

**VIRGINIA PRESS ASSOCIATION  
COMMENTS ON PROPOSED RULE 3A:14.1  
(CONFIDENTIALITY OF JUROR PERSONAL INFORMATION)**

The Virginia Press Association (“VPA”), submits these comments on proposed Rule 3A:14.1 of the Rules of the Supreme Court of Virginia (the “Rule”), in response to public notice and invitation for comment published by the Supreme Court of Virginia. The public notice states that the proposed Rule has been tentatively approved by the Advisory Committee on Rules of Court but not presented to or considered by the Judicial Council of Virginia or the Supreme Court of Virginia. For the reasons stated in these comments, VPA opposes the Rule in its proposed form, as it is (1) overbroad and (2) of questionable constitutionality.

**EXECUTIVE SUMMARY**

The General Assembly in 2008 enacted Va. Code § 19.2-263.3, codifying certain aspects of the trial courts’ inherent authority to manage the conduct of criminal trials. Subsection A of that statute authorized trial judges, based on a showing of “good cause,” to render juror identities anonymous. The statute defines the “good cause” standard narrowly, referring to a “likelihood” of serious misconduct such as bribery, jury tampering, juror harassment and threats of physical injury to jurors.

Subsection B of the statute states that the Supreme Court of Virginia shall prescribe and publish rules to protect juror personal information “in addition to the provisions of subsection A.” Read broadly, subsection B permits the adoption of rules that exceed the bounds of the legislative policy expressed in subsection A of the statute. The Advisory Committee has read subsection B broadly, proposing a rule that exceeds

the scope of Va. Code § 19.2-263.3.A. by mandating a shutdown of juror identities in all criminal cases.

The 2008 legislation permits concealing jurors' identities where concrete and serious threats to jurors or their deliberations are shown to exist. The Rule is not so narrowly targeted. The "juror number" provisions of proposed subsection A and the sealing requirements of proposed subsection B are (1) an overbroad response to rare but serious problems that demand common-sense solutions, (2) outside the boundary of the legislative policy articulated in Va. Code § 19.2-263.3.A., and (3) vulnerable to facial challenge under the First Amendment to the Constitution of the United States.

The proposed Rule, in subsection C, tracks the "good cause" standard set out in Va. Code § 19.2-263.3.A. Although the "good cause" standard may be too relaxed to pass constitutional muster, VPA would not oppose a rule that applies a higher, constitutional standard to protect jurors where (1) concrete threats are identified based on reasonable inquiry; (2) the public is given the opportunity, after notice, to raise objections and be heard on the proposed closure; and (3) the grounds for any resulting closure order are stated in the record. Subsection C of the Rule is flawed because it presupposes the default procedures described in subsections A and B of the Rule, and allows for "*further regulating* the disclosure" of juror personal information. Without that reference to subsections A and B, and with appropriate amendments, subsection C of the proposed Rule could form the basis for a workable and constitutionally acceptable rule.

## I.

### **THE UNDERLYING PROBLEM: PROTECTING JURORS FROM HARM**

VPA monitored the legislative process that resulted in the passage of HB 181, creating new Va. Code § 19.2-263.3. *See* 2008 Acts of Assembly c. 538. The recorded votes suggest that the bill was not controversial, presumably because it addressed a potentially serious and narrowly-defined (although not well-documented) problem. The circumstances under which the statute might be invoked arise rarely, and the statute leaves case-by-case discretion in the trial courts to hide juror identities.<sup>1</sup> VPA has attempted to monitor the application of the statute to determine whether it is being construed and applied narrowly and constitutionally. VPA is aware of two circuit courts that, in a clear misreading of the statute, have determined that all criminal trials will be conducted before anonymous jurors.<sup>2</sup>

The frequency of true threats to jurors or to the integrity of their deliberations is not well-documented. A Nexis search of press reports published since 1990 reveals few Virginia criminal trials involving alleged juror intimidation by parties or related

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<sup>1</sup> In 2007, VPA opposed HB 2423 and HB 2424. Those bills would have mandated restrictions on juror identifying information in all criminal cases. HB 2424 did not pass the House of Delegates. HB 2424 was left in the Senate Courts of Justice Committee and a letter was sent to the Virginia State Crime Commission regarding the proposal.

<sup>2</sup> *See* “Virginia Beach Judges Keep Jurors’ Names Secret,” *The Virginian-Pilot*, May 14, 2009 (reporting on decision of City of Virginia Beach Circuit Court to render jurors anonymous in all criminal cases)(See Attachment 1). VPA is advised that the policy was altered after the publication of media reports to allow interested persons to petition post-trial for the release of juror names.

outsiders.<sup>3</sup> There appear to be more frequent examples of the integrity of the jury process being compromised not by outside threats, but by juror misconduct and failures to follow instructions from trial judges. We discuss those below in Part IV.

