Reporting on NDAs and #MeToo: How the Press May Obtain Standing to Challenge NDAs

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With the dawn of the #MeToo movement, it's no secret that individuals accused of sexual harassment have used nondisclosure agreements (NDAs)—contracts in which parties agree that they will not disclose information listed in the agreement (such as the terms of a settlement offer)—to conceal details of the alleged wrongdoing. Disgraced former film producer Harvey Weinstein, for example, used NDAs to escape public scrutiny of his sexual misconduct for decades.[1] His former personal assistant, Zelda Perkins, described nearly constant sexual harassment while working for Weinstein.[2] The harassment was so severe that she eventually quit and sought damages against Weinstein.[3] In exchange for a payment of $316,000 split with a coworker, Perkins signed an NDA that prohibited her from speaking about the harassment with anyone, including her friends, family, and doctors, unless they also signed an NDA.[4] The agreement also limited her ability to speak to law enforcement.[5]

Weinstein is not the only notable figure who employed NDAs in the wake of sexual harassment allegations. Bill Cosby, Bill O'Reilly, and Leslie Moonves used NDAs to resolve accusations of sexually abusive behavior in secret.[6] Further, use of NDAs is not limited to those in the entertainment and media industries; members of Congress as well as state governments have also been known to use confidential settlements to silence harassment victims.[7] While NDAs are commonly (and harmlessly) used across the business world to safeguard competitively advantageous information, significant legal and public policy questions arise when the agreements are used to conceal potentially hazardous wrongdoing. In workplace sexual harassment cases, NDAs restrict one's ability to warn colleagues about the risks of harassment and warn others about matters of public concern. By silencing would-be speakers, these NDAs restrict journalists' ability to gather news.

This article explores the effect of NDAs on the news media's right to engage in newsgathering. Because NDAs are increasingly employed to silence would-be speakers who could provide information valuable to the public on matters of great concern, courts must understand the nature of the injury to the news media caused by such agreements and the First Amendment implications that plague both the victim, the press, and the public—especially the right to receive information.

The Problem with NDAs

There are two main types of NDAs: contracts that serve as a condition of employment, and contracts that stem from settlement agreements.[8] For this article we focus on the latter. A party may wish to keep the details of the settlement confidential over fear of retaliation or privacy concerns. However, depending on the nature of the issue leading to the suit and settlement agreement, an aggrieved individual may want to advise the public about hostile work environments to protect others from falling victim to the same practices. Under settlement agreement-based NDAs, such a person would be precluded from speaking to the public, including journalists. Further, the individual would be unable to alert coworkers or future employees about the risk of harassment. Worse, such an NDA often restricts individuals from discussing their cases with friends and family. For example, under the confidential settlement Perkins reached with Weinstein, she was prevented from speaking about the harassment with her friends and family, unless they too signed NDAs.

A party who violates the terms of an NDA is at risk of legal and financial repercussions, regardless of the reason for doing so. Perkins violated her NDA—despite the consequences—because she believed that such agreements are egregious and that she had a moral duty to end hers to bring awareness to the detrimental effect of her harassment (and of NDAs, generally).[9] Damages assessed against those who break NDAs are often considerable: notably, Olympic gymnast McKayla Maroney faced a $100,000 forfeiture for breaking an NDA and speaking about the harassment by USA Gymnastics team doctor Larry Nassar.[10] The organization ultimately dropped the fine against Maroney, but only after celebrities offered to pay her fees for coming forward.[11] Even if a speaker successfully avoids paying damages, the cost of fighting the legal battle (particularly against a powerful and well-funded opponent) can itself serve as a deterrent to speaking out.

