Supreme Court's Committee for the Study of Cameras in the Trial Courts

Appendix to Final Report and Recommendations

January 2010

Supreme Court's Committee for the Study of Cameras in the Trial Courts

Appendix to Final Report

Exhibit	Document
1.	State by state summary of media coverage.
2.	South Dakota materials concerning cameras in the courts.
3.	Minnesota materials regarding expanded media coverage in the trial courts.
4.	Nebraska materials regarding expanded media coverage in the trial courts.
5.	Transcript of a panel discussion concerning cameras in the Mississippi state courts.
6.	Cameras in the Courtroom, *Report on Rule 980*: Judicial Council of California Administrative Office of the Courts (May 2000).
7.	*Media Guidelines for Brazos County*, Texas (2009).
8.	Indiana Supreme Court press release- Authorizing Cameras in Trial Courts.
9.	Media Advisory, Webcast of Nevada Supreme Court Oral Arguments (2009).
10.	Third Branch, *Newsletter of the Federal Courts,* Vol. 37, Number 12-December 2005 (article regarding proposal allowing cameras in the federal courts).
11.	*Background on Cameras in the Federal Courts*, Administrative Office of the U.S. Courts.
12.	Statement of Judge Diarmuid O'Scannlain regarding proposed legislation allowing cameras in the federal courts.
13.	Statement of Judge Nancy Gertner regarding proposed legislation allowing cameras in the federal courts.
14.	Statement of Judge Donovan Frank regarding proposed legislation allowing cameras in the federal courts.
15.	Testimony of Judge Jan E. DuBois before the United States Senate Committee on the Judiciary regarding cameras in the federal courts.
16.	Various media articles regarding proposed cameras in the federal courts.
17.	The Judges Journal, Vol. 46, No. 2, *Maintaining and Improving the Public's Trust in the Judiciary*, American Bar Association (2007).
18.	The Court Manager, *What a Difference a Lens Makes*, Jerriane Hayslett (1997).

Appendix to Final Report

Exhibit	Document
19.	*Facts and Opinions About Cameras in Courtrooms*, Court TV, January 1997.
20.	Judicature, Vol. 74, Number 6, *Cameras in the Courtroom: a case study*, S.L. Alexander (1991).
21.	*Cameras in the Courtroom: Real Cases, Real Judges, Real Justice?* Maria Nakis.
22.	*Evaluation of Empirical Research on the Effects of Cameras in the Courtroom*, Jason Zenor.
23.	Caselaw and secondary authority addressing media coverage of court proceedings.

EXHIBIT 1

TIER 1: States that allow the most coverage

California - broad discretion in presiding judge
Colorado - broad discretion is presiding judge
Florida - "qualitative difference" test
Georgia - broad discretion in presiding judge
Idaho - broad discretion in presiding judge
Kentucky - broad discretion in presiding judge
Michigan - judge may prohibit coverage of certain witnesses
Montana - broad discretion in presiding judge
Nevada - broad discretion in presiding judge
New Hampshire - broad discretion in presiding judge
New Mexico - judge may prohibit coverage of certain witnesses
North Dakota - broad discretion in presiding judge
South Carolina - broad discretion in presiding judge
Tennessee - broad discretion in presiding judge/coverage of minors is restricted
Vermont - broad discretion in presiding judge
Washington - broad discretion in presiding judge
West Virginia - broad discretion in presiding judge
Wisconsin - broad discretion in presiding judge
Wyoming - broad discretion in presiding judge

TIER II: State with restrictions prohibiting coverage of important types of cases, or prohibiting coverage of all or large categories of witnesses who object to coverage of their testimony

Alaska - requires sex offense victim consent
Arizona - coverage of juvenile/adoption proceedings prohibited
Connecticut - coverage of certain types of cases prohibited
Hawaii - coverage of certain cases and witnesses prohibited
Indiana - appellate coverage only; pilot program for coverage of trials in designated courtrooms.
Iowa - need victim/witness consent in sexual abuse cases; regularly scheduled Supreme Court hearings are *not* subject to witness or party objections.
Kansas - consent of parties/attorneys not required, but coverage of many types of witness may be prohibited
Massachusetts - coverage of certain types of hearings prohibited
Missouri - coverage of certain cases and witnesses prohibited
North Carolina - coverage of certain cases/witnesses prohibited
New Jersey - coverage of various types of cases prohibited
Ohio - victims and witnesses have right to object to coverage
Oregon - witnesses discretion to object to coverage of certain cases
Rhode Island - coverage of certain proceedings, including criminal trials prohibited
Texas - no rules for criminal trial coverage, but such coverage allowed increasingly on a case by case basis
Virginia - coverage of sex offense cases prohibited

TIER III: States that allow appellate coverage only, or that coverage rules essentially preventing coverage.

Alabama - consent of all parties/attorneys required
Arkansas - coverage ceases with objection by a party, attorney or witness
Delaware - appellate coverage only/currently experimenting with trial-level coverage of civil, non-jury cases in before certain courts
Illinois - appellate coverage only
Louisiana - appellate coverage only

Maine - coverage only permitted in appellate proceedings, civil trials, criminal arraignments, sentencing and other non-testimonial criminal proceedings
Maryland - consent of all parties/attorneys required; coverage of criminal trials is prohibited.
Minnesota - consent of all parties required at trial level
Mississippi - coverage of certain types of cases and witnesses prohibited.
Nebraska - appellate coverage/audio trial coverage only
New York - appellate coverage only
Oklahoma - consent of criminal parties/attorneys
Pennsylvania - any witness who objects may not be covered, coverage of non-jury civil trials permitted
South Dakota - Supreme Court coverage only
Utah - appellate coverage/trial coverage - still photography only

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Alabama

Trial and appellate courtroom coverage is permissible if the Supreme Court of Alabama has approved a plan for the courtroom in which coverage will occur. The plan must contain certain safeguards to assure that coverage will not detract from or degrade court proceedings, or otherwise interfere with a fair trial. If such a plan has been approved, a trial judge may, in the exercise of "sound discretion" permit coverage if: (1) in a criminal proceeding, all accused persons and the prosecutor give their written consent and (2) in a civil proceeding, all litigants and their attorneys give their written consent. Following approval of their coverage plans, appellate courts may authorize coverage if the parties and their attorneys give their written consents. In both trial and appellate contexts, the court must halt coverage during any time that a witness, party, juror, or attorney expressly objects. In an appellate setting, it must also halt coverage during any time that a judge expressly objects to coverage.

Authority: Canon 3A(7), 3A(7A), and 3A(7B), Alabama Canons of Judicial Ethics, Ala. Code, Vol. 23A (Rules of Alabama Supreme Court).

Alaska

The news media, which includes the electronic media, still photographers and sketch artists, may cover court proceedings in all state trial and appellate courts. Administrative Rule 50 permits media coverage anywhere in the state court facility and is not limited to courtrooms. Under the permanent rule, the media must apply for and receive the consent of the presiding judge prior to commencing coverage. Requests for coverage must be made 24 hours prior to the proceeding, and applications that are timely filed are deemed to have been approved, unless otherwise prohibited. The consent of all parties is required for coverage of divorce, domestic violence, child custody and visitation, paternity or other family proceedings. Jurors may not be photographed, filed or videotaped in the courtroom at any time.

Victims of a sexual offense may not be photographed, filmed, videotaped or sketched without the consent of the court and the victim. A procedure is prescribed for suspension of an individual's or an organization's media coverage privileges for a period of up to one year for violation of the media coverage plan.

Authority: Rule 50, Rules Governing the Administration of All Courts, Alaska Rules of Court (West).

Arizona

Electronic and still photographic coverage of proceedings in all state courts and "areas immediately adjacent thereto" is permitted, provided the media follow certain guidelines that set forth rules for coverage. Audio recording by media is also generally permitted, provided that the audio recording does not create a distraction in

the courtroom and is only used as personal notes of the proceedings. Coverage of juvenile proceedings is prohibited, and the judge has sole authority to decide whether to permit coverage of all other matters. The photographing of jurors in a way that permits them to be recognized is strictly forbidden. Requests for coverage should be made to the judge of the particular proceeding "sufficiently in advance" of the sought-after coverage event. Only one television and one still camera is allowed in the courtroom at one time, and the media are responsible for arranging pooling agreements. No flash bulbs or additional artificial lights of any kind are allowed in the courtroom without the notification and approval of the presiding judge.

Authority: Rule 122, Rules of the Arizona Supreme Court, Ariz. Rev. Stat., Vol. 17A.

Arkansas

A judge may authorize broadcasting, recording, or photographing in the courtroom and adjacent areas provided that "the participants will not be distracted, [n]or will the dignity of the proceedings be impaired." An objection to the coverage by a party or attorney precludes media coverage of the proceedings and an objection by a witness precludes coverage of that witness. Coverage of juvenile, domestic relations, adoption, guardianship, divorce, custody, support and paternity proceedings is expressly prohibited. Similarly, coverage of jurors, minors without parental or guardian consent, sex crime victims, undercover police agents and informants is also prohibited. Only one television and one still camera is allowed in the courtroom at one time and the media are responsible for arranging pooling agreements.

Authority: Administrative Order Number 6, Rules of Civil Procedure - Appendix, Arkansas Code of 1987 Annotated (Court Rules).

California

Media coverage of State Court proceedings is governed by Rule 980 of the California Rules of Court. Personal recording devices may be used with advance permission of the judge for personal note-taking only. Media coverage is permitted by written order of the judge following a media request for coverage filed at least five court days before the proceeding to be covered. Any such requests must be made on the official form provided by courts. Coverage of jury selection, jurors, spectators, proceedings held in chambers, proceedings closed to the public or conferences between an attorney and a client, witness or aide, between attorneys or between counsel and the judge is prohibited.

Effective January 1, 1998, Rule 4.1 restricting media coverage within the courthouse unless specifically authorized by the presiding judge was added to the Los Angeles County Superior Court Rules. This rule also prohibits the filming or photographing of any person wearing a juror badge in the court.

Authority: Rule 1.150, California Rules of Court; Rule 4.1 Los Angeles County Superior Court Rules (West).

Colorado

Canon 3A(7) of the Colorado Code of Judicial Conduct gives judges the power, implemented in Canon 3A(8), to authorize media coverage of court proceedings, subject to several guidelines. Judges also have the power to prohibit or limit coverage upon a finding of substantial likelihood of interference with a fair trial, disruption or degradation of the proceedings, or harm which is distinct from that caused by coverage by other types of media. Those wishing to cover a particular proceeding must submit a written request to do so to the presiding judge at least one day in advance of the proceeding desired to be covered and must give a copy of the request to the

counsel for each party participating in the proceeding. Coverage of jury selection, in camera hearings and most pre-trial hearings is prohibited. No close-up photography of the jury, bench conferences or attorney-client communication is permitted. Consent of the participants is not required. The judge may also terminate coverage if the terms of the canon or any additional rules imposed by the Court have been violated. Only one television and one still camera are allowed in the courtroom at one time and the media are responsible for arranging pooling agreements.

Authority: Canon 3(A)(8), Colorado Code of Judicial Conduct, Colo. Rev. Stat., Vol. 7A (Court Rules), Appendix to Chapter 24; Form.

Connecticut

Sections 70-9 and 70-10 of the Rules of Appellate Procedure (governing media coverage in the Appellate and Supreme Courts) and Sections 1-10 and 1-11 of the Rules for the Superior Court (governing coverage in trial courts) permit the coverage of judicial proceedings under specific circumstances.

In appellate courts, those wishing to cover a particular proceeding must submit a written request to do so to the appellate clerk "not later than the Wednesday which is thirteen days before the day in which that proceeding is scheduled to occur." In trial courts, those wishing to cover a particular proceeding must submit a written request to do so at least three days prior to the commencement of the trial to the administrative judge of the judicial district where the case is to be tried. In both courts, coverage of family relations matters, trade secrets cases, sexual offense cases, and cases otherwise closed to the public are prohibited. In jury trials, no coverage of proceedings held in the jury's absence is permitted. Additionally, in criminal cases, sentencing hearings may only be covered if the trials are covered. Photographing or televising individual jurors is prohibited, and where coverage of the jury is unavoidable, no close-ups may be taken.

Authority: §§ 70-9, 70-10, Rules of Appellate Procedure; §§ 1-10, 1-11, Rules for the Superior Court, Connecticut Rules of Court (West).

Delaware

Rule 53 of the Delaware Superior Court Criminal Rules, Rule 53 of the Delaware Family Court Criminal Rules, and Rule 53 of the Criminal Rules of Delaware Courts of Justices of the Peace forbid coverage. By order dated April 29, 1982, the Delaware Supreme Court issued guidelines for its one year appellate experiment. Under those guidelines, coverage is permissible so long as it does not impair or interrupt the orderly procedures of the Court. Consents of the parties are not required. This experiment was extended indefinitely by order of the Delaware Supreme Court, dated and effective May 2, 1983.

On April 5, 2004, the Delaware Supreme Court issued its Administrative Directive No. 155, which established a six-month trial court experiment, which was originally scheduled to end on October 15, 2004. In this experiment, media coverage was permitted in the Sussex Court of Chancery, and courtrooms in New Castle, Kent and Sussex Counties. Broadcast of non-confidential, non-jury, civil proceedings was permitted.

Administrative Directive No. 155 was amended on October 25, 2004, and the experiment was extended until May 16, 2005. As of this writing, no further action has been taken.

Authority: Canon 3A(7), Delaware Judges' Code of Judicial Conduct, adopted by Rule 84, Rules of the Delaware Supreme Court, Del. Code, Vol. 16; Rule 53, Delaware Family Court, Criminal Rules, Del. Code, Vol. 16; Rule 53, Delaware Superior Court Criminal Rules, Del. Code, Vol. 17; Rule 31, Delaware Courts of Justices of the Peace, Criminal Rules, Del. Code, Vol. 16. See also Rule 169, Rules of the Delaware Court of Chancery, Del. Code, Vol. 17 (as modified by above-referenced orders).

Authority: Court Rules; Administrative Directive 155; Administrative Directive 155, amended

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District of Columbia

Rule 53(b) of the Superior Court Rules of Criminal Procedure, Rule 203(b) of the Superior Court Rules of Civil Procedure, Superior Court Juvenile Proceedings Rule 53(b), and Superior Court Domestic Relations Rule 203(b) forbid "[t]he taking of photographs, or radio or television broadcasting" coverage of trial proceedings. That said, in certain circumstances, photography may be permitted under Juvenile Court Rule 53(b)(2) or Criminal Court Rule 53(b)(2), which permits photography "in any office or other room of the division" upon the consent of the person in charge of the office or room and the person or people being photographed.

Coverage is also prohibited in Appellate proceedings.

Authority: All rules cited in the foregoing paragraph are contained in D.C. Code Ann. (Court Rules-D.C. Courts).

Webcast: D.C. Court of Appeals (no archives)

Florida

Electronic media and still photography coverage of proceedings is allowed in both the appellate and trial courts. Coverage is subject only to the authority of the presiding judge who may prohibit coverage to control court proceedings, prevent distractions, maintain decorum, and assure fairness of the trial. Exclusion of the media is permissible only where it is shown that the proceedings will be adversely affected because of a "qualitative difference" between electronic and other forms of coverage. Florida v. Palm Beach Newspapers, 395 So. 2d 544 (1981). Two still cameras operated by one photographer are allowed in trial and appellate courtrooms at one time. In trial proceedings only one television camera is allowed, while in appellate proceedings, two television cameras operated by one camera person is allowed. The media are responsible for arranging pooling agreements.

Authority: Rule 2.170, Rules of Judicial Administration, Florida Rules of Court (West) (2007).

Georgia

Rule 18 of the Probate Court Rules, Rule 11 of the Magistrate Court Rules and Rules 26.1 and 26.2 of the Juvenile Court Rules provide guidelines for extended media coverage of those judicial proceedings. If the court elects to grant approval for expanded media coverage of a proceeding must be "without partiality or preference to any person, news agency, or type of electronic or photographic coverage." Those requesting coverage in these proceedings must file a "timely written request" on a form provided by the court with the judge involved in the specific proceeding prior to the hearing or trial. The judge, at his or her discretion, may allow only one television or still photographer in the courtroom at any one time, thereby requiring a pooling arrangement. Any additional lights or flashbulbs must be approved by the judge beforehand. Lastly, under the Juvenile Court Rules, pictures of the child in juvenile proceedings are expressly prohibited.

The Superior Court's Rule 22, in additional to the above requirements, prohibits photographing or televising members of the jury, unless "the jury happens to be in the background of the topics being photographed."

In the Court of Appeals, written requests for coverage must be submitted at least seven days in advance. Further, radio and television media are required to supply the Court with a video or audio tape, respectively, of

all proceedings covered. Only one "pooled" television camera with one operator and one still photographer, with not more than two cameras, is allowed in the courtroom at any one time.

In the Supreme Court, coverage is allowed without prior approval from the Court and the Supreme Court retains exclusive authority to limit, restrict, prohibit and terminate coverage. No more than four still photographers and four television cameras will be permitted in the courtroom at any time. All television cameras are restricted to the alcove of the courtroom, while still photographers may sit anywhere in the courtroom designated for use by the public.

Authority: Rules 75-91, Supreme Court Rules; Rules 26.1 and 26.2, Juvenile Court Rules; Rule 18, Probate Court Rules; Rule 11, Magistrate Court Rules; Rule 22, Superior Court Rules, Georgia Rules of Court Annotated (West).

Hawaii

Electronic media and still photography coverage of proceedings is allowed in both the appellate and trial courts. Consent of the judge prior to coverage of a trial proceeding is required, but prior consent of the judge is not required for coverage of appellate proceedings. The judge may rule on the request orally and on the record or by written order if requested by any party. A request for coverage will be granted unless good cause is found to prohibit it. Good cause for denying coverage is presumed to exist when the proceeding is for the purpose of determining the admissibility of evidence, when child witnesses or complaining witnesses in a criminal sexual offense case are testifying, when testimony regarding trade secrets is being given, when a witness would be put in substantial jeopardy of bodily harm, or when testimony of undercover law enforcement agents involved in other ongoing undercover investigations is being received. Coverage of proceedings, which are closed to the public is prohibited. These proceedings include juvenile cases, child abuse and neglect cases, paternity and adoption cases, and grand jury proceedings. Coverage of jurors or prospective jurors is prohibited. Only one television camera and one still photographer, with not more than two still cameras are allowed in the courtroom at one time (although the judge may allow more at his/her discretion) and the media are responsible for arranging pooling agreements.

Authority: Rules 5.1, 5.2, Rules of the Supreme Court, Hawaii Court Rules (West).

Idaho

Rule 45 of the Idaho Court Administrative Rules (ICAR) allows extended coverage of all public proceedings, provided permission to cover a proceeding is obtained in advance from the presiding judge, and ICAR Rule 46 provides guidelines for the use of cameras in appellate proceedings.

In trial courts, the presiding judge may prohibit coverage or order that the identity of a participant be concealed when such coverage would have a substantial adverse effect upon that participant. Coverage of the jury, adoptions, mental health proceedings and other proceedings closed to the public is prohibited. Permission to photograph or broadcast a proceeding must be sought, in advance, from the presiding judge. Electronic flash or artificial lighting is prohibited, and the television camera may not "give any indication of whether it is operating". Only one still photographer and one camera operator is permitted in the courtroom, and any pooling arrangements must be made by the media. Still photographers must keep "the number of exposures . . . to a minimum."

Pursuant to ICAR Rule 46(a), photography is limited to designated areas of the Supreme Court Courtroom. While video cameras are permitted on a first-come basis, no more than two (2) still photographers are permitted at any one time. Live coverage of proceedings in the Supreme Court Courtroom may be prohibited in the

interest of justice. Flash photography or the use of additional lighting for video photography is prohibited. No separate microphones may be used.

In all other appellate proceedings, ICAR Rule 46(b) imposes many of the same requirements as 46(a); however, microphone and video pooling is required.

Authority: Rules 45 & 46, Idaho Court Administrative Rules (2007).

Illinois

Illinois Revised Statutes, Chapter 735, § 8-701 specifies that no witness will be compelled to testify in any court in the State if any portion of his testimony is to be covered. Rule 63(A)(7) allows coverage pursuant to an order of the Illinois Supreme Court, while coverage of trial court proceedings is prohibited. For coverage of appellate proceedings, consents are not required, although the judge or presiding officer, with good cause, may prohibit or terminate coverage at any time. Those wishing to cover a particular proceeding must notify the appropriate clerk of the court not less than five "court" days prior to the date the proceeding is scheduled to begin. Only one television camera and one still camera, each operated by one camera-person, is permitted in the courtroom at any one time. No equipment or clothing of media personnel can have marks that identify any individual medium or network affiliation. Artificial lighting of any kind is not allowed, and the media are responsible for any pooling arrangements.

Authority: Rule 63(A)(7), Rules of the Illinois Supreme Court(2000); Chapter 735, §8-701, Illinois Compiled Statutes Annotated(2000); Supreme Court Orders of November 29, 1983 and January 22, 1985.

Indiana

Extended media coverage of oral arguments before the Indiana Supreme Court is allowed. Requests for coverage are to be made at least 24 hours prior to the start of the proceeding.

Beginning September 1, 1997 and continuing indefinitely, the Indiana Court of Appeals will allow extended media coverage of its proceedings. Requests for coverage are to be made at least 48 prior to the start of the oral argument.

The Indiana Supreme Court authorized a pilot project for video and audio coverage of proceedings in certain Indiana courtrooms. The project, which lasts from June 6, 2006 through December 31, 2007, permits certain trial judges to consent to media coverage, subject to certain restrictions. Specifically, judges must prohibit coverage of police informants, undercover agents, minors, victims of sexual offenses, jurors, witnesses at sentencing hearings, bench conferences, attorney-client communications, and conversations among counsel. Equipment is limited to no more than one still camera, one video camera, and three audio recording devices, and coverage may not intrude upon the proceedings. Journalists should consult the implementing order for additional details and a list of eligible courtrooms.

All appellate oral arguments are webcast live, and the courts maintain an archive of webcast arguments from 2001 to date.

Authority: Order Nos. 94S00-9901-MS-59 and 94S00-0605-MS-166.

Supreme Court Media Guidelines

Iowa

Extended media coverage, defined as "broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public," is generally permitted upon application to the presiding judge. Iowa's rules require that permission for extended media coverage be granted, unless the coverage will interfere with the rights of the parties or a witness or party provides a good cause why coverage should not be permitted. In certain types of proceedings, such as sexual abuse or criminal trials, witness or party consent is required.

Extended media coverage is not permitted, however, during jury selection or if a private proceeding is required by law. Prolonged or unnecessary coverage of jurors should be prevented to the extent practicable.

Written requests to use photographic equipment, television cameras, etc. must be made, in advance to the Media Coordinator, and equipment must meet certain specifications. Flash photography and other supplemental light sources are prohibited. Pooling arrangements must be made by the media.

All regularly scheduled Supreme Court oral arguments taking place in the Supreme Court's courtroom are subject to expanded media coverage and are *not* subject to objections by witnesses or parties. Additionally, all Supreme Court oral arguments are streamed over the internet.

Authority: Ch. 25, Iowa Court Rules (2007).

Webcast: Supreme Court Oral Arguments

Kansas

Rule 1001 of the Kansas Supreme Court authorizes extended media coverage of appellate and trial court proceedings and extends coverage to state municipal court proceedings. Under this rule, coverage is permissible only by the news media and educational television stations and only for news or educational purposes.

The media must give at least one week's notice of its intention to cover a proceeding. However, this requirement may be waived upon a showing of good cause. Photographing of individual jurors is prohibited, and where coverage of the jury is unavoidable, no close-ups may be taken. Consents of the participants are not required. The presiding judge may prohibit coverage of individual participants at his discretion; however, if a participant is a police informant, undercover agent, relocated or juvenile witness, or victim/witness and requests not to be covered, the judge must prohibit coverage of that person. Coverage of a participant in proceedings involving motions to suppress evidence, divorce, or trade secrets will also be prohibited, if the participant so requests. Coverage of materials on counsel tables, photographing through the windows or open doors of the courtroom also is prohibited. Moreover, criminal defendants may not be photographed in restraints as they are being escorted to or from court proceedings prior to rendition of the verdict. Only one television camera, operated by one person, and one still photographer, using not more than two cameras, are authorized in any one court proceeding.

Authority: Rule 1001, Rules of the Kansas Supreme Court, Kansas Court Rules and Procedures - State and Federal (1999).

Kentucky

Electronic coverage is permitted in all appellate and trial court proceedings. Consents of the parties are not required, but coverage is subject to the authority of the presiding judge. Requests for coverage should be made to the judge presiding over the proceeding for which coverage is desired. Coverage of attorney-client conferences or conferences at the bench are prohibited. Only one television camera and one still photographer, with not more than two still cameras are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements. Juvenile proceedings are closed to the public. KRS 610.070

Authority: Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings, Rules of the Kentucky Supreme Court, Ky. Rev. Stat. Ann. (2007).

Reporters Handbook on Covering Kentucky Courts

Louisiana

Electronic coverage of appellate proceedings is allowed, while coverage at the trial level is generally prohibited. Those wishing to cover trial-level proceedings should consult with the courts of that district or parish concerning coverage. At the appellate level, obtaining the consent of the involved parties is not required, although the Court may prohibit coverage upon its own motion or if an objection is made by a party. Notice of intent to cover a proceeding must be made at least 20 days in advance or, in expedited proceedings, within a reasonable time before the proceeding is schedule to occur. No more than two television cameras, each operated by no more than one camera person, and one still photographer, using not more than two still cameras with not more than two lenses for each camera, will be permitted in the courtroom during proceedings. In addition, the media are responsible for any pooling arrangements.

Authority: Canon 3A(7), Louisiana Code of Judicial Conduct & Appendix (1999).

Maine

Extended media coverage is authorized in all civil matters but coverage in criminal matters is limited to arraignments, sentencing and other non-testimonial proceedings. Coverage of divorce, annulment, support, domestic abuse and violence, child custody and protection, adoption, paternity, parental rights, sexual assault, trade secrets, and juvenile proceedings is prohibited. Coverage of the jury and any proceeding in which a living child is a principal subject is also prohibited. Requests for coverage should be made to the clerk of the court at which coverage is desired. Only one television camera, operated by one person and two still photographers, each with only one camera may be in the courtroom at any one time. The cameras may not have any "insignia or other indication of organizational affiliation". Pooling arrangements are the sole responsibility of the media.

Authority: Administrative Order--Cameras in the Courtroom (July 11, 1994) (West, 2000).

Maryland

In the absence of a statutory provision requiring close proceedings or permitting closed proceedings, coverage is permitted at civil trials, upon written consent of all the parties. Consent is not required, however, from a party that represents the government, or from an individual being sued in his or her governmental capacity. At the appellate level, consent is not required, but a party may move to limit or terminate coverage at any time. Requests for coverage must be submitted to the clerk of the court where the proceedings will be held at least five days before the trial begins. Coverage of jury selection, jurors or courtroom spectators, private conferences between an attorney and a client or conferences at the bench is prohibited. Not more than one television

camera is permitted in any trial court proceeding, and not more than two are allowed in appellate proceedings. Only one still photographer, with not more than two cameras with not more than two lenses each, is allowed in both trial and appellate proceedings. Pooling arrangements are the sole responsibility of the media.

Coverage is prohibited in criminal trials.

Authority: Rule 16-109, Maryland Rules Annotated, (2007); MD Code, Criminal Proc. § 1-201 (2007).

Massachusetts

Rule 1:19 of the Supreme Judicial Court of Massachusetts permits extended coverage of all proceedings open to the public except hearings on motions to suppress or to dismiss, or of probable cause or jury selection hearings. Close-up short of bench conferences, conferences between attorneys, or attorney-client conferences is prohibited. Frontal and close-up photography of the jury "should not usually be permitted." The media must submit requests for coverage to the presiding judge "reasonably" in advance of the proceeding to be covered, or risk denial. Before a party or a witness may move to limit media coverage, it must first notify the Bureau Chief, Newspaper Editor, or Broadcast Editor of the Associated Press. Oral arguments before the Supreme Judicial Court are available by webcast.

Authority: Rule 1:19, Rules of Massachusetts Supreme Judicial Court, (2004).

Guidelines on the Public's Right of Access to Judicial Proceedings and Records (2000).

Webcast: Supreme Judicial Court

Michigan

Extended coverage of judicial proceedings is permitted, but requests for coverage must be made in writing not less than three business days before the proceeding is scheduled to begin. A judge may terminate, suspend or exclude coverage at any time upon a finding, made and articulated on the record that the rules for coverage have been violated or that the fair administration of justice requires such action. Such decisions are not appealable. Coverage of jurors or the jury selection process is not permitted. The judge has sole discretion to exclude coverage of certain witnesses, including but not limited to, the victims of sex crimes and their families, police informants, undercover agents and relocated witnesses.

Authority: Canon 3A(7), Michigan Code of Judicial Conduct, Michigan Rules of Court 1986; Administrative Order No.1989-1, Film or Electronic Media Coverage of Court Proceedings

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Minnesota

Expanded coverage is permitted at both the trial and appellate level, but at the trial level, the judge and all parties must consent to coverage prior to commencement of the trial. All courtroom coverage must occur in the presence of the presiding judge. Coverage of witnesses who object prior to testifying and coverage of jurors is prohibited, as is coverage of hearings that take place outside of the presence of the jury. Coverage is prohibited in cases involving child custody, divorce, juvenile proceedings, hearings on suppression of evidence, police informants, relocated witnesses, sex crimes, trade secrets, and undercover agents. Judges and media

representatives must inform the Supreme Court of denials of coverage requests and the reason for such denials.

At the appellate level, consents of the parties and witnesses are not required, but the Clerk of the Appellate Courts must be notified of an intent to cover the proceedings at least 24 hours in advance of the coverage. Only one television camera and one still photographer, using not more than two cameras with two lenses each are permitted in the courtroom during proceedings. The media are responsible for arranging pooling agreements.

