel notified the court that, although it had escaped

his notice, defendant advised him that his parents had not been present for the morning's jury selection proceedings. Although defendant's parents were present at that time, counsel moved for a mistrial based on the earlier denial of the right to a public trial. The court denied the motion, observing that the courtroom had been filled by prospective jurors and that in 'every trial we ask the family to step out and as soon as seats are available, they are [the] first ones offered seats.' ¶ . . . The protest raised by defense counsel in *Alvarez*, both immediately after the violation and as soon as he realized that an error had occurred, was sufficient to preserve the public trial issue. Notably, the court did not take issue with the credibility of counsel's representation that he had only just learned that defendant's parents had been excluded from the courtroom; nor was there any indication that counsel was attempting to engage in some type of artifice. In these circumstances, where only five jurors had been selected, the appropriate remedy would have been to grant the request for a mistrial and start jury selection anew.").

Due process requires that juvenile respondents be accorded the same right to protect themselves from "judicial oppression [by] . . . focusing community attention upon the trial of their cases." *McKeiver v. Pennsylvania,* 403 U.S. 528, 555 (1971) (concurring and dissenting opinion of Justice Brennan). *See, e.g., R.L.R. v. State,* 487 P.2d 27, 35-39 (Alaska 1971) (holding that juvenile respondents have a state constitutional right to a public trial). *But see State ex rel. Plain Dealer Publishing Company v. Geauga County Court of Common Pleas, Juvenile Division*, 90 Ohio St. 3d 79, 82-83, 734 N.E.2d 1214, 1218 (2000) (per curiam) (holding that, notwithstanding the federal and state constitutional guarantees that give rise to a "presumption of openness" in "most criminal proceedings," the media and the public "do not have a . . . constitutional right of access to . . . juvenile delinquency proceedings, including the transfer hearing" because "[j]uvenile court proceedings have historically been closed to the public, and public access to these proceedings does not necessarily play a significant positive role in the juvenile court process"). Accordingly, the power of a juvenile court to close the proceedings over the respondent's objection and demand for a public trial is doubtless very limited. Although "the [respondent's] right to an open trial may give way in certain cases to other rights or interests, such as . . . the government's interest in inhibiting disclosure of sensitive information, . . . [s]uch circumstances will be rare [and] . . . '[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Waller v. Georgia,* 467 U.S. at 45.

When the respondent conversely requests a closed trial or does not object to one, the constitutional issues are more complicated. Fortunately, they seldom arise in practice because neither the press nor the public cares to attend most juvenile trials, and the ordinary juvenile court judge is unlikely to worry greatly about their theoretical rights to attend if nobody shows up in the courtroom demanding those rights. In the unusual case in which anyone is likely to demand them – ordinarily, cases of sensational crimes that have sparked sufficient media interest to create a realistic possibility that representatives of the press may undertake legal proceedings to gain admittance – counsel will have to contend with First Amendment issues. *Compare Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980) (the closure of trial on the merits without considering alternative means of protecting the defendant from adverse publicity is

unconstitutional); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982) (the mandatory closure of portions of the trial on the merits of a sex offense while complainants under age 18 are testifying is unconstitutional); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) [*Press-Enterprise I*] (closure of *voir dire* examination of prospective jurors and sealing of the *voir dire* transcript without considering alternative means of protecting the defendant from adverse publicity and protecting jurors' compelling privacy interests held unconstitutional); and *Press-Enterprise II*, 478 U.S. at 13-15 (the closure of a preliminary hearing and sealing of the transcript without adequate determinations that these procedures are necessary to protect the defendant's right to a fair trial and without consideration of alternative protective measures held unconstitutional), *with Gannett Co. v. DePasquale*, 443 U.S. at 387-94 (the closure of a pretrial suppression hearing is constitutional). In this situation the respondent must demonstrate that "closure is required to protect the [respondent's] . . . superior right to a fair trial, or that some other overriding consideration requires closure." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 564 (plurality opinion). *See Press-Enterprise I,* 464 U.S. at 510; *Press-Enterprise II,* 478 U.S. at 13-14. The court is obliged to balance the First Amendment rights of the press and the public against the danger that open proceedings will impair the respondent's right to a fair trial and such considerations as the "purposes and traditions of the juvenile court [which] dictate that . . . the delinquency proceeding be administered (1) to avoid for one who has the defense of infancy the stigma attached to defense or conviction of 'criminal' charges and (2) to assure, to the extent possible, that the young person's experience with the law is constructive and rehabilitative." *In the Matter of Robert M.,* 109 Misc. 2d 427, 429, 439 N.Y.S.2d 986, 988 (N.Y. Fam. Ct. 1981) (footnote omitted). *See, e.g.*, *In re J.D.C.*, 594 A.2d 70, 75-77 (D.C. 1991); *In the Interest of a Minor*, 205 Ill. App. 3d 480, 488, 563 N.E.2d 1069, 1074, 150 Ill. Dec. 942, 947 (1990); *In the Matter of N.H.B.*, 769 P.2d 844, 849 (Utah App. 1989). Orders to close proceedings or to restrict press or public access must be "'narrowly tailored to serve th[e] interest'" that necessitates the closure order. *Press-Enterprise I,* 464 U.S. at 510; *Press-Enterprise II,* 478 U.S. at 9, 15. Therefore, counsel who is seeking or defending a closure order must be careful to assure that the record reflects the evidence and the judicial findings required by *Richmond Newspapers,* 448 U.S. at 580-81 (plurality opinion); *Globe Newspaper,* 457 U.S. at 608 & n.20; *see also id.* at 611 n.27; *Press-Enterprise I,* 464 U.S. at 508-13; *Press-Enterprise II,* 478 U.S. at 13-14; *and cf. Smith v. Daily Mail Publishing Co.,* 443 U.S. at 104-05: essentially, "specific findings . . . demonstrating that first, there is a substantial probability that the [respondent's] . . . right to a fair trial [or other overriding interests] will be prejudiced by publicity [or exposure] that closure could prevent and, second, reasonable alternatives to closure cannot protect the [respondent's] . . . rights," *Press-Enterprise II,* 478 U.S. at 13-14. *Accord*, *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 151 (1993) (per curiam). *See, e.g.*, *In re J.D.C.*, 594 A.2d at 77-79; *In the Interest of a Minor*, 205 Ill. App. 3d at 490-92, 563 N.E.2d at 1076-77, 150 Ill. Dec. at 949-50; *In the Matter of M.C.*, 527 N.W.2d at 292-94; *In the Matter of N.H.B.*, 769 P.2d at 852-53.

As a tactical matter the defense will ordinarily want closure. Because the only juvenile cases that attract press attention are those involving heinous crimes, media coverage is likely to be highly unfavorable to the respondent, placing pressure upon the judge to convict. The

exceptions, as explained in Justice Brennan's concurring and dissenting opinion in *McKeiver v. Pennsylvania,* are cases in which the respondent is charged with a political crime and "there may be a substantial 'temptation to use the courts for political ends,'" 403 U.S. at 556, or in which the circumstances of the case or the biases of the judge create other dangers of "misuse of the judicial process," *id.*