By restricting would-be speakers, NDAs impair newsgathering on matters of public concern. Journalists are unable to speak to victims who sign NDAs about their experiences due to the penalty the speaker may face in doing so. Reporters may not even be able to ask witnesses about wrongdoing: some employees of Weinstein told journalists that, while they had not themselves settled claims against Weinstein, they were bound by pre-employment NDAs to refrain from speaking about any suspicious behavior observed on the job.[12]

In cases involving government officials, such as one that belatedly came to light three years later involving former Texas congressman Blake Farenthold,[13] NDAs can prevent

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journalists from reviewing government action, and scrutinizing the use of taxpayer funds to litigate and settle claims. Thus, while NDAs have a significant impact on the rights of victims, they also inflict a blow in limiting the media's watchdog role to the public.

Treatment of NDAs by the Courts

Where a speaker wishes to share information, First Amendment protections apply to both the speaker and the intended recipient of the speech. In other words, freedom of speech protects one's right to receive information.[14] This right is a separate, independent corollary of the First Amendment speech and press freedoms. An "informed citizenry" is "vital to the functioning of a democratic society,"[15] and thus "the First Amendment protects the news agencies right to receive protected speech."[16]

NDAs cut against these well-established principles, especially where government is involved as either a party or (when a dispute reaches the courts) an enforcer. NDAs are typically shrouded in secrecy, which inevitably thwarts both the right to speak and to receive information. While it cannot be denied that certain agreements do implicate privacy concerns of those involved, NDAs particularly place certain rights at risk as well as potentially limit the availability of information beneficial to the public. In such scenarios, courts have been known to weigh the public interest heavily—especially where matters that may affect the public at large are concerned.

Traditionally, courtrooms have been open to the public and there is a presumptive right of access to judicial records.[17] Even when parties have reached a confidential settlement, courts have granted journalists access to judicial documents or granted journalists standing to intervene and modify confidentiality orders. The argument for news media standing is strongest in cases involving matters of public concern and cases involving government officials or public officers. In *Pansy v. Borough of Stroudsburg*, for example, the U.S. Court of Appeals for the Third Circuit found that newspapers had standing to intervene and challenge a confidentiality order in a civil rights case between a former police chief and the city.[18] The court determined that the trial court did not properly balance the interests of the public and the privacy interests of the parties in granting the confidentiality order. More specifically, the court reasoned that the public has a *legitimate* and *important* interest when at least one party is a public official or public entity.[19] While parties' privacy interests are important, the court explained that privacy interests diminish "when the party seeking protection is a public person subject to legitimate public scrutiny."[20]

Courts have also granted journalists standing to intervene and access to settlement agreements in cases of public concern. The U.S. District Court for the District of Columbia in *In re Fort Totten Metrorail Cases* granted the *Washington Post* standing to intervene and access settlements between minors and the Washington Metropolitan Area Transit Authority (WMATA).[21] The settlements arose out from a Metro train crash that killed nine people and injured 80 others. The court found that the settlement documents were judicial records and were therefore presumptively open, ultimately holding that sealing the court records was not justified.[22] In its opinion, the court explained that the case involved a public entity and some of the records indicated how WMATA used taxpayer funds.[23] Although the records did not reveal the cause of the crash, the significance of the underlying event—the deadliest crash in WMATA history—weighed on the court's decision in making the records public.[24] Finally, the court explained that allowing scrutiny of settlement documents and the court's decisions approving them would protect minors from disadvantageous settlements.[25]

Similarly, the U.S. Court of Appeals for the Fourth Circuit found that court documents were subject to the public's right of access under the First Amendment in a consumer protection case involving a government agency.[26] In *Company Doe v. Public Citizen*, a company tried to enjoin the Consumer Product Safety Commission from publishing a report about one of its products linked to an infant's death. The district court allowed the entire case to be sealed and released an opinion, ruling in favor of the company, with most facts, analysis, and evidence redacted.[27] When consumer advocacy groups moved to intervene, challenging the sealing order and decision to let the company use a pseudonym, the Fourth Circuit agreed, reasoning that the company's interest in its reputation *did not* outweigh the public's interest in access to the record and court's decision.[28] Moreover, the interest in access was especially high because a government agency was a party. The court opined that "the public has a strong interest in monitoring not only functions of the courts but also the positions that its elected officials and government agencies take in litigation."[29]

Additionally, courts have refused to enforce NDAs that interfere with ongoing investigations. Notably, Bill Cosby tried to enforce a confidential agreement signed by Andrea Constand and her attorneys arising from a 2005 sexual assault case.[30] A judge refused to enforce the NDA to the extent Constand and her attorneys were reporting a *crime*, reasoning that the agreement was unenforceable as a matter of public policy.[31] The court explained that agreements cannot prevent parties from either voluntarily talking to law enforcement or answering subpoenas.[32] Similarly, courts have refused to enforce NDAs that interfere with civil investigations, including inquiries by the Equal Employment Opportunity Commission.[33]

Courts, however, are likely to enforce a confidentiality agreement (and deny journalists standing) in cases involving private interests that are not matters of public concern. The Third Circuit in *Pansy* explained that confidential settlements between private parties, or the lack of a strong public interest or concern in the underlying case, would weigh in favor of maintaining a confidentiality order.[34] Additionally, an NDA included in an employment contract, rather than a settlement agreement, is likely to be enforced.

Challenging NDAs and News Media Standing

As *Branzburg v. Hayes* famously tells us, "without some protection for seeking out the news, freedom of the press

could be eviscerated."[35] As discussed above, NDAs pose a unique threat to the newsgathering process due to their effect on both would-be speakers and recipients of often-vital information on matters of public concern. Part of the problem is that, until recently, there has been a question regarding the standing of news media organizations in challenging NDAs (or decisions pertaining to them) in court.

Standing poses a unique problem for news media. A litigant presents no constitutionally justiciable question if there is no "case or controversy" for the judiciary to redress.[36] At times, courts have permitted standing for litigants in a representational capacity on behalf of others who are more directly injured but are unable to assert their own interests,[37] such as abortion doctors standing in for prospective patients.[38] However, to receive standing, a party generally must be able to meet the standard of proving a substantial likelihood that the injury is redressable by an available remedy.[39]

News media have managed to establish standing in cases pertaining to gag orders on trial participants, a sibling of NDAs. Although a would-be speaker faces the greatest personal jeopardy from a judicial gag order, courts have consistently found that journalists have a sufficiently concrete interest in access to lawyers, parties, and witnesses to establish standing—whether the injury is conceived as one directly to the journalist or as derivative of the injury to the speaker at risk of contempt.

However, some courts have found that gag orders on trial participants do not deprive journalists of constitutionally protected rights because there is no constitutional entitlement to interview a particular source. Such courts apply a lower level of scrutiny when gag orders are challenged by news media intervenors rather than by would-be speakers themselves.[40] This line of reasoning has been influenced by the Supreme Court's observation in *Nebraska Press Ass'n v. Stuart* that orders limiting what lawyers and witnesses may say to anyone outside of the proceedings do not amount to prior restraints and are more constitutionally tolerable.[41] This view was illustrated by the U.S. Court of Appeals for the Second Circuit in *In re Dow Jones & Co.*, where the court found that news organizations had standing to challenge the order because they were the prospective recipients of speech, but declined to characterize the order as a "prior restraint" on the media plaintiffs, noting that there is a fundamental difference between a challenge of a gagged individual and a third party.[42]

It follows that some courts view gag orders—and most likely NDAs—as potentially injuring the rights of the potential speaker, rather than any right to newsgathering or right to receive information afforded to the news media. As demonstrated in the analogous prison access case, *Pell v. Procunier*, a prison system's policy of limiting prisoners' ability to grant interviews could be justified by reasonable safety concerns and did not violate the rights either of inmates or of the journalists who sought to interview them.[43] As the Supreme Court noted:

> It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.[44]

The takeaway is that journalists may have only the benefit of the First Amendment protection afforded to their sources—which may be none, depending on the circumstances.

Against this body of analogous precedent, strong considerations support recognizing standing for journalists to challenge employer policies and NDAs that restrain would-be speakers from speaking to the media, whether in the journalists' own right or as stand-ins for the speakers themselves. The Supreme Court has recognized that third-party standing is compelling when the fear of harm from penalty deters a party from suing.[45] This is extremely compelling for individuals subject to NDAs—particularly NDAs that stem from instances of sexual assault or other civil rights-based harms—who but for the threat of penalty under the NDA would supply information to journalists, fellow employees, and the public at large.

Recent Development: The *Baltimore Brew* Case

In July 2019, a federal appeals court confronted media standing and the enforceability of NDAs head-on, ruling that the city of Baltimore's use of NDAs with individuals in the process of settling claims against the city for police misconduct was unconstitutional.[46] In *Overbey v. Mayor of Baltimore*, the Fourth Circuit highlighted the fact that subjecting speakers to NDAs runs afoul of the "public's well-established First Amendment interest in 'uninhibited, robust, and wide-open' debate on 'public issues.'"[47] The Fourth Circuit's encouraging holding centers on the rights of the *Baltimore Brew*, the newspaper that brought suit along with plaintiff Ashley Overbey, who challenged the NDA she signed following her settlement with the city after she was the victim of a wrongful arrest and police misconduct.[48] Overbey lost nearly half of her settlement with the city after she responded to comments about her case on a blog pertaining to race and police brutality, prompting her challenge of the NDA.[49] The *Brew* joined the case to challenge the city's use of NDAs based on its interference with the paper's ability to engage in newsgathering.[50]

Ultimately, the Fourth Circuit found that the city failed to identify "a comparably compelling public good or other legitimate governmental aim that was, or could be, furthered by enforcement of the non-disparagement clause (other than a general interest in using settlements to resolve lawsuits)."[51] Moreover, the court examined the *Brew*'s standing by challenging the city's definition of a willing speaker, noting that a willing speaker "would be willing to provide information on a matter of public significance

to the news media but chooses not to because she does not want to violate a settlement agreement with the government."[52] In clarifying this definition, the court determined that those subject to the city's NDAs would qualify as willing speakers and therefore should not be barred from speaking on matters of public concern. Thus, the court found that the city's NDAs injured the *Brew* by directly interfering with the paper's right to receive information from willing speakers.[53] Further, the court held that the mere fact that public records may exist regarding a case does not negate a journalist's need or desire to obtain information from a source firsthand or that the forced refusal of would-be speakers to speak to the media in light of such records would not have a deleterious effect on newsgathering.[54]

Importantly, the Fourth Circuit also addressed a potential roadblock for news media standing: the question of ongoing or imminent harm for standing to bring a claim for injunctive relief. Typically, injury implies monetary relief, which, in most cases, news media plaintiffs do not seek. Rather, news media often pursue injunctive relief to allow for proper newsgathering. In the *Overbey* case, the *Brew* specifically sought injunctive and declaratory relief, which (like all plaintiffs seeking redress in this fashion) required the paper to establish "*ongoing or future* injury in fact" that was not dependent on any prior harms.[55] Thankfully, the court recognized the potential for the continual harm to newsgathering posed by NDAs, holding that the *Brew* was able to establish an ongoing or imminent injury based on its allegation that the city's "pervasive use of non-disparagement clauses in settlements with police brutality claimants 'impedes the ability of the press generally, and *Baltimore Brew* specifically, to fully carry out the important role the press plays in informing the public about government actions.'"[56]

Overbey is, indeed, a huge victory for the First Amendment and for newsgathering generally. The Fourth Circuit's analysis on news media standing correctly struck the balance of interests at play and brought home the principle that the right to speak and the right to receive information are paramount where a matter of public concern is at issue. The court correctly found and gave credence to the fact that NDAs (and similar gag orders) cause injury to the news media and thwart the media's protected right to gather information from willing speakers.

While the *Overbey* holding stemmed from government action, the analysis can arguably apply to civil matters where matters of public concern are at stake. If courts continue to recognize the injury in fact sustained by the news media when NDAs silence would-be speakers, we may see a much-needed shift in judicial treatment of such cases. This is especially true considering courts' historical treatment of NDAs regarding issues that directly affect the public and the public's right to know.

Looking Forward: Challenging and Reporting on NDAs

In the wake of the #MeToo movement, journalists are eager to amplify the voices of those who have suffered in silence. And rightfully so; it is, after all, the task of the news media to disseminate information needed by society for political, social, and even emotional growth. As the stories emerge, though, journalists (and their lawyers) must be conscious of NDA litigation and be prepared to combat it accordingly.

Thankfully, the #MeToo movement's effect has reached far beyond headlines and hashtags. As of August 2019, 15 states have passed legislation fortifying legal protections that forbid sexual harassment at work.[57] As many as 12 states have put forward bills to curb the use of NDAs in cases regarding sexual harassment.[58] Legislators appear to be realizing that while NDAs do serve to protect trade secrets and other business interests, they can also be used to silence sexual harassment victims and would-be whistleblowers who could shed light on very alarming practices.[59] Thus, some states are seeking to ban the use of NDAs in sexual harassment cases altogether.[60]

Regardless of such legislation, which is subject to both praise and scrutiny,[61] courts and legislators should remain aware of First Amendment implications when it comes to NDAs. As the D.C. district court noted in *In re Fort Totten Metrorail Cases*, the public does maintain a significant interest in access to documents that provide information that affects the public. Similarly, the public does have an interest in hearing from survivors of sexual harassment as well as those who suffered from police brutality. It is for this reason that the news media must be able to engage in effective newsgathering; after all, the Supreme Court has designated the news media as a surrogate for the public when it comes to attending and reporting on matters of public concern.[62]

In light of the Fourth Circuit's decision in *Overbey*, media lawyers should carefully craft their arguments to stress the ongoing or imminent injury sustained by the news media when challenging NDAs. Because NDAs serve as an impediment to obtaining information from sources on matters of public concern, it is easy to stress the actual harms suffered by the public and press. It must also be stressed that—legislation notwithstanding—use of NDAs will perpetually thwart newsgathering on matters of great public concern while they are deemed viable. Courts have proven that they are more than capable of striking the balance between actual privacy or business concerns and access to information that speaks to matters of great public interest. In allowing for news media standing in cases like *Overbey*, courts embrace the First Amendment protections guaranteed to speakers and bolster the right to receive information. And, most importantly, they will allow more journalists to tell more stories of survival and allow more abusers to be held accountable to the public. ■

Endnotes

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(Dec. 31, 2018), https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html.

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6. Emily Steel & Michael S. Schmidt, *O'Reilly Thrives as Settlements Add Up*, N.Y. Times, Apr. 2, 2017, at A1; Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, New Yorker (July 27, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct; Jen Kirby, *Bill Cosby Paid Accuser Andrea Constand Nearly $3.4 Million in a 2006 Settlement*, Vox (Apr. 9, 2018), https://www.vox.com/2018/4/9/17217210/bill-cosby-retrial-andrea-constand-settlement-3-4-million-retrial.

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10. Alice Park, *McKayla Maroney Won't Be Fined for Speaking Out about Sexual Abuse, USA Gymnastics Says*, Time (Jan. 1, 2018), https://time.com/5106664/mckayla-maroney-no-fine-usa-gymnastics.

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12. Farrow, *supra* note 1.

13. Rachel Bade, *Lawmaker behind Secret $84K Sexual Harassment Settlement Unmasked*, Politico (Dec. 1, 2017), https://www.politico.com/story/2017/12/01/blake-farenthold-taxpayer-funds-sexual-harassment-274458.

14. Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972).

15. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

16. Davis v. E. Baton Rouge Par. Sch. Bd., 78 F.3d 920, 926 (5th Cir. 1996).

17. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." (footnote omitted)).

18. 23 F.3d 772 (3d Cir. 1994).

19. *Id.* at 786.

20. *Id.* at 787.

21. 960 F. Supp. 2d 2, 5 (D.D.C. 2013).

22. *Id.* at 7.

23. *Id.*

24. *Id.*

25. *Id.* at 11; *see also* C.L. v. Edson, 409 N.W.2d 417 (Wis. Ct. App. 1987) (granting access to settlements between children and their psychiatrist over claims of sexual and psychological abuse).

26. Co. Doe v. Pub. Citizen, 749 F.3d 246 (4th Cir. 2014).

27. *Id.* at 252.

28. *Id.* at 269–70.

29. *Id.* at 271.

30. Cosby v. Am. Media, Inc., 197 F. Supp. 3d 735, 737 (E.D. Pa. 2016).

31. *Id.* at 742.

32. *Id.*

33. EEOC v. Astra USA, 94 F.3d 738 (1st Cir. 1996); Hamad v. Graphic Arts Ctr., No. 96-216-FR, 1997 U.S. Dist. LEXIS 249, at *1 (D. Or. Jan. 3, 1997) (finding that nondisclosure and nondisparagement clauses that prevented an employee from testifying in a civil rights case against his former employer were against public policy).

34. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994).

35. 408 U.S. 665, 681 (1972).

36. *See* Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. Miami L. Rev. 393, 394 (1981) (explaining that the only constitutional imperative to qualify for standing is that the party suffer a personal "injury in fact" traceable to the challenged practice).

37. *See* Tacy F. Flint, *A New Brand of Representational Standing*, 70 U. Chi. L. Rev. 1037, 1045–52 (2003) (explaining how courts have allowed both "representational" standing on the part of associations whose members individually would have standing, as well as "third party" standing in cases where the directly injured party faces hindrances making litigation impracticable).

38. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

39. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998); Lugan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).

40. *See, e.g.*, Radio & Television News Ass'n v. U.S. Dist. Court, 781 F.2d 1443, 1447 (9th Cir. 1986) (requiring only a reasonable justification for a judge's gag order on participants in a criminal trial).

41. 427 U.S. 539, 564 (1976); *see, e.g.*, State *ex rel.* Missoulian v. Mont. Twenty-First Judicial Dist. Court, 933 P.2d 829, 839 (Mont. 1997) (applying *Nebraska Press* and concluding that "[w]hile an order restraining the trial participants from communicating with the press may be a prior restraint upon the participants as communicators, it is not a prior restraint upon the press").

of Prior Restraint, 44 U. Miami L. Rev. 165, 183-85 (1989).

42. 842 F.2d 603, 608–09 (2d Cir. 1988) (relying in part on the Ninth Circuit's resolution in *Radio & Television News Ass'n*, 781 F.2d at 1446, holding that a restraining order not directed at the press does not restrain the press's First Amendment rights).

43. 417 U.S. 817 (1974).

44. *Id.* at 834–35 (citations omitted).

45. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684 n.4 (1977) (recognizing that minors would not come forward to challenge a law forbidding them from purchasing contraceptives, because doing so would expose their private sexual practices, thus making a contraceptive vendor a suitable stand-in plaintiff).

46. Overbey v. Mayor of Baltimore, 930 F.3d 215 (4th Cir. 2019).

47. *Id.* at 224.

48. *Id.* at 220; *see Baltimore's Gag Orders in Police Misconduct Cases Unconstitutional, Appeals Court Rules*, Balt. Brew (July 11, 2019), https://www.baltimorebrew.com/2019/07/11/baltimores-gag-orders-in-police-misconduct-cases-unconstitutional-appeals-court-rules.

49. *Overbey*, 930 F.3d at 220.

50. *Id.*

51. *Id.* at 226.

52. *Id.* at 228.

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54. *Id.* at 229.

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59. *Id.*

60. *Id.*

61. Perman, *supra* note 4.

62. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).