Authority: Canon 3A(10), Minnesota Code of Judicial Conduct, Minn. Stat. Ann. vol. 52 (West); Rule 4, General Rules of Practice for the District Courts, Minn. Stat. Ann. vol. 51 (1999).

Compilation of local rules + admin. items

Policy Guidelines

Mississippi

Electronic media coverage of judicial proceedings (trial, pre-trial hearings, post-trial hearings and appellate arguments) is permitted in Mississippi's Supreme Court, Court of Appeals, chancery courts, circuit courts and county courts. Mississippi's Rules for Electronic and Photographic Coverage of Judicial Proceedings ("MREPC"), effective July 1, 2003, prohibit electronic media coverage in justice and municipal courts.

Electronic coverage is subject to the authority of the presiding judge who may limit or terminate coverage at any time if there is a need to protect (1) the rights of the parties or witnesses, (2) the dignity of the court or, (3) to assure orderly conduct of the proceedings. Any party may object by written motion, filed no later than 15 days prior to the proceeding, unless good cause allows for a shorter filing period. Under MREPC the media is required to notify the clerk and the court of any plans to cover a proceeding at least 48 hours prior to the proceeding.

The media must comply with certain coverage restrictions. Electronic coverage of police informants; minors; undercover agents; relocated witnesses; victims and families of victims of sex crimes; victims of domestic abuse, and members or potential members of the jury (before their final dismissal) is expressly prohibited. In addition, audio recordings of off-the-record conferences and coverage of closed proceedings are also prohibited. Similarly, coverage of divorce; child custody; support; guardianship; conservatorship; commitment; waiver of parental consent to abortion; adoption; delinquency and neglect of minors; paternity proceedings; termination of parental rights; domestic abuse; motions to suppress evidence; proceedings involving trade secrets; and in camera proceedings are prohibited unless authorized by the presiding judge.

Only one television camera, one video recorder, one audio system, and one still camera are allowed in the courtroom at one time and the media are responsible for pooling arrangements. If the media cannot agree to a pooling arrangement, all contesting media personnel shall be excluded from the proceeding. Electronic media coverage may not distract from the courtroom proceedings, and in accordance with this principle, no artificial, flash or strobe lighting is allowed in the courtroom without the notification and approval of the presiding judge. All wires must be taped to the floor and equipment may only be moved before or after a proceeding or during a recess. The presiding judge may "relax" the technical restrictions so long as no distractions are created.

Authority: Rules for Electronic and Photographic Coverage of Judicial Proceedings ("MREPC"); Cannon 3B(12), Code of Judicial Conduct of Mississippi Judges; Rule 1.04, Uniform Rules of Circuit and County Courts, Mississippi Rules of Court.

Missouri

Media coverage at both the trial and appellate levels are permitted, but coverage of jury selection, juvenile, adoption, domestic relations, and child custody cases is not permitted. Requests for coverage must be made to the media coordinator, in writing, at least five days in advance of the scheduled proceeding, and the media coordinator must then give written notice of the request to counsel for all parties, parties appearing without counsel and the judge at least four days in advance of the proceeding. Coverage of objecting participants who are victims of crimes, police informants, undercover agents, relocated witnesses, or juveniles is prohibited. Further, the judge may prohibit coverage of any or all of a participant's testimony, either upon the objection of the participant, party, or the court's own motion. Only one television camera and one still photographer, using not more than two cameras with two lenses each, are allowed in the courtroom at any one time. The media are responsible for all pooling arrangements.

Authority: Administrative Rule 16, Missouri Supreme Court Rules, (2005).

Montana

Coverage of trial and appellate courts is permitted, though judges may restrict coverage of proceedings upon a finding that media coverage will "substantially and materially interfere with the primary function of the court to resolve disputes fairly under the law."

Authority: Canon 35, Montana Canons of Judicial Ethics, 176 Mont. xxiii, 6 Media L. Rep. (BNA) 1543 (1980).

Nebraska

Media coverage in the Supreme Court and Court of Appeals is explicitly permitted, but this right is only afforded to "persons or organizations which are part of the news media." Party consent is not required, although a party may file an objection to media coverage before commencement of the proceeding in question.

Authority: Rules 17, 18; Rules of the Supreme Court/Court of Appeals; Nebraska Court Rules and Procedure (West).

Reporters' Guide to Media Law and Nebraska Courts

Nevada

Extended media coverage is permitted, at the judge's discretion except for certain proceedings which are made confidential by law. Obtaining the consent of the participants is not required, but the judge may prohibit coverage of any participant who does not consent to being filmed or photographed. Requests for coverage must be made in writing at least 72 hours in advance of the proceeding, but the judge may grant a request on shorter notice for "good cause." Deliberate coverage of jurors or of conferences of counsel is not allowed. No more than one television camera and one still photographer are allowed in a proceeding at any one time, and the media are responsible for any pooling arrangements.

Authority: Nevada Supreme Court Rules, Part IV, Rules on Cameras and Electronic Media Coverage in the Courts, (2006).

New Hampshire

Rule 19 of the Rules of the Supreme Court of New Hampshire permits coverage of that court's proceedings subject to the Court's consent.

Rule 78 of the Rules of the New Hampshire Superior Court exhorts judges to permit the media coverage of all proceedings open to the general public, unless the coverage creates a substantial likelihood of harm to a person or party. While those wishing to cover a proceeding must obtain the court's permission, in Petition of WMUR Channel 9, 148 N.H. 644 (2002), the New Hampshire Supreme Court stated that permission *should* be granted unless four requirements are met: "(1) closure advances an overriding interest that is likely to be prejudiced; (2) the closure ordered is no broader than necessary to protect that interest; (3) the judge considers reasonable alternatives to closing the proceedings; and (4) the judge makes particularized findings to support the closure on the record." Id. Photography of jurors is prohibited.

The media rule of the New Hampshire District Courts is substantially similar to that of the Superior Court. The differences between the two courts' media rule arise provide that upon the petition of any party the court may, in its discretion, permit coverage of its judicial proceedings.

Authority: Rule 19, New Hampshire Supreme Court Rules; Rule 78, New Hampshire Superior Court Rules and Directory; Rule 1.4, New Hampshire District and Municipal Court Rules, (2000).

New Jersey

Canon 3A(9) of the New Jersey Code of Judicial Conduct exhorts judges to allow "bona fide media" to cover proceedings. To this end, the Supreme Court has issued a set of guidelines for media coverage, which grants judges some latitude in limiting coverage, especially where the coverage may result in a substantial likelihood of harm to a witness or party. Unlike other jurisdictions, the media are granted the right to appeal any order excluding or varying coverage. Photography of the jury is prohibited, and photography and audio recording is prohibited in certain types of proceedings, such as juvenile proceedings, proceedings to terminate parental rights, child abuse/neglect proceedings, custody proceedings, and "proceedings involving charges of sexual contact or charges of sexual penetration or attempts thereof when the victim is alive." Photography and audio recordings of crime victims under the age of 18 or witnesses under the age of 14 may be permitted at the trial judge's discretion. Additionally, while coverage of juvenile proceedings is usually forbidden, courts, in their discretion, may allow coverage of 17-year old defendants in proceedings involving motor vehicle violations. The media are responsible for pooling arrangements.

Authority: Canon 3A(9), Code of Judicial Conduct; Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey (2003).

Webcast: Archive of Supreme Court Oral Arguments (Webcasts)

New Mexico

Electronic coverage of proceedings in the state's appellate and trial courts is permitted, although the judge may limit or deny coverage for good cause. The judge also has wide discretion to exclude coverage of certain types of witnesses, including, but not limited to, the victims of sex crimes and their families, police informants, undercover agents, relocated witnesses and juveniles. Filming of the jury or any juror is prohibited, as is filming of jury selection. Coverage of any attorney-client or attorney-court conferences is prohibited. Those wishing to cover a proceeding must notify the clerk of the particular court at least 24 hours in advance of the proceeding. Only one television camera and two still photographers, each with one camera are allowed in the courtroom at any one time, and any pooling arrangements are the responsibility of the media.

Authority: Rule 23-107, New Mexico Supreme Court General Rules, (2000).

New York

Appellate Courts

Electronic photographic recording of proceedings in appellate courts is permitted, subject to the approval of the respective appellate court. Consent to coverage by parties or the attorneys is not required and any objections by attorneys or parties are limited to those showing good cause. Only two television cameras and two still photographers are allowed in the courtroom at any one time, and coverage is subject to various other technical conditions concerning media equipment.

Trial Courts

Section 52 of the Civil Rights Law ("Section 52") imposes a per se ban on all televising of trial court proceedings, no matter what the circumstances of the case or the assessment of the presiding judge. The statute became effective on July 1, 1997, when Section 218 of the Judiciary Law ("Section 218") expired by operation of law. For all but one of the prior ten years, Section 218 had allowed, subject to specific limits in certain types of cases and with respect to certain trial participants, the televising of trials in New York State. In 1997, the Legislature failed to renew Section 218, resulting in the reimposition of Section 52, and thus barring extended coverage of trial proceedings. In response to the per se ban, a number of trial judges ruled Section 52 unconstitutional and permitted camera coverage. On June 16, 2005, however, the New York Court of Appeals effectively ended the debate by affirming a lower court's holding that Section 52 is constitutional. Unless the Legislature enacts a statute overruling the Court of Appeals, cameras will not be allowed in trial court proceedings for the foreseeable future.

Authority: Courtroom Tel. Network, LLC v. New York; New York Civil Rights Law § 52 (trial court); 22 NYCRR §§ 29.1-29.2 (appellate court); NY CLS Standards & Administrative Policies § 131 (2000).

North Carolina

The rules for coverage require that the equipment and personnel used in coverage be neither seen nor heard by anyone inside the courtroom and that all personnel and equipment be located in an area set apart by a booth or partition with appropriate openings to allow photographic coverage. The presiding trial judge may permit coverage without booths, however, if coverage would not disrupt the proceedings or distract the jurors. The Chief Justice of the Supreme Court and the Chief Judge of the Court of Appeals may waive the booth requirements in proceedings in these courts. Hand-held audio tape recorders may be used upon prior notification to, and with the approval of, the presiding judge.

The rules do not require the consents of participants, but prohibit coverage of jurors. In addition, coverage of certain types of proceedings, such as adoption, divorce, juvenile proceedings, and trade secrets cases, is prohibited. Coverage of certain types of witnesses, such as police informants, undercover agents, victims of sex crimes and their families, and minor witnesses is also not permitted. Only two television cameras and one still photographer are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: Rule 15, General Rules of Practice for the Superior and District Courts of North Carolina, North Carolina Rules of Court (2000).

North Dakota

Extended media coverage is authorized in all courts. The judge may deny media coverage of any proceeding or portion of a proceeding in which the judge determines that media coverage would materially interfere with a party's right to a fair trial or when a witness or party objects and shows good cause why expanded coverage should not be permitted. The judge may also deny coverage if: the coverage would include testimony of an adult victim or witness in sex offense prosecutions; or would include a juvenile victim or witness in proceedings in which illegal sexual activity is an element of the evidence; or coverage would include undercover or relocated witnesses.

Coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the bench may not be recorded or received by sound equipment. Further, close up photography of jurors is also prohibited.

Requests for expanded media coverage of the Supreme Court must be made at least seventy-two hours before the proceeding and must be made by regular mail and, if possible, by facsimile with copies to counsel of record.

Requests for expanded media coverage of trial court proceedings must be made to the presiding judge at least seven days before the proceeding. Notice of the request must be given to all counsel of record and any pro se parties. The notice must be in writing and filed with proof of service with the clerk of the appropriate court.

Authority: Administrative Rule 21; (North Dakota Court Rules).

Ohio

Rule 12 of the Rules of Superintendence for the Courts of Ohio requires judges to permit coverage of proceedings that are open to the public, subject to certain exceptions.

At the trial level, coverage of objecting witnesses and victims is prohibited. The judge is also required to inform victims and witnesses of their right to object to coverage. Requests for coverage must be submitted to the presiding judge, as the consent of the judge is required for coverage to take place. Only one still photographer and one television camera are permitted in the courtroom, unless the judge grants permission to use additional cameras. Coverage of attorney-client conferences and any bench conferences is prohibited. In addition to these rules, local courts may impose additional obligations and requirement for extended coverage.

Rule 12 may be modified by local rules. For example, the Hamilton County Court of Common Pleas requires broadcasters to use the court's audio system and permits coverage requests to be made up to thirty (30) minutes before the start of the proceeding.

Authority: Rule 12, Rules of Superintendence for the Courts of Ohio (2005); Hamilton County Common Pleas Rule 30.

Oklahoma

Trial and appellate coverage is permitted, but express permission of the judge is required. Coverage of objecting witnesses, jurors, or parties is not permitted in either criminal or civil proceedings. Moreover, no coverage is allowed in criminal trials without the express consent of all accused persons.

Authority: Title 5, Oklahoma Statutes, Chapter 1, Appendix 4, Canon 3B(9).

Oregon

In the appellate courts, broad discretion to permit or deny coverage is vested in the judge, who may deny coverage to "control the conduct of the proceedings before the court, insure decorum and prevent distractions, and insure the fair administration of justice in proceedings before the court." Only one television camera and one still photographer are allowed in the courtroom at any one time, and any pooling arrangements are the responsibility of the media.

At the trial court level, coverage is allowed, but a judge may deny coverage if there is a "reasonable likelihood" that the coverage would interfere with the rights of the parties to a fair trial, would affect the presentation of evidence or the outcome of the trial, or if "any cost or increased burden resulting" from the coverage would interfere with the "efficient administration of justice." Coverage of dissolution, juvenile, paternity, adoption, custody, visitation, support, mental commitment, trade secrets, and abuse, restraining and stalking order proceedings is prohibited. Also, coverage of sex offense proceedings will be prohibited at the victim's request. Upon request, those covering a proceeding must provide a copy of the coverage to the court and "any other person, if the requestor pays actual copying expense."

Courts may adopt local rules to establish procedural requirements governing media access.

Authority: Rule 8.35, Rules of Appellate Procedure; Rule 3.180 Uniform Trial Court Rules, Oregon Rules of Court-State (2006).

Pennsylvania

Photography or broadcasting of judicial proceedings is generally prohibited in both civil and criminal trials.Canon 3A(7) does, however, permit judges to authorize media coverage of non-jury civil proceedings. Coverage of support, custody, and divorce proceedings is prohibited. A judge may only authorize coverage with the consent of the parties. Additionally, coverage of objecting witnesses is prohibited. Media wishing to seek permission to cover a proceeding should speak in advance with the courtroom tipstaff, as the presiding judge must expressly authorize coverage.

Coverage is prohibited in proceedings before District Justices.

Local rules may vary.

Authority: Canon 3A(7), Code of Judicial Conduct; Rule 112, Pennsylvania Rules of Criminal Procedure; Rule 223, Pennsylvania Rules of Civil Procedure (Official Note); Rule 7, Rules of Conduct, Offices Standards and Civil Procedure for District Justices (2005).

Rhode Island

Extended coverage is prohibited in all trial-level criminal proceedings. At the appellate level and in civil proceedings, the judges have "sole discretion" to "entirely exclude media coverage of any proceeding or trial over which he or she presides." Exclusion by the trial court may also be based on a party's request for non-coverage. Coverage of juvenile, adoption or any other matters in the Family Court "in which juveniles are significant participants" is prohibited. Coverage of hearings which take place outside of the jury's presence (e.g., hearings regarding motion to suppress evidence) is not permitted. After the jury has been impaneled, individual jurors may be photographed, with their consent. Where photographing of the jury is unavoidable, close-ups that clearly identify individual jurors are not permitted.

Only one television camera and one still photographer, using not more than two cameras, are allowed in the courtroom, and the media must arrange for any pooling arrangements.

Authority: Article VII, Rhode Island Supreme Court Rules, Rhode Island Court Rules Annotated; Rule 53, Rhode Island Superior Court Rules of Criminal Procedure (2005).

South Carolina

Extended media coverage is permitted, but presiding judges are given significant discretion to limit coverage. Those wishing to cover a proceeding must give the presiding judge "reasonable notice" of the request for coverage, and the judge may request a written notice. The judge may also refuse, limit or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses. Coverage of prospective jurors is prohibited and members of the jury may not be photographed except when they happen to be in the background of other subjects being photographed. Two television cameras and two still-photographers are allowed in the courtroom at one time, and the media are responsible for any pooling arrangements. Media personnel's equipment and clothing must not "bear the insignia or marking of any media agency," and the cameraperson must wear "appropriate business attire."

Authority: Rule 605 and Part 6, Appendix B, Form 1, South Carolina Appellate Court Rules, South Carolina Rules of Court (2007).

South Dakota

Extended coverage of trial and intermediate appellate court proceedings is prohibited. Expanded media coverage of Supreme Court proceedings is permitted. Under Rule 15-24-6, public appellate proceedings are presumed open, but parties may file an objection to such coverage 10 days prior. The rule provides that media coverage may not be limited unless it is shown that such coverage would materially interfere with the rights of the parties or the administration of justice.

Authority: Canon 3B(12), South Dakota Code of Judicial Conduct, S.D. Codified Laws, § 15-24-6.

Webcasts: South Dakota Supreme Court Oral Arguments

Tennessee

Extended coverage is permitted in all courts. Requests for coverage must be made in writing to the presiding judge not less than two business days before the proceeding. Coverage of a witness, party or victim who is a minor is prohibited except when a minor is being tried for a criminal offense as an adult. Coverage of the jury selection and the jurors during the proceeding is also prohibited.

In juvenile court proceedings, the court will notify parties and their counsel that a request for coverage has been made and prior to the beginning of the proceedings, the court will advise the accused, the parties and the witnesses of their right to object. Objections by a witness in a juvenile case will limit coverage of that witness. Objections to coverage by the accused in a juvenile criminal case or any party in a juvenile civil action will prohibit coverage of the entire proceeding.

Only two television cameras and two still photographers, using not more than two cameras each, are allowed in the courtroom at one time. The media are responsible for any pooling arrangements.

Appellate review of a presiding judge's decision to terminate, suspend, limit, or exclude media coverage shall be in accordance with Rule 10 of the Tennessee Rules of Appellate Procedure.

Authority: Rule 30, Rules of the Tennessee Supreme Court, Tenn. Code Ann., Vol. 5A (2007).

Texas

Rule 18c, Texas Rules of Civil Procedure, and Rule 14, Texas Rules of Appellate Procedure, provide for the recording and broadcasting of civil court proceedings.

Rule 18c allows television, radio and photographic coverage with the consent of the trial judge, the parties and each witness to be covered. Coverage also may not "unduly distract participants or impair the dignity of the proceedings."

Rule 14 technically permits coverage of civil and criminal appellate proceedings. Requests for coverage at the appellate level must be filed five days prior to the proceeding, and coverage may be subject to other limitations imposed by the presiding judge(s). Those seeking coverage at the trial level should check with the local court, as the Supreme Court has approved local rules submitted by counties and cities in the state to allow coverage of trial proceedings and will continue to do so.

Authority: Rule 18c, Rules of Civil Procedure; Rule 14, Rules of Appellate Procedure (2007).

Utah

Under Rule 4-401, filming, video recording and audio recording of appellate proceedings is permitted to preserve the record and as permitted by procedures of those courts, but is prohibited in trial proceedings except to preserve the record. Still photography of trial and appellate proceedings is permitted at the discretion of the presiding judge. Requests for still photography coverage should be made at least 24 hours prior to the proceeding but will be considered less than 24 hours ahead for good cause.

Authority: Rule 4-401, Utah Code of Judicial Administration (2000).

Vermont

Extended media coverage of Supreme Court proceedings is permitted without the consent of the full court, but the Chief Justice has discretion to prohibit coverage. Audio recording of conferences between members of the Court, between co-counsel or between counsel and client is prohibited. Only two television cameras, each operated by one cameraperson, and one still photographer, using not more than two cameras, are permitted in the Supreme Court at any one time.

At the trial level, coverage is permitted in the courtroom and in immediately adjacent areas that are generally open to the public. Consent of parties and witnesses is not required, but the trial judge has discretion to prohibit, terminate, limit or postpone coverage on the judge's own motion or on a motion of a party or request of a witness.

Coverage of jurors is prohibited, except in the background when courtroom coverage would be otherwise impossible. While the rules do not ban coverage of specific types of cases, the reporter's note accompanying the rule suggests that coverage of sex offense, domestic relations, trade secret cases or offenses in which the victim is a minor may be inappropriate. This issue is left to the discretion of the trial judge to evaluate on a case-by-case basis. No proceeding that is closed to the public, by statute, may be covered. Only one television camera, operated by one cameraperson, and one still photographer, using not more than two cameras, are permitted in the courtroom at any one time. The media are responsible for any pooling arrangements. There is no right to an interlocutory appeal of a decision to prohibit or limit coverage.

Authority: Rule 35, Vermont Rules of Appellate Procedure; Rule 53, Vermont Rules of Criminal Procedure; Rules 79.2 & 79.3, Vermont Rules of Civil Procedure; 79.2, Rules of Probate Procedure (2000).

Vermont Rules

Virginia

Extended media coverage of both trial and appellate proceedings is permitted in the sole discretion of the trial judge. Coverage of jurors as well as certain kinds of witnesses (police informants, minors, undercover agents and victims and families of victims of sexual offenses) is prohibited. Media coverage of adoption, juvenile, child custody, divorce, spousal support, sexual offense, trade secret and in camera proceedings and hearings on motions to suppress evidence is prohibited as well. Not more than two television cameras and one still photographer (using no more than two cameras) are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: Va. Code Ann. § 19.2-266 (1992).

Washington

The Courts of Washington permit extended media coverage of trial and appellate courtroom proceedings. The presiding judge may place conditions on the coverage, and the judge must expressly grant permission and ensure that the media personnel will not distract participants or impair the dignity of the proceedings. If a judge finds that media coverage should be limited, he or she must make, on the record, particularized findings that relate to specific circumstances of the proceeding. Judges may not rely on "generalized views" to limit media coverage.

The Bench-Bar-Press Committee, established in 1963, seeks to "foster better understanding and working relationships between judges, lawyers and journalists who cover legal issues and courtroom stories." In addition to moderating disputes between the bench and the press, the Committee promulgates a nonbinding Statement of Principles as well as an annual report of its "Fire Brigade" (also known as its Liaison Committee).

Authority: Rule 16, General Rules, Washington Court Rules - State (West).

Bench-Bar-Press Committee
Fire Brigade's 2006 Report on Activities.

West Virginia

West Virginia's rules permit coverage of both trial and appellate proceedings but also permits a presiding judge to terminate coverage if he or she "determines that coverage will impede justice or create unfairness for any party." Requests for media coverage must be made at least one day in advance of the proceeding. The presiding judge may sustain or deny objections made by parties, witnesses and counsel to the coverage of any portion of a proceeding. Audio coverage of attorney-client meeting or any other conferences conducted between and among attorneys, clients, or the presiding judge is prohibited. Coverage that shows the face of any juror or makes the identity of any juror discernible is prohibited without juror approval. Only one television camera and one still photographer are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: Canon 3B(12), West Virginia Code of Judicial Conduct; Rules Governing Camera Coverage of Courtroom Proceedings, West Virginia Code Annotated; Rule 8, West Virginia Trial Court Rules (2007); Media Coverage of Courtroom Proceedings in the Supreme Court of Appeals, Rule 1 (2007)

Wisconsin

Extended coverage is permitted, but the presiding judge retains the authority to determine whether coverage should occur and, upon a finding of cause, to prohibit coverage. The trial judge retains the power, authority and responsibility to control the conduct of proceedings, including the authority over the inclusion or exclusion of the media and the public at particular proceedings or during the testimony of particular witnesses under the experimental and permanent guidelines. A presumption of validity attends objections to coverage of participants in cases involving the victims of crimes (including sex crimes), police informants, undercover agents, juveniles, relocated witnesses, divorce, trade secrets, and motions to suppress evidence. An individual juror may be photographed only after his or her consent has been obtained. Photographs of the jury are permitted in courtrooms where the jury is part of the unavoidable background, but close-ups, which enable jurors to be clearly identified, are prohibited. Audio coverage of conferences between an attorney and a client, co-counsel, or attorneys and the trial judge is also prohibited. Three television cameras and three still photographers, using not more than 2 cameras each, are allowed in the courtroom to cover a proceeding. Disputes regarding a court's application of Chapter 61 are treated as administrative matters, which may not be appealed.

Authority: Chapter 61, Wisconsin Supreme Court Rules (1999).

Wyoming

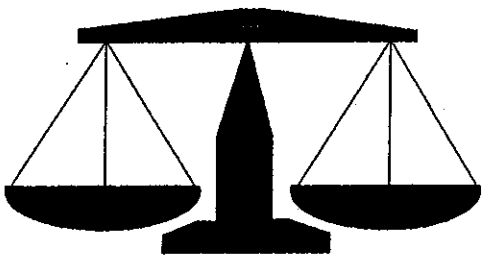
Extended media coverage is allowed in at both the appellate and trial court levels. A request for media coverage must be submitted 24 hours or more prior to the proceedings. The media may not make any close-up photography or visual recording of the members of the jury, nor may it make an audio recording of conferences between attorney and client or between counsel and the presiding judge. Additionally, equipment may not be moved during a proceeding. The trial judge has broad discretion in deciding whether there is cause for prohibition of coverage. Requests to limit media coverage enjoy a presumption of validity in cases involving the victims of crimes, confidential informants, and undercover agents, as well as in evidentiary suppression hearings.

Authority: Rule 804, Uniform Rules of the District Courts of the State of Wyoming; Rule 53, Wyoming Rules of Criminal Procedure, (2007).

Last Updated May 25, 2007

EXHIBIT 2

Rules on Electronic Coverage of the South Dakota Supreme Court



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Overview

In July, 2001, the state Supreme Court adopted a new rule that allows print and broadcast media to cover all public sessions of the state Supreme Court with video cameras, still cameras, audio equipment and electronic recording devices.

Coverage is limited to two video camera operators and two still photographers in the courtroom. If additional media outlets want coverage, reporters will be expected to form a pool and share the pictures and video.

Anyone wishing to cover a Supreme Court session must notify the media coordinator, who is appointed by the high court. Notice must come 48 hours before the proceeding is set to begin, although the court could wave the 48-hour requirement for good cause.

The name of the media coordinator will be on file with the clerk of the Supreme Court. The schedule for upcoming Supreme Court hearings may be obtained from the clerk, or from the Unified Judicial System Web site at www.state.us/judicial/.

If more than two still and two video cameras are planning to cover a court session, the media coordinator will be responsible for pooling arrangements so the photos, video and audio can be shared. Disputes will be settled by the media coordinator, and the justices will not be called upon to resolve such issues.

Media employees covering the high court are expected to dress neatly and inform themselves of all the rules for conduct in the courtroom. No clothing or equipment may display insignia of the media organizations.

Media personnel must be inside the courtroom, with all equipment set up, 15 minutes before the court sessions begins. They cannot move from their assigned positions during the hearing. They are not allowed to change lenses or tape, make repairs, or do anything that would disrupt the proceedings.

The high court requires that electronic equipment to be used in the courtroom be as quiet and unobtrusive as possible, without extra lights or flash. Reporters may use hand-held tape recorders for note-taking as long as they are no more sensitive than the human ear. There can be no recording of in-chambers conferences, discussions between lawyers and their clients or lawyers and judges and no photographing of materials on the tables or on the bench.

No interviews may be conducted inside the courtroom before, during or after the proceedings.

Any media personnel violating the court's rules will be removed and denied further coverage privileges at the discretion of the court.

The justices retain the right to deny electronic coverage of a session in the interest of justice. Anyone may object to electronic coverage at least 10 days before the proceeding, but coverage will not be limited without showing of good cause. If electronic coverage is denied, the media coordinator will notify the media.

The court reserves the right to obtain copies of any photos, film, or tape taken by the media. Such duplicate materials will be provided by the media free of charge.

Media Pool Guidelines

The media coordinator appointed by the Supreme Court must be notified if a media organization wishes to cover the high court with still photos, video or sound. Notice must be made as soon as possible, but no less than 48 hours before the hearing is to begin.

The name and contact information for the media coordinator will be on file with the clerk of the Supreme Court.

If the number of media outlets giving notice of coverage exceeds the limit set by the court, the media coordinator will appoint a pool. Pool photographers will be responsible for distributing still pictures and video to all the media organizations requesting coverage.

The pool will be limited to legitimate media organizations as determined by the media coordinator. Such organizations may be required to provide equipment and personnel for the pool on a rotating basis. The equipment and personnel provided must meet the rules set out by the court and must satisfy the needs of the other pool members.

Any organization approved by the media coordinator to share in the images and audio obtained by the pool must provide its own equipment and personnel to access the pool feed. All sound, video and still pictures obtained in the courtroom belong to the pool. No identifying insignia may be used on pool equipment or on the images produced. No credit will be given to the individual media organizations rotating in the pool.

Any disputes that arise over the operation of the pool will be settled by the media coordinator. At no time will the court or its personnel be asked to mediate disputes involving the pool. Failure of the media to create and maintain a functioning pool under direction of the media coordinator will result in forfeiture of expended coverage for that proceeding.

All expenses incurred in electronic coverage of the Supreme Court are the responsibility of the media. The court reserves the right to obtain a copy of any audio or visual materials produced by the pool. The media coordinator will provide the requested copy to the court, at the expense of the media.

The Supreme Court retains the discretion to exclude or terminate electronic coverage at any time. The court has ultimate control over the rules, and any decision made by the court is not subject to appeal. Failure to comply with the court's rules or orders regarding coverage is punishable by sanction or contempt proceedings under South Dakota law.