It is naïve to assert that jurors are never threatened, or that convicted persons or their affiliates never contact jurors after trial. However rarely such contact occurs, it is unnerving for citizens who are called to serve on juries. However, where such contacts rise to the level of harassment or threats of physical harm to jurors or their families, there is a legitimate law enforcement function to be performed, as it is a crime to engage in such conduct. *See* Va. Code §§ 18.2- 441 (bribery of jurors); 18.2-456(2)(summary punishment for contempt, including threat to juror); 18.2-460 (obstructing justice); *see also* “Man Charged Over Contact With Juror,” *Daily Press*, June 24, 1997 (defendant who contacted a potential juror prior to trial charged with intimidating a juror)(See Attachment 2).

It is equally naïve to enact a rule on the assumption that assigning numbers to jurors, or otherwise hiding their names and addresses, will prevent improper or illegal contacts. First, as common sense and experience show, and as the cases discussed below reflect, courts sitting in smaller communities cannot effectively hide jurors’ identities. In

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<sup>3</sup> Examples include juror contacts during recesses by family members of a murder victim, *Winston v. Warden of the Sussex I State Prison*, No. 052501 (Supreme Court of Virginia, March 7, 2007)(denial of petition for appeal) *reported in Virginia Lawyers Weekly*, April 2, 2007; intimidation of a juror by Richmond City Police, “Show of Force Shows Police Don’t Get It,” *Richmond Times-Dispatch*, April 5, 2003; harassment by fellow jurors of a juror who was dismissed from service during the trial, “Man Is Given 35 Years in Wife’s Death,” *Richmond Times-Dispatch*, August 1, 2001; and a defendant who contacted a potential juror prior to trial and was charged with intimidating a juror. “Man Charged Over Contact With Juror,” *Daily Press*, June 24, 1997. (See Attachment 2 for text of articles).

smaller communities, people simply know each other, if not by name at least by face, and a few simple inquiries can identify jurors.

Second, even in cases tried in urbanized areas, common sense suggests that a highly-motivated individual with a desire to influence or harm jurors will not be deterred by a juror anonymity rule. Courts implicitly recognize this in high-profile cases by taking extra steps to protect jurors from harm, such as sequestering and making transportation arrangements to and from the courthouse that discourage stalking of jurors. Otherwise, someone could simply wait outside the courthouse and follow any juror home, even an “anonymous” one.

These realities counsel adoption of a rule that focuses on the rare cases where serious and identifiable harms are present, and juror anonymity works in conjunction with other protocols to ensure the safety of jurors and the integrity of their deliberations. A blanket rule such as the one proposed for all criminal trials is an impractical and overbroad solution to the problems that occasionally do present themselves in unusual criminal trials.

## **II.**

### **CONSTITUTIONAL CONSIDERATIONS**

#### **A. Supreme Court of the United States**

Although the Supreme Court has not directly addressed the issue of juror anonymity, it has (1) established an analytical framework for addressing the issue and (2) stated in direct language that public access to the process of jury selection is grounded in the First Amendment.

The analytical framework is set by *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (“*Richmond Newspapers I*”). In holding that the First Amendment establishes a public right to attend criminal trials, absent an overriding interest articulated in findings, *Id.* at 580, the Court looked to (1) the historical practice of the courts with regard to access and (2) the functional significance of public access in ensuring effective and trustworthy judicial processes. Tracing the historical underpinnings of modern criminal trials to the pre-Colonial English system, the Court had no difficulty concluding that there is a deeply-rooted tradition of public access to criminal trials. *Id.* at 564-69. Turning to the function of public access, the Court concluded that public trust in the judicial system cannot be sustained when its processes occur in secret:

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is “done in a corner [or] in any covert manner.” [citation omitted] It is not enough to say that results alone will satiate the natural community desire for “satisfaction.” A result considered untoward may undermine public confidence, and where the trial has been concealed from public view, an unexpected outcome can cause a reaction that the system, at best, has failed, and, at worst, has been corrupted.

*Id.* at 571.

The rule announced in *Richmond Newspapers I* was echoed by the Supreme Court of Virginia in *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981) (“*Richmond Newspapers II*”). The Supreme Court of Virginia held that Article I, Section 12 of the Constitution of Virginia affords a public right to attend suppression hearings in criminal cases, noting the critical function suppression hearings play in many cases as “the only adversary proceeding the accused will have in resolving his case.” 222 Va. at 588.

The rule in *Richmond Newspapers I* was further developed and applied in subsequent decisions by the Supreme Court of the United States. Of critical importance to the issue of juror anonymity is the reasoning of the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (“*Press-Enterprise I*”). The case arose out of the high-profile prosecution of a defendant accused of raping and murdering a teenage girl. The prosecutor, citing juror privacy concerns, and the defendant, citing Sixth Amendment fair trial rights, supported the trial court’s closure of all but three days of the *voir dire* proceedings in which the jurors were selected. In support of its closure order, the trial court noted that juror responses during *voir dire* referred to sensitive personal problems, and its concerns about “a person performing their [sic] civic duty as a prospective juror [to open] their private information [to] the public.” *Id.* at 504.

In the face of those articulated concerns, the Supreme Court held that the closure order was unconstitutional, noting that the “process of selection of jurors has presumptively been a public process” in our judicial history. *Id.* at 505. Following the “history-plus-function” analysis of *Richmond Newspapers I*, the Supreme Court noted that the openness of *voir dire* “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 508. The Supreme Court concluded that closure of *voir dire* proceedings “must be rare and only for cause shown that outweighs the value of openness.” *Id.* at 509. It adopted this standard: “The 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. The interest is to be articulated along with findings specific

enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* at 510.

### **B. Other Appellate Analyses of Juror Anonymity**

Federal appellate courts addressing the issue of juror anonymity since the Supreme Court’s ruling in *Richmond Newspapers I* have relied on the two-part constitutional analysis to reject juror secrecy where an overriding interest cannot be established in a particular case.

In the Fourth Circuit, juror anonymity was addressed in *In re Baltimore Sun Co.*, 841 F.2d 74 (4<sup>th</sup> Cir. 1988), a case involving the prosecution of savings and loan executives. The Court held that the public had a right of access to the names and addresses of jurors selected to decide the case, as well as the venire persons who attended court but were not selected to serve.<sup>4</sup> It applied the “history-plus-function” test, finding first that:

When the jury system grew up with juries of the vicinage . . . everybody knew everybody on the jury and we may take judicial notice that this is yet so in many rural communities throughout the country. So, everyone can see and know everyone who is stricken from a venire list or otherwise does not serve.”

*Id.* at 75 (footnote omitted). Recognizing that this no longer holds true in urbanized areas, the Court nonetheless stated that “the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity.” *Id.* at 76. It noted:

We think it no more than an application of what has always been the law to require a district court, upon the seating of the panel of a jury and alternates, if

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<sup>4</sup> Although the opinion discussed and relied on *Press Enterprise I*, the Court did not purport to base its decision on the First Amendment. The Court denied access to other information on questionnaires completed by prospective jurors under 28 U.S.C. § 1867(f).

any, which will hear a case, to release the names and addresses of those jurors who are sitting, as well as those veniremen and women who have attended court but have not been seated for one reason or another.

*Id.* at 75 (footnote omitted).

The First Circuit, while acknowledging that there may be rare cases requiring the withholding of juror information, such as the presence of a “credible threat of jury tampering, a risk of personal harm to individual jurors,” or “other evils affecting the administration of justice,” applied constitutional principles (while ruling on non-constitutional grounds) to the analysis of a federal statute authorizing the withholding of juror information to grant a petition for post-trial access to juror information in a highly-publicized trial. *In re Globe Newspaper Co.*, 920 F.2d 88 (1<sup>st</sup> Cir 1990)(“*Globe Newspaper III*”).<sup>5</sup> The Court thoroughly addressed the important purposes served by relegating juror anonymity to only the most unusual cases, noting that access to names and addresses could assist inquiry into whether jurors reflected only a narrow demographic group, had limited political affiliations, or were associated with organized crime. It noted the role of such openness in educating the public regarding the judicial system, facilitating public discourse on improving the process, helping to uncover juror bias and deterring misrepresentations during *voir dire*. Echoing a theme from *Richmond Newspapers I*, it noted that withholding such information could add weight to suspicions of juror impropriety in the jury selection process. *Id.* at 94. *See also United States v. Antar*, 38 F.3d 1348, 1351 (3d Cir. 1994)(constitutional right of access to sealed

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<sup>5</sup> For an example of restrictions necessary to address concrete risks of jury tampering, see *United States v. Brown*, 250 F.3d 907 (5<sup>th</sup> Cir. 2001), where unusually broad restrictions were imposed in connection with the prosecution of Louisiana’s ex-governor and state Insurance Commissioner. Concrete allegations of jury tampering, as well as media violations of prior court orders, were present.

transcripts of *voir dire* proceedings; unconstitutional to seal transcripts absent compliance with substantive and procedural safeguards).

### **C. Constitutional Infirmity of the Proposed Rule**

As proposed, the Rule invites constitutional attack. The question is not whether restrictions on juror identities are ever warranted. Plainly, they are warranted in cases where it appears to the trial court that a concrete threat to the safety of the jurors or the integrity of their deliberations has been clearly articulated, the threat is significant enough to outweigh the recognized benefits of openness in proceedings, and a procedure of notice, opportunity to object, and findings articulated on the record has been followed.

The Rule is infirm because subsection A deprives trial judges of the case-by-case opportunity to balance clearly-articulated concerns against the strong constitutional presumption that the public is entitled to observe and understand all aspects of a criminal proceeding. It establishes a rule in *all* criminal cases that the names and addresses of jurors will be replaced by numbers, with the express objective of hiding juror identities from the public. This reverses historical practice and undermines the critically important role that access to juror identities plays in the vast majority of criminal cases. A rule that simply decides, regardless of the circumstances, that the citizens who decide the liberty interests of their peers can do so without being identified is an affront to both the historical and functional elements relied on in *Richmond Newspapers I*.

It is foreseeable that the adoption of the Rule in its present form will draw challenges on constitutional grounds. Such a challenge could easily be on facial grounds (rather than “as applied”) because the proposed Rule operates automatically in all criminal cases. As VPA notes below, a revision of the proposed Rule to accommodate

constitutional rules would avoid the difficulties invited by the Advisory Committee's proposal.

### **III.**

#### **JUDICIAL RESTRAINT IN RULEMAKING**

Article VI, Section 5 of the Constitution of Virginia confers rulemaking authority on the Supreme Court of Virginia. Virginia Code § 19.2-263.3.B. is the instruction from the General Assembly to the Supreme Court of Virginia regarding the scope of its rulemaking authority in this instance. The language of that subsection, read literally, does not confine the Supreme Court of Virginia to the boundaries of subsection 19.2-263.3.A. However, prudence dictates that the proper course is to do so.

First, the First Amendment jurisprudence discussed above in Part II counsels an approach that can be squared with the case-by-case balancing of articulated concerns against the constitutional presumption of access.

Second, the Supreme Court of Virginia exercises its constitutional rulemaking authority with restraint. The General Assembly's authorization to adopt a rule "in addition to" the rule legislated in 2008 was not a helpful guidepost for the Court. Although there is no facial conflict between Va. Code § 19.2-263.3 and the proposed Rule, the statute read as a whole creates significant uncertainty whether the General Assembly intended to grant rulemaking authority as extensive as that the Advisory Committee is encouraging the Court to exercise. If the General Assembly truly wants a rule, albeit of dubious constitutionality, that renders all criminal jurors anonymous by assigning them numbers, it should be invited to make its intentions clear.

Third, as Part IV below explains, recent cases illustrate the importance of the free flow of information in ensuring the integrity of jury decision-making. In the current environment, the Court should not act hastily to limit the ability of the public or the press to inquire into and candidly discuss failures in the system.

#### IV.

#### **NEGATIVE CONSEQUENCES OF JUROR SECRECY FOR THE JUDICIAL SYSTEM**

The jury system has entered a new era in which technology is overwhelming the ability of trial judges to manage the decision-making process. Judges, trial lawyers and those familiar with the courts are well aware of standard instructions given to jurors at the outset of every case. Those instructions include an admonition to avoid discussing the evidence until it is all received, to avoid discussing the case outside the confines of the jury room until the trial is over, and to avoid any media accounts of the proceedings. *See* Virginia Model Jury Instructions (Criminal) No. 2.050.

Virginia's instructions are typical of those given daily in courts around the country – and courts around the country are experiencing, despite such instructions, an inability to “get the message” to jurors on these critical points. There are continuing reports of jurors having improper, unsolicited interaction with news media during trial. *See, e.g., United States v. Basham*, 561 F.3d 302 (4th Cir. 2009)(juror in death penalty case contacting television station during trial). There are reported circumstances of jurors conducting their own research during trial by searching the Internet for relevant information on the parties or the issues presented by the case. *See* “Jurors Ordered: Unplug,” *LancasterOnline.com*, April 9, 2009 (reporting on Philadelphia trial where juror

sent a message on Facebook about upcoming “big announcement” and Florida drug trial where eight of twelve jurors did independent online research during trial)(See Attachment 3). Courts now operate within a larger culture of jurors addicted to their handheld devices, chatting with friends and “Twittering” about the details of their daily lives.

Judges, lawyers, legal scholars and commentators are shocked by this lack of discipline and frustrated by the conduct of jurors – not only at an ethical level but at the practical level of building error into jury trials. Creating a regime for criminal cases in which jurors are presumed anonymous will not help the judicial system address these growing problems. In fact, it will help drive them underground. If the press and the larger community lose the ability to identify jurors, juror misconduct is far less likely to be unearthed and reported. The credibility of the jury process as a whole is undermined.

A recent criminal trial in Powhatan County illustrates the point. Because the community is not populous and jurors are relatively easy to identify, a reporter for the *Richmond Times-Dispatch*, despite a court order sealing their identities, was able to interview eleven of fourteen jurors (including alternates) who sat on the homicide trial of Joseph and Nathan Parrish. See “Inside the Talaiferro Jury,” *Richmond Times-Dispatch*, June 28, 2009 (See Attachment 4). The verdict generated enormous anger and recrimination in the community. The juror interviews, given on condition of confidentiality, revealed that media reports and perceived pressure from the community may have influenced the jury’s sentencing recommendation. In a larger community where it is more difficult to ferret out the identities of jurors without their names and

addresses, this type of story, which is critical to public understanding and debate about the efficacy of the jury system, may not have been written.

## V.

### STATE LEGISLATIVE ENACTMENTS

The states that have addressed the issue of juror identity protection legislatively have done so inconsistently.<sup>6</sup> A fair reading of the statutes supports these conclusions: (1) no consensus has formed regarding a “model” or “best practices” approach, (2) the states addressing the issue proceed in most cases from a presumption of openness as opposed to a presumption of closure with regard to juror identifying information, and (3) the statutes set forth a multiplicity of standards for permitting closure of juror information, from no standard at all, to the “interest of justice,” to “good cause,” to “compelling interest.”

Thus, Virginia has the opportunity to create a national model for a reality-based and constitutionally sound statute addressing the protection of jurors in criminal cases.

## VI.

### A NARROWER PROPOSAL

The wisest approach to the problem of juror safety and deliberative integrity is to craft a rule that presumes jurors will be identified in all criminal cases. The identifying

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<sup>6</sup> *See, e.g.*, Ark. Code Ann. § 16-32-11 (2008)(juror lists closed); Cal Code Civ. Proc. § 237 (2009)(juror names available on request absent showing of compelling interest to withhold; procedures for post-verdict sealing); Del. Code Ann § 4513 (2009)(names of persons summoned shall be disclosed; court may determine confidentiality; no standard stated).

information will be sufficient for the public to know the names and home addresses of jurors. Publicly-available information need not include details about personal, financial or other sensitive matters.<sup>7</sup>

The Rule should provide that a trial judge, when presented with credible information identifying a concrete threat to the safety of any juror, will make inquiry into the nature of the threat and determine what steps, under the circumstances, might be taken to reduce the risk of physical harm to jurors or the tainting of jury deliberations. Should the judge contemplate masking the identities of jurors, the court would give public notice of its intention to do so, reasonable under the circumstances, but absent an emergency no less than two business days before the commencement of jury selection. Any person objecting to the closure of juror identifying information would be required to appear and be heard at a time set prior to the commencement of jury selection.

The Rule should provide that a trial judge may only conceal the identities of jurors where there appears an overriding interest, specifically, credible evidence of a threat of physical harm to a particular juror or jurors, bribery or other forms of jury tampering, or harassment of any juror. After first taking steps, with the assistance of law enforcement authorities, to address directly the source of the threatened harm, the judge could enter an order protecting the identities of jurors for such time as protection is needed, and subject to reconsideration during trial if the threat has diminished. The order should include findings sufficient for meaningful review by an appellate court.

In any case where such an order is entered, a sealed record with juror identifying information should be maintained in the case file. The judge should be required to

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<sup>7</sup> VPA does not address the needs of defendants or trial counsel for more detailed juror information.

reconsider the secrecy order at the close of trial and make a further finding as to the post-trial duration of the sealing of juror identifying information. All such orders should be subject to later reconsideration and vacation for journalistic, academic or historical record purposes when it is clear that a threat no longer exists.

### **CONCLUSION**

VPA opposes the proposed Rule as overbroad and unconstitutional. It recognizes the need for courts to address juror security concerns in those rare cases where they arise. If a rule is to be adopted, such a rule must be narrowly drawn to meet First Amendment standards and to deal directly and narrowly with concrete and well-articulated harms.

Virginia Press Association

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