When a crime has stirred strong emotions in the community or in the victim's family, victim's-rights advocates or family members who want to see a respondent convicted and severely punished may seek to display their support for these results in various ways – by wearing mourning garb or message-bearing T-shirts or buttons in the courtroom (if spectators are admitted to the trial), by conducting demonstrations outside the courthouse, and so forth. In jurisdictions where delinquency charges are tried to a jury, counsel should move for an order prohibiting all such exhibitions in locations where the jury may be exposed to them. The motion should invoke the court's inherent authority to regulate its proceedings so as to "preserve the calm and dignity of a court," *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Justice Kennedy, concurring), and to avoid "a risk of improper considerations" affecting the jury's fair and impartial deliberation of the case, *id*. at 82 (Justice Souter, concurring). *See, e.g.*, *Wright v. State*, 276 Ga. 419, 420, 577 S.E.2d 782, 784 (2003) ("[t]he trial court forbade those wearing the T-shirts [bearing the victim's picture] from entering the courtroom, and the record does not show that any juror was ever exposed to a relative of . . . [the victim] who was wearing one"); *Johnson v. Commonwealth*, 259 Va. 654, 676, 529 S.E.2d 769, 781-82 (2000) ("When Johnson raised his objection to the buttons at the beginning of trial, the court ruled that the spectators would not be permitted to display the buttons in any manner that would allow the jurors to see them. The court also ruled that anyone wearing a button was required to refrain from any contact with any of the jurors."); *State v. Speed*, 265 Kan. 26, 48, 961 P.2d 13, 30 (1998) ("[I]t would seem that the wearing of such buttons or t-shirts is not a good idea because of the possibility of prejudice which might result. Under the circumstances, it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up."); *State v. Rose*, 112 N.J. 454, 541-42, 548 A.2d 1058, 1104 (1988) ("[A] trial court's paramount responsibility in presiding over a criminal trial is to assure that the proceedings are conducted fairly and that a verdict is rendered impartially by the jury. To that end, a court has broad discretionary powers that may be exercised to protect the jury from extraneous pressures that might affect the proper discharge of its sworn duty. In appropriate circumstances, that power might properly be exercised by imposing limitations on the dress of police or correction officers, by prohibiting the display of buttons or emblems, or by other proscriptions necessary to preserve decorum and an atmosphere of impartiality in the courtroom."). *Cf. Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."). The motion should also invoke the state and federal Due Process guarantees of a fair trial by an impartial jury (see § 20.03(b) *supra*; § 28.03(a), subpart (iv) *infra*). *See State v. Franklin*, 174 W. Va. 469, 475, 327 S.E.2d 449, 455 (1985). The extent of federal constitutional protection in this area is cloudy in the wake of *Carey v. Musladin*,

so it is particularly important for counsel to cite the respondent's state as well as federal rights to due process and to trial by an impartial jury. See § 7.09 *supra*.

§ 27.09 TRANSCRIPTION OF PROCEEDINGS AND THE RESPONDENT'S RIGHT TO OBTAIN A TRANSCRIPT

In most jurisdictions trials in juvenile court, like trials in adult criminal court, are routinely attended by a court reporter or stenographer who records the proceedings at public expense. Whenever this is not so, counsel should arrange to have a reporter present to record the trial proceedings; and if the respondent is indigent, counsel should move the court to order the trial recorded without cost to the defense. The constitutional right of an indigent to a state-paid transcription of stenographically recorded trial testimony in the event of an appeal is firmly settled, see § 39.02(b) *infra,* and on grounds which logically compel the conclusion that the indigent has a cognate right to have the proceedings recorded *in forma pauperis* in the first place. *See, e.g., State in the Interest of Collins,* 288 So. 2d 918 (La. App. 1973); *see also In re Gault,* 387 U.S. 1, 58 (1967) (describing the burdens imposed upon the judicial system when a juvenile court fails to transcribe the trial).

Counsel should be alert to local practices under which some portions of the trial, such as the closing arguments of counsel, are not transcribed. Counsel should request their transcription except when it is absolutely clear that nothing of any significance will occur in the proceeding. A full transcript is indispensable whenever there is any prospect of an appeal, because – for example – appellate courts reviewing a trial in which the closing arguments have not been transcribed may well find "harmless error" in the erroneous admission of the very piece of inadmissible evidence that the prosecutor used to clinch his or her summation.

In major trials it is ordinarily possible for a respondent who can afford it to procure a "day transcript" – that is, to arrange with the court reporter to have each day's testimony transcribed in the evening and delivered to counsel at night for use at trial the next day. This is a valuable aid for many purposes: cross-examining prosecution witnesses, reviewing the testimony of defense witnesses to be sure that no gaps are left in the proof, quoting from the evidence in argument to the jury. Because of its considerable utility and its availability to those with money, the argument that an indigent has the right to the same service without cost is cogent. See § 4.31(d) *supra.* Accordingly, counsel should not hesitate to move for a free day transcript in a long or complicated trial on a serious charge.

Part B. The Opening Stage of the Trial

§ 27.10 THE PRELIMINARY CONFERENCE WITH THE JUDGE BEFORE TRIAL BEGINS

In most cases it is customary for the judge, the prosecutor, and defense counsel to confer briefly immediately prior to the commencement of trial, to review the status of pretrial matters

and assure that all pending motions that should be disposed of before trial have been disposed of; to estimate the probable length of trial and to plan convenient recesses; to make arrangements to accommodate the convenience of an expert witness and the like; to discuss any problems occasioned by the failure of witnesses to appear; and sometimes to attempt to expedite matters by stipulations. In a bench trial this pretrial conference is immediately followed by opening statements or, if counsel have waived openings (see § 29.03(a) *infra*), by the presentation of the prosecution's first witness. In a jury trial the pretrial conference is immediately followed by *voir dire* examination of prospective jurors. See Chapter 28.

Counsel may be well advised to request such a pretrial conference if one is not routinely held. Its utility should be considered for the following purposes, among others:

(a) *To attempt to enlist some judicial support if counsel feels that the prosecutor is taking an unreasonable position in pressing certain charges that should be dropped, or to explore diversion* (see Chapter 19)*, or to "try out" an agreed sentencing recommendation on the judge* (see § 14.06(c)(2) *supra*). Judges differ considerably on whether they will involve themselves in plea negotiation and what they regard as a reasonable disposition of particular kinds of cases. Counsel who is not familiar with the attitudes of the presiding judge should inquire of other defense attorneys who have had experience with the judge before undertaking to pursue this goal.

(b) *To anticipate evidentiary problems that will arise at trial and attempt to resolve them.* If counsel anticipates that the prosecutor will attempt to introduce items of evidence whose admissibility the defense plans to contest, and particularly if the evidence will be prejudicial to the respondent, counsel should consider making a motion *in limine* at the pretrial conference for a ruling excluding the evidence. *Cf.* § 7.03 *supra.* In a jury trial such a ruling ensures that the evidence will not reach the jury through the prosecutor's opening statement or through a witness who blurts out the matter before defense counsel can object. In a bench trial, counsel may be able to persuade the judge to rule on the admissibility of the evidence without listening to its content (for example, ruling in the abstract that the respondent's prior juvenile record is inadmissible for impeachment except to the extent that it consists of *crimen falsi,* without hearing what kind or number of adjudications of delinquency it does consist of) or, if the content of the evidence is material to a ruling on its admissibility, certify the issue to another judge for resolution. See § 30.07(a) *infra*; see also §§ 20.05-20.07 *supra.* If the judge is unwilling to rule until the prosecutor has actually sought to introduce the challenged items of evidence at trial, counsel should request an order that the prosecutor refrain from mentioning the evidence in opening statement and conduct examinations of witnesses in a fashion that will permit both a defense objection and a ruling on it before it is disclosed to the trier of fact.

(c) *To arrange to stipulate certain matters, in the interest of trial convenience* (see § 30.02(b) *infra*).

(d) *To obtain agreement that certain witnesses need not be called by either party and that neither party will request or be entitled to a missing witness instruction or inference because of*

the other party's failure to call them. (See § 10.08 *supra.*) Counsel may also want to seek other agreements or advance judicial rulings on matters that will determine whether s/he is going to call particular witnesses: for example, an agreement or ruling that the presentation of good-character evidence by the defense will not open the door to the prosecutor's use of certain prior delinquency adjudications of the respondent in cross-examining the character witnesses (see §§ 30.07(a), 33.17 *infra*).

(e) *To obtain discovery of the prosecution's case.* As explained in § 27.12 *infra,* in those jurisdictions where the prosecutor is obliged by discovery rules to turn over prior statements or convictions of prosecution witnesses after, but not before, the witness has concluded his or her direct examination, it may be possible to invoke the judge's discretion to order that these materials be delivered to defense counsel at some earlier time – at the beginning of trial or during a recess prior to the witnesses' testimony – by pointing out that this will avoid mid-trial delays. In addition, the defense will usually obtain some degree of discovery of the prosecution's case simply by raising and discussing the various matters noted in subsections (a)-(d) *supra* and similar matters.

(f) *To impress the judge.* When the judge already knows and respects the prosecutor but defense counsel is a stranger to the court, defense counsel starts off at a significant disadvantage. In these circumstances the pretrial conference is an excellent opportunity for defense counsel to make a good impression on the judge by demonstrating counsel's preparation and reasoned judgment.

(g) *To get a sense of the judge's attitude toward the case.* Counsel will want to learn, if s/he can, both how the judge is likely to react to certain kinds of evidentiary issues at trial (for example, whether the judge is disposed to exercise liberally or sparingly the court's discretion to exclude prejudicial matter (see § 30.03 *infra*); whether the judge is likely to respond favorably to a highly technical hearsay argument) and how the judge is likely to react to the case and to the respondent at sentencing in the event of conviction if the defense presents one or another line of evidence or argument. The answers to these questions may not only affect counsel's trial strategies but, in some cases, suggest the wisdom of a last-minute guilty plea instead of trial.

§ 27.11 THE RULE ON WITNESSES

The trial judge possesses "broad power to sequester witnesses before, during, and after their testimony." *Geders v. United States,* 425 U.S. 80, 87 (1976) (dictum); *see also Perry v. Leeke,* 488 U.S. 272, 281-82 (1989). Usually either party may request that all witnesses who have not yet testified in the case (and also those who may be recalled) be excluded during the taking of testimony. This is called, in the jargon, *asking for the rule on witnesses* or, simply, *asking for the rule.*

The rule is not ordinarily applicable to expert witnesses, but the court will consider excluding them in a particular case if there appears reason to do so. In some jurisdictions, a

victims' rights statute or state constitutional provision may also establish an exception to the rule on witnesses for the victim and the parents of a minor victim. *See, e.g.*, *State v. Uriarte*, 194 Ariz. 275, 277-79, 981 P.2d 575, 577-79 (Ariz. App. 1998); *and see generally* Jay M. Zitter, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5th 343 (2001 & Supp.).

Defense counsel should ordinarily invoke the rule on witnesses. It not only helps to prevent prosecution witnesses from homogenizing their testimony but deprives successive prosecution witnesses of the opportunity to learn from counsel's cross-examination of earlier witnesses both the defense theory of the case and counsel's techniques for pursuing it on cross. Invoking the rule on witnesses particularly tends to give the defense an advantage in all cases in which the respondent is going to testify: S/he cannot be excluded under the rule (see § 27.01 *supra*; *Geders v. United States,* 425 U.S. at 88) and will thus be the only witness who has heard all the others. (Section § 10.10 *supra* discusses the respondent's potential role as cleanup hitter.)

In cases in which the respondent's parent or guardian will be a witness, counsel can oppose application of the rule on witnesses to exclude the parent or guardian. *See, e.g.*, *State in the Interest of V.M.*, 363 N.J. Super. 529, 535, 833 A.2d 692, 696 (2003); *In the Interest of Hopkins*, 227 So. 2d 282 (Miss. 1969).

In some courts a specific request is required if the rule is invoked against police witnesses: There is some sort of conventional understanding that they are not covered by an exclusion order unless their coverage is made explicit. Counsel should expressly ask that they be excluded, and should keep an eye open throughout the trial lest they reappear (see § 22.03(c) *supra*). Prosecutors will sometimes attempt to defeat the rule by asking that the investigating officer be permitted to remain at the prosecution table "to assist with the case." Defense counsel should object to this procedure. There is no reason why a properly prepared prosecuting attorney needs assistance.

In cases involving a prosecution witness who is a child, when counsel's pretrial investigation indicates that the child has been coached by a parent, counsel should approach the bench at the beginning of the trial and request that the parent be excluded from the courtroom until after the child has testified, whether or not the parent is going to be a witness.

If the trial is conducted in a jurisdiction that permits press attendance at delinquency proceedings, see § 27.08 *supra,* and if media coverage of the trial is expected to be intensive, counsel should consider requesting not only that prosecution witnesses be excluded from the courtroom when they are not testifying but also that they be sequestered throughout the trial. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 581 (1980) (plurality opinion) (dictum). If this request is denied, counsel should ask that at least the court bring all of the witnesses into the courtroom before the trial begins and admonish them not to read anything in the papers, watch anything on TV, or listen to anything on the radio about the case and not to discuss it with other people or listen to others discuss it, until after they have testified and been relieved from further

attendance. Counsel should make clear that this latter request is not being made as an alternative to the request for sequestration previously denied and that counsel is preserving a claim of error in the denial of the first request even if the second is granted.

§ 27.12 DISCOVERY AT TRIAL

§ 27.12(a) Defense Discovery

Chapter 9 describes the information and materials that the respondent can obtain from the prosecutor in pretrial discovery and the procedures for obtaining them. In many jurisdictions the prosecutor is obliged to turn over certain additional items at trial if the respondent requests their production.

§ 27.12(a)(1) Prior Statements of Witnesses

The prosecutor is commonly required to produce copies of all prior statements of prosecution witnesses upon defense counsel's request. *See, e.g.,* MINN. RULE JUV. DELINQUENCY PROC. 10.04(1)(A) (2016). Although some jurisdictions require that these statements be delivered to the defense before trial, *see, e.g.,* FLA. RULE Juv. PROC. 8.060(a) (2016), other jurisdictions allow the prosecutor to withhold them until trial and to turn them over to defense counsel only at the commencement of the trial, *see, e.g.,* N.Y. FAM. CT. ACT § 331.4(1)(a) (2016), or from time to time during trial, at the conclusion of each witness's direct examination (*see, e.g., In re S.W.B.,* 321 A.2d 564 (D.C. 1974)).

In jurisdictions in which the defense is not technically entitled to obtain the prior statements of each witness until after the witness has testified on direct examination, counsel can often persuade the prosecutor (or, if persuasion fails, solicit the judge's assistance in pressuring the prosecutor) to turn over the prior statements of all prosecution witnesses at the beginning of the trial in order to avoid mid-trial delays caused by defense counsel's need to scrutinize the statements of every witness when counsel first receives them, during the period between each witness's direct examination and cross-examination. If the prosecutor has not turned the statements over to defense counsel before trial and has indicated that s/he does not intend to turn them over until each witness has testified on direct examination, counsel should ordinarily inform the court of this situation at the pretrial conference (see § 27.10 *supra*) and should seek the court's assistance in obtaining the statements earlier. Counsel might urge, for example, that the statements be turned over at the beginning of trial "in the interest of trial efficiency and so that I will not have to be continually requesting recesses to read statements in the middle of each witness's testimony." Prior statements of prosecution witnesses can be extremely useful in cross-examining their makers (see § 31.10 *infra*), and the earlier counsel obtains the statements, the more time s/he will have to use them in planning cross-examination. Obtaining the statements early also enables counsel to start cross-examination immediately after the completion of direct examination in cases in which this seems desirable in order to deny a witness the opportunity to reflect and regroup between direct and cross or in order to begin undercutting a witness before

the witness's testimony on direct "sinks in" and makes indelible impressions on the trier of fact. In a jury trial, counsel may also want to be prepared to begin cross-examination immediately in order to avoid the jury's thinking that s/he is delaying cross because the witness has "stumped" the defense with seriously damaging testimony.

If a prosecutor intentionally violates a statute or court rule by refusing to divulge witnesses' prior statements or if the prosecutor is unable to comply because the prosecuting authorities or the police have destroyed or lost the statements, counsel can seek sanctions such as the preclusion (or striking) of the testimony of the witness whose statements have not been furnished to the defense. In some jurisdictions the applicable statute or court rule specifically provides for these sanctions. In jurisdictions where it does not, counsel can base a request for sanctions upon the court's inherent authority to enforce the statute or court rule, as well as upon the constitutional doctrines summarized in §§ 9.09(a), 9.09(b)(1), 9.09(b)(3), 9.09(b)(5), 9.09(b)(6), 9.09(b)(7) *supra.*

In jurisdictions that do not have statutes or rules providing for disclosure of the prior statements of prosecution witnesses, counsel can invoke the same doctrines as the basis for an argument that disclosure is constitutionally required.

§ 27.12(a)(2) Prior Criminal Records of Witnesses

Some jurisdictions also require the prosecutor to turn over to the defense at trial any records of judgments of conviction of prosecution witnesses and information about any charges that are pending against prosecution witnesses. *See, e.g.,* MINN. RULE JUV. DELINQUENCY PROC. 10.04(1)(A) (2016) (including juvenile delinquency adjudications); N.Y. FAM. CT. ACT § 331.4(1)(b)-(c) (2016). In jurisdictions in which the applicable statute, court rule, or caselaw does not already provide for this kind of disclosure (including the disclosure of juvenile delinquency adjudications), counsel should invoke the constitutional doctrines referenced at the end of the preceding section to demand that s/he be informed about all prior convictions and juvenile adjudications of prosecution witnesses and pending charges against them.

In jurisdictions in which the prosecutor is merely required to turn over information about prior convictions and not the record of the judgments of conviction, counsel can usually obtain a certified record of the judgments from the court in which the convictions were handed down. A certified record will be necessary to prove the conviction if the witness denies it when asked about it on cross-examination. See § 31.11 *infra.*

Techniques for impeaching witnesses with their prior criminal record are discussed in § 31.11.

§ 27.12(b) Prosecutorial Discovery

In some jurisdictions the prosecution has a right to discovery of the written or recorded

statements of defense witnesses prior to trial or at the commencement of the defense case or at the conclusion of each defense witness's direct examination. *See, e.g.,* FLA. RULE JUV. PROC. 8.060(b) (2016); N.Y. FAM. CT. ACT § 331.4(2)(a) (2016). Counsel should ordinarily resist any attempt by the prosecutor or the judge to compel the production of defense witnesses' statements before the commencement of the defense case at trial, insisting that the respondent has a constitutional prerogative to delay until that time the decision whether to present evidence. See § 9.12 penultimate paragraph *supra.* Insofar as local statutes or court rules require earlier disclosure, their constitutionality can be challenged under the principles discussed in that section. Statutes or rules that purport to require defense disclosure without requiring similar disclosure by the prosecution should be challenged under *Wardius v. Oregon,* 412 U.S. 470 (1973). See § 9.09(b)(7) *supra.* And see §§ 5.05 concluding paragraph, 8.10, 9.13 *supra* for suggestions of ways in which counsel can insulate his or her own notes of pretrial interviews with defense witnesses as "work product."

§ 27.12(c) Inspection *In Camera* Before Production of Materials Whose Disclosure is Sought by Either Party at Trial; Making a Record of Redaction Proceedings

When the prosecutor or defense counsel requests at-trial discovery and the opposing party resists it, the trial judge may be able to determine from the respective arguments of counsel that the requested disclosure should not be ordered or that it should be ordered in its entirety. If, however, the contents of the material requested bear upon its discoverability, or if the opponent of disclosure contends that some part of it should be withheld, the ordinary procedure is for the judge to inspect the material *in camera*. *See*, *e.g.*, *Campbell v. United States*, 365 U.S. 85 (1961), and 373 U.S. 487 (1963); *United States v. Miller*, 771 F.2d 1219, 1229-33 (9th Cir. 1985); *United States v. Peters*, 625 F.2d 366, 369-72 (10th Cir. 1980). Should s/he determine that only a portion of the material is discoverable, s/he will redact the non-discoverable parts and order the remainder disclosed. *See, e.g.*, FED. RULE CRIM. PRO. 26.2(c) (2016); 18 U.S.C. § 3500(c) (2016); *Commonwealth v. Warren*, 23 Mass. L. Rptr. 83, 2007 WL 2781936 (Mass. Super. 2007). (In the case of documents and records, the redaction is done on the face of the text; in the case of oral material, the judge hears the witness's testimony in chambers and has it stenographically or electronically recorded and transcribed, then redacts the transcript.) If any part of defense counsel's request is denied, counsel should (1) review the redacted version of the material that s/he receives, and, if it suggests arguments for broader disclosure, renew his or her request for the so-far undisclosed material; (2) put the disclosed portions of the material to whatever good use they can serve in cross-examining; (3) ask the witness, during this cross, for information about the context of the disclosed portions; (4) renew counsel's request for production of the undisclosed portions in light of the contextual information thus developed; and (5) request the judge to preserve under seal, for the record on any appeal, (a) the entire, unredacted version of the material submitted in chambers, and (b) a transcript of all proceedings conducted in chambers in connection with the abridged discovery. *See*, *e.g.*, *State v. Hager*, 271 N.W.2d 476 (N.D. 1978) (examining the unredacted version of a prosecution witness's statement and holding that the redaction of "parts . . . containing information of possible impeachment value" was reversible error (*id*. at 484): "the sole basis on which the trial court may excise

portions of a producible statement is if those statements do not relate to the subject matter of the testimony of the witness" (*id*. at 483)).

§ 27.13 REQUESTS BY THE COURT THAT COUNSEL ESTIMATE THE LENGTH OF TIME THAT THE DEFENSE CASE WILL TAKE

Frequently, at the commencement of the trial, the judge will ask the prosecutor and defense counsel how long the case will take and how many witnesses each attorney intends to present. In a bench trial this inquiry is not particularly problematic so long as counsel is careful to emphasize that his or her assessment is extremely tentative and that s/he will not make any final decisions about defense evidence until after s/he has heard the prosecution's case-in-chief. In a jury trial, however, the inquiry can be deadly if made in front of the jury. Since jurors, unlike a judge, are not likely to understand the necessity for flexibility in any trial plan, they may respond to a later change of defense plans by deducing that defense counsel has found the prosecution's evidence more formidable than anticipated or has discovered mid-way through trial that the respondent and his or her witnesses were lying.

Accordingly, if asked in front of the jury about the expected length of the defense case or the number of defense witnesses, counsel should ask leave to approach the bench. Out of the hearing of the jury, s/he should explain that s/he has not yet decided whether to present evidence; that s/he wishes to hear the prosecution's case before s/he determines how to conduct the defense; that s/he will be prejudiced if s/he is forced to make a commitment in the presence of the jury at this time; and that s/he will be equally prejudiced if the jury is informed of counsel's indecision. S/he should then offer the judge for the court's own planning purposes the best estimate s/he can make of the probable length of the defense case if s/he does present evidence, and s/he should request that this estimate not be mentioned in the hearing of the jury.
If the judge insists on an announcement in open court or discloses counsel's estimate to the jury, counsel should object on the grounds of the federal and state constitutional privileges against self-incrimination and guarantees of the right to effective assistance of counsel. Counsel should point out that the purpose and effect of the self-incrimination privileges are to allow the defense to reserve the option of presenting or not presenting evidence until after the prosecution has proved its case. To require an election before that stage violates the privileges and also violates the respondent's constitutional rights to counsel by impeding counsel's ability to make an advised decision with regard to how the defense should be conducted. *Cf. Brooks v. Tennessee,* 406 U.S. 605 (1972); *Lakeside v. Oregon,* 435 U.S. 333, 339 n.9 (1978) (dictum); *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980) (dictum).

If a sidebar conference is refused, counsel should reply to the judge's inquiry by saying that it is difficult to tell how long the case will take, that it depends on the prosecution's evidence, how the cross-examination goes, the availability of witnesses, and a number of matters that are not yet evident. If the court attempts to put counsel down or to nail counsel down, counsel may want to move for a mistrial on the ground that requiring a commitment of evidence by the defense before the prosecution has presented a *prima facie* case violates the Fifth and

Sixth Amendments and parallel state constitutional guarantees.