Complete Rules

Here is the complete South Dakota Supreme Court ruling (Rule 01-08) on the adoption of the rules of procedure for expanded media coverage of Supreme Court proceedings:

A hearing was held June 19, 2001, at Sioux Falls, South Dakota, relating to the adoption of the Rules of Procedure for Expanded Media Coverage of Supreme Court Proceedings, and the Court having considered the proposed rules, the correspondence and oral presentations relating thereto, and being fully advised in the premises now, therefore it is

ORDERED that the Rules of Procedure for Expanded Media Coverage of Supreme Court Proceedings is adopted in its entirety as a pilot project, subject to annual review.

1. Definitions

(a) "Judicial proceeding" or "proceeding" referenced in these rules includes all public appellate arguments, hearings, or other proceedings before the Supreme Court, except those specifically excluded by the rules. These rules do not apply to coverage of ceremonial or non-judicial proceedings.

(b) "Expanded media coverage " includes broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news and educational or instructional information to the public. Any other use, absent express written permission of the Court, is prohibited.

(c) "Supreme Court" or the "Court" means the Supreme Court of South Dakota.

(d) "Chief Justice" means the Chief Justice of the Supreme Court of South Dakota.

(e) "Clerk" means the Clerk of the Supreme Court of South Dakota.

(f) "Media Coordinator" means the representative from the news media appointed by the Court to coordinate expanded media coverage of judicial proceedings of the Court under these rules.

2. General

(a) Expanded media coverage must be conducted in conformity with applicable statutes, rules, and case law.

(b) Nothing herein shall alter the obligation of any attorney to comply with the provisions of the Rules of Professional Conduct governing trial publicity.

(c) Except as otherwise provided by these rules, electronic recording by moving camera, still camera, and audio tape, and broadcasting will be permitted of all judicial proceedings in the courtroom during sessions of the Supreme Court.

(d) There shall be no audio or video recording or broadcast of conferences between the attorneys and their clients, co-counsel, or justices.

(e) There shall be no audio or video recording or broadcast of in- chambers court conferences.

(f) There shall be no focusing on and photographing of materials on counsel or law clerk tables or the judicial bench.

(g) The courtroom shall not be used to conduct interviews before or after the judicial proceedings.

(h) No media film, videotape, still photograph or audio reproduction of a judicial proceeding shall be admissible as evidence in any subsequent or collateral proceeding, including any retrial or appeal thereof, except by order of the Supreme Court.

(i) The quantity and type of equipment permitted in the courtroom shall be subject to the discretion of the Court within the guidelines set out in these rules.

(j) Notwithstanding the provisions of these rules, the Court, upon written application, may permit the use of equipment or techniques at variance with these rules, provided the application for variance is made at least ten days prior to the scheduled judicial proceeding. Variances may be allowed by the Court without advance application or notice if all counsel and parties consent.

(k) It shall be the responsibility of the media to settle disputes among media representatives, facilitate pooling where necessary, and implement procedures that meet the approval of the Court prior to any coverage and without disruption to the Court. The Media Coordinator will coordinate media coverage and act as liaison between the media and the Court.

(l) The Court reserves the right to obtain, for historical purposes, a copy of any audio recordings, visual tape or film recordings or published photographs made of its proceedings. The Media Coordinator will be responsible for providing the Court with this duplicate copy.

(m) All expenses incurred in expanded media coverage of the judicial proceedings, including duplication of materials to provide to the Court, shall be the responsibility of the news media.

(n) The rights provided for herein may be exercised only by persons or organizations that are part of the news media.

(o) Under all circumstances, the Court retains the discretion to exclude or terminate electronic coverage or broadcast of its proceedings. This discretion is not to be exercised in an effort to edit the proceedings, but where deemed necessary in the interests of justice or where these rules have been violated. This rule does not otherwise limit or restrict the First Amendment rights of the news media to cover and report judicial proceedings.

(p) The Court shall retain ultimate control of the application of these rules over the broadcasting, recording or photographing of its proceedings, Any decision made by the Court or Chief Justice for the Court under these rules is final and not subject to appeal.

(q) These rules are designed primarily to provide guidance to media and courtroom participants and are subject to withdrawal or amendment by the Court at any time.

(r) Failure to comply with the Court's rules or orders regarding coverage and broadcast is punishable by sanction or contempt proceedings pursuant to South Dakota law.

3. Objections

(a) All public appellate proceedings are presumed open for expanded media coverage under these rules. A party to a proceeding objecting to expanded media coverage under these rules shall file a written objection, stating the grounds therefor, at least ten days prior to commencement of the proceeding. Time for filing objections may be extended or reduced in the discretion of the Court, which may also, in appropriate circumstances, extend the right of objection to persons other than the parties to the appeal.

(b) All objections shall be reviewed and determined by the Court prior to commencement of the proceeding. Expanded media coverage of the proceedings shall not be limited by objection of parties or others except for good or legal cause shown that such coverage would materially interfere with rights of the parties and the interests of justice.

(c) Where expanded media coverage of a proceeding has been prohibited by decision of the Court, the Clerk shall notify the Media Coordinator who shall notify the appropriate media personnel prior to commencement of the proceeding.

4. Advance Notification

The Court calendar is published on its website at www.state.sd.us/judicial/. News media interested in video, still camera, or audio coverage of any judicial proceeding must notify the Media Coordinator, who will notify the Clerk no later than 48 hours before the proceeding his set to begin and make all necessary assignments and arrangements if pool coverage is required. For good cause shown, relief from this notification requirement may be granted by the Court.

5. Conduct and Attire

(a) Media representatives are expected to present a neat appearance in keeping with the dignity of the proceedings and be sufficiently familiar with court proceedings to conduct themselves so as not to interfere with the dignity of the proceedings, or to distract counsel or the Court, All media personnel shall be properly attired. Clothing and equipment shall not display insignia of the media organization.

(b) All photographing and recording equipment and media representatives must be in place 15 minutes before the scheduled commencement of the proceeding to be recorded. When Court is in session, media representatives will not be permitted to move from the location they have been assigned by the Court, change film, lenses or tape, make repairs or otherwise disrupt the proceedings. Equipment shall be installed or removed before proceedings, after proceedings, or during a recess of adequate length to assure that the courtroom will not be disrupted. Media representatives may be removed from the courtroom for failure to comply with this provision of the rules.

6. Media Coordinator

The Media Coordinator and an alternate shall be appointed by the Court from a list of nominees provided by a representative of the news media designated by the Court. The Media Coordinator and the alternate shall serve until such time as the Court names a replacement. The name, business address, e-mail address and telephone number of the Media Coordinator and the alternate shall be on file with the Clerk. The Court and all interested members of the media shall work, whenever possible, with and through the Media Coordinator regarding all arrangements for expanded media coverage.

7. Technical

(a) Video cameras, still cameras, audio equipment and other equipment to be used by the media in the courtroom during judicial proceedings must be unobtrusive and must not produce distracting sound or bear the insignia of any media organization. Cameras are to be designed or modified so participants in the judicial proceedings are unable to determine when recording occurs.

(b) When practical, media organizations may use existing audio recording systems in the courtroom. If the media representatives determine that the existing system does not produce sound of sufficient quality, they may provide equipment, All such equipment shall be unobtrusive and shall be of adequate technical quality to prevent interference with the judicial proceedings being covered, No modifications of existing systems shall be made at public expense and without Court approval.

(c) With the approval of the Court or Chief Justice for the Court, modifications may be made in light sources existing in the courtroom (e.g., higher wattage light bulbs), provided such modifications are installed and maintained without public expense.

8. Equipment and pooling

The following limitations on the amount of equipment and number of media personnel in the courtroom shall apply:

(a) Video cameras

Not more than two video cameras, each operated by not more than one cameraperson, shall be permitted in the courtroom during a judicial proceeding. Where possible, recording and broadcast equipment that is not a component part of a video camera shall be located outside of the courtroom at a place designated by the Court.

(b) Still cameras

Not more than two still camera photographers shall be permitted in the courtroom during a judicial proceeding. Each photographer will be allowed two camera bodies.

(c) Audio

Not more than one audio system shall be set up in the courtroom for media coverage of a judicial proceeding. Audio recording shall be accomplished from any existing audio system present in the courtroom, with the Court's approval, if such recording would be technically suitable for media use. Where possible, electronic audio recording equipment and any operating personnel shall be located outside of the courtroom at a place designated by the Court.

(d) Personal Recorders

Reporters, in the interest of accuracy, may use hand-held audio recorders in the courtroom. Such devices must have built-in microphones that are no more sensitive than the human ear. These personal recording devices are to be used for reporters' notes and not to gather sound for redistribution by the media. As with other media equipment, such personal recorders must not produce distracting sound or bear a media organization's insignia. Tapes may not be changed when Court is in session.

(e) Pooling

Where the above limitations on equipment and personnel make it necessary, the media shall be required to pool equipment and personnel. Pooling arrangements shall be the sole responsibility of the Media Coordinator. The Court shall not be called upon to mediate any dispute as to the appropriate media representatives authorized to cover a particular judicial proceeding.

(f) Location of equipment and personnel

Equipment and operating personnel permitted inside the courtroom by these rules shall be located in, and coverage of the proceedings shall take place from, an area or areas within the courtroom designated by the Court or Chief Justice for the Court. The area or areas designated shall provide reasonable access to the proceeding to be covered.

Dated at Pierre, South Dakota this 17th day of July, 2001, Robert A. Miller, Chief Justice

Media Do's and Don'ts for Supreme Court Coverage

DO:

Notify the media coordinator as soon as possible, but at least 48 hours in advance.

Get there early. Equipment must be ready to go 15 minutes before court begins.

Stay in your assigned position. Stand still as much as possible. Minimize movements.

Be as quiet and unobtrusive as possible.

Dress neatly in business casual attire.

Be sure your equipment is ready to go, plenty of battery power, etc.

Resolve any problems with the media coordinator, whose decision is final.

DON'T:

Change equipment or batteries, make repairs, rummage through a camera bag or do anything distracting during the court session.

Move away from your assigned position. Don't repeatedly stand up and sit down during the session.

No flash or extra lighting. No noisy cameras with distracting sounds. No lights on video cameras.

No media insignia on clothing or equipment in the courtroom.

No interviews in the chambers - before, during or after the court session.

Justices and court personnel will not be approached with questions or problems involving media coverage. Those issues go to the media coordinator.

CAMERAS IN THE COURTROOM COMMITTEE

Minutes

Thursday, January 4, 2001

Committee Members Present: Richard Sabers, DJ Hanson, James McMahon, Mark Millage, Shirley Jameson-Fergel, Lynn Sudbeck, Kent Grode

Also present were Carson Walker, Dallas Johnson and Terri Adams

Introduction of Members

Richard Sabers - justice of the SD Supreme Court
DJ Hanson – state court administrator for Unified Judicial System (UJS)
Jim McMahon - attorney in Sioux Falls
Mark Millage – news director at KELO-Land TV and chair of Radio, TV and News
Carson Walker for Tena Haraldson – Associated Press
Director Association (RTNDA)
Kent Grode – network administrator for the Unified Judicial System for UJS
Lynn Sudbeck – staff attorney for the UJS
Shirley Jameson-Fergel – clerk of the Supreme Court
Dallas Johnson – Deputy State Court Administrator for UJS
Terri Adams – Executive Secretary for UJS

Role of the Committee

DJ Hanson reviewed the role of the committee as outlined in the Chief Justice's December 18 letter:

> Your committee's role is to explore the alternatives available and make recommendations to the Court as to (1) whether the SD Supreme Court should adopt rules permitting cameras in the Supreme Court, and, if so, what those rules should provide; and, (2) what process, methodology and technology would be best suited for our purposes and needs.

DJ reiterated that the scope of the committee is for Supreme Court application only, and not circuit or magistrate courts.

Committee Organization

Justice Sabers proposed that the committee spend January and February gathering information. Mr. Hanson said he has requested information from the National Center

for State Courts (NCSC) and that they assigned a staff person as a resource for us, but he hasn't heard from them yet.

Lynn Sudbeck said she found on the Internet a summary of the states that allow TV cameras in their courts. She said last year the Pennsylvania Superior Court began televising oral arguments for en banc cases, and that she has a report on their experience from *The Journal of Appellate Practice and Process*. Lynn said she would send copies of both to the members of the committee.

Mark Millage said he has many resources available through RTNDA that he will use to gather information. He said his information shows that of the states that allow cameras in the courts, ten allow them in the appellate court only. Mr. Millage said some state cites, such as www.missourinet.com, offer audio transcripts of proceedings.

Justice Sabers asked that all information be provided to Dallas and Terri as well as to committee members. Mr. Hanson said that if members would send information to his office, he will get it copied and distributed.

Justice Sabers suggested that Messrs. Millage and Grode concentrate on productivity and methodology issues; Mses. Sudbeck and Jameson-Fergel on rules, and Messrs. Johnson and Hanson information from the NCSC.

Additional Members

The members discussed broadening the committee by adding someone from public broadcasting and print media. DJ will talk to the Chief Justice about this.

Future Meetings

The next meeting will be Tuesday, March 6, from 9:00 to 11:00 a.m. via DDN, with sites at Studio A in Pierre and Southeast Technical Institute in Sioux Falls.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ADOPTION OF THE)
RULES OF PROCEDURE FOR EXPANDED MEDIA)
COVERAGE OF SUPREME COURT PROCEEDINGS)

RULE 01-08

A hearing was held June 19, 2001, at Sioux Falls South Dakota, relating to the adoption of the Rules of Procedure for Expanded Media Coverage of Supreme Court Proceedings, and the Court having considered the proposed rules, the correspondence and oral presentations relating thereto, and being fully advised in the premises now, therefore it is

ORDERED that the Rules of Procedure for Expanded Media Coverage of Supreme Court Proceedings is adopted in its entirety as a pilot project, subject to annual review.

1. Definitions

(a) "Judicial proceeding" or "proceeding" referenced in these rules includes all public appellate arguments, hearings, or other proceedings before the Supreme Court, except those specifically excluded by the rules. These rules do not apply to coverage of ceremonial or non-judicial proceedings.

(b) "Expanded media coverage " includes broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news and educational or instructional information to the public. Any other use, absent express written permission of the Court, is prohibited.

(c) "Supreme Court" or the "Court" means the Supreme Court of South Dakota.

(d) "Chief Justice" means the Chief Justice of the Supreme Court of South Dakota.

(e) "Clerk" means the Clerk of the Supreme Court of South Dakota.

(f) "Media Coordinator" means the representative from the news media appointed by the Court to coordinate expanded media coverage of judicial proceedings of the Court under these rules.

2, General

(a) Expanded media coverage must be conducted in conformity with applicable statutes, rules, and case law,

(b) Nothing herein shall alter the obligation of any attorney to comply with the provisions of the Rules of Professional Conduct governing trial publicity,

(C) Except as otherwise provided by these rules, electronic

recording by moving camera, still camera, and audio tape, and broadcasting will be permitted of all judicial proceedings in the courtroom during sessions of the Supreme Court.

(d) There shall be no audio or video recording or broadcast of conferences between the attorneys and their clients, co-counsel, or justices.

(e) There shall be no audio or video recording or broadcast of in- chambers court conferences,

(f) There shall be no focusing on and photographing of materials on counsel or law clerk tables or the judicial bench.

(g) The courtroom shall not be used to conduct interviews before or after the judicial proceedings,

(h) No media film, videotape, still photograph or audio reproduction of a judicial proceeding shall be admissible as evidence in any subsequent or collateral proceeding, including any retrial or appeal thereof, except by order of the Supreme Court.

(i) The quantity and type of equipment permitted in the courtroom shall be subject to the discretion of the Court within the guidelines set out in these rules.

(j) Notwithstanding the provisions of these rules, the Court, upon written application, may permit the use of equipment or techniques at variance with these rules, provided the application for variance is made at least ten days prior to the scheduled judicial proceeding. Variances may be allowed by the Court without advance application or notice if all counsel and parties consent.

(k) It shall be the responsibility of the media to settle disputes among media representatives, facilitate pooling where necessary, and implement procedures that meet the approval of the

Court prior to any coverage and without disruption to the Court. The Media Coordinator will coordinate media coverage and act as liaison between the media and the Court,

(l) The Court reserves the right to obtain, for historical purposes, a copy of any audio recordings, visual tape or film recordings or published photographs made of its proceedings. The Media Coordinator will be responsible for providing the Court with this duplicate copy,

(m) All expenses incurred in expanded media coverage of the judicial proceedings, including duplication of materials to provide to the Court, shall be the responsibility of the news media.

(n) The rights provided for herein may be exercised only by persons or organizations that are part of the news media.

o) Under all circumstances, the Court retains the discretion to

exclude or terminate electronic coverage or broadcast of its proceedings. This discretion is not to be exercised in an effort to edit the proceedings, but where deemed necessary in the interests of justice or where these rules have been violated. This rule does not otherwise limit or restrict the First Amendment rights of the news media to cover and report judicial proceedings.

(p) The Court shall retain ultimate control of the application of these rules over the broadcasting, recording or photographing of its proceedings, Any decision made by the Court or Chief Justice for the Court under these rules is final and not subject to appeal.

(q) These rules are designed primarily to provide guidance to media and courtroom participants and are subject to withdrawal or amendment by the Court at any time.

(r) Failure to comply with the Court's rules or orders regarding coverage and broadcast is punishable by sanction or contempt proceedings pursuant to South Dakota law.

3, Objections

(a) All public appellate proceedings are presumed open for expanded media coverage under these rules. A party to a proceeding objecting to expanded media coverage under these rules shall file a written objection, stating the grounds therefor, at least ten days prior to commencement of the proceeding. Time for filing objections may be extended or reduced in the discretion of the Court, which may also, in appropriate circumstances, extend the right of objection to persons other than the parties to the appeal,

(b) All objections shall be reviewed and determined by the Court prior to commencement of the proceeding. Expanded media coverage of the proceedings shall not be limited by objection of parties or others except for good or legal cause shown that such coverage would materially interfere with rights of the parties and the interests of justice,

(c) Where expanded media coverage of a proceeding has been prohibited by decision of the Court, the Clerk shall notify the Media Coordinator who shall notify the appropriate media personnel prior to commencement of the proceeding.

4. Advance Notification

The Court calendar is published on its website at www.state.sd.us/judicial/. News media interested in video, still camera, or audio coverage of any judicial proceeding must notify the Media Coordinator, who will notify the Clerk no later than 48 hours before the proceeding his set to begin and make all necessary assignments and arrangements if pool coverage is required. For good cause shown, relief from this notification requirement may be granted by the Court.

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The Media Coordinator and an alternate shall be appointed by the Court from a list of nominees provided by a representative of the news media designated by the Court. The Media Coordinator and the alternate shall serve until such time as the Court names a replacement. The name, business address, e-mail address and telephone number of the Media Coordinator and the alternate shall be on file with the Clerk. The Court and all interested members of the media shall work, whenever possible, with and through the

Media Coordinator regarding all arrangements for expanded media coverage.

7, Technical

(a) Video cameras, still cameras, audio equipment and other equipment to be used by the media in the courtroom during judicial proceedings must be unobtrusive and must not produce distracting sound or bear the insignia of any media organization. Cameras are to be designed or modified so participants in the judicial proceedings are unable to determine when recording occurs.

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(C) With the approval of the Court or Chief Justice for the Court, modifications may be made in light sources existing in the courtroom (e.g., higher wattage light bulbs), provided such modifications are installed and maintained without public expense.

8, Equipment and pooling

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Not more than one audio system shall be set up in the courtroom for media coverage of a judicial proceeding. Audio recording shall be accomplished from any existing audio system present in the courtroom, with the Court's approval, if such recording would be technically suitable for media use. Where possible, electronic audio recording equipment and any operating personnel shall be located outside of the courtroom at a place designated by the Court.

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Reporters, in the interest of accuracy , may use hand-held audio recorders in the courtroom . Such devices must have built-in microphones that are no more sensitive than the human ear. These personal recording devices are to be used for reporters' notes and not to gather sound for redistribution by the media. As with other media equipment, such personal recorders must not produce distracting sound or bear a media organization's insignia, Tapes may not be changed when Court is in session.

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(f) Location of equipment and personnel
Equipment and operating personnel permitted inside the courtroom by these rules shall be located in, and coverage of the proceedings shall take place from, an area or areas within the courtroom designated by the Court or Chief Justice for the Court. The area or areas designated shall provide reasonable access to the proceeding to be covered,

DATED at Pierre, South Dakota this 17th day of July, 2001,
Robert A. Miller, Chief Justice

Amendment

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE AMENDMENT OF CANON 3(B)(12) OF THE CODE OF JUDICIAL CONDUCT, SDCL CH. 16-2, APPX., RELATING TO MEDIA COVERAGE OF THE COURTROOM	)	**RULE 01-09**

A hearing was held June 19, 2001, at Sioux Falls South Dakota, relating to the amendment of, Canon 3(B)(12) of The Code of Judicial Conduct, SDCL CH. 16-2, Appx., and the Court having considered the proposed amendment, the correspondence and oral presentations relating thereto, and being fully advised in the premises now therefore it is

ORDERED that Canon 3(B)(12) of The Code of Judicial Conduct, SDCL CH. 16-2, Appx., is amended to read in its entirety as follows:

Canon 3(B)(12), South Dakota Code of Judicial Conduct

With the exception of the rules for expanded media coverage of appellate court proceedings, a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recess between sessions, except that a judge may authorize:

a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

b) the broadcasting, televising, recording, or photographing of investigative, ceremonial, or naturalization proceedings;

c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

DATED at Pierre, South Dakota this 17th day of July, 2001.

BY THE COURT:

Robert A. Miller, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUL 17 2001

Clerk

CAMERAS IN THE COURTROOM COMMITTEE

Minutes

Tuesday, March 10, 2001

Committee Members Present: Richard Sabers, DJ Hanson, James McMahon, Mark Millage, Tena Haraldson, Don Ravellette, Michelle Van Maanen, Shirley Jameson-Fergel, Lynn Sudbeck, Kent Grode

Also present were Dallas Johnson and Terri Adams

Introduction of Members

Richard Sabers – justice of the SD Supreme Court
DJ Hanson – state court administrator for Unified Judicial System (UJS)
Jim McMahon - attorney in Sioux Falls
Mark Millage – news director at KELO-Land TV and chair of Radio, TV and News Director Association (RTNDA)
Tena Haraldson – Associated Press
Don Ravellette – director, TV for Public Broadcasting
Michelle Van Maanen – president, SD Press Association
Kent Grode – network administrator for the Unified Judicial System for UJS
Lynn Sudbeck – staff attorney for the UJS
Shirley Jameson-Fergel – clerk of the Supreme Court
Dallas Johnson – deputy state court administrator for UJS
Terri Adams – executive secretary for UJS

Report from Mark Millage

- Additional equipment must be no cost to courts – taxpayers should bear no burden
- Not necessary to specify the types of cameras as noise and low lighting negligible factors with state-of-the-art equipment
- Court/media liaison should be member of media appointed and policed by media
- Media will need area outside Courtroom for videotape recording equipment
- Cameras must be set up before court is in session and torn down after to ensure no interruptions
- No insignia on cameras or camera operator apparel

Jim McMahon expressed a concern about camera "clicks" being distracting to both lawyers and the court and asked if all reporters use digital equipment. Mr. Millage and Ms. Haraldson said not all reporters have digital equipment, but the new cameras are all very quiet. Mr. Ravellette said most of the dailies use digital cameras and the

weeklies are moving that way. Mr. Millage added that in a media pooling arrangement, someone would always have digital equipment.

Report from Lynn Sudbeck

- Pattern of similarity in rules for the 23 states reviewed
- Concern about type of cases not an issue at appellate level
- Nebraska presumes coverage and puts the burden on the party and attorney if they do not want coverage - chief justice makes decision
- Court retains right to stop or exclude coverage at any time in interest of justice
- Some courts require that media request permission prior to court proceedings
- Some states delay broadcast coverage till opinion handed down

Tena Haraldson said the media is not interested in delayed broadcast because it has no news value. She said the court could use streaming video on their website if they want to broadcast an entire hearing at the time the decision is handed down. The committee agreed that broadcasts must be current to have value.

Justice Sabers said he likes the idea of throwing all the cases into the mix with no exclusions, and leaving it up to the parties or the Court to limit or exclude if they feel rights will be violated. It was the consensus of the committee that no cases should be automatically excluded. Mr. McMahon asked if a standard could be developed for what test will be applied for exclusions because he is concerned that the burden will get too high. Justice Sabers said he does not think a standard is needed; for good cause shown and in the interest of justice is enough.

In answer to Justice Sabers' question about how a media pool works, Ms. Haraldson and Mr. Millage advised that there is a media pool currently operating in Minnehaha County. Some of the rules for the pool are that it:

- Makes no distinction about whose camera is used
- Gives no credits - pool cameras are anonymous
- Is required to provide coverage for any station that wants it, whether or not they planned to cover the event. [redacted]
- Rotates among stations on a monthly basis
- Is responsible for getting the picture to the recording deck. From there, individual station is responsible for taping

Justice Sabers asked if he could get a copy of the media rules. Tena Haraldson said there are no rules, but she would get him a copy of the pool agreement.

Ms. Haraldson said coverage of the Supreme Court proceedings would be on a news judgment basis, and cautioned that they may not want to cover every oral argument. She added that the print media wants to have their own still camera in addition to a video camera. The media representatives on the committee said that they would work out a liaison among themselves, and would give the information to the Supreme Court and State Court Administrator.

Justice Sabers said the committee needs written options and alternatives in three areas: 1) rules for court; 2) rules for media in courtroom; 3) rules for media in a pooling arrangement. He suggested that Lynn Sudbeck be primary draftsperson of court rules and that Mr. Millage and Ms. Haraldson be primary drafters of media rules for the courtroom and the pool. It was agreed that the drafts would be sent to DJ Hanson's office in two weeks. DJ Hanson will distribute the drafts to all committee members for their reaction, and the committee will review the final drafts in detail at the April 2 meeting.

Because he is representing the Bar, Mr. McMahon asked Justice Sabers if the draft document should be published in the Bar Newsletter. Justice Sabers said he would rather Mr. McMahon share the draft with five or six other members of the Bar and/or bring them to the April meeting.

Dallas Johnson asked what type of area is needed for cabling and recording. Ms. Van Maanen advised that the tape decks do not have to be in close proximity to the camera, or even on the same floor. Mr. Millage volunteered to have KELO's cameraman meet with Kent Grode on March 21 (when KELO is in Pierre to cover the last day of the legislative session) to look at the Courtroom and discuss the requirements for camera location and wiring.

Ms. Haraldson said that the dimensions of the Courtroom might require two cameras and camera operators. Justice Sabers suggested that the rules be drafted to allow not more than two cameras without permission of the court. Mr. Ravellette asked if one still camera could cover everything, and Ms. Haraldson said it would.

Report from DJ Hanson

Mr. Hanson discussed the information from the National Center for State Courts, and said most of it duplicated what had been covered earlier in the meeting.

Future Meeting

The next meeting will be Monday, April 2, from 9:00 to 11:00 a.m. via DDN, with sites at Studio A in Pierre, Southeast Technical Institute in Sioux Falls, and USD 2 in Vermillion.

CAMERAS IN THE COURTROOM COMMITTEE

Minutes

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Ms. Haraldson said coverage of the Supreme Court proceedings would be on a news judgment basis, and cautioned that they may not want to cover every oral argument. She added that the print media wants to have their own still camera in addition to a video camera. The media representatives on the committee said that they would work out a liaison among themselves, and would give the information to the Supreme Court and State Court Administrator.

Justice Sabers said the committee needs written options and alternatives in three areas: 1) rules for court; 2) rules for media in courtroom; 3) rules for media in a pooling arrangement. He suggested that Lynn Sudbeck be primary draftsperson of court rules and that Mr. Millage and Ms. Haraldson be primary drafters of media rules for the courtroom and the pool. It was agreed that the drafts would be sent to DJ Hanson's office in two weeks. DJ Hanson will distribute the drafts to all committee members for their reaction, and the committee will review the final drafts in detail at the April 2 meeting.

Because he is representing the Bar, Mr. McMahon asked Justice Sabers if the draft document should be published in the Bar Newsletter. Justice Sabers said he would rather Mr. McMahon share the draft with five or six other members of the Bar and/or bring them to the April meeting.

Dallas Johnson asked what type of area is needed for cabling and recording. Ms. Van Maanen advised that the tape decks do not have to be in close proximity to the camera, or even on the same floor. Mr. Millage volunteered to have KELO's cameraman meet with Kent Grode on March 21 (when KELO is in Pierre to cover the last day of the legislative session) to look at the Courtroom and discuss the requirements for camera location and wiring.

Ms. Haraldson said that the dimensions of the Courtroom might require two cameras and camera operators. Justice Sabers suggested that the rules be drafted to allow not more than two cameras without permission of the court. Mr. Ravellette asked if one still camera could cover everything, and Ms. Haraldson said it would.

Report from DJ Hanson

Mr. Hanson discussed the information from the National Center for State Courts, and said most of it duplicated what had been covered earlier in the meeting.

Future Meeting

The next meeting will be Monday, April 2, from 9:00 to 11:00 a.m. via DDN, with sites at Studio A in Pierre, Southeast Technical Institute in Sioux Falls, and USD 2 in Vermillion.

FOR YOUR INFORMATION
MARK G. GEDDES
STATE COURT ADMINISTRATOR

CAMERAS IN THE COURTROOM COMMITTEE
April 7, 1983
Pierre, South Dakota

The first meeting of the committee to study the pros and cons of allowing cameras in the courtroom in South Dakota convened in Room 468 of the State Capitol. Members in attendance were: Justice Robert E. Morgan, Judge R.D. Hurd, Judge Jeff Davis, Dan Winders, Roger Kasa, Abner George, Gene Lebrun, Richard Battey, and Wally Eklund.

Chief Justice Jon Fosheim opened the meeting with brief remarks. He said the Supreme Court was requesting the committee's assistance in determining which direction to go and depending on that direction, suggestions for compliance with the First Amendment rights, a fair trial for the accused, and the right of the public to know. He noted the Supreme Court has an open mind in this area and is looking to the committee for suggestions.

The Chief Justice thanked the committee for their willingness to serve.

Justice Morgan noted this issue had been studied by an ad hoc committee of the Judicial Planning Committee and the committee had recommended the courtrooms be opened in civil cases for a one year trial basis. This committee met its demise with the Judicial Planning Committee and no action has been taken.

Justice Morgan said he realized nothing could be done overnight and that this committee will need extensive input from the bar association and the media.

With the general discussion, several points were agreed upon:

1) That SDCL 23A-44-16 may require legislative change, if a decision was made by the Supreme Court to open courtrooms to the cameras.

2) That any such proposal from this committee would need the support of the Bar or it would face a hard legislative battle.

3) It is imperative that the rights of the accused be protected.

4) That every effort should be made to prevent sensationalism and the intimidation of witnesses and jurors.

5) That a comprehensive set of guidelines must be drafted and implemented if cameras were to be allowed in the courtroom.

6) At first we should experiment only, possibly for a one-year period.

7) It must remain the judge's decision whether or not to allow cameras in a particular trial or when certain witnesses testify.

The committee decided to take the following actions:

1) To get samples of guidelines used from other states for their review.

2) To find out if any states have experimented with cameras and then rejected the idea, and get any reports in this area.

3) To try and get any reports concerning the effects of cameras on witnesses, jurors, etc.

4) To coordinate their study to be ready for a presentation to the 1984 State Bar convention.

5) That Justice Morgan will call Bill Sahr of the State Bar and prepare an item for the Bar newsletter concerning the committee's activities.

The next meeting of the committee will be held Tuesday, June 7, 1983, in Pierre, beginning at 9:00 a.m. The meeting will begin with subcommittees reviewing the guidelines obtained and preparing them for presentation to the full committee in the afternoon. The committee also asked that Dan Winters bring the video material he has in this area for viewing by the committee members.

Presentation of the Cameras in the Courtroom Committee.

This committee was appointed by Chief Justice Fosheim to explore the possibility of South Dakota joining the growing number of states that have and are permitting expanded media coverage of trials and courtroom proceedings. The committee is made up of members of the trial bar, the judiciary and the media, including radio, newspaper and television.

At the outset, it was recognized that expanded media coverage would require action by the Supreme Court with respect to Canon 3(7) of the South Dakota Code of Judicial Conduct, and by the legislature with respect to SDCL 23A-44-16. It was further recognized that any proposal for such an expansion would have to have the support of the South Dakota Bar Association.

As a starting point for discussion of such a proposal, the committee has reviewed the rules and guidelines adopted in numerous other jurisdictions. We have selected such rules and guidelines as we deemed appropriate to put together a proposed revision of the Code of Judicial Conduct that would put into effect a two-year trial period of expanded coverage.

The committee does not unanimously endorse expansion. Some have reservations, as we are sure many of you do. Furthermore, we are not a committee of the State Bar Association, so that any action to support this trial expansion would have to come from the floor of this meeting.

Various committee members will be in attendance to try to answer any questions or discuss any aspect of the proposal. The recommended Rule follows:

IN THE SUPREME COURT OF THE

STATE OF SOUTH DAKOTA

ORDER TEMPORARILY SUSPENDING CANON 3(7)

SOUTH DAKOTA CODE OF JUDICIAL CONDUCT

It is hereby ordered that Canon 3(7) of the South Dakota Code of Judicial Conduct be suspended from July 1, 1985, until July 1, 1987, to allow for electronic and still photographic coverage of public proceedings in all courts of the State of South Dakota on an experimental basis, in accordance with the following:

A. Definitions.

"Judicial proceedings" or "proceedings" as referred to in these rules shall include all public trials, hearings or other proceedings in a trial or appellate court, for which expanded media is requested, except those specifically excluded by these rules.

"Expanded media coverage" includes broadcasting, televising, electronic recording or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public.

"Court" means the lay magistrate or law-trained magistrate or circuit judge presiding in a trial court proceeding or the presiding judge or justice in an appellate proceeding.

"Good cause" for purposes of exclusion under these rules means that coverage will have a substantial effect upon the objector which would be qualitatively different from the effect on members of the public in general and that such effect will be qualitatively different from coverage by other types of media.

B. General Provisions and Exclusions.

(1) Broadcasting, televising, recording and photographing will be permitted in the courtroom under the following conditions:

(a) Permission first shall have been granted expressly by the court, which may prescribe such conditions of coverage as provided for in these rules.

(b) Expanded media coverage of a proceeding shall be permitted, unless the court concludes, for reasons stated on the record, that under the circumstances of the particular proceeding such coverage would materially interfere with the rights of the parties, or either of them, to a fair trial.

(c) Expanded media coverage of a participant also may be refused by the court for cause upon its own motion or upon objection and showing of good cause by a participant. In cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in evidentiary suppression hearings, divorce proceedings, child custody cases, and cases involving trade secrets, a presumption of validity attends the requests; the court shall exercise a broad discretion in deciding whether there is cause for prohibition. This list of requests which enjoy the presumption is not exclusive; the court may in its discretion find cause in comparable situations.

(d) Expanded media coverage is prohibited of any court proceeding which, under South Dakota law, is required to be held in private. In any event, no coverage shall be permitted in any juvenile, dissolution, adoption, child custody or trade secret cases unless consent on the record is obtained from all parties (including a parent or guardian of a minor child).

(e) Individual jurors shall not be photographed, except in instances in which a juror or jurors consent. In courtrooms where

photography is impossible without including the jury as part of the unavoidable background, the photography is permitted, but close-ups which clearly identify individual jurors are prohibited. Courts shall enforce this subsection for the purpose of providing maximum protection for jury anonymity.

(f) To protect the attorney-client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences in a court proceeding between attorneys and their clients, between co-counsel, between counsel and the court held at the bench or in chambers, or between justices in an appellate proceeding.

(g) No televising, photographing or broadcasting shall take place in courthouse corridors or other portions of the courthouse building, save the courtroom during court proceedings. No televising, photographing or broadcasting shall take place within the courtroom during recesses or at any other time when the trial court is not present and presiding.

(h) During or immediately preceding a jury trial, there shall be no televising or broadcasting during hearings which take place outside the presence of the jury. Without limiting the generality of the foregoing, such hearings would include motions to suppress evidence, motions for judgment of acquittal or directed verdict, hearings to determine competence or relevance of evidence, motions in limine, and motions to dismiss for legal inadequacy of the indictment, information or complaint (criminal or civil).

(i) The quantity and types of equipment permitted in the courtroom shall be subject to the discretion of the court within the guidelines set out in the accompanying rules.

(j) The court may, as to any or all media participants, limit or terminate photographic or electronic media coverage at any time during the proceedings in the event the court finds (1) that rules established under this Canon, or additional rules imposed by the court, have been violated, or (2) that substantial rights of individual participants or rights to a fair trial will be prejudiced by such manner of coverage if it is allowed to continue.

(k) The rights of photographic and electronic coverage provided for herein may be exercised only by persons or organizations which are part of the news media.

(2) A court may authorize expanded media coverage of investitive or ceremonial proceedings at variance with these procedural and technical rules as the court sees fit.

C. Procedure for Extended Coverage.

(1) Media Coordinators shall be appointed by the supreme court (chief justice) from a list of nominees provided by a representative of the broadcast media designated by the supreme court (chief justice). The trial judge (court) and all interested members of the broadcast media shall work, whenever possible, with and through the appropriate broadcast media coordinator regarding all arrangements for expanded media coverage. The supreme court (chief justice) shall designate the jurisdiction of each broadcast media coordinator. In the event a broadcast media coordinator has not been nominated or is not available for a particular proceeding, the trial judge (court) may deny in court broadcast media coverage or may appoint an individual from among local working representatives of the broadcast media to serve as the coordinator for the proceeding.

(a) Advance notice of coverage. All requests by representatives of the news media to use photographic equipment, television

cameras or electronic sound recording equipment in the courtroom shall be made to the presiding judge or justice. The media applicant shall inform counsel for all parties at least fourteen days in advance of the time the proceeding is scheduled to begin, but these times may be extended or reduced by court order. When the proceeding is not scheduled at least fourteen days in advance, however, the media applicant shall give notice of the request as soon as practicable after the proceeding is scheduled.

Notice shall be in writing and filed in the appropriate clerk's office. A copy of the notice shall be sent by ordinary mail to the last known address of all counsel of record, parties appearing without counsel, the appropriate court administrator and the court expected to preside at the proceeding for which expanded media coverage is being requested. The attached notice form Exhibit 1 is illustrative and not mandatory.

(Alternate (a)) All requests by representatives of the news media to use photographic equipment, television cameras or electronic sound recording equipment in the courtroom shall be made to the boardcast media coordinator. The broadcast media coordinator, in turn, shall inform counsel for all parties and the trial judge (court) at least fourteen days in advance of the time the proceeding is scheduled to begin, but these times may be extended or reduced by court order. When the proceeding is not scheduled at least fourteen days in advance, however, the broadcast media coordinator shall give notice of the request as soon as practicable after the proceeding is scheduled.

Notice shall be in writing, filed in the appropriate clerk's office. A copy of the notice shall be sent by ordinary mail to the

last known address of all counsel of record, parties appearing without counsel, the appropriate court administrator and/or the judge (court) expected to preside at the proceeding for which expanded media coverage is being requested.

The attached notice form, Exhibit I, is illustrative and not mandatory.

(b) Objections. A party to a proceeding objecting to expanded media coverage under Rule 2(b) shall file a written objection, stating the grounds therefor, at least three days before commencement of the proceeding. All witnesses shall be advised by counsel proposing to introduce their testimony of their right to object to expanded media coverage, and all objections by witnesses under Rule 2(c) shall be filed prior to commencement of the proceeding. The attached objection forms, Exhibits 2 & 3, are illustrative and not mandatory. All objections shall be heard and determined by the court prior to the commencement of the proceedings. The court may rule on the basis of the written objection alone. In addition, the objecting party or witness, and all other parties, may be afforded an opportunity to present additional evidence by affidavit or by such other means as the court directs. The court in its absolute discretion may permit presentation of such evidence by the media applicant in the same manner. Time for filing of objections may be extended or reduced in the discretion of the court which, in appropriate circumstances, may also extend the right of objection to persons not specifically provided for in these rules.

(Alternate (b)) A party to a proceeding objecting to broadcast media coverage shall file a written objection, stating the grounds therefor, at least five days before commencement of the proceeding.

All witnesses shall be advised by counsel proposing to introduce their testimony of their right to object to broadcast media coverage, and all objections by witnesses shall be filed prior to commencement of the proceeding. The attached objection forms, Exhibits 2 & 3, are illustrative and not mandatory. All objections shall be heard and determined by the trial judge (court) prior to the commencement of the proceedings. The trial judge (court) may rule on the basis of the written objection alone. In addition, the objecting party or witness, and all other parties, may be afforded an opportunity to present additional evidence by affidavit or by such other means as the trial judge (court) directs. The trial judge (court) in his (its) absolute discretion may permit presentation of such evidence by the broadcast media coordinator in the same manner. Time for filing of objections may be extended or reduced in the discretion of the trial judge (court), who also, in appropriate circumstances, may extend the right of objection to persons not specifically provided for in these rules.

D. Media Standards and Pooling.

(1) Equipment and Personnel. Unless otherwise agreed upon by the court, equipment and personnel within the courtroom or hearing room shall be limited as follows:

(a) Location. All equipment shall be operated behind the rail. The type of equipment utilized and its placement in the courtroom or hearing room is subject to final approval by the trial judge (court).

(b) Television cameras. Not more than one portable television camera, and operated by not more than one camera person, shall be permitted. Only natural lighting shall be used. Cameras shall be

quiet and shall be placed and operated as unobtrusively as possible within the courtroom at a location approved by this court. The cameras shall be in place at least fifteen minutes before the proceedings begin. Cameras shall remain in place during the proceedings but they may be moved during a recess.

(c) Audio systems. Not more than one audio system shall be permitted. All running wires shall be securely taped to the floor. Multiple radio feeds shall be provided by a junction box. Additional audio systems may be approved by the court where facilities are otherwise inadequate.

(d) Still photography. Not more than one still photographer, utilizing not more than two still cameras shall be permitted. The cameras must not produce any distracting sounds. Only natural lighting shall be used. Still photographers shall remain in one place during the proceedings, but they may shift positions during breaks or recess.

(e) Tape recorders. Tape recorders may be used by members of the media, so long as they do not constitute a distraction during the proceedings.

(2) Pooling arrangements. Any pooling arrangements necessary shall be the sole responsibility of the media and must be concluded prior to coverage without calling upon the court to mediate any dispute regarding appropriate media and personnel.

(3) Decorum. The decorum and dignity of the court, the courtroom and the proceedings must be maintained at all times. Court customs must be followed, including appropriate attire. Movement in the courtroom shall be limited, except during breaks or recess. The changing of tapes, film magazines, film and similar actions during the proceedings shall be avoided.

EXHIBIT 1

STATE OF SOUTH DAKOTA) :SS
COUNTY OF _____)

IN CIRCUIT COURT
_____ JUDICIAL CIRCUIT

* *

_____, Plaintiff,

vs

_____, Defendant.

No. _____

BROADCAST MEDIA COORDINATOR'S NOTICE OF REQUEST(S) FOR BROADCAST MEDIA COVERAGE OF TRIAL OR PROCEEDING

* *

COMES NOW the undersigned person, who states as follows:

1. Certain representatives of the broadcast news media want to use photographic equipment (____), television cameras (____) or electronic sound recording equipment (____) in courtroom coverage of the above proceeding. (Check the appropriate type or types of equipment.)

2. The trial or proceeding to be covered by broadcast media techniques is scheduled for the _____ day of _____, 19___, at _____ __.m., at the _____ County Courthouse, _____, South Dakota. The request(s) for broadcast media coverage include every part of such proceeding and any later proceedings caused by a delay or continuance.

3. The request(s) for broadcast media coverage are described as follows, e.g., the number of photographers with still cameras:

_____

_____

_____

_____

4. This notice of request(s) for broadcast media coverage is filed at least fourteen days in advance of the proceeding for which broadcast media coverage is being requested or grounds for shorter notice are set out in an attached statement.

5. I sent a copy of this notice by ordinary mail directed to the last known address of all counsel of record, parties appearing without counsel, the circuit court administrator for this judicial circuit, and the circuit court judge expected to preside at the trial or proceeding for which broadcast media coverage has been requested, as follows:

ATTORNEYS: _____

_____

_____

_____

PARTIES APPEARING WITHOUT COUNSEL: _____

_____

_____

_____

CIRCUIT COURT ADMINISTRATOR: _____

CIRCUIT COURT JUDGE: _____

WHEREFORE, the undersigned media coordinator gives notice of request(s) for broadcast media coverage as aforesaid.

_____
Signature

_____
Media Coordinator (Print Name)

_____ Judicial Circuit

Address: _____

_____

Telephone: _____

EXHIBIT 2

STATE OF SOUTH DAKOTA) :SS
COUNTY OF _____)

IN CIRCUIT COURT

_____ JUDICIAL CIRCUIT

* *

_____, Plaintiff

vs

_____, Defendant.

NO. _____

OBJECTION OF PARTY TO BROADCAST MEDIA COVERAGE OF TRIAL OR PROCEEDING

* *

COMES NOW the undersigned party, who states as follows:

1. Broadcast media coverage has been requested for the above matter.

2. There is good cause to believe that the presence of broadcast media coverage, under the particular circumstances of this proceeding, would materially interfere with the rights of the parties to a fair trial. The specific facts and circumstances in support of this allegation are described as follows: _____

_____

_____

_____

3. This objection is filed at least five days before commencement of the proceeding for which broadcast media coverage has been requested.

4. I have attached a proof of service showing service by ordinary mail of a copy of this objection upon all counsel of record, parties appearing without counsel, the broadcast media coordinator for this judicial circuit, the circuit court administrator for this judicial circuit and the circuit court judge expected to preside at

at the proceeding for which broadcast media coverage has been requested, such mailings having been directed to the last known address of each person.

WHEREFORE, I object to broadcast media coverage of this proceeding for the reasons urged.

_____

_____

_____

(Add Proof of Service)

EXHIBIT 3

STATE OF SOUTH DAKOTA) :SS
COUNTY OF _____)

IN CIRCUIT COURT

_____ JUDICIAL CIRCUIT

* *

_____, Plaintiff

vs

_____, Defendant.

No. _____

OBJECTION OF WITNESS TO BROADCAST MEDIA COVERAGE OF TESTIMONY

* *

COMES NOW the undersigned person, who states as follows:

1. I understand that broadcast media coverage has been requested for the above proceeding, which is scheduled to begin in the near future.

2. I expect to be called as a witness in this case.

3. I object to broadcast media coverage of my testimony for the folloiwng reasons (please be specific): _____

_____

_____

4. I understand this objection must be filed with the clerk of circuit court prior to the beginning of the case.

5. I hereby ask the clerk of circuit court for assistance in providing copies of this objection to all counsel of record, parties appearing without counsel, the broadcast media coordinator for this judicial circuit, the circuit court administrator for this judicial circuit and the circuit court judge expected to preside in this proceeding.

WHEREFORE, I object to broadcast media coverage of my testimony.

SIGNATURE: _____

NAME(please Print): _____

TELEPHONE: _____

As of the effective date hereinbefore specified, this order shall supersede the order of this court dated November 26, 1974, relating to electronic and photographic coverage of proceedings in the South Dakota Supreme Court and the Circuit Courts of the State of South Dakota. This order may be modified or withdrawn by this Court at any time.

Dated at Pierre, South Dakota, this ____ day of _____, 1984.

BY THE COURT:

_____
Chief Justice

ATTEST:

_____
Clerk of the Supreme Court

(SEAL)

If this body approves the trial period, in addition to presenting the proposed Rule to the Supreme Court at the December 1974 Rules Hearing, we would present to the 1985 Legislature a proposed amendment to SDCL 23A-44-16 in the following form:

23A-44-16 (Rule 53) PHOTOGRAPHS, RADIO AND TELEVISION BROADCASTING ~~PROHIBITED~~ PERMITTED. The taking of photographs in a courtroom during the progress of judicial proceeding or radio or television broadcasting of judicial proceedings from a courtroom shall ~~not-be-permitted-by-a-court~~ be permitted in accordance with such rules and guidelines as shall be adopted by the Supreme Court.

The Cameras in the Courtroom Committee urges your thoughtful consideration of these proposals.

EXHIBIT 3

STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

PROMULGATION OF CORRECTIVE AMENDMENTS TO THE MINNESOTA GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS

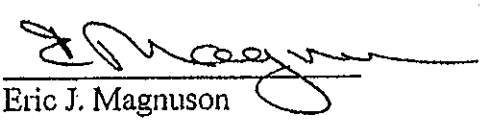
ORDER

In our Order dated February 11, 2009, the language intended to maintain the existing requirement of consent of all parties to the use of camera coverage in the trial courts was inadvertently omitted and a correction is necessary to cure that omission.

IT IS HEREBY ORDERED that the attached amendment to Rule 4.02 of the General Rules of Practice for the District Courts be, and the same is, prescribed and promulgated to be effective on the filing of this order.

DATED: March 12, 2009

BY THE COURT:



Eric J. Magnuson
Chief Justice

OFFICE OF
APPELLATE COURTS

MAR 12 2009

FILED

AMENDMENTS TO MINNESOTA GENERAL RULES OF PRACTICE

Rule 4. Pictures and Voice Recordings

***

Rule 4.02 Exceptions. A judge may, however, authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investitive, ceremonial or naturalization proceedings;

(c) upon the consent of the trial judge and all parties in writing or made on the record prior to the commencement of the trial, the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) There shall be no audio or video coverage of jurors at any time during the trial, including *voir dire*.

(ii) There shall be no audio or video coverage of any witness who objects thereto in writing or on the record before testifying.

(iii) Audio or video coverage of judicial proceedings shall be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings that occur in other areas of the court building.

(iv) There shall be no audio or video coverage within the courtroom during recesses or at any other time the trial judge is not present and presiding.

(v) During or preceding a jury trial, there shall be no audio or video coverage of hearings that take place outside the presence of the jury. Without limiting the generality of the

foregoing sentence, such hearings would include those to determine the admissibility of evidence, and those to determine various motions, such as motions to suppress evidence, for judgment of acquittal, *in limine* and to dismiss.

(vi) There shall be no audio or video coverage in cases involving child custody, marriage dissolution, juvenile proceedings, child protection proceedings, paternity proceedings, petitions for orders for protection, motions to suppress evidence, police informants, relocated witnesses, sex crimes, trade secrets, undercover agents, and proceedings that are not accessible to the public. No ruling of the trial court relating to the implementation or management of audio or video coverage under this rule shall be appealable until the trial has been completed, and then only by a party.

***

OFFICE OF
APPELLATE COURTS

FEB 12 2009

FILED

STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

PROMULGATION OF AMENDMENTS
TO THE MINNESOTA GENERAL RULES OF PRACTICE
FOR THE DISTRICT COURTS AND RELATED RULES,
AND IMPLEMENTATION OF A PILOT PROJECT
ON CAMERAS IN THE COURTROOM

ORDER

In its report filed March 31, 2008, the Supreme Court Advisory Committee on the General Rules of Practice recommended amendments to the General Rules of Practice for the District Courts in response to a petition filed by the Minnesota Joint Media Committee, Minnesota Newspaper Association, Minnesota Broadcasters Association, and Society of Professional Journalists, Minnesota Chapter ("Petitioners"). This Court held a hearing on the report on July 1, 2008. The Court has reviewed all submitted comments and is fully advised in the premises.

IT IS HEREBY ORDERED that:

1. The attached amendments to the General Rules of Practice for the District Courts be, and the same are, prescribed and promulgated to be effective on March 1, 2009.

2. The attached amendments to the Code of Judicial Conduct be, and the same are, prescribed and promulgated to be effective from March 1, 2009, through June 30, 2009, and thereafter the provisions of the revised Code of Judicial Conduct adopted in the *Order Promulgating Revised Minnesota Code Of Judicial Conduct*, No. ADM08-8004 (Minn. Dec. 18, 2008), to be effective July 1, 2009, shall apply.

3. The following orders are vacated effective March 1, 2009:

a. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct,* Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Apr. 18, 1983);

b. *Order Permitting Audio and Video Coverage of Supreme Court Proceedings*, No. C6-78-47193 (Minn. Apr. 20, 1983);

c. *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-300 (Minn. Sept. 28, 1983);

d. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings*, Order, No. C7-81-300 (Minn. Aug. 21, 1985);

e. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings , No. C7-81-300 (Minn. May 22, 1989); and

f. *In re Modification of Canon 3A(10) of the Minnesota Code of Judicial Conduct*, Order, No. C7-81-300 (Minn. Jan. 11, 1996) (reinstating April 18, 1983, program and extending until further order of Court).

4. Except as otherwise provided herein, the attached amendments shall apply to all actions pending on the effective date and to those filed thereafter.

5. The inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments made therein.

6. The Advisory Committee on the General Rules of Practice shall, in consultation with the Petitioners, recommend draft rules establishing a pilot project on cameras in the court that includes:

a. the rule recommendations of the minority of the Advisory Committee set forth in the March 31, 2008, report;

b. effective mechanisms for measuring the impact of cameras on the proceedings and on the participants before, during and after the proceedings, and the financial impact of both the pilot project and study, and the ongoing administration of cameras in the courtroom; and

c. recommendations for funding the pilot project, including any additional staff required to administer the project and any costs associated with the study, all without additional costs to the judiciary.

The Advisory Committee shall submit its recommendations to this Court on or before January 15, 2010, and upon submission the recommendations will be posted on the state court website (www.mncourts.gov).

7. All persons, including members of the bench and bar, desiring to submit written statements on the forthcoming recommendations regarding a pilot project on cameras in the trial court shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Boulevard., St. Paul, MN 55155, on or before February 15, 2010.

8. The Court's memorandum on this matter is attached to this order.

DATED: February 11, 2009

BY THE COURT:

Eric J. Magnuson
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

MEMORANDUM

The General Rules of Practice Committee, and all those that appeared before it, have carefully examined the topic of cameras in the courtroom. The court very much appreciates the thoroughness and thoughtfulness with which both the Committee majority and minority explored the issues and presented their conclusions. The majority report of the Committee concluded that, in the absence of a clear benefit, and in light of concerns about a potential chilling impact on victims and witnesses, there was no compelling reason to change the current rule. The minority report concluded that there are sufficient safeguards in place to address any issues relating to victim or witness participation.

Most states allow cameras in the courtroom, and the evidence seems clear that cameras themselves do not impact the actual in-court proceedings. But this court remains concerned by the fact that there is no empirical evidence addressing whether the prospect of televised proceedings has a chilling impact on victims and witnesses. Numerous participants in the justice system who work on a regular basis with victims and witnesses expressed the firmly held view that televised proceedings would make a difficult situation even more problematic. Under the order filed today, the charge to the Committee and the media is to design a pilot project that will include a study of the impact of televised proceedings on victims and witnesses. This pilot project will provide the court with additional information important to any final decision it might make regarding the presence or absence of cameras in the courtroom on a statewide basis.

In addition, because of the serious budget constraints that currently face the judiciary, it is vital that any pilot project and study not rely upon the judicial

branch for funding. Although it may be asking a great deal, the court has directed the Committee to explore methods of funding the pilot project and study that will result in no fiscal impact for the courts.

The court once again wishes to express its thanks to the Committee and those who appeared before it and looks forward to receiving additional recommendations.

CONCURRENCE

DIETZEN, Justice (concurring).

I concur in the majority's opinion to not make any substantive changes to the court rules that restrict cameras in the courtroom at this time. Further, I concur that a properly conducted pilot study may provide useful information to assist the court in considering whether to relax those restrictions. I write separately to express my concerns that cameras in the courtroom may deprive a defendant of the right to a fair trial, that a pilot study may not produce reliable results, and that the judiciary does not have the financial resources to pay the related costs of the study.

First, I consider the constitutional implications of cameras in the courtroom. While the Due Process Clause does not prohibit electronic media coverage of judicial proceedings, the First and Sixth amendments to the United States Constitution do not mandate electronic media in judicial proceedings. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978), the U.S. Supreme Court concluded that there is no constitutional right to have witness testimony recorded and broadcast and that the constitutional guarantee of a public trial confers no special benefit to the press. The *Nixon* court concluded that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Id.* at 610. Thus, the press has no constitutional right to have cameras in the courtroom.

A defendant, however, has a constitutional right to a fair trial. In the landmark case of *Estes v. Texas*, 381 U.S. 532 (1965), the U.S. Supreme Court held that a

defendant was deprived of his right under the Fourteenth Amendment to due process and a fair trial by the broadcasting of his notorious, heavily publicized and highly sensational criminal trial. In *Estes* there were two concurring opinions. The concurring opinions expressed a concern that the very presence of media cameras and recording devices at a trial inescapably gives rise to an adverse psychological impact on the participants in the trial. *See id.* at 567-70, 591-92. In his concurring opinion, Justice Harlan observed that "[p]ermitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process," and that although such distortions may produce no telltale signs, "their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction." *Id.* at 587, 592 (Harlan, J., concurring). Justice Harlan also observed that the "countervailing factors" were the educational and informational value of a trial proceeding to the public. *Id.* at 587, 594-95.

In *Chandler v. Florida*, 449 U.S. 560 (1981), the U.S. Supreme Court held that a state court could provide for radio, television, and still photographic coverage of a criminal trial for public broadcast. In doing so the court rejected the defendant's argument that *Estes* prohibited all photographic or broadcast coverage of criminal trials under the due process clause. *Id.* at 573-74. The court noted, among other things, that the general issue of the psychological impact of the broadcast coverage upon the participants in a trial, and particularly upon the defendant, is a subject of sharp debate. *Id.* at 575-76. That debate continues to rage today. The *Chandler* court observed that:

> [i]nherent in electronic coverage of a trial is the risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected.

Id. at 577. I share those same concerns.

Second, I have concerns regarding the pilot study. Specifically, the pilot study must be properly constructed to gather empirical evidence of the potential impact of cameras in the courtroom. Although it is useful to gather information of actual trials that have occurred, it is also important to measure the potential impact of cameras on victims and witnesses who choose not to participate in criminal investigations because of the potential media coverage. Unless the pilot study is based on a representative sample, the results may be biased and therefore unreliable.

In my opinion, the best evidence of the potential impact of cameras on victims and witnesses is prosecutors, public defenders, and advocacy groups representing individuals directly affected. Those individuals are directly involved in interviewing the victims and witnesses involved in the criminal investigations and trials. Unless their experience is measured, the pilot study will be deficient.

Third, I am concerned about the pilot study's financial impact on the judiciary and the potential hidden costs associated with having cameras in the courtroom. The judiciary will incur indirect costs associated with the study that are not insignificant. If this court ultimately approves cameras in the courtroom, I fear that the judiciary will absorb ongoing indirect costs from the operation of cameras in the courtroom that will

need to be offset by additional cuts to our already strained budget. At a time when the State of Minnesota and its judiciary are struggling under severe fiscal constraints, it seems unwise to divert badly needed resources to this pilot study.

DISSENT

PAGE, Justice (dissenting).

I dissent from that part of the court's order, as set out in paragraphs six and seven of the order, that requires the Supreme Court Advisory Committee on General Rules of Practice to recommend draft rules establishing a pilot program that expands camera usage in the courtroom. The right to due process and a fair trial before an impartial tribunal militate against expanding the use of cameras in our trial courts.

Before recommending that the current camera-usage rule not be changed, the advisory committee solicited information, heard testimony and presentations from interested parties, and conducted research into how other jurisdictions approached the use of cameras in the courtroom. The testimony and presentations came from members of the media, representatives from jurisdictions that permit expanded camera access, public defenders, prosecutors, judges, private attorneys, victim advocates, and this court's racial fairness committee.

The media proponents of changing the current rule to expand the use of cameras in our state's trial courtrooms argue that the rule should be changed because a significant majority of other states have implemented more liberal access without noticeable adverse effects, the public may have an interest in greater access to judicial proceedings, and technological advances have eliminated the obtrusive impact of cameras in the courtroom. Supreme Court Advisory Committee on General Rules of Practice, *Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of*

Practice 6 (Final Report 2008) (hereinafter *Advisory Recommendations*). They further argue that expanded use of cameras in our trial courts will provide increased public understanding of the judiciary. *Id.*

Prosecutors, public defenders, private attorneys, advocates for victims, and this court's racial fairness committee expressed strong opposition to changing the rule. In addition, the committee heard from at least one victim who opposed changing the rule.

The advisory committee's majority report concluded that the rule should not be changed.[1] *Id.* at 2. This conclusion was based on the majority members' findings that cameras do not further the core mission of the courts to provide a fair tribunal and may instead interfere with that mission. *Id.* at 7. The committee's minority report recommended that cameras be allowed at the discretion of the trial court judge, with specific limitations. *Id.* at 20. In making this recommendation, the authors of the minority report reasoned that the opponents of a more liberal rule, not the proponents, have the burden of proof, and that the opponents failed to demonstrate that expanded camera coverage would actually interfere with the administration of justice. *Id.* For the reasons discussed below, I would deny the petitioners' request for expanded use of cameras in our state's trial courtrooms and would not order the advisory committee to develop a pilot program.

The Due Process Clause of the United States Constitution "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of

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[1] The majority report was endorsed by 16 of the advisory committee's 19 voting members; the minority report was endorsed by the remaining three members. *Id.* at 2.

neutrality . . . safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process . . . ." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Moreover, a fair trial is the "most fundamental of all freedoms" and "must be maintained at all costs." *Estes v. Texas*, 381 U.S. 532, 540 (1965) (5-4 decision) (plurality opinion). In *Estes*, the court noted that cameras do not "contribute materially" to ensuring a fair trial and may even interfere with it. *Id.* at 544. That notion is as true today as it was when *Estes* was decided.

In concluding that the rule should not be changed, the advisory committee majority was concerned with, among other things, the potential chilling effects that the expanded use of cameras would have in criminal, juvenile, family, and order-for-protection proceedings. *Advisory Recommendations* 6-8. The advisory committee found that:

> Even if cameras were limited to prevent their use in particular categories of cases, the committee heard and credited the view of numerous participants in those proceedings that crime victims and witnesses, and other interested parties, would be deterred from reporting crimes or from agreeing to testify. This is a significant problem that cannot be readily mitigated; the mere fact that camera coverage of court proceedings is generally known to exist is, according to witnesses before the committee, likely to cause crime and domestic abuse victims and witnesses to decline to report crimes and to refuse to come forward to testify. This chilling effect on victims and witnesses occurs even in types of cases where cameras are not likely to be allowed, as the victims or witnesses would have the impression that being in court subjects one to camera scrutiny.

Id. at 7. Prosecutors, defense attorneys, and victim advocates raised the concern that the expanded use of cameras would have a chilling effect on crime victims and witnesses. Their concerns and the advisory committee's findings should not be set aside.

Interestingly, after studying the issue and conducting a three-year pilot program, the Judicial Conference of the United States opposes the use of cameras in federal trial courts and Congress has not authorized the use of cameras in federal district courtrooms. Testifying before the House Committee on the Judiciary, Federal District Court Judge John Tunheim explained the Conference's opposition, noting that a desire for "increased public education should not interfere with the Judiciary's primary mission," which is to protect "citizens' [rights to] enjoy a fair and impartial trial." *Sunshine in the Courtroom Act of 2007: Hearing on H.R. 2128 Before the H. Comm. on the Judiciary*, 110th Cong. 8, 10 (2007) (statement of John R. Tunheim, Judge, U.S. District Court for the District of Minnesota, on behalf of the Judicial Conference of the United States). According to Judge Tunheim, the

> use of cameras in courtrooms [has the potential] to undermine the fundamental right of citizens to a fair trial. It could jeopardize court security and the safety of trial participants, including judges, U.S. attorneys, trial counsel, U.S. marshals, court reporters, and courtroom deputies. The use of cameras in the trial courts could also raise privacy concerns and produce intimidating effects on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding. In addition, appearing on television could lead some trial participants to act more dramatically, to pontificate about their personal views, to promote commercial interests to a national audience, or to increase their courtroom actions so as to lengthen their appearance on camera. Finally, camera coverage could become a

negotiating tactic in pretrial settlement discussions or cause parties to choose not to exercise their right to have a trial.

Id.

In 2005, Judge Jan DuBois, who participated in the federal court pilot project that permitted cameras in civil cases, testified before the Senate's Judiciary Committee that "cameras in the district courts could seriously jeopardize" judges' paramount role of ensuring that citizens have a fair and impartial trial. *Cameras in the Courtroom Act of 2005: Hearing on S. 829 Before the S. Comm. on the Judiciary*, 109th Cong. 14 (2005) (statement of Jan E. DuBois, Judge, U.S. District Court for the Eastern District of Pennsylvania). She emphasized that the "right to a fair trial" should not be sacrificed "to make courtrooms more open." *Id.* at 15. The concerns identified by Judge Tunheim and Judge DuBois are equally applicable to the use of cameras in Minnesota's district courts.[2]

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[2] The advocates for expanded camera access argue that the media has a right to such access under the First and Sixth Amendments to the United States Constitution. This argument does not carry the day. The First Amendment prohibits laws that abridge the "freedom of speech, or of the press." The Sixth Amendment guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." The right to a public trial, however, is a right unique to the defendant and does not guarantee the public access. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-80 (1979) (plurality opinion) (analyzing public access to a pretrial hearing). The defendant's right to a public trial does not include the "right to have such testimony recorded and broadcast" but rather is satisfied when the public and press have the right to "attend the trial and to report what they have observed." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978). Under the current rule, there can be no serious claims that the public and the press have been denied the right to "attend the trial and to report what they have observed."

The First Amendment protects the public's right to observe trials over the objection of the defendant. *Globe Newspaper Co. v. County of Norfolk*, 457 U.S. 596, 604-06 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 580-81

(Footnote continued on next page.)

An issue raised, but not fully considered by the advisory committee,[3] was the impact that the expanded use of cameras in our trial courts would have on people of color who use our judicial system. In 1993, our court issued a report from the Task Force on Racial Bias in the Judicial System. In its report, the task force found that, for Minnesota's communities of color, our court system lacked fairness. In response to the report, we set up a committee to implement the report's recommendations. That committee, which is now called the Racial Fairness Committee and which now reports to

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(Footnote continued from previous page.)
(1980) (plurality opinion). The press, however, has "no right to information about a trial superior to that of the general public." *Nixon*, 435 U.S. at 609. Further, the public's right to observe trials is not absolute. The public's access may be limited upon demonstrating that it is necessary to "protect the defendant's superior right to a fair trial." *Richmond Newspaper*, 457 U.S. at 564. That is to say, when the right to a fair trial before an impartial tribunal conflicts with the public's right under the First Amendment, the First Amendment must yield. *See Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966) (The right to free speech "must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' " (quoting *Cox v. Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting)); *Estes*, 381 U.S. at 540 ("We have always held that the atmosphere essential to the preservation of a fair trial - the most fundamental of all freedoms - must be maintained at all costs."); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) ("Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."); *In re Dow Jones & Co.*, 842 F.2d 603, 609 (2nd Cir. 1988) ("When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter."); *State v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544, 549 (Fla. 1981) ("[I]t remains essential for trial judges to err on the side of fair trial rights for . . . the defense. The electronic media's presence in . . . courtrooms is desirable, but it is not indispensable. The presence of witnesses is indispensable.").

[3] It appears that this issue was not fully considered because the early consensus among the advisory committee was that no change would be recommended and, therefore, there would be no change from the status quo. *Advisory Recommendations* 9.

the Judicial Council, continues today in its effort to eliminate racial bias from our judicial system. By letter dated June 19, 2008, the Racial Fairness Committee strongly supported the advisory committee majority's recommendation that the current rule on the use of cameras in Minnesota's trial courts be retained. Underlying that support was the Racial Fairness Committee's belief that in communities of color the expanded use of cameras in trial courtrooms would diminish public trust and confidence in the judicial system. I agree. More importantly, however, the expanded use of cameras will do nothing to assist in the elimination of racial bias from our judicial system and will, in fact, exacerbate the problem.

The media spends a great deal of time reporting on crime. Franklin D. Gilliam Jr. & Shanto Iyengar, *Prime suspects: The influence of local television news on the viewing public*, 44 Am. J. Pol. Sci. 560, 560 (2000). Crime reporting is one of the reasons for seeking the rule change to allow the expanded use of cameras in the courtroom. Unfortunately, studies indicate that the media consistently portrays crime in a way that emphasizes crime when perpetrated by African Americans and other people of color[4] and portrays African Americans who are accused and/or convicted of crimes in a more negative light than their white counterparts.

One comparison of crime reports with news coverage revealed that local television news is more likely to cover crime when committed by African Americans, while simultaneously over-representing whites as victims. Travis L. Dixon & Daniel Linz,

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[4] While the examples discussed below relate to African Americans, it is not at all clear that the media treats members of other racial minorities any different.

Overrepresentation and underrepresentation of African Americans and Latinos as law-breakers on television news, 50 J. Comm. June 2000, at 131, 131-54; Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 Comm. Res. Oct. 2000, at 547, 568. A 14-week analysis of the 11 p.m. Philadelphia news revealed that 72% of crimes perpetrated by blacks were reported in contrast to only 47% of crimes against blacks. Daniel Romer, Kathleen H. Jamieson & Nicole J. De Coteau, *The treatment of persons of color in local television news: Ethnic blame discourse or realistic group conflict*, 25 Comm. Res. 286, 286-305 (1998). Black congress members involved in the 1992 House banking scandal received more negative press than their white counterparts. Robert M. Entman, *Young Men of Color in the Media: Images and Impacts*, Joint Center for Political and Economic Studies Health Policy Institute Background Paper 13 (2006) (citing David Niven, *A fair test of media bias: Party, race and gender in coverage of the 1992 house banking scandal*, 36 Polity 637, 637-49 (2004)).

The media also portrays black and white perpetrators of the same crime differently. Local networks are more likely to show African Americans in handcuffs and to broadcast their mug shots. Robert M. Entman, *Modern racism and the images of blacks in local television news*, 7 Crit. Stud. in Mass Comm. 332, 332-45 (1990). A 55-day study of Chicago local television news revealed that blacks accused of a crime were shown in the grip of a restraining police officer twice as often as their white counterparts. Robert M. Entman, *Blacks in the news: Television, modern racism, and cultural change*,

69 Journalism Q. 341, 341-61 (1992). The Entman-Rojecki Index of Race and Media (2002) reports that "it is four times more likely for the mug shot of an accused to be shown on TV if the suspect is black and it is two times more likely that a suspect will be shown restrained by police if she or he are black."

Media coverage of Hurricane Katrina provides another recent example of the media's slanted coverage of race and crime. The Agency France-Press labeled a photo of a young white couple carrying bags of food and a case of soda as "finding bread and soda from a local grocery store," but the Associated Press labeled a similar photo of a young black man as "looting a grocery store." Neil F. Carlson & Leonard M. Baynes, *Rethinking the Discourse on Race: A Symposium on how the Lack of Racial Diversity in the Media Affects Social Justice and Policy*, 21 St. John's J. Legal Comment. 575, 581 (2007). Eighty-three percent of photos from the New York Times, Washington Post, USA Today, and The Wall Street Journal depicted African Americans as looting, while whites were depicted as guarding property 66% of the time. *Id.* Blacks were also overly represented as victims and whites as rescuers. *Id.*

Finally, a March 2002 article from the Journal of Broadcasting and Electronic Media reported that:

> Tests of whether or not race has an impact on the presentation of prejudicial information revealed that stories featuring Black and Latino defendants and White victims were more likely than stories featuring White defendants and non-White victims to contain prejudicial information. More than a third of both Blacks and Latinos were associated with prejudicial information. . . . Blacks and Latinos were more than twice as likely as Whites to have prejudicial information aired about them. Latinos who victimized Whites

> were almost three times as likely as Whites to be associated with prejudicial information.

Travis L. Dixon & Daniel Linz, *Television news, prejudicial pretrial publicity, and the depiction of race*, 46 Am. J. Pol. Sci. 112, 112-36 (2002).

In the end, my disagreement with the court's order is premised on two simple points. First, given the concerns raised by the prosecutors, defense attorneys, and victim advocates who work in our trial courts on a daily basis, I cannot conclude that changing our rules to allow the expanded use of cameras in our trial court courtrooms will "contribute materially" to ensuring a fair trial by promoting "participation and dialogue by affected [witnesses and victims] in the decision-making process." In fact, expanded access may have the opposite effect. Second, given the media's documented treatment of African Americans and other people of color accused of crime, I can only conclude that expanding the use of cameras will not assist in the court's obligation to prevent "unjustified and mistaken deprivations."

For these reasons I respectfully dissent.

AMENDMENTS TO MINNESOTA CODE OF JUDICIAL CONDUCT

Canon 3A(11):

(11) ~~Except in the Supreme Court and the Court of Appeals, a~~ A judge shall prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto ~~during sessions of court or recess between sessions. A judge may, however, authorize:~~ except as permitted by order or court rule adopted by the Minnesota Supreme Court.

~~(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;~~

~~(b) the broadcasting, televising, recording or photographing of investitive, ceremonial or naturalization proceedings;~~

~~(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:~~

~~(i) the means of recording will not distract participants or impair the dignity of the proceedings;~~

~~(ii) the parties have consented, and the consent to be depicted or recorded has been obtained from each witness appearing in the recording and reproduction;~~

~~(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and~~

~~(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.~~

General Rules Advisory Committee Comment—2008

This rule is amended to delete the specific standards to be followed in considering whether electronic recording and transmission should be allowed of Minnesota court proceedings. The material deleted is adopted in part in Rule 4 of the Minnesota General Rules of Practice, applicable in all court proceedings other than appeals or similar proceedings in the Minnesota Court of Appeals and Minnesota Supreme Court. Rule 4 is modified, however, to incorporate salient provisions of a series of orders dealing with a multi-decade experiment to permit some recording or broadcast of court proceedings with the agreement of all parties. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983); *Order Permitting Audio and Video Coverage of Supreme Court Proceedings*, No. C6-78-47193 (Minn. Sup. Ct. April 20, 1983); *Amended Order Permitting*

Audio and Video Coverage of Appellate Court Proceedings, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Conduct and Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings*, Order, C7-81-300 (Minn. Sup. Ct. Aug. 21, 1985); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings (Minn. Sup. Ct. May 22, 1989); and *In re Modification of Canon 3A(10) of the Minnesota Code of Judicial Conduct*, Order, No. C7-81-3000 (Minn. Sup. Ct. Jan. 11, 1996)(reinstating April 18, 1983, program and extending until further order of Court).

The reason for amendment of Canon 3A(11) is to state in the Code of Judicial Conduct the simple requirement that judges adhere to the Minnesota Supreme Court's orders and rules relating to recording and broadcast of court proceedings, and that the actual substantive requirements be contained in a single place. Rule 4 of the Minnesota General Rules of Practice, adopted at the same time as the amendment of Canon 3A(11) now sets forth all the surviving portions of this canon and the intervening orders that have modified it. All of these provisions were updated to reflect current recording technologies.

AMENDMENTS TO MINNESOTA GENERAL RULES OF PRACTICE

Rule 4. Pictures and Voice Recordings

Rule 4.01. General Rule. Except as set forth in this rule, ~~N~~no pictures or voice recordings, except the recording made as the official court record, shall be taken in any courtroom, area of a courthouse where courtrooms are located, or other area designated by order of the chief judge made available in the office of the court administrator in the county, during a trial or hearing of any case or special proceeding incident to a trial or hearing, or in connection with any grand jury proceedings.

This rule ~~shall~~ may be superseded by specific rules of the Minnesota Supreme Court relating to use of cameras in the courtroom for courtroom security purposes, for use of videotaped recording of proceedings to create the official recording of the case, or for interactive video hearings pursuant to rule or order of the supreme court. This Rule 4 does not supersede the provisions of the Minnesota Rules of Public Access to Records of the Judicial Branch.

Rule 4.02 Exceptions. A judge may, however, authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investitive, ceremonial or naturalization proceedings;

(c) upon the consent of the trial judge in writing or made on the record prior to the commencement of the trial, the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) There shall be no audio or video coverage of jurors at any time during the trial, including *voir dire*.

(ii) There shall be no audio or video coverage of any witness who objects thereto in writing or on the record before testifying.

(iii) Audio or video coverage of judicial proceedings shall be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings that occur in other areas of the court building.

(iv) There shall be no audio or video coverage within the courtroom during recesses or at any other time the trial judge is not present and presiding.

(v) During or preceding a jury trial, there shall be no audio or video coverage of hearings that take place outside the presence of the jury. Without limiting the generality of the foregoing sentence, such hearings would include those to determine the admissibility of evidence, and those to determine various motions, such as motions to suppress evidence, for judgment of acquittal, *in limine* and to dismiss.

(vi) There shall be no audio or video coverage in cases involving child custody, marriage dissolution, juvenile proceedings, child protection proceedings, paternity proceedings, petitions for orders for protection, motions to suppress evidence, police informants, relocated witnesses, sex crimes, trade secrets, undercover agents, and proceedings that are not accessible to the public. No ruling of the trial court relating to the implementation or management of audio or video coverage under this rule shall be appealable until the trial has been completed, and then only by a party.

Rule 4.03. Technical Standards for Photography, Electronic and Broadcast Coverage of Judicial Proceedings. The trial court may regulate any aspect of the proceedings to ensure that the means of recording will not distract participants or impair

the dignity of the proceedings. In the absence of specific order imposing additional or different conditions, the following provisions apply to all proceedings.

(a) Equipment and personnel.

(1) Not more than one portable television or movie camera, operated by not more than one person, shall be permitted in any trial court proceeding.

(2) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in any trial court.

(3) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in any trial court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court. If no technically suitable audio system exists in the court, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the trial judge.

(4) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the trial judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude from a proceeding all media personnel who have contested the pooling arrangement.

(b) Sound and light.

(1) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Excepting modifications and additions made pursuant to Paragraph (e) below, no artificial, mobile lighting device of any kind shall be employed with the television camera.

(2) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(3) Media personnel must demonstrate to the trial judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light requirements of this rule. A failure to demonstrate that these criteria have been met for specific equipment shall preclude its use in any proceeding.

(c) Location of equipment and personnel.

(1) Television camera equipment shall be positioned in such location in the court as shall be designated by the trial judge. The area designated shall provide reasonable access to coverage. When areas that permit reasonable access to coverage are provided, all television camera and audio equipment must be located in an area remote from the court.

(2) A still camera photographer shall position himself or herself in such location in the court as shall be designated by the trial judge. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to attract attention by distracting movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(3) Broadcast media representatives shall not move about the court facility while proceedings are in session.

(d) Movement of equipment during proceedings. News media photographic or audio equipment shall not be placed in, or removed from, the court

except before commencement or after adjournment of proceedings each day, or during a recess. Microphones or taping equipment, once positioned as required by (a)(3) above, may not be moved from their position during the pendency of the proceeding. Neither television film magazines nor still camera film or lenses may be changed within a court except during a recess in the proceedings.

(e) **Courtroom light sources.** When necessary to allow news coverage to proceed, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions do not produce distracting light and are installed and maintained without public expense. Such modifications or additions are to be presented to the trial judge for review prior to their implementation.

(f) **Conferences of counsel.** To protect the attorney-client privilege and the effective right to counsel, there shall be no video or audio pickup or broadcast of the conferences which occur in a court between attorneys and their client, co-counsel of a client, opposing counsel, or between counsel and the trial judge held at the bench. In addition, there shall be no video pickup or broadcast of work papers of such persons.

(g) **Impermissible use of media material.** None of the film, videotape, still photographs or audio reproductions developed during, or by virtue of, coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

Rule 4.04. Camera Access in Appellate Court Proceedings.

(a) Unless notice is waived by the Chief Justice of the Supreme Court or the Chief Judge of the Court of Appeals, notice of intent to cover appellate court proceedings by either audio or video means shall be given by the media to the Clerk of the Appellate Courts at least 24 hours prior to the time of the intended coverage.

(b) Camera operators, technicians, and photographers covering a proceeding must:

- avoid activity which might distract participants or impair the dignity of the proceedings;
- remain seated within the restricted areas designated by the Court;
- observe the customs of the Court;

- conduct themselves in keeping with courtroom decorum; and
- not dress in a manner that sets them apart unduly from the participants in the proceeding.

(c) All broadcast and photographic coverage shall be on a pool basis, the arrangements for which must be made by the pooling parties in advance of the hearing. Not more than one (1) electronic news gathering ("ENG") camera producing the single video pool-feed shall be permitted in the courtroom. Not more than two (2) still-photographic cameras shall be permitted in the courtroom at any one time. Motor-driven still cameras may not be used.

(d) Exact locations for all camera and audio equipment within the courtroom shall be determined by the Court. All equipment must be in place and tested 15 minutes in advance of the time the Court is called to order and must be unobtrusive. All wiring, until made permanent, must be safely and securely taped to the floor along the walls.

(e) Only existing courtroom lighting may be used.

Advisory Committee Comment—~~1994~~2008 Amendments

This rule ~~is~~was initially derived from the ~~current~~ local rules of three districts.

~~It appears that this rule is desired by the benches of three districts and it may be useful to have an articulated standard for the guidance of lawyers, litigants, the press, and the public.~~

The Supreme Court adopted rules allowing cameras in the courtrooms in limited circumstances, and it is inappropriate to have a written rule that does not accurately state the standards which lawyers are expected to follow. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, No. C7-81-300 (Minn. Sup. Ct. May 22, 1989). The court has ordered an experimental program for videotaped recording of proceedings for the official record in the Third, Fifth and Seventh Judicial Districts. In re Videotaped Records of Court Proceedings in the Third, Fifth, and Seventh Judicial Districts, No. C4-89-2099 (Minn. Sup. Ct. Nov. 17, 1989) (order). The proposed local rule is intended to allow the local courts to comply with the broader provisions of the Supreme Court Orders, but to prevent unauthorized use of cameras in the courthouse where there is no right to access with cameras.

~~This rule is amended in 1994 to make it unnecessary for local courthouses to obtain Supreme Court approval.~~ The rule was amended in 2008 to add Rule 4.02, comprising provisions that theretofore were part of the Minnesota Rules of Judicial Conduct. This change is not intended to be substantive in nature, but the provisions are moved to the court rules so they are more likely to be known to litigants. Canon 3(A)(11) of the Minnesota Code of Judicial Conduct is amended to state the current obligation of judges to adhere to the rules relating to court access for cameras and other electronic reporting equipment.

The extensive amendment of Rule 4 in 2008 reflects decades of experience under a series of court orders dealing with the use of cameras in Minnesota courts. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983); *Order Permitting Audio and Video Coverage of Supreme Court Proceedings*, No. C6-78-47193

(Minn. Sup. Ct. April 20, 1983); *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Conduct and Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings*, Order, C7-81-300 (Minn. Sup. Ct. Aug. 21, 1985); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings (Minn. Sup. Ct. May 22, 1989); and *In re Modification of Canon 3A(10) of the Minnesota Code of Judicial Conduct*, Order, No. C7-81-3000 (Minn. Sup. Ct. Jan. 11, 1996)(reinstating April 18, 1983, program and extending until further order of Court). The operative provisions of those orders, to the extent still applicable and appropriate for inclusion in a court rule, are now found in Rule 4.

Amended Rule 4.01 defines how this rule dovetails with other court rules that address issues of recording or display of recorded information. The primary thrust of Rule 4 is to define when media access is allowed for the recording or broadcast of court proceedings. Other rules establish limits on access to or use of court-generated recordings, such as court-reporter tapes and security tapes. *See, e.g.*, Minnesota Rules of Public Access to Records of the Judicial Branch.

Amended Rules 4.02(a) & (b) are drawn from Canon 3A(11)(a) & (b) of the Minnesota Code of Judicial Conduct prior to its amendment in 2008. Rule, 4.02(c) and the following sections (i) through (vii) are taken directly from the Standards of Conduct and Technology Governing Still Photography, Electronic and Broadcast Coverage of Judicial Proceedings, Exhibit A to *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983)

Amended Rule 4.04 establishes rules applicable to the appellate courts, and is drawn directly from *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983).

CX-89-1863
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee on General Rules of Practice

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Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice

Final Report
March 31, 2008

Hon. Elizabeth Anne Hayden
Chair

Hon. C. Barry Anderson
Liaison Justice

Hon. [illegible] J. Cahill, Moorhead
Hon. Joseph J. Carter, Hastings
R. Scott Davies, Minneapolis
Hon. Mel I. Dickstein, Minneapolis
Francis Eggert, Winsted
Jennifer L. Frisch, Minneapolis
Karen E. Sullivan Hook, Rochester
Hon. Lawrence R. Johnson, Anoka
Hon. Kurt J. Marben, Thief River Falls
Hon. Kathryn D. Messerich, Hastings
Hon. Rosanne Nathanson, Saint Paul
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Timothy Roberts, Foley
Daniel Rogan, Bellingdale
Hon. Jon Stafsholt, Glenwood
Hon. Robert D. Walker, Fairmont

Michael B. Johnson, Saint Paul
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Reporter

Introduction

The advisory committee met five times[1] during 2007 and 2008 to consider the Court's referral to it of the issues raised by the Petition of Minnesota Joint Media Committee, Minnesota Newspaper Association, Minnesota Broadcasters Association, and Society of Professional Journalists, Minnesota Chapter ("Joint Petition"). In addition to its own research and deliberations, the committee held three meetings that amounted to public hearings, hearing from witnesses, including judges, lawyers, and representatives of organizations with an interest in these issues.

The committee's recommendations are summarized below, but the primary recommendation is that the current rules not be substantially changed, other than to consolidate them into a single rule provision. A minority of the committee would favor a relaxation of the current rule, and allow a trial judge to permit electronic media access to the courtroom without requiring consent of all parties.

Summary of Recommendations

The committee's specific recommendations are briefly summarized as follows:

1. **Majority Report.** A significant majority of the committee recommends retention of the existing rules on the availability of cameras in Minnesota courtrooms, with one non-substantive exception: the committee believes that the existing substantive rule should be contained in one place, rather than divided between the rules of practice, the code of judicial conduct, and a series of orders of this Court from the 1980's that effectively amend the code of judicial conduct. Therefore, the committee recommends that the Minnesota General Rules of Practice be amended to include portions of existing Canon 3 of the code of judicial conduct and that the Minnesota Code of Judicial Conduct be similarly shortened to include only a cross-reference to the general rules provision. The various orders amending or suspending provisions of the code should be made part of the published rule.

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[1] August 1, September 21 & October 24, 2007; January 11 & February 27, 2008.

2. **Minority Report.** A minority of the committee favors a more extensive relaxing of the current rule. As now written, the rules effectively require consent of all parties before a court proceeding can be covered by media using still, video, or audio recording; and since adoption in the early 1980s, very few proceedings have been open to the electronic media. The minority would favor a rule that commits the decision about media access to the discretion of the trial court, with specific limitations. Because of the majority's conclusion that the availability to courtrooms should remain substantially unchanged, a specific minority proposal is not set forth.

The majority comprised 16 of the advisory committee's 19 voting members; the minority included three voting members.

Subsumed within both of the foregoing recommendations is an implicit further recommendation: that the Joint Petition should not be granted. Even if the Court were to conclude that the current rules should be relaxed, the committee believes the proposals in the Joint Petition are overbroad and not appropriate for adoption as submitted.

Committee Process

The history of this Court's consideration of electronic media access to courtrooms is relatively extended. The most important historical artifact is its 1983 order that established a two-year experimental process to permit, but not require, trial judges to allow cameras into courtrooms upon the consent of all interested parties. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order (Minn. Sup. Ct. April 18, 1983). That order was extended by subsequent orders and appears to govern this issue today. The current Joint Petition would dramatically change the rules, creating a presumption of media access without regard to consent of parties or witnesses, and would permit exceptions only in limited circumstances and with findings by the trial court.

The committee spent considerable time and energy in an effort to gain a full understanding of the issues raised in the Joint Petition. It reviewed the Joint Petition that the Court referred to the advisory committee and invited Petitioners and their counsel to an initial meeting of the committee. The committee actively sought information from

interested parties and the public. The committee sent to parties known to have an interest in these issues, and published the notice on the Minnesota Judicial Branch website, a request that specifically sought information as follows:

> The committee welcomes comments on any aspect of these issues, but is particularly interested in obtaining objective or anecdotal evidence that helps answer the following questions:
>
> 1. How do cameras in criminal proceedings impact the fair trial rights of criminal defendants or the state's interests?
>
> 2. How does the use of camera coverage of court proceedings assist, if it does, in the administration of justice or improving public access to information about the courts?
>
> 3. Does camera coverage either advance or hinder the rights of litigants, including crime victims, civil litigants, and others? If so, how should these interests be balanced?
>
> 4. How does camera coverage impact non-party witnesses?
>
> 5. How have advances in technology changed the impact cameras, microphones, and related recording equipment have on court proceedings? What limits are appropriate to minimize the negative effects of this equipment?
>
> 6. In those jurisdictions where video or audio coverage of court proceedings is allowed, what impact has that coverage had on the conduct of the attorneys, judges, witnesses, or others in those matters?
>
> 7. In those jurisdictions where video or audio coverage of court proceedings is allowed:
>
> a. Are there groups other than television stations, radio stations, and newspapers that have requested and/or obtained either audio or video coverage of courtroom proceedings:
>
> b. Who provides the necessary camera and/or audio equipment?
>
> c. Does it lengthen, shorten, improve, or affect trials?
>
> d. How much advance notice does the judge receive?
>
> e. What constitutes good cause for not permitting use of cameras or audio recordings?
>
> 8. What different concerns are there, if any, for proceedings in Minnesota appellate courts (the Minnesota Court of Appeals and Minnesota Supreme Court)?

9. If the committee were to recommend the adoption of broader use of cameras in Minnesota court proceedings, what limitations or other protections should be adopted?

The committee received numerous responses to this request for information.

The committee also conducted research into, and collected, the rules of other states dealing with media access to court proceedings. These rules provided the committee with useful insights into the issues other states have addressed and the issues of media access.

The committee met with representatives of the Petitioners, and heard from witnesses produced by interested parties, as well as those responding to the committee's notices of hearings. The following witnesses addressed the committee in person; in addition the committee received written comments from these and other interested persons, including written comments addressing each of the foregoing nine questions from Chief Justice Thomas J. Moyer, Chief Justice of the Supreme Court of Ohio.

The committee heard live "testimony" or presentations from the following witnesses:

1. Mark Anfinson, Attorney for Petitioners
2. Rick Kupchella, KARE 11 Investigative Reporter, representative of MN Chapter of the Society of Professional Journalists
3. Hon. Patrick Grady, Sixth District Court, Cedar Rapids, IA
4. Hon. Norman Yackel, Circuit Court, Sawyer County, WI
5. Lolita Ulloa (Racial Fairness Committee)
6. Jeffrey Degree (MN Association of Criminal Defense Attorneys)
7. Marna Anderson (WATCH)
8. Hon. Michael Kirk (MN Seventh Judicial District)
9. Hon. Lucy Wieland (MN Fourth Judicial District)
10. James Backstrom (Dakota County Attorney)
11. Janelle Kendall (Stearns County Attorney)
12. Charles Glasrud (Stevens County Attorney)
13. John Stuart (State Public Defender)
14. Donna Dunn (MN Coalition Against Sexual Assault)
15. Charles T. Hvass, Jr. (attorney, civil practice, Minneapolis)

16. Tom Frost (former prosecutor and Executive Director, CornerHouse Interagency Child Abuse Evaluation and Training Center, Minneapolis)
17. Olga Trujillo (Casa de Esperanza)
18. Diana Villella (Centro Legal, Inc.)
19. Carla M. Ferrucci (MN Coalition for Battered Women)
20. Earl Maus (appointee MN Ninth Judicial District; Cass County Attorney at time of appearance)
21. Ann Gustafson (Victim-Witness Assistance Program, St. Croix County, WI)
22. Mark Biller (former county attorney, Polk County, WI)

The committee reviewed the approaches of other states and the federal courts to the issues surrounding cameras in the courtroom and did not find a lot of directly helpful information. Clearly, it is possible to draft rules that allow cameras to be used while still protecting against many of the problems that concern the committee; it is not possible to solve some of the problems by rule-drafting, however.

The committee found the following publications of some value to it in its deliberations:

- Wendy Brewer & Thomas W. Pogorzelski, *Cameras in Court: How Television News Media Use Courtroom Footage*, 91 JUDICATURE 124 (2007).
- AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON CAMERAS IN THE COURTROOM (March 2006).
- KNOWLEDGE AND INFORMATION SERVICES, NATIONAL CENTER FOR STATE COURTS, CAMERAS IN THE COURTS: SUMMARY OF STATE COURT RULES (2001).
- NATIONAL CENTER FOR STATE COURTS, USE OF CAMERAS IN TRIAL COURTS – 2007.

These studies do not, however, shed a lot of light on the issue the Court faces.

Reasons for Committee Recommendations

The committee members approached with open and inquiring minds the question of whether the rules on cameras in Minnesota courtrooms should be relaxed. The

committee received substantial information about the role cameras have played in Minnesota court proceedings following this Court's orders in the early 1980's and about how other states have dealt with these issues. Ultimately, the committee found that there was insufficient evidence to support relaxation of the current rules.

The evidence received by the committee was hardly unequivocal. Among the conclusions a majority of the committee would draw and that would militate in favor of relaxing the current rule are the following:

1. A significant majority of states have implemented more liberal access to camera and voice devices in courtrooms, and the judges and litigants from those states have not reported particular problems caused by cameras and media access. The committee did not hear about any of the problems feared by the opponents in Minnesota, such as victim and witness reticence, disruption of the pretrial process, or grandstanding by lawyers.
2. Other things being equal, greater access to courtrooms by electronic media would advance to some degree the interests of the public in having access to information about judicial proceedings. The importance of this factor is not always clear in many aspects of media coverage, however. The committee did not receive information suggesting that greater access yields greater coverage that really provides a realistic view of the administration of justice; the majority of the coverage is short in duration and skewed towards sensational stories and trials.
3. Technology has advanced in the past decades to permit cameras to be placed in courtrooms in ways that are not very obtrusive from a physical standpoint and court rules can effectively control issues of obtrusiveness and physical interference with proceedings.
4. Any relaxation of the current rules should be limited to prevent use of cameras in certain proceedings, including family law, juvenile, probate, and other categories of cases and in any case where depiction of child witnesses, jurors, or confidential sidebar or attorney-client communications would be shown.

Major concerns that militate in favor of retaining the procedural limitations of the current rule include:

1. The committee did not see any benefit to the core mission of the courts: the search for truth and the administration of justice. Cameras do not help the courts get cases tried fairly, and sometimes interfere with that goal.
2. Balanced against the absence of benefit is a clear cost of allowing camera access. Some judge time, some prosecutor time, and some defense counsel time is inevitably expended dealing with concerns about whether camera coverage should be allowed, hearing disputes over this issue, and monitoring media compliance with any court-imposed guidelines. A majority of the committee concludes that these costs outweigh any benefits of changing the current rule.
3. The committee heard from only one representative of the broader "public" suggesting that the current rules should be changed. That submission argued that family law matters should be opened to camera coverage in order to foster "more fact-based and child-centered decisions." The request for change comes most prominently from the organized news media.
4. The majority of the participants in the Minnesota court system opposed changing the current practice. This opposition transcended the predictable resistance to change, and came particularly strongly from the participants in the criminal justice system. Representatives of prosecutors, public defenders, and victim advocates fairly consistently opposed relaxation of the current rules.
5. The committee was concerned about the chilling effects cameras would have in several types of cases, including criminal, juvenile, family, and order-for-protection proceedings. Even if cameras were limited to prevent their use in particular categories of cases, the committee heard and credited the views of numerous participants in those proceedings that crime victims and witnesses, and other interested parties, would be deterred from reporting crimes or from agreeing to testify. This is a significant problem that cannot be readily mitigated; the mere fact that camera coverage of court proceedings is generally known to exist is, according to witnesses before the committee, likely to cause crime and domestic abuse victims and witnesses to decline to

report crimes and to refuse to come forward to testify. This chilling effect on victims and witnesses occurs even in types of cases where cameras are not likely to be allowed, as the victims or witnesses would have the impression that being in court subjects one to camera scrutiny.

6. The committee was not convinced that the vast majority of cases warrant coverage for the purpose of improving public understanding of the operation of the judiciary. There does not appear to be empirical evidence that supports the conclusion that relaxing the rules on media access would result in better public understanding. The committee did not hear of a single example from a state with greater media access where advancement of the public understanding of the judicial role was appreciably advanced.
7. The reality of media coverage in states that allow access "on request" is that the stories tend to be short "sound-bites" that focus on sensational cases involving famous or notorious litigants. The committee did not conclude that this type of coverage would generally foster greater public confidence in the judicial system. The cable channel "Court TV" has changed its name and no longer provides extensive coverage of trial court proceedings.
8. Some committee members are concerned about the use that may be made of images from courtroom coverage. In the modern age, images are susceptible to distortion and misuse, and this has particularly dire consequences for court proceedings. The committee is concerned that camera access will result in "trial by YouTube," and that neither the public interest nor that of litigants would be served in the process.
9. Although not a major factor, the committee also notes concern about who should have access if a relaxed rule were adopted. Given the proliferation of media channels and outlets, including a significant question of the status of web-logging (blogging), the committee has concerns about the feasibility of managing media access. *See generally* Jessi Hempel, *Are Bloggers Journalists?*, Business Week, *Mar. 7, 2005, available at http://www.businessweek.com/technology/content/mar2005/tc2005037_7877_*

tc024.htm (last visited March 2, 2008) (reporting on decision relating to question of whether journalist privilege applies to work of bloggers).

One of the concerns raised was the impact of expanded use of cameras on minorities. Ultimately, it was not something that the committee spent a great deal of time on, in part because the early consensus seemed to be that no change was recommended.

Another issue that was raised was the possibility of a pilot project. Several chief judges expressed to the committee an interest in participating in a pilot project, while other participants in those same districts uniformly opposed the concept.

The majority view represents a total of sixteen (16) committee members.[2] The minority view, set forth following the majority rule draft below, represents a total of three committee members.

Style of Report

The specific recommendations are reprinted in traditional legislative format, with new wording underscored and deleted words ~~struck-through~~.

Respectfully submitted,

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE

[2] The committee liaison, reporter and staff are non-voting members.

RECOMMENDATIONS: **Retain the existing rules, but move the substantive provisions regulating cameras in courtrooms to a single place, in Rule 4 of the General Rules of Practice.**

The committee's only recommended rule amendment requires related changes to several existing rules provisions: Canon 3A(11) of the Minnesota Code of Judicial Conduct, this Court's series of orders modifying former Canon 3A(7) (later 3A(10) and now 3A(11)) of the Code of Judicial Conduct, and Rule 4 of the Minnesota General Rules of Practice. These changes should be made (or not made) together, as they are directly related and dependent on each other.

1. Amend Canon 3 of the Minnesota Code of Judicial Conduct as follows:

MINNESOTA CODE OF JUDICIAL CONDUCT

Canon 3A(11):

(11) ~~Except in the Supreme Court and the Court of Appeals, a~~ A judge shall prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto ~~during sessions of court or recess between sessions. A judge may, however, authorize:~~ except as permitted by order or court rule adopted by the Minnesota Supreme Court.

~~(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;~~

~~(b) the broadcasting, televising, recording or photographing of investitive, ceremonial or naturalization proceedings;~~

~~(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:~~

~~(i) the means of recording will not distract participants or impair the dignity of the proceedings;~~

~~(ii) the parties have consented, and the consent to be depicted or recorded has been obtained from each witness appearing in the recording and reproduction;~~

~~(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and~~

~~(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.~~

General Rules Advisory Committee Comment—2008

This rule is amended to delete the specific standards to be followed in considering whether electronic recording and transmission should be allowed of Minnesota court proceedings. The material deleted is adopted in part in Rule 4 of the Minnesota General Rules of Practice, applicable in all court proceedings other than appeals or similar proceedings in the Minnesota Court of Appeals and Minnesota Supreme Court. Rule 4 is modified, however, to incorporate salient provisions of a series of orders dealing with a multi-decade experiment to permit some recording or broadcast of court proceedings with the agreement of all parties. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983); *Order Permitting Audio and Video Coverage of Supreme Court Proceedings*, No. C6-78-47193 (Minn. Sup. Ct. April 20, 1983); *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Conduct and Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings*, Order, C7-81-300 (Minn. Sup. Ct. Aug. 21, 1985); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings (Minn. Sup. Ct. May 22, 1989); and *In re Modification of Canon 3A(10) of the Minnesota Code of Judicial Conduct*, Order, No. C7-81-3000 (Minn. Sup. Ct. Jan. 11, 1996)(reinstating April 18, 1983, program and extending until further order of Court).

The reason for amendment of Canon 3A(11) is to state in the Code of Judicial Conduct the simple requirement that judges adhere to the Minnesota Supreme Court's orders and rules relating to recording and broadcast of court proceedings, and that the actual substantive requirements be contained in a single place. Rule 4 of the Minnesota General Rules of Practice, adopted at the same time as the amendment of Canon 3A(11) now sets forth all the surviving portions of this canon and the intervening orders that have modified it. All of these provisions were updated to reflect current recording technologies.

2. Terminate the temporary suspension of the rules as established by a series of orders of this Court.

The Order adopting these recommended rule changes should end the "temporary" suspension of Canon 3A(7) (now Canon 3A(11)) as mandated by the following orders of this court:

1. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct,* Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983);
2. *Order Permitting Audio and Video Coverage of Supreme Court Proceedings,* No. C6-78-47193 (Minn. Sup. Ct. April 20, 1983);
3. *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings,* No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983);
4. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Conduct and Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings,* Order, C7-81-300 (Minn. Sup. Ct. Aug. 21, 1985);
5. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct,* Order re: Audio and Video Coverage of Trial Court Proceedings (Minn. Sup. Ct. May 22, 1989); and
6. *In re Modification of Canon 3A(10) of the Minnesota Code of Judicial Conduct,* Order, No. C7-81-3000 (Minn. Sup. Ct. Jan. 11, 1996)(reinstating April 18, 1983, program and extending until further order of Court).

The subject matter of these orders, to the extent still relevant and necessary for inclusion in a rule of court, is incorporated into the recommended amendment of Rule 4 of the Minnesota General Rules of Practice, set forth in Recommendation 3, below.

3. Amend Rule 4 of the Minnesota General Rules of Practice as follows:

56 MINNESOTA GENERAL RULES OF PRACTICE

57 **Rule 4. Pictures and Voice Recordings**

58 **Rule 4.01 General Rule.** Except as set forth in this rule, ~~N~~no pictures or voice
59 recordings, except the recording made as the official court record, shall be taken in any
60 courtroom, area of a courthouse where courtrooms are located, or other area designated
61 by order of the chief judge made available in the office of the court administrator in the
62 county, during a trial or hearing of any case or special proceeding incident to a trial or

63 hearing, or in connection with any grand jury proceedings. This rule ~~shall~~ may be
64 superseded by specific rules of the Minnesota Supreme Court relating to use of cameras
65 in the courtroom for courtroom security purposes, for use of videotaped recording of
66 proceedings to create the official recording of the case, or for interactive video hearings
67 pursuant to rule or order of the supreme court. This Rule 4 does not supersede the
68 provisions of the Minnesota Rules of Public Access to Records of the Judicial Branch.
69 **Rule 4.02 Exceptions.** A judge may, however, authorize:
70 (a) the use of electronic or photographic means for the presentation of
71 evidence, for the perpetuation of a record or for other purposes of judicial
72 administration;
73 (b) the broadcasting, televising, recording or photographing of investitive,
74 ceremonial or naturalization proceedings;
75 (c) upon the consent of the trial judge and all parties in writing or made on the
76 record prior to the commencement of the trial, the photographic or
77 electronic recording and reproduction of appropriate court proceedings
78 under the following conditions:
79 (i) There shall be no audio or video coverage of jurors at any
80 time during the trial, including *voir dire*.
81 (ii) There shall be no audio or video coverage of any witness
82 who objects thereto in writing or on the record before
83 testifying.
84 (iii) Audio or video coverage of judicial proceedings shall be
85 limited to proceedings conducted within the courtroom, and
86 shall not extend to activities or events substantially related
87 to judicial proceedings ~~which~~ that occur in other areas of
88 the court building.
89 (iv) There shall be no audio or video coverage within the
90 courtroom during recesses or at any other time the trial
91 judge is not present and presiding.
92 (v) During or preceding a jury trial, there shall be no audio or
93 video coverage of hearings ~~which~~ that take place outside

the presence of the jury. Without limiting the generality of the foregoing sentence, such hearings would include those to determine the admissibility of evidence, and those to determine various motions, such as motions to suppress evidence, for judgment of acquittal, *in limine* and to dismiss.

(vi) There shall be no audio or video coverage in cases involving child custody, marriage dissolution, juvenile proceedings, child protection proceedings, paternity proceedings, petitions for orders for protection, motions to suppress evidence, police informants, relocated witnesses, sex crimes, trade secrets, ~~and~~ undercover agents, and proceedings that are not accessible to the public. No ruling of the trial court relating to the implementation or management ~~of this experimental program~~ of audio or video coverage under this rule shall be appealable until the trial has been completed, and then only by a party.

Rule 4.03. Technical Standards for Photography, Electronic and Broadcast Coverage of Judicial Proceedings. The trial court may regulate any aspect of the proceedings to ensure that the means of recording will not distract participants or impair the dignity of the proceedings. In the absence of specific order imposing additional or different conditions, the following provisions apply to all proceedings.

(a) Equipment and personnel.

(1) Not more than one portable television or movie camera ~~[film camera 16 mm sound on film (self blimped) or videotape electronic camera]~~, operated by not more than one person, shall be permitted in any trial court proceeding.

(2) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in any trial court.

(3) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in any trial court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court. If no technically suitable audio system exists in the court, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the trial judge.

(4) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the trial judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude from a proceeding all media personnel who have contested the pooling arrangement.

(b) Sound and light.

(1) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Excepting modifications and additions made pursuant to Paragraph (e) below, no artificial, mobile lighting device of any kind shall be employed with the television camera.

(2) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(3) ~~It shall be the affirmative duty of m~~Media personnel ~~to~~ must demonstrate to the trial judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light ~~criteria enunciated herein~~ requirements of this rule.

A failure to demonstrate that these criteria have been met for specific equipment shall preclude its use in any proceeding. ~~If these Guidelines should include a list of equipment approved for use, such equipment need not be the object of such a demonstration~~.

(c) **Location of equipment and personnel.**

(1) Television camera equipment shall be positioned in such location in the court as shall be designated by the trial judge. The area designated shall provide reasonable access to coverage. When areas ~~which~~ that permit reasonable access to coverage are provided, all television camera and audio equipment ~~shall~~ must be located in an area remote from the court.

(2) A still camera photographer shall position himself or herself in such location in the court as shall be designated by the trial judge. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to ~~call attention to himself or herself through~~ attract attention by distracting movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(3) Broadcast media representatives shall not move about the court facility while proceedings are in session.

(d) **Movement of equipment during proceedings.** News media photographic or audio equipment shall not be placed in, or removed from, the court except ~~prior to~~ before commencement or after adjournment of proceedings each day, or during a recess. Microphones or taping equipment, once positioned as required by (a)(3) above, ~~shall~~ may not be moved from their position during the pendency of the proceeding. Neither television film magazines nor still camera film or lenses ~~shall~~ may be changed within a court except during a recess in the proceedings.

187 (e) **Courtroom light sources.** When necessary to allow news coverage to
188 proceed, modifications and additions may be made in light sources existing in the facility,
189 provided such modifications or additions do not produce distracting light and are installed
190 and maintained without public expense. Such modifications or additions are to be
191 presented to the trial judge for review prior to their implementation.

192 (f) **Conferences of counsel.** To protect the attorney-client privilege and the
193 effective right to counsel, there shall be no video or audio pickup or broadcast of the
194 conferences which occur in a court between attorneys and their client, co-counsel of a
195 client, opposing counsel, or between counsel and the trial judge held at the bench. In
196 addition, there shall be no video pickup or broadcast of work papers of such persons.

197 (g) **Impermissible use of media material.** None of the film, videotape, still
198 photographs or audio reproductions developed during, or by virtue of, coverage of a
199 judicial proceeding shall be admissible as evidence in the proceeding out of which it
200 arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of
201 such proceedings. .

202 **Rule 4.04. Camera Access in Appellate Court Proceedings.**

203 (a) Unless notice is waived by the Chief Justice of the Supreme Court or the
204 Chief Judge of the Court of Appeals, notice of intent to cover appellate court proceedings
205 by either audio or video means shall be given by the media to the Clerk of the Appellate
206 Courts at least 24 hours prior to the time of the intended coverage.

207 (b) Camera~~men~~ operators, technicians, and photographers covering a
208 proceeding ~~shall~~ must:

209 • avoid activity which might distract participants or impair the dignity of the
210 proceedings;
211 • remain seated within the restricted areas designated by the Court;
212 • observe the customs of the Court;
213 • conduct themselves in keeping with courtroom decorum; and
214 • not dress in a manner ~~which~~ that sets them apart unduly from the
215 participants in the proceeding.

216 (c) All broadcast and photographic coverage shall be on a pool basis, the
217 arrangements for which must be made by the pooling parties in advance of the hearing.

Not more than one (1) electronic news gathering ("ENG") camera producing the single video pool-feed shall be permitted in the courtroom. Not more than two (2) still-photographic cameras shall be permitted in the courtroom at any one time. Motor-driven still cameras ~~shall~~ may not be used.

(d) Exact locations for all camera and audio equipment within the courtroom shall be determined by the Court. All equipment ~~shall~~ must be in place and tested 15 minutes in advance of the time the Court is called to order and ~~shall~~ must be unobtrusive. All wiring, until made permanent, ~~shall~~ must be safely and securely taped to the floor along the walls.

(e) Only existing courtroom lighting ~~shall~~ may be used.

Advisory Committee Comment—~~1994~~2008 Amendments

This rule ~~is~~was initially derived from the ~~current~~ local rules of three districts.

~~It appears that this rule is desired by the benches of three districts and it may be useful to have an articulated standard for the guidance of lawyers, litigants, the press, and the public.~~

The Supreme Court adopted rules allowing cameras in the courtrooms in limited circumstances, and it is inappropriate to have a written rule that does not accurately state the standards which lawyers are expected to follow. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, No. C7-81-300 (Minn. Sup. Ct. May 22, 1989). The court has ordered an experimental program for videotaped recording of proceedings for the official record in the Third, Fifth and Seventh Judicial Districts. In re Videotaped Records of Court Proceedings in the Third, Fifth, and Seventh Judicial Districts, No. C4-89-2099 (Minn. Sup. Ct. Nov. 17, 1989) (order). The proposed local rule is intended to allow the local courts to comply with the broader provisions of the Supreme Court Orders, but to prevent unauthorized use of cameras in the courthouse where there is no right to access with cameras.

~~This rule is amended in 1994 to make it unnecessary for local courthouses to obtain Supreme Court approval.~~ The rule was amended in 2008 to add Rule 4.02, comprising provisions that theretofore were part of the Minnesota Rules of Judicial Conduct. This change is not intended to be substantive in nature, but the provisions are moved to the court rules so they are more likely to be known to litigants. Canon 3(A)(11) of the Minnesota Code of Judicial Conduct is amended to state the current obligation of judges to adhere to the rules relating to court access for cameras and other electronic reporting equipment.

The extensive amendment of Rule 4 in 2008 reflects decades of experience under a series of court orders dealing with the use of cameras in Minnesota courts. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983); *Order Permitting Audio and Video Coverage of Supreme Court Proceedings*, No. C6-78-47193 (Minn. Sup. Ct. April 20, 1983); *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Conduct and Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings*, Order, C7-81-300 (Minn. Sup. Ct. Aug. 21, 1985); *In re Modification of Canon 3A(7) of the Minnesota*

268 *Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court
269 Proceedings (Minn. Sup. Ct. May 22, 1989); and *In re Modification of Canon*
270 *3A(10) of the Minnesota Code of Judicial Conduct*, Order, No. C7-81-3000
271 (Minn. Sup. Ct. Jan. 11, 1996)(reinstating April 18, 1983, program and
272 extending until further order of Court). The operative provisions of those
273 orders, to the extent still applicable and appropriate for inclusion in a court rule,
274 are now found in Rule 4.
275 Amended Rule 4.01 defines how this rule dovetails with other court rules
276 that address issues of recording or display of recorded information. The
277 primary thrust of Rule 4 is to define when media access is allowed for the
278 recording or broadcast of court proceedings. Other rules establish limits on
279 access to or use of court-generated recordings, such as court-reporter tapes and
280 security tapes. *See, e.g.*, Minnesota Rules of Public Access to Records of the
281 Judicial Branch.
282 Amended Rules 4.02(a) & (b) are drawn from Canon 3A(11)(a) & (b) of
283 the Minnesota Code of Judicial Conduct prior to its amendment in 2008. Rule
284 4.02(c) and the following sections (i) through (vii) are taken directly from the
285 Standards of Conduct and Technology Governing Still Photography, Electronic
286 and Broadcast Coverage of Judicial Proceedings, Exhibit A to *In re*
287 *Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order
288 re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300
289 (Minn. Sup. Ct. April 18, 1983)
290 Amended Rule 4.04 establishes rules applicable to the appellate courts,
291 and is drawn directly from *Amended Order Permitting Audio and Video*
292 *Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct.
293 Sept. 28, 1983).

MINORITY REPORT AND RECOMMENDATION

The majority argues that the proponents of a more liberal rule regarding cameras in the courtroom (*i.e.*, permitting them in certain cases without the unanimous consent of the parties and the judge) have not met their burden of proving that doing so will improve the administration of justice. If that is the burden which must be met, they may be correct.

The minority, however, challenges the proposition that those proposing a more liberal rule have such a burden. We approach the problem with a frame of mind that a more liberal rule should be adopted unless it can be shown that doing so is likely to degrade the administration of justice by our trial courts. Approaching it from that perspective, we submit that opponents of a more liberal rule have failed to meet their burden of showing that such will degrade or detract from the quality of administration of justice in Minnesota's trial courts.

The First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution guarantee freedom and liberty of the press. No one argues that the press, as representatives of the people in a sense, should not be allowed to observe trial court proceedings, report them, or to publish sketches of the participants. At the same time, no one argues that the courts cannot, at least for good cause, prohibit the use of cameras in the courtrooms. In the past many courts have done so, and some still do. The justifications for doing so have traditionally been to protect the privacy of some litigants, *e.g.*, juveniles, and to prevent disruption of court proceedings.

The rule which we propose, and which is essentially the rule that has been in effect in Minnesota since 1983, (minus the parties' veto power), prohibits camera coverage in every conceivable case where privacy is a concern, such as in juvenile and children in need of protection (CHIPS) cases, family law cases, domestic abuse and sexual abuse cases, and in certain other kinds of proceedings. *See* proposed Rule 4.02(c)(vi). It gives the trial judge discretion to prohibit photography of a witness who requests not to be photographed. It prohibits camera coverage of *voir dire*, and of the jury at any time. It gives the trial judge discretion to prohibit camera coverage entirely for good cause, on a case-by-case basis.

The minority's proposed rule would adopt the majority proposal with two substantively important, although not extensive, changes. The first change is in Rule 4.02(c), beginning on line 75 of the majority report (minority report changes are shown in ***bold italicized*** text compared to the majority report language):

294 (c) upon the consent of the trial judge ~~*and all parties*~~ in writing or made on
295 the record prior to the commencement of the trial, the photographic or
296 electronic recording and reproduction of appropriate court proceedings
297 under the following conditions:

The second change is in Rule 4.02(c)(ii) beginning on line 81 of the majority report (minority report changes are shown in ***bold italicized*** text compared to the majority report language):

298 *(ii)* ***At the discretion of the trial judge, t***~~T~~here shall be
299 no audio or video coverage of any witness who
300 objects thereto in writing or on the record before
301 testifying.

Disruption of proceedings and distraction are no longer an issue. Gone are the large, noisy cameras, still and motion picture, of days gone by. Today's cameras are small, quiet and unobtrusive.

We believe that since the courts do the public's business, the public should have as great an opportunity as possible to see and know of what their courts are doing. Certainly any member of the public can come down to the courthouse any time to personally observe most proceedings. Realistically, it is not possible or feasible for most people to do so. Most have to rely on the media to know what is going on in the courts.

The public is accustomed to getting, as an important part of its news, photographs and video as an aid to understanding the news – what is going on in the world and in their community. Photographs and video clips of courtroom scenes which are of interest to the

public will enhance their understanding of the proceedings and, we think, enhance their appreciation for what their courts are doing.

The committee received objections, oral and written, to a change in the rule from almost every conceivable quarter: prosecutors, public defenders, criminal defense lawyers, civil trial lawyers and victim's rights advocates. Many of those objections dealt with such things as protections for juveniles, sexual abuse victims and domestic abuse victims. Those concerns are met in the proposed rule. As for general objections to the basic concept of cameras, no evidence at all was provided to show that the presence of cameras in the courtroom is likely to be a distraction or that images broadcast by the media were likely to cause any harm to the courts or the litigants. The objectors offered nothing but unsubstantiated fear of change and fear of the unknown.

Were we to have employed a *Frye-Mack* test (*see State v. Mack*, 292 N.W.2d 764 (Minn. 1980) to those who spoke against a liberalization of the rule and warned of dire consequences, none would have been permitted to offer their opinions because none had any experience whatsoever with cameras in courtrooms; and clearly the proposition that cameras in courtrooms are undesirable has not gained general acceptance in the courts of the several states, since a large majority of the states permit cameras in their trial courts, and many have done so for many years.

Significantly, what the committee did *not* hear were comments from persons experienced with cameras in the courtroom who believed it was a bad idea, or who had experienced problems.

We are told that 35 states permit cameras in their courtrooms on a more liberal basis than does Minnesota. Our neighbors Wisconsin, Iowa and North Dakota routinely permit use of cameras in their courtrooms and have done so for many years. In March 2008 our last remaining camera-less neighbor, South Dakota, repealed a law that has prohibited radio and television broadcasting and the taking of photographs in trial-level courtrooms.

No judge from any state where cameras have been permitted in the trial courts addressed the committee, either in person or in writing, to express any reservations about the concept or to tell us of any problems encountered in their states.

No prosecutor or prosecutor's association, no public defender or criminal defense lawyer or association of them, no victim's rights advocate or victim's rights advocates group, no civil litigation attorneys or associations of them from any state which permits cameras in their courtrooms appeared before the committee to lend credence to the concerns expressed by Minnesota prosecutors, criminal defense lawyers, civil litigators or victim's rights advocates. If, indeed, problems are likely to arise in Minnesota as a result of the introduction of cameras in the courtrooms, one would expect that such problems would have arisen in other states and that those opposed to cameras would have arranged for the committee to be made aware of the existence of such problems.

The committee was addressed by the Hon. Norman Yackel of Sawyer County, Wisconsin, and the Hon. Patrick Grady of Cedar Rapids, Iowa, both trial court judges. Each told us that cameras have been allowed in the trial courts of their states for many years and that there have been no problems with them. In fact, they found it somewhat curious that Minnesota is engaged in a debate over the concept which has been so well accepted and considered to be mundane and routine in their court systems.

Judge Yackel presided over the trial of Chai Vang of Saint Paul, who was charged with the murder of six hunters in Wisconsin in 2004. There was considerable public and media interest in the Twin Cities. Twin Cities media covered the trial, held in Hayward, Wisconsin, and no doubt broadcast still photos and video footage of courtroom proceedings, since cameras are allowed in Wisconsin courtrooms. Judge Yackel told the committee that the presence of cameras during that trial created no problems whatsoever. No one brought to the attention of the committee any complaints or concerns with the way the Twin Cities television media reported on that trial.

Persons opposed to cameras in courtrooms typically cite the O.J. Simpson trial and the Florida judge in the Anna Nicole Smith case as examples of why cameras should be prohibited. When one considers the many thousands of trials and other courtroom proceedings which have likely been covered by media with cameras in the courtrooms in 35 states, and the fact that only two of them appear to have shown the court system in a bad light, it seems that the chances of anything of a similar nature happening in a Minnesota courtroom are slim, indeed.

The Rule adopted by the Minnesota Supreme Court on April 18, 1983, and appended to Canon 3 of the Code of Judicial Conduct was well thought out and is essentially the Rule which the Minority proposes with only one significant difference. The veto power of the parties and witnesses to the presence of cameras in the courtroom has been eliminated, and has been entrusted to the discretion of the trial judge. The many restrictions contained in the current rule are continued in the proposed rule.

The 1983 Rule was a good one, but unfortunately never used, insofar as we can tell. There have been no reports of any Minnesota trial proceedings at which cameras have been authorized since the rule was adopted, apparently because there has never been a case in which both sides agreed to it.

We urge the Court to adopt the Minority's proposed amendment to Rule 4, General Rules of Practice.

Respectfully submitted,

Hon. Steven J. Cahill
Hon. Elizabeth Anne Hayden
Linda M. Ojala

EXHIBIT 4

NEBRASKA SUPREME COURT
Office of Public Information

Contact: Janet Bancroft | (402) 471-3730 | jbancroft@nsc.state.ne.us

March 13, 2008

Supreme Court Authorizes Television News Cameras in Trial Courts

Judges Dan Bryan and Paul Korslund of the 1st Judicial District are establishing a pilot project to test the use of still and video news cameras in their courtrooms. The Nebraska Supreme Court has approved local court rules for the two judges to allow expanded news coverage by broadcasters for trials held in courtrooms where they preside.

"We have, of course, always welcomed the press into the trial court with their notepads and pens. In November of 2007, we asked the Supreme Court to approve rules allowing radio newscasters into the courtroom with their audio equipment. The experiment went so well we are more than willing to make room for television cameras, should the news stations want to cover cases in our area," said Judge Dan Bryan.

News stations will have restrictions on which portions of a trial can be covered, similar to the restrictions developed by the Iowa Supreme Court. All proceedings required by law to be private will be strictly prohibited from media coverage. In addition, expanded media coverage of cases with juveniles, child custody, police informants, undercover agents and similar witnesses are prohibited unless consent of all parties to a case is obtained.

Judge Paul Korslund remarked, "I hope this experiment will help inform the public about the workings of the judicial system and remove any mystery about what happens in a courtroom. Our intent is to provide Nebraskans with a greater understanding of their court system without putting undue pressure on litigants. Courtrooms are, after all, open to the public."

The Nebraska Supreme Court has hosted cameras in oral argument sessions for nearly a quarter century as have most state supreme courts. At the trial court level, policy varies from state to state

Chief Justice Mike Heavican said he "couldn't be more pleased" with the willingness of Judges Bryan and Korslund to develop a pilot project for the broadcasters. "The right of citizens to a fair trial is of utmost importance. The right of citizens to see courts at work is also an important goal. Allowing television cameras into our courtrooms provides us with a mechanism to become more visible and show Nebraskans the very important work of this branch of government."

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Janice K. Walker, State Court Administrator
Administrative Office of the Courts | P. O. Box 98910 | Lincoln, NE 68509-8910

Nebraska Judicial News

Special Events Publication of the Nebraska Supreme Court August 2007

Iowa Chief Justice hosts Nebraska Supreme Court Members on Informational Visit and Tour

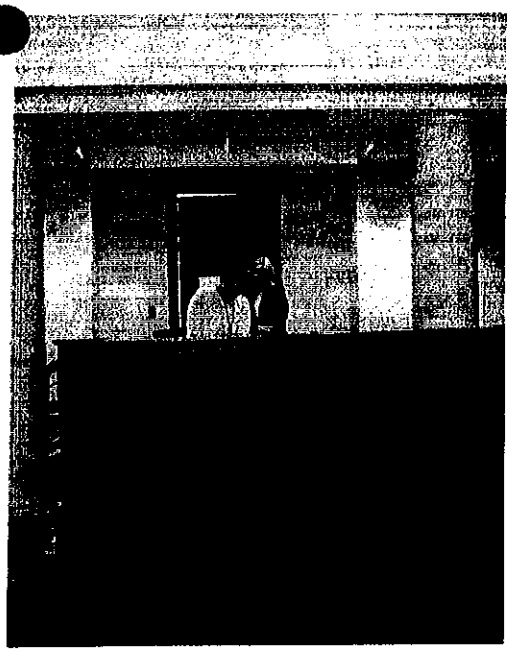
Iowa Chief Justice Marsha Ternus (left) discusses her views of public access to the court system via news cameras with (l to r) Nebraska Chief Justice Mike Heavican, Iowa Justice Michael Streit, and Nebraska State Court Administrator Janice Walker.

The opportunity for a 'behind the scenes' tour of the recently constructed Iowa Judicial Branch Building and a discussion of the 2005 anniversary of twenty-five years with cameras in Iowa's trial courts prompted an August visit to the Iowa Supreme Court from several Nebraska Supreme Court justices.

The Judicial Branch Building is the home of the Iowa Supreme Court, the Iowa Court of Appeals, and state court administration. The building, which was completed in 2003, sits on a bluff overlooking downtown Des Moines, two blocks south of the Capitol.

Prior to the formal tour, Nebraska Justices Mike McCormack, Ken Stephan, John Gerrard and Chief Justice Mike Heavican, along with State Court

Justice John Gerrard tests microphones from the bench in the Iowa Supreme Court. Chief Justice Heavican (background) tours bench area of the Court.



Justice Chief Justice Marsha Ternus (right) works with her law clerk to adjust camera control equipment in the Iowa Supreme Court.

Administrator Janice Walker and Public Information Officer Janet Bancroft, met with Iowa Justices Jerry Larson, Michael Streit and Chief Justice Marsha K. Ternus, along with their lead information staff, Steve Davis and Rebecca Colton. Iowa District Court Judge for Polk County, Eliza J. Ovrom, joined the group for a discussion specific to cameras in Iowa's trial courts.

In opening the discussion, Chief Justice Heavican noted that the Nebraska Broadcasters Association had, once again, asked the Nebraska Supreme Court to review policies on television cameras and other broadcast equipment in Nebraska's trial courts.

An abbreviated history of cameras in Iowa's trial courts was given by Justice Larson and Judge Ovrom. As a member of the Iowa Supreme Court in the 1970's, Justice Larson played a key role in developing the court's rules for expanded media coverage of Iowa's courts. Judge Ovrom was appointed to the bench in 1999 and has been dealing with cameras since the day she took the bench.

When asked about the distraction level of a camera in her courtroom, Judge Ovrom responded, "My experience is that it (the television camera) is not a problem. Really, once you get rolling, I don't even notice they are there." Justice Larson added, "People are used to being videotaped when they are in public. People walk into convenience stores these days and are videotaped and everyone knows it."

Larson, who frequently watches Omaha news stations commented, "(In Omaha) you see criminal defendants walk into court in their orange jumpsuits with their arms over their face trying to hide from the camera. To me, it is much more dignified to show them in a coat and tie at the counsel table."

Putting things into an historical perspective, Justice Larson recounted a conversation he had with a long-time Iowa attorney,

"He said that in the old days the courtroom was packed with spectators. It was a place where people would go to see what was going on. But people are too busy now days." Justice Larson added, "We characterize this (television cameras) as a window into the courtroom."

Judge Ovrom agreed, "It is good for the public to see how a trial is conducted."

According to the August 2005, Iowa Freedom of Information Council Update, "Iowa's first camera in the courtroom trial was a high profile case that attracted a great deal of coverage. . . Michael Moses was the son of a prominent local dentist and was charged with killing two women. The trial was held in January 1980 in Waterloo."

That was a quarter-century ago.

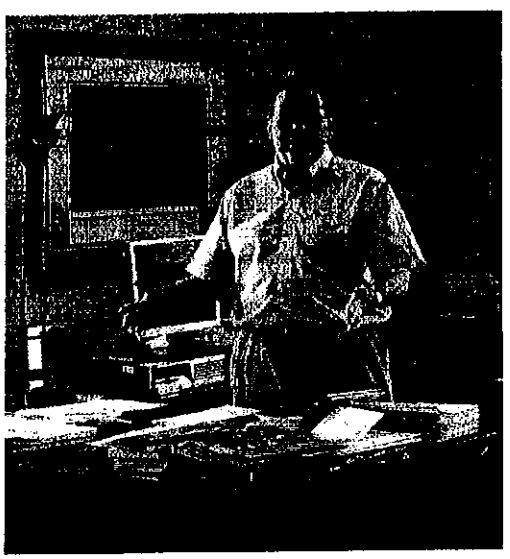
Since that time, Iowa has edited and refined their rules on a couple of occasions, but their Expanded Media Coverage program remains a model for other states.

As with Nebraska, the appellate courts in Iowa allow cameras in their courts for oral arguments; although Iowa has some distinct advantages with the construction of their new building.

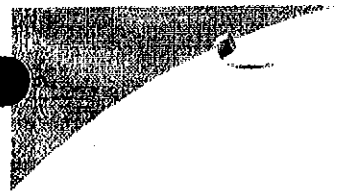
During the tour of the Judicial Branch Building, the Nebraska delegation was escorted through the appellate courtrooms and shown the ten permanently mounted, voice activated cameras located around the perimeter of the Supreme Court courtroom.

According to Chief Justice Ternus, "Once we got the feel for the new building, we began recording all of our oral arguments and started putting them on the internet." Video recordings of oral

Justice Stephan (left) discusses the newly constructed Iowa Judicial Branch building with Chief Justice Marsha Ternus (center left). Chief Justice Mike Heavican (center right) and Iowa Communications Officer-Steve Davis (right).

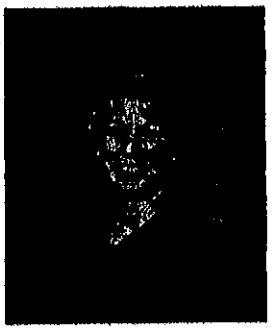


Iowa Justice Michael Streit provides tour of his personal office to Nebraska delegation. Justice Streit, appointed to the Iowa Supreme Court in 2001, joked with the Nebraska visitors that he was fairly certain that he had written a high school paper on the virtues of cameras in the courtroom.



(left to right) State Court Administrator Janice Walker, Justice Ken Stephan, Chief Justice Heavican, Justice Gerrard and Justice Mike McCormack tour Iowa Supreme Court courtroom with Rebecca Colton, Assistant to Iowa's Chief Justice.

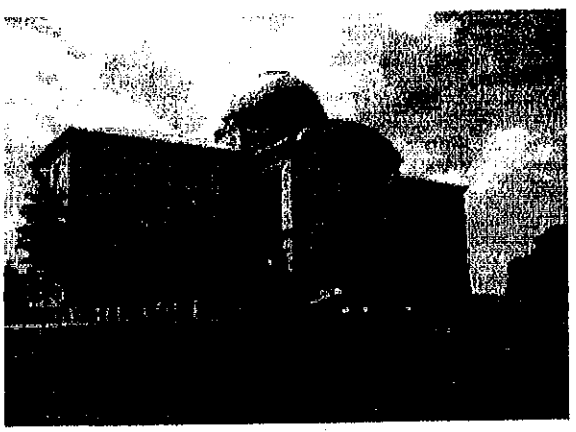
arguments before the Iowa Supreme Court are available through the Iowa Judicial Branch Web site monthly. Recordings are posted and archived on the site the week after the argument. To view a sample of the Iowa arguments, go to: www.judicial.state.ia.us, click on 'Supreme Court' and 'Oral Argument Video.'



Iowa Chief Justice Marsha Ternus

The Iowa Supreme Court members seemed to agree that even though not as many people are visiting the Web site as when the video of arguments was first begun, citizens of Iowa appear to be satisfied knowing that they can see what goes on in the Supreme Court if they choose to watch. The Nebraska Supreme Court is contemplating a study of the use of cameras through a committee appointed by the Court.

For anyone traveling through Des Moines the new Judicial Branch Building is worth the visit.



Iowa Judicial Branch Building

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Nebraska Supreme Court
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RULES FOR EXPANDED MEDIA COVERAGE IN NEBRASKA TRIAL COURTS: FIRST JUDICIAL DISTRICT

Rule 1. Definitions.
Rule 2. General.
Rule 3. Procedural.
Rule 4. Technical.

RULES FOR EXPANDED MEDIA COVERAGE IN NEBRASKA TRIAL COURTS

These rules shall be effective, on an experimental basis, beginning March 12, 2008, and shall apply in the First Judicial District, district court judicial proceedings presided over by District Court Judges Paul W. Korslund and Daniel E. Bryan, where experimental video coverage has been authorized by the Nebraska Supreme Court pursuant to these rules. During the experimental period, the Nebraska Supreme Court Public Information Officer will serve as the media coordinator for the First Judicial District.

Rule 1. Definitions.
"Expanded media coverage" includes broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public.

"Good cause" for purposes of exclusion under this chapter means that coverage will have a substantial effect upon the objector which would be qualitatively different from the effect on members of the public in general and that such effect will be qualitatively different from coverage by other types of media.

"Judge" means the judge presiding in a trial court proceeding.

"Judicial proceedings" or *"proceedings"* includes all public trials, hearings, or other proceedings in a trial court, for which expanded media is requested, except those specifically excluded by this rule.

"Media coordinator" means the Nebraska Supreme Court Public Information Officer.

"Media representative" means Nebraska radio or television stations licensed by the Federal Communications Commission. In the event photographs are requested by a Nebraska newspaper, photographers must be employed by a recognized Nebraska news outlet.

Rule 2. General. Broadcasting, televising, recording, and photographing will be permitted in the courtroom and adjacent areas during sessions of the court, including recesses between sessions, under the following conditions:

(A) Permission first shall have been granted expressly by the judge, who may prescribe such conditions of coverage as provided for in this rule.

(B) Expanded media coverage of a proceeding shall be permitted, unless the judge concludes, for reasons stated on the record, that under the circumstances of the particular proceeding such coverage would materially interfere with the rights of the parties to a fair trial.

(C) Expanded media coverage of a witness also may be refused by the judge upon objection and showing of good cause by the witness. In prosecutions for sexual abuse, or for charges in which sexual abuse is an included offense or an essential element of the charge, there shall be no expanded media coverage of the testimony of a victim/witness unless such witness consents. Further, an objection to coverage by a

victim/witness in any other forcible felony prosecution, and by police informants, undercover agents, and relocated witnesses, shall enjoy a rebuttable presumption of validity. The presumption is rebutted by a showing that expanded media coverage will not have a substantial effect upon the particular individual objecting to such coverage which would be qualitatively different from the effect on members of the public in general and that such effect will not be qualitatively different from coverage by other types of media.

(D) Expanded media coverage is prohibited of any court proceeding which, under Nebraska law, is required to be held in private. In any event, no coverage shall be permitted in any juvenile, dissolution, adoption, child custody, or trade secret cases unless consent on the record is obtained from all parties (including a parent or guardian of a minor child).

(E) Expanded media coverage of jury selection is prohibited. Expanded media coverage of the return of the jury's verdict shall be permitted with permission of the judge. In all other circumstances, however, expanded media coverage of jurors is prohibited except to the extent it is unavoidable in the coverage of other trial participants or courtroom proceedings.

The policy of the rules is to prevent unnecessary or prolonged photographic or video coverage of individual jurors.

(F) There shall be no audio pickup or broadcast of conferences in a court proceeding between attorneys and their clients, between co-counsel, or between counsel and the presiding judge held at the bench or in chambers.

(G) The quantity and types of equipment permitted in the courtroom shall be subject to the discretion of the judge within the guidelines as set out in these rules.

(H) Notwithstanding the provisions of any procedural or technical rules, the presiding judge, upon application of the media coordinator, may permit the use of equipment or techniques at variance therewith, provided the application for variance is included in the advance notice of coverage. All media representatives will direct communication through the media coordinator. Ruling upon such a variance application shall be in the sole discretion of the presiding judge. Such variances may be allowed by the presiding judge without advance application or notice if all counsel and parties consent to it.

(I) The judge may, as to any or all media participants, limit or terminate photographic or electronic media coverage at any time during the proceedings in the event the judge finds that rules have been violated or that substantial rights of individual participants or rights to a fair trial will be prejudiced by such manner of coverage if it is allowed to continue.

(J) The rights of photographic and electronic coverage provided for herein may be exercised only by persons or organizations which are part of the Nebraska news media.

(K) A judge may authorize expanded media coverage of ceremonial proceedings at variance with the procedural and technical rules as the judge sees fit.

Rule 3. Procedural.

(A) *Media Coordinator.* The Nebraska Supreme Court Public Information Officer shall serve as the media coordinator. The judge and all interested members of the media shall work, whenever possible, with and through the media coordinator regarding all arrangements for expanded media coverage.

(B) *Advance notice of coverage.*

1. All requests by representatives of the news media to use photographic equipment or television cameras in the courtroom shall be made to the media coordinator. The media coordinator, in turn, shall inform counsel for all parties and the presiding judge at least 14 days in advance of the time the proceeding is scheduled to begin, but these times may be extended or reduced by court order. When the proceeding is not scheduled at least 14 days in advance, however, the media coordinator shall give notice of the request as soon as practicable after the proceeding is scheduled.

2. Notice shall be in writing, filed in the office of the Clerk of the District Court. A copy of the notice shall be sent to the last known address of all counsel of record, parties appearing without counsel, and the judge expected to preside at the proceeding for which expanded media coverage is being requested.

(C) *Objections.* A party to a proceeding objecting to expanded media coverage shall file a written objection, stating the grounds therefore, at least 3 days before commencement of the proceeding. All witnesses shall be advised by counsel proposing to introduce their testimony of their right to object to expanded media coverage, and all objections by witnesses shall be filed prior to commencement of the proceeding. All objections shall be heard and determined by the judge prior to the commencement of the proceedings. The judge may rule on the basis of the written objection alone. In addition, the objecting party or witness, and all other parties, may be afforded an opportunity to present additional evidence by affidavit or by such other means as the judge directs. The judge in absolute discretion may permit presentation of such evidence by the media coordinator in the same manner.

Time for filing of objections may be extended or reduced in the discretion of the judge, who also, in appropriate circumstances, may extend the right of objection to persons not specifically provided for in this rule.

Rule 4. Technical.

(A) *Equipment specifications.* Equipment to be used by the media in courtrooms during judicial proceedings must be unobtrusive and must not produce distracting sound. In addition, such equipment must satisfy the following criteria, where applicable:

1. Still cameras. Still cameras and lenses must be unobtrusive, without distracting light or sound.

2. Television cameras and related equipment. Television cameras are to be electronic and, together with any related equipment to be located in the courtroom, must be unobtrusive in both size and appearance, without distracting sound or light. Television cameras are to be designed or modified so that participants in the judicial proceedings being covered are unable to determine when recording is occurring.

3. Audio equipment. Microphones, wiring, and audio recording equipment shall be unobtrusive and shall be of adequate technical quality to prevent interference with the judicial proceeding being covered. Any changes in existing audio systems must be approved by the presiding judge. No modifications of existing systems shall be made at public expense. Microphones for use of counsel and judges shall be equipped with off/on switches.

4. Advance approval. It shall be the duty of media personnel to demonstrate to the presiding judge reasonably in advance of the proceeding that the equipment sought to be utilized meets the criteria set forth in this rule. Failure to obtain advance judicial approval for equipment may preclude its use in the proceeding. All media equipment and personnel shall be in place at least 15 minutes prior to the scheduled time of commencement of the proceeding.

(B) *Lighting.* Other than light sources already existing in the courtroom, no flashbulbs or other artificial light device of any kind shall be employed in the courtroom. With the concurrence of the presiding judge,

however, modifications may be made in light sources existing in the courtroom (e.g., higher wattage light bulbs), provided such modifications are installed and maintained without public expense.

(C) *Equipment and pooling.* The following limitations on the amount of equipment and number of photographic and broadcast media personnel in the courtroom shall apply:

1. Still photography. Not more than one still photographer, using not more than two camera bodies and two lenses, shall be permitted in the courtroom during a judicial proceeding at any one time.

2. Television. Not more than one television camera, operated by not more than one camera person, shall be permitted in the courtroom during a judicial proceeding. Whenever possible, recording and broadcasting equipment which is not a component part of a television camera shall be located outside of the courtroom.

3. Audio. Not more than one audio system shall be set up in the courtroom for broadcast coverage of a judicial proceeding. Audio pickup for broadcast coverage shall be accomplished from any existing audio system present in the courtroom, if such pickup would be technically suitable for broadcast. Whenever possible, electronic audio recording equipment and any operating personnel shall be located outside of the courtroom. Exceptions may be made by the presiding judge to accommodate the pre-existing audio broadcast role for this Judicial District.

4. Pooling. Where the above limitations on equipment and personnel make it necessary, the media shall be required to pool equipment and personnel. Pooling arrangements shall be the sole responsibility of the media coordinator and representative, and the presiding judge shall not be called upon to mediate any dispute as to the appropriate media representatives authorized to cover a particular judicial proceeding.

(D) *Location of equipment and personnel.* Equipment and operating personnel shall be located in, and coverage of the proceedings shall take place from, an area or areas within the courtroom designated by the presiding judge. The area or areas designated shall provide reasonable access to the proceeding to be covered.

(E) *Movement during proceedings.* Television cameras and audio equipment may be installed in or removed from the courtroom only when the court is not in session. In addition, such equipment shall at all times be operated from a fixed position. Still photographers and broadcast media personnel shall not move about the courtroom while proceedings are in session, nor shall they engage in any movement which attracts undue attention. Still photographers shall not assume body positions inappropriate for spectators.

(F) *Decorum.* All still photographers and broadcast media personnel shall be properly attired and shall maintain proper courtroom decorum at all times while covering a judicial proceeding.

3rd District Rules

County to compensate the guardian ad litem, notice of the hearing on the motion shall be given to the Lancaster County Attorney as it is given to any other party.

Approved July 14, 2004.

RULE 3-15

COURTROOM MEDIA COVERAGE PILOT PROJECT

The following rule covers publication of courtroom proceedings through a pilot project of the Third Judicial District in courtrooms presided over solely by the Honorable Karen Flowers and the Honorable Steven Burns.

Courtroom proceedings in these two courtrooms may be broadcast, both by audio and video, and may be televised, recorded, or photographed (hereafter collectively referred to as "broadcast") under the following conditions:

1. Cameras and sound equipment of a quality and type approved by the Judge presiding in the case will be fixed in place in the courtroom with field of view of the camera and field of range of microphones being approved by the Judge presiding over the proceedings. Other than the cameras identified herein, no other camera will be permitted in the courtroom, including a still camera. The images produced by the camera in the courtroom should be of such a nature that still images may be retrieved.

2. The audio broadcast shall include only the statements made in open court and shall not include communications between counsel, between counsel and their clients, or bench conferences between counsel and the court.

3. Images of, or statements from, jurors will not be broadcast.

4. Jury selection will not be broadcast.

5. The following cases will not be broadcast: matters involving grand juries, juveniles (persons under 19 years old), child custody, parenting time, sexual abuse, sexual assault, and protection orders.

6. The testimony of certain witnesses may not be broadcast. Those witnesses are as follows: persons under age 19, a person who claims to be a victim of sexual abuse or sexual assault who will be called upon to testify about the abuse or assault, or a confidential informant whose testimony is about the matter upon which the person informed. Any witness may make a request to prevent that person's testimony from being broadcast by making application to the Judge presiding over the proceeding indicating the reason the witness does not want his or her testimony broadcast.

7. Upon application of any party or counsel, the court may determine to not broadcast courtroom proceedings or terminate the broadcast of courtroom proceedings.

8. Upon application at least 14 days in advance of a scheduled hearing that may be broadcast, the court may permit other types of broadcast or recording equipment in the courtroom.

The images and sound produced from the courtroom will be available to any broadcast media licensed by the Federal Communications Commission and any print media published in the State of Nebraska on a pool basis.

The overriding principle in administering this pilot project shall be the guarantee of a fair trial to the litigants. Criteria may change from time to time based on factors which the court has not yet considered, experience with this project, and the circumstances of individual cases.

Approved March 12, 2008.

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Cameras in the Courtroom

Beatrice, Neb.
Posted: 6:32 PM May 23, 2008
Last Updated: 6:36 PM May 23, 2008
Reporter: Alicia Myers
Email Address: alicia.myers@kolnkgin.com

A | A | A

As part of a pilot project initiated by the Nebraska Supreme Court, media cameras were allowed inside the courtroom for the murder trial of 43-year-old Richard Griswold of Beatrice.

Many other states have allowed media cameras inside courtrooms for decades, to document judicial proceedings.

Until this last week, cameras were only allowed in Nebraska courtrooms for State Appeals and Supreme Court.

Those involved in the Griswold trial say it was a positive experience.

It's an image Nebraskans haven't seen before.

A convicted murderer leaves the courtroom, and it's all caught on camera.

For the first time in Nebraska history, media cameras were allowed inside the courtroom for the Richard Griswold murder trial as part of a pilot program started by the Nebraska Supreme Court, to help the public understand how the courts work.

"It's very common now that people view the world and their community through the technology that we have. For the courts not to be open to this, I think deprives people of access to the courts," said Judge Paul Korslund, 1st Judicial District.

All week, media outlets around Nebraska have shown viewers images, and provided sound from the proceedings; a first that has some impressed with the new program.

"One comment I had from a person in the public, without asking, is "I'm really impressed with all the work that's being done." So, I think the message is getting across," said Judge Korslund.

That's a message attorneys and jurors say didn't distract them in the process.

"Honestly, I didn't have any problems. You didn't seem to be attracting any additional attention, and the jury didn't seem to be bothered by it," said Defense Attorney James Mowbray.

"For us, in this case, it was a non-issue. We didn't see them. They didn't see us. It made no difference to how we felt and reacted," said Larry Thomas, Juror.

"I think it's a ground-breaker in Nebraska, and I'm pleased that I've been part of it," said Judge Korslund.

Judge Korslund says he plans to forge ahead with the new process.

He says the only changes he would make are to the actual facilities of the court.

Judge Korslund says the Gage County courtroom needs a new sound system.

Besides that, Judge Korslund says it was a very positive experience.

Find this article at:
http://www.kolnkgin.com/home/headlines/19224339.html

Check the box to include the list of links referenced in the article.

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EXHIBIT 5

Cameras in the Courtroom

a panel discussion hosted by

The Mississippi Associated Press Broadcasters Association

June 28, 2003
Biloxi, Mississippi

Frank Fisher: Good morning, everybody. My name is Frank Fisher. I'm the Associated Press bureau chief for Mississippi, and I appreciate you making the time to come to this workshop, uh, given, uh, by the Mississippi AP Broadcasters Association on cameras in the courtroom.

In three days, Mississippi journalists and judges will enter a historic phase. Thanks to a committee headed by Supreme Court Justice James Graves and including Dick Rizzo and Dennis Smith, cameras will be allowed, will be allowed in state trial and appellate courtrooms until December 2004. What does this mean? How will it work? Here to help us answer those and other questions is a distinguished panel of jurists, journalists and a media attorney. The panel will be moderated by Randy Bell, news director of WMSI. And I'll now turn it over to Randy for the introductions and the moderation. Thank you.

Randy Bell: Thanks, Frank. Uh, we have as he said a, uh, distinguished panel, and let me give you a little information about the various people we have today.

Uh, Justice George Carlson Jr.: Justice Carlson has been a member of the Mississippi Supreme Court since November of 2001. Prior to that time he served as circuit judge of Panola County for 19 years. Beginning in 199-, beginning 1972, Justice Carlson was in private practice in Panola County. He's also served as a member of the Governor's Criminal Justice Task Force in 1991, and as a member of the Commission on the Courts in the 21st Century in 1992 and '93.

Justice James Graves: Justice Graves also has been a member of the Mississippi Supreme Court since November 2001. He previously served as a circuit judge for 10 years. Justice Graves worked as a staff attorney at Central Mississippi Legal Services, a special assistant attorney general and as head of the Human Services Division of the Attorney General's Office. He also served as chief legal counsel to the Mississippi Department of Human Services and director of the department's Child Support Enforcement Division.

Also with us is Judge Margaret Alfonso. Judge Margaret Alfonso is in her second term as Chancery Court judge and serves Hancock, Harrison and Stone counties. She served on the Mississippi Supreme Court's Media and the Courts Study Committee and is a founding member of PACT, Professionals Advocating for Children Together.

Also Leonard Van Slyke. Leonard is an attorney with Watkins, Ludlam, Winter and Stennis. He's a former reporter and has represented various media companies on First Amendment issues for more than 20 years. His clients include WLBT, WAPT, WJTV and WDAM. He also serves as the hotline attorney for the Mississippi Center for Freedom of Information.

Also on the panel, Dennis Smith. Dennis Smith has spent more than 35 years in TV news. Since 1989 he served as news director for Jackson WLBT. From '84 until '89 Dennis was an investigative reporter, managing editor and assignment editor for WLBT. He also served as a member of the Mississippi Supreme Court's Media and the Courts Study Committee.

Dave Vincent: Dave is currently news director and station manager for Biloxi's WLOX TV. Since 1977 he's also worked uh, at WLOX as a reporter, anchor and assignment editor. From 1973 to 1977, Dave was news director of Biloxi radio stations WBMI and WQID. For his masters degree program Dave wrote a research paper about state by state rules regarding electronic journalists' coverage of courtrooms.

Beverly Luckett: Beverly is news director and co-anchor for Greenville's WXVT Television. She's been a broadcast journalist for 14 years. And before her work at WXVT Beverly spent eight years in Jackson as a general assignment reporter and as the senior legislative reporter for WJTV. She began her broadcasting career in Tupelo for WTVA-TV.

And those are our panelists and, uh, what I want to ask uh, the, uh, panelists to do is to spend uh, each five minutes, uh, or a maximum of five minutes. If they want to be short-winded that's OK. Just try not to be long-winded. Uh, the question that I want to ask to each is this: regarding Mississippians' First Amendment right to a free press and their Sixth Amendment right to speedy and public courtroom justice, what is one major advantage and one major disadvantage that may result from the Mississippi Supreme Court's recently drafted rules for electronic and photographic coverage of judicial proceedings? And I know Justice Graves has to leave us early today to uh, catch a flight for another engagement so I am going to ask him to uh, to go first and respond uh, to the question. Justice Graves.

Justice Graves: I think one major advantage uh, that may result is just that citizens will have an opportunity, uh, via electronic uh, and broadcast media to view what actually takes place inside trial courtrooms in Mississippi. I'm not naive enough to think that some 15 or 30 seconds of broadcast on the TV station is going to provide a wealth of knowledge about the inner workings of this court system. But to the extent that, that coverage uh, provokes debate, uh, provokes some interest, provokes someone to learn, to read about it, to study more about the judicial system, to the extent that that can be accomplished, I think that is a very, uh, positive thing, uh, and, and there are a number of other things, advantages, but you asked me to just give you the one. I think there are a number of others.

Uh, one of the disadvantages obviously is that you talk about the First Amendment right to freedom of the press versus the Sixth Amendment, and we are talking about the United States Constitution, the Sixth Amendment right to a fair trial, and I think in the, in this instance as many others, uh, courts and judges are often called on to weigh what may be competing Constitutional rights, uh, and it's difficult to make a determination about whether or not one is any more important than the other. Uh, there are Constitutional Amendments uh, which arguably are of equal importance. And so the judge has to weigh, uh, those two rights and to the extent that some media coverage or pretrial coverage or publicity uh, may impede uh, a litigant's right to a fair trial, then I think the judge on a case by case basis has to examine those facts and circumstances to weigh those and to make a determination about whether or not allowing a certain trial to be covered via electronic media and broadcast via electronic media, uh, works in such a way that it just unfairly impedes a litigant's right, Sixth Amendment right to a fair trial and a judge has to weigh those competing interests and make a determination and that's probably the biggest disadvantage is that there are going to be circumstances which are going to require that a judge evaluate those circum-, those uh, those competing interests and make some determination.

Bell: All right, thank you. Let's uh, get a contrasting view perhaps, or different perspective uh, from the media. Dave Vincent, uh, let me call on you now to uh, give us an advantage and disadvantage of the new rule.

Vincent: Well, I think there are a lot of advantages. Uh, one, the biggest advantage I see for broadcasters, uh, especially television, is that, um, we will have, like an artist, will have more colors in our pallette. Right now all we can do is uh, write a story. We might be able to hire an artist to go in and draw. But now we will be able to use uh, video. We will be able to use sound, which we have never been able to do in the past. And so we will be able to really convey what is going on in the courtroom. We will have all or many more colors to use in painting the picture of the story that is being broadcast that we have not been able to do in the past.

The uh, disadvantage that I see is that if was as broadcasters and media do not go a good job, then the disadvantage of it, we will lose a great opportunity to carry this on further than 2005 when it runs out, so I think it's up to us as broadcasters to make sure that we do a good job so this does not become a disadvantage.

Bell: All right. Thanks, Dave. Uh, let's try the perspective of the uh, trial judge, shall we? Judge Alfonso.

Judge Alfonso: First of all, let me say that uh, my comments are directed to chancery court only. I'm going to let the uh, others speak to those with vast circuit court experience. Now you understand that chancery court primarily has to do with domestic relations. Certainly we hear other types of cases, so I qualify my remarks once again to the field of uh, domestic relations. I am very concerned about media access in chancery court domestic relations cases. I'm sure that uh, as Judge Graves certainly knows, and the others that were on the committee, I was adamantly opposed to public access to domestic relations child custody cases. The rule as it uh, came out gives the trial judge great discretion in limiting access in the field of domestic relations. However, what I wanted was a blanket prohibition, that there would be no access in domestic relations, child custody and divorce cases. And let me tell you just as briefly as I can why. Um, why would a trial judge open up a courtroom to a child custody case? Why would we permit TV coverage of a child custody case? That judge would have to decide two things: First of all, the child in front of them didn't matter. They weren't important enough, or the family wasn't important enough, or conversely, that there is such perceived public clamor of the details of that family's life. I don't think either are good reasons.

There are mechanical problems with the rule as it pertains to chancery court. These rules have uh, motions to be filed in advance, or motions to close in advance. Much of what we do in chancery is of an, an emergency nature. You simply can't comply either way with the rule. Thank you.

Bell: All right. We take it there are no advantages to the law as you see it.
(audience laughter)

Judge Alfonso: No, I'm, I am discussing only as I said, chancery domestic relations. I have no strong feelings on annexation, uh, the type of case that you had with the Imperial Palace. You know, I am not against access in those type of cases. I qualified it by saying domestic relations. All the other types of chancery, uh, I don't see the mechanical problems with the rule like I do in the field of domestic relations and particularly child custody.

Bell: Let's uh, turn now to a, uh, First Amendment battler, uh, in the courts, uh, (audience laughter) Leonard Van Slyke, uh, to talk about the issue at hand.

Van Slyke: Well I, I have uh, been interested in cameras for many years, uh, particularly because I feel like the public needs, uh, all the information that it can get about the court system. I think the court system has suffered, uh, along with the legal profession, an image problem for many years. I think a lot of that stems from just a lack of understanding by the general public. Now once again as Judge, Justice

Graves said, I'm not naive enough to believe that this would solve all of the problems. However, I do believe that it will give uh, an opportunity for people to see their courts in action and to see how seriously the judge and the lawyers take their jobs and how important it is to the parties. Perhaps the next time they get that jury summons, they won't be as quick to try to find a reason to get off of the case.

Uh, as far as disadvantage, the nature of TV news is that you, you have a context problem uh, to the extent that you have 30 seconds, 60 seconds, 90 seconds to do a, an important story. Uh, it's going to be a problem to explain and to edit uh, for, for the news a trial. But that's no different than the problem that you face every day with virtually every story, so it's a problem. We have to recognize it's a problem and to uh, work through it.

The other thing that is, these rules - a concern I have about the rules is uh, the fact that it really requires cooperation among the members of the media who are of course competitors, uh, so it is going to, it's going to stress all of our best efforts to try to make these rules work and to make pool coverage of trials work in such a way that uh, everybody uh, is, is on board. And it's going to - although the judges do not want to be involved and I understand that, I do hope that they will make a real effort to make sure their staffs are educated about what the rules are about, and uh, that, that there is a right to be there, and that they will cooperate and do the best they can. Thank you.

Bell: All right. Thanks, Leonard. Beverly Luckett, how about another uh, perspective from the media side?

Luckett: I think it allows people who sometimes might otherwise not be able to attend the hearings to see justice carried out first hand. Uh, as others have said, that it will also help educate people on the uh, judicial process. And having covered a lot of trials, it will help journalists to do a better job, uh, with accuracy, uh, where we will have clips of people actually saying the things that we can use instead of us going back writing what was said, and it will help with interpretations of stories. Although I know in the editing process people can complain perhaps how a story was edited. But it will, a lot of times we talk about apathy with situations. I think you will have more people getting involved in the process and learning. Uh, when they are called for jury duty they will have some knowledge of how trials are carried out uh, and maybe peak some interest in the proceedings and also just uh, finding out how juries arrive at a verdict by uh, by just getting involved in seeing the cases, uh, so I think it is a good situation and it's a historical moment.

And for the disadvantage, I pray that the journalists don't blow it (audience laughter) because we are very competitive, but we have to learn to work together in this situation so it works for everyone and make sure that ev-, we don't hamper the free and fair trial, uh we don't become a distraction. Uh, so it will require us to work closely together and decide - as Mr. Van Slyke was talking about, we have to work together and figure out the pooling the formatting. We are on different formats in the media uh, with tape situations. So we'll just have to work closely together and try to uh, also have a good relationship with the judges. That always helps the cases and journalists and the people involved in the case.

Bell: OK thanks. Justice, uh, Carlson, let's hear from you now on the pros and cons of this new rule.

Justice Carlson: Thank you. I should mention that since you expected Chief Justice Pittman here instead of me, that uh, he is where he needs to be. His wife Virginia unexpectedly had open heart surgery Thursday and she's doing fine, and but he does send his regrets for not being here. I should say also that because of his leadership uh, in this uh, rule that we have, that we are sitting here today talking about it.

Immediately upon my arrival at the court along with Justice Graves - we arrived the same day, Nov. 1, 2001 - Justice Graves was put on the Rules Committee, I mean on the Committee on, to chair the Cameras in the Courtroom Committee and I was put on the Rules Committee. And ultimately the Rules Committee of the court, Justice Waller as chair and Justice Cobb and myself, uh, took Justice Graves' report and that of his committee - outstanding work they did - uh, and eventually presented it to the en banc.

I think as far as an advantage, the, I use an example. I think the courts and the judiciary were well served when we saw, we all saw what was going on in Florida in 2000 for the Presidential uh, election. You know, otherwise it would have been a great cloud of suspicion as to what was going on there. And I think the judiciary was well served by the two judges at different stages who presided over the proceedings. And I know I felt better. Whether you are Republican or Democrat, whether you were happy or not happy with the outcome, I think I was happy to be able to be a witness to what was going on and I think all of you were also. I think the rule will work.

I've got a, a shaded past so to speak. Leonard Van Slyke was very kind not to mention that I was the trial judge in *Gannett vs. Hand* that you so often site. Uh, and I was reversed, and I might say correctly so, by the Supreme Court by the way I handled that. But after the *Hand* case, unless somebody can correct me, there was never another closed proceeding, whether it be a suppression hearing or a jury selection in a death penalty case.

I was a trial judge for 19 years so I understand what Judge Alfonso and the trial judges are going through. They can certainly, as she points out, a different perspective from chancery. I think it would work.

The uh, the disadvantage: it certainly puts more on the trial judge to deal with the situation. I, I find having been a member of the Trial Judges Conference for 19 years, that uh, like most judges would say, 'I'm not against progress. I'm just against change.' (laughter from audience) And it's something that we've got, that the trial judges have to get used to in dealing with. And I think they will. We've got outstanding trial judges who I hope will exercise their discretion appropriately.

First versus Sixth Amendment rights: in the, in the rule, I will point out to you that uh, in Rule 3 (a) it points out the rights of the parties to a fair adjudication are recognized as paramount, so I think that uh, has to be the overriding factor. But certainly the, the trial judge in exercising discretion and hopefully not abusing discretion will balance out the First vs. uh, Sixth Amendment rights issue. And I think it will work, without, without question.

Bell: All right. Last but not least, let's hear from Dennis Smith.

Smith: Well, one of the advantages is it's, it's going to bring about a greater spirit of cooperation in many ways among the, uh, competing, uh, television stations. I know just this past week, or couple of weeks ago, Bruce Barkley at WAPT and I met with Justice Green in Hinds County and went over some of the particulars there and the camera angles and things like that. She was very, she was also on the panel and she was very, very supportive of this whole process and so, uh, uh, we will see an opportunity not only for that but also clearly an opportunity to make sure that our stories are more correct, correctly done. Uh, the chances of making errors like perhaps that we have made in the past of quoting or misquoting people I think is going to be hopefully alleviated.

I do see a situation where it is probably not going to have a great deal of effect on what we are intent on doing. We don't cover that many trials per se. There is one up in Madison County underway right now

where clearly uh, both WAPT and us have made, have made the request to get cameras in there at least in the closing uh, part of the trial if it goes through next week through the first. We've filed those and, and I don't know if the trial is going to continue at that time or not. Hopefully the judge will allow us to do it and we'll work that out.

I think we've got, uh, we've got an opportunity to get some dialogue and just make it work for everybody. But in the great scheme of things, and this is one of the things I tried to get the Rules Committee to uh, make a modification on: it does not apply of course to the municipal courts as well as to the uh, justice courts. There is not going to be cameras in those, in those areas. Possibly if the rules are, if this new rule is successful beyond 2004, uh, Justice Pittman and the Rules Committee said they might consider that.

It's incumbent upon us to recognize we have got to convince the judges, and indeed I was fortunate enough to speak to them a couple of months ago at the Judicial Conference, that we are prepared to better educate our staffs and ourselves to know what the judicial system is, how it works, what these rules mean. We don't have folks coming into these courts uh, unprepared and, and uh, attired in certain fashion that might have a question about the decorum of the court. Each judicial, uh, district and the judge is probably going to look at things a little bit differently, uh, so it is important that we contact these judges and let them know this is what we would like to do, and if you have any questions, to please let me know so I could let my staff better adapt to this. So it's again, it's a matter of dialogue and I think it's going to work in the long run. But it's very important that we educate our staffs.

Don't be afraid to call the judges. Just as an example, last week I completely rewrote one of my reporters' copy. It just was not in what we call "people speak." And I called the judge up and I said, "Let me read this to you." And indeed he said that is exactly what we are trying to say, or I was trying to say in the order. So don't be afraid to get your staffs to call the judge and make sure they have an opportunity before we go out and make those errors that we have made in the past and they see them. They don't always call but they see them. It's very important not to be overly intimidated by the judicial system, but in fact to learn as much as we can about it.

Justice Carlson: Randy, can I say one thing about what Dennis said?

Bell: Certainly.

Justice Carlson: And Dennis brings up a good point on the municipal and justice courts and why they were excluded. And I agree with what he is saying. That needs to be revisited and will prior uh, to the December 31, 2004. The approach of the Rules Committee on that point - and we discussed that point about municipal and justice courts - we wanted to take it from the standpoint that we wanted this rule to work and we felt like that with our courts of record, the chancery and circuit courts and county courts at the trial level, that those judges would make it work. That courts that were not of record, being city court, municipal court and justice court - there might not be the same spirit of cooperation, and I don't mean this in a derogatory manner toward municipal and justice court judges, but it might not be the spirit of cooperation and it might be, it might set it up possibly for failure versus success. And we wanted to make sure uh, that it did work and, again, I emphasize I am not slighting those judges. Uh, but they are not courts of record and yet I know the media would be interested in certainly many cases coming into those courts because, uh, and that's, I'm sure one reason why Dennis understandably so was interested in seeing that, and all of you are, in, in seeing those two courts put under the rule, and that is because in uh, these high profile cases if you will, that's the first court appearance they have. If you have somebody on a capital murder case they are not going into a circuit court. They are going before a justice court judge or a municipal court judge for a first appearance for a bond setting and the appointment of a lawyer and so forth, and certainly that's the first opportunity for the public to see

what's going on in the judicial system with that case and we understand, I promise you, at the Supreme Court why that is important to you, but we want, agin we hope we were setting it up for success as opposed to a possible failure.

Bell: All right. Thanks for those, uh, excellent comments. And now we want to turn to you in the audience for what's on your mind, the questions you may have for panelists. Bruce?

Bruce Barkley: I wanted, I'd like to (inaudible) Judge Alfonso's concerns, uh, and wondered, Leonard or anybody on the panel, uh, obviously other states have adopted rules for cameras in the courtroom. Is there a solution to her concerns about the child custody cases and domestic abuse cases? Have other states or other examples, are they out there about how to handle that properly?

Van Slyke: Well I think, Bruce, as a, as a practical matter, uh, the kinds of cases that Judge Alfonso is concerned about are probably not going to be cases that are going to be covered. Uh, as, as I would see, and obviously you make the news decisions, but as I would see it, the kinds of cases in chancery that would more likely be covered would be the annexation case. Uh, perhaps there may be a high profile tax case, although I, I doubt it. Uh, there could be, could be a sitting governor or congressman or senator in a divorce that might be, might, might want (voice drowned out by audience laughter). If that is the case, uh, you know, I, I could understand that there would be a need to cover that. That person has subjected himself or herself to the uh, limelight by entering the political process.

But as a practical matter I just cannot envision a typical child custody case being of concern uh, to the, to the media, and, and very frankly uh, that would be the very last area that I would push uh, if I were sitting where you are because that uh, some sort of abuse case, those are the cases that uh, that I think the public would react against uh, coverage.

Bell: Dick.

Smith: Let me just one, one reference to that, Bruce, if, if you will. The, uh, obviously the domestic matters like we mentioned to you are in fact prohibited unless you can convince the judge. The judge has the right to say "Well, wait a minute. I'll, I'll consider this." So if there is a unique situation like Leonard with reference to, perhaps the Mabus situation, you convince the judge this is extremely important and definitely in the public interest, then the judge apparently has that right to say, "Well I think I will let the, let cameras in there."

Unidentified audience member: But to quote Judge Alfonso, wide perceived public clamor is not a good reason (inaudible).

Judge Alfonso: The, let me explain just a little bit about the law in uh, child custody cases. The Supreme Court uh, sent down an opinion several years ago and I'm grateful that they did because child custody is hard enough as it is, but they sent down an *Albright* case. It's called the *Albright* case and it gave us many many factors as trial judges to consider in, in which parent should have custody. The stability of the home. The stability of the employment. The degree of responsibility. Who has been the primary caretaker for the child. It's all these factors that we look to in a child custody case. The Supreme Court says don't weigh any one factor over another. Look at the totality of the circumstances. One of the factors is moral fitness of the parent. Now you tell me if you are going to report the moral fitness of the parent or the stability of the home or the school record of the child.

Audience member: Well I think, I mean

(momentary blank on tape)

Judge Alfonso: ...factors and say that this parent has been the primary caretaker of this child since birth. You don't punish a child because the mom or the dad had an affair. And I'm not talking about Mabus. I'm talking about your run of the mill custody case. You don't punish a child because the parent has had an affair. You look at all of the factors. So if you are going to report the coverage accurately you are going to report the trial judges' decision on all *Albright*. Now how are you going to do that in a 20-second sound bite?

Bell: Dave.

Vincent: You know, if you look, I was looking at the RTNDA site this morning about all of the cameras in various uh, court systems in the, in the country and not all but very many have the same rules that we have here in Mississippi, so I don't think that it's really, what we have here in Mississippi, I don't think it's really out of line with what's happening throughout the country. I know we as broadcasters are very sensitive to uh, children's issues and I don't know that we would want to do anything to harm a child. Of course we wouldn't. So, uh, you know, I don't see where it's going to be a big deal. Now like the governor, that might be a different issue. But just the average person on the street, I don't know that we would be wanting to know that. I don't know that we have the right to know that.

Bell: Dick.

Dick Rizzo: I wanted to just ask the three judges, looking at the circumstances and there's all levels of, of reaction to these rules by the judges and the journalists, what, uh, what do you advise the journalists that they need to do to facilitate this and to have this work? What, what is it, what are we required from your perspective to do so that this will, so that any of the perceptions or possible prejudices against this will be, will be uh, removed?

Justice Graves: I think my first advice to journalists would be to read the rule. One of the things that is most troublesome for me is repeated questions about matters which are explicitly dealt with in the rule and, and, and journalists probably are, are the same way a lot of lawyers will be about it. We will know that there is a rule on it. We just won't read it. So the first piece of advice is READ THE RULE. Uh, I would make sure that those with whom I work had some familiarity with the rule, uh, and and and make an effort to understand it, to know in what situations it is going to be applicable, the notice requirement, when you need to notify uh, the courts that you intend to cover a trial, and we recognize that there are often instances where, given the nature of the news business as regards some matters you may not know until the last minute that it is a matter that you intend to cover, that you actually have personnel available to go cover this versus covering something else, and, and, and so we hope that the judiciary is sensitive to the nature of the business of, of journalism and that's part of the reason I think it is so important uh, that we have meetings like this, that journalists endeavor to understand the court system and what it is judges have to deal with, and that judges make an effort to understand what it is journalists have to deal with. But if journalists are familiar uh, with the rules, work to enhance their relationship with the judiciary, uh, getting to know the court personnel, court staff. Uh, it's, it's a situation where, when I was a trial judge we always tried to develop that. Media would come into my courtroom. I would bring them right up front. If they are going to report, I want them to be able to see and hear. So I would bring them right up front right where my staff sat. Uh, if we were, if the jury was out deliberating, I know that what they really want to cover is when the verdict is read, and the litigants' reaction to the verdict being read, and so we would delay taking the verdict until we, we would call up the reporter so that they could go back and do some other work we would call them up and say, "Jury's back with a verdict and you know we'll wait 10 minutes for you to get over here." And in our situation the courthouse is across the street from the *Clarion-Ledger*. We are going to wait 10 minutes before we take

it. It didn't hurt us to wait a few minutes to give them an opportunity to be there. But I think it's imperative that both the judiciary and the journalists work to develop a relationship because what we are both looking at, hopefully, in addition to I know that journalists want to make money and the judges want to get justice, but we want to enhance the public's knowledge about the court system and your job is to give them information. I think that's what both sides ultimately want to do.

Justice Carlson: Cooperation. Excuse me, judge. Go ahead.

Judge Alfonso: I was just going to point out one other thing. As, as, as Justice Graves said, the rule said that it's prohibitive "unless," and I'm grateful that it does read in that fashion, but I've been talking about children and uh, as Justice Graves and the others that were on the committee know, I was very concerned about another aspect of chancery court work that we do each week, which is conservatorships. What about the high profile person or the former political person that has become elderly, and uh, there is a request to open a conservatorship action for the public? Now y'all know what conservatorship is. It's when a person either through mental or physical infirmity can't take care of themselves and someone is requesting to be appointed the conservator. I can see that happening. We have many people that I think the public would be, the press would be interested in coming in to see a conservatorship action. Now, as a trial judge in chancery, I have no jury. You understand that. I have to make the decision. Now, uh, if you request to come into my courtroom or to any chancery courtroom, am I then required to appoint a guardian ad litem for the elderly person, so that elderly person has an advocate? Who's going to pay for the guardian ad litem? You know, is the press going to pay for somebody to ad-, advocate for the potential ward's position? Are you in the, in the press willing to do that?

Justice Graves: You want me to answer?

(audience laughter)

Justice Graves: I'll be happy to answer. If you are telling me you got an elderly person and you are concerned about their rights, I can't imagine you wouldn't be appointing a guardian ad litem anyway.

Judge Alfonso: No I don't. We don't do it in every case. I'm I'm I'm talking about with only, the issue is only access. We don't, we certainly don't appoint guardian ad litems in most conservatorship actions. There is just not the funds to pay for it.

Justice Graves: So who's representing the interest of the person who is about to have someone else appointed their conservator?

Judge Alfonso: Well, I mean I have two doctors, two doctor certificates that say this person needs a conservator. If I am satisfied based upon the doctors' certificates, but that's a matter of a trial on the merits. I'm talking about I have a request from the media in advance. I don't know what the evidence is going to be at the trial. It may be clear-cut.

Rizzo: Let me ask the judge, is there in those circumstances when someone requests uh, coverage, is there anything that you can tell us that would help you allay your concerns and, and let us cover that kind of a circumstance, assuming again that, that we are not talking about vulnerable children and we are not talking about the unusual but, but something that probably a lot of people would think that the public wants to know about?

Judge Alfonso: Yes. And let me just say once again about chancery, and reiterate we are the fact

finders. Uh, I am very very uh, concerned about, you know, the ex parte contact from the press. I would immediately, once you give me some sort of notice, whether that's verbal or written, of this intent to cover, I immediately would have a conference with the, the attorneys representing the parties because of this contact from you and because I am the fact finder. So give me as much notice as you possibly can so that I can satisfy myself I am not violating some canon by discussing it with you ex parte from the representation of the parties.

Bell: All right, question -

Justice Carlson: Let me, if I could, just add, uh, to the question that, what can you do. I think cooperation and that has been emphasized by Justice Graves also. Uh, and, but that's a two-way street. Not just cooperation as far as the media. Certainly you need to do so on pooling under the rule, uh, because you know that if you can't agree on pooling, then you can't, you can't go to the judge to resolve it. The judge is busy doing other things. You just, you won't get in there if you don't cooperate with each other, but cooperation certainly with the court, but that's a two-way street. Uh and as pointed out, you do need to establish a good relationship uh, with the court uh, and with the judges and with the judges' staff because you are going to be communicating probably more with the uh, court administrator or clerk of the court uh, as opposed to the judge, so certainly establish a good relationship.

And the judge, the trial judge needs to inform his or her staff as to how to appropriately deal with uh, media representatives. I know I've seen situations where the court personnel would take it on their own to say, "Well I know the judge doesn't want to be bothered with this call from the newspaper trying to meet a deadline so I'm just not going to tell the judge about it and I'm going to tell the reporter that the judge is too busy to talk." And the judge without ever knowing is going to see his or her name in print as having not wanted to cooperate or talk and not even, and the judge won't even know that the call was made. So the judge needs to do a good job of informing the staff as to how to appropriately deal with media representatives.

Certainly read the rule as Justice Graves said. That goes for the judge and the staff as well as uh, the uh, media and, uh, because there has to be a trust there. I, you know, I had a reporter tell me one time, "You know, Judge, if you are going to mess up, mess up on a slow news day." Uh, and, I mean, if I'm going to do it maybe it would be good when, when there's a war going on and maybe my mess-up would take a back page or some little blurb. Well if it was a slow news day, I would be on the front page. So, but you have to have that uh, good relationship and, uh, but cooperation I think is the key. And it goes both ways.

Bell: Terry Smith.

Terry Smith: I just, I guess this question is directed to Judge Graves and Dennis Smith. I know you all and probably some others on the panel traveled around the state. Based on that and from the two different, maybe, viewpoints generally speaking, what is the attitude that you both see among judges in this whole issue, just to give us some feel of what we may be facing as we try to work together in the years to come?

(audience laughter)

Justice Graves: I think generally the attitude in the legal profession is that the profession resists change. The profession itself is slow to change and judges who sit at the top of the profession probably sit at the top of the pile of those who are most resistant to change. Uh, and so I think the general attitude obviously before the adoption of the rule was that, uh, we resist change, we don't want it, we don't like it, it's worked this - I mean, somebody said "It's worked this way for 200 years. Why do we need it

now?" Which to me was about like saying we didn't have computers 200 years ago so why should we use them now. So, that's I think the general attitude before the adoption of the rule.

I think the attitude now is, "We have the rule. It is the law. We have to deal with it." And so I hope that they are forward thinking enough uh, that they are going to do the best that they can do to make it work. And so I would approach it, I would approach a particular judge or a particular district not with the expectation that I am going to receive some resistance, but I really would approach it with the expectation that, "I know you didn't want it to happen but now that it's here, uh, let's try to work together to make it work." And I think they are really committed, uh, most of them, to insuring that it works in a way that is just not obtrusive. I think they have accepted that it's here uh, and it is likely to stay so I might as well learn to live with it or retire from the bench. (audience laughter) Uh, so I, I, I think there is going to be a spirit of cooperation.

Dennis Smith: That's my feeling too, Terry, although, granted, there was a significant amount of trepidation on the, on the judges around the state in our, in our travels there, and I did try to convince them that I thought that, that in toto that the rules uh, that we were looking at was probably not going to be a significant variance from what they were seeing on a regular basis because the reality is 90, probably 95 percent of the cases we are going to be interested in are going to be criminal cases. Ninety-five percent of those criminal cases are very likely going to be initial appearance, uh, shots of the defendant at the initial appearance or the arraignment or perhaps at sentencing. We don't have the resources, we don't have the people, the time to go and staff these courthouses uh, with any degree of, of regularity on a lot of the cases. Very few cases can I think of over the past many years have I seen that we would even want to have any interest in having uh, a camera there during the whole process and that uh, there is going to be a situation where we have got to educate our staff exactly how to, how to get this notice out, pull it off the web site of the Supreme Court, fill it out, make sure we've got some dialogue going with the court administrator, the judge, and that, that we have cleared up these problems with any competitive arrangements well before hand.

Judges don't want to fool with that, I can tell you. You may have seen it up there in Tupelo. They don't, this is just one more little extra burden they would rather not have so it's incumbent on us to make sure we don't throw any extra weight their way that they have got to make any further decisions.

Bell: Yes.

Angela Williams: Uh, do you know if the judges have talked to the court administrators about having this extra burden on them? When I was in Tennessee, I spoke to the court administrators almost daily about the cases that were going on and things that we may want to follow. So they had to deal with us a lot more than they had to in the past. Are the court administrators prepared for this?

Justice Graves: There has not been as I am aware of, any, any mass effort to educate court administrators in that connection. As with most things, I would imagine that there are some judges who have spoken with the court administrators. Others may not have. Uh, you know, my hope is, is that when we have our fall educational training that is typically for judges, court administrators, court clerks - uh, there is a training in the spring and then another training in the fall - my hope is that at, at least with the fall training on everybody's agenda would be some training in connection with this matter. And we will have had an opportunity to view it for a few months by that time.

Justice Carlson: I think too, you know, it would help - I know it again kind of shifts the burden to you - but it would help also maybe to prior to a situation to go ahead and either talk to the judge or the court administrator and say, "OK, here's this rule and we want to help you make it work, judge or court administrator. Tell us, the media, how can we help you so that it, it will work." And uh, I know that

being from Batesville, and Terry, I watch Channel 9 News exclusively to any other to get my news. You do a great job.

Justice Graves: All you other stations heard that.

(audience laughter)

Justice Carlson: