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David Raybin

Written by David L. Raybin and Victor S. (Torry) Johnson III

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The Oct. 18 Tennessean editorial regarding four former Vanderbilt football players accused of rape suggests that the pursuit of truth may be “undermined” by restrictions in the disclosure of evidence.

These are fair concerns, and the paper asks legitimate questions. Thus, we deemed it appropriate that a defense attorney unconnected to the case and the Davidson County district attorney jointly address why the law imposes limitations on what the prosecution may disclose in advance of a jury trial.

Years ago, there was virtually no obligation of the government to disclose evidence to the defense lawyer. That policy was changed by the Tennessee Supreme Court in 1978.

The current rules of discovery exist, in part, to prevent “trial by ambush,” and to rid trials of the element of surprise that often leads to results based not upon the merits but upon unexpected legal maneuvering.

In general, courts have found no right of public access to pretrial discovery in civil or criminal cases. In *Seattle Times Co. v. Rhinehart*, the U.S. Supreme Court stated that “pretrial depositions and interrogatories are not public components of a civil trial” and “restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.”

Numerous courts have reached the same conclusion under the First Amendment, in both civil and criminal cases.

Indeed, the Tennessee Supreme Court has held that until a criminal case is at an end, there is no right of public access to police or

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prosecution investigative files under the open records law. Only when the case is closed are case files open to public inspection.

These rules exist for a reason. Evidence that the prosecution is required to disclose to the defense attorney may not always be admissible. To cast this potentially inadmissible evidence into the public domain could seriously compromise a defendant's right to a fair trial. Prospective jurors may have seen or heard that evidence in the media, but it might not be considered in open court.

Both the Tennessee and U.S. constitutions secure for the accused a right to a public trial before an impartial jury. To that end, courts have struck a balance between the public's right to know and the defendant's right to be tried in a courtroom and not in the press. In fact, prosecutors must adhere to ethical rules that strictly limit the information that can be released to the media so as to avoid "heightening public condemnation of the accused."

To understand the wisdom of this rule, one need look no further than the case of the Duke University lacrosse players accused of rape. There, an unethical prosecutor convicted them in the court of public opinion

by releasing false and misleading information to the media.

Public curiosity about a sensational case is insatiable. History is littered with appellate decisions requiring a new trial where inappropriate pretrial publicity contaminated a defendant's fair-trial rights. Dr. Samuel Sheppard, convicted in Ohio in 1954 of murdering his pregnant wife, was granted a new trial because of the carnival atmosphere of his case. Last month, a new trial was granted to five New Orleans police officers who were convicted of killing unarmed citizens in light of prosecution misconduct in releasing information about the defendants before jury selection.

The Davidson County district attorney takes these discovery rules seriously. The prosecution has an obligation to the victim in the Vanderbilt case that she testify but once. It is not in the public interest for her to endure a second trial because the first conviction — if there is one — might be reversed for some violation of the discovery rules.

Once the jury trial begins, the rules change. At that point, everything is conducted in open court, and all the evidence is a matter of public record. Thus, The Tennessean's real complaint is not if the facts surrounding the alleged Vanderbilt sexual assault will be revealed,

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but rather when.

A careful balance of the competing factors dictates that complying with the Supreme Court disclosure rules protects the defendants' fair trial rights, honors the Constitution's public trial guarantee, and gives the victim some assurance that the matter will be concluded in a single proceeding.

David L. Raybin is a partner in the Nashville law firm Hollins, Raybin & Weissman PC. Victor S. (Torry) Johnson III is the district attorney general for Davidson County.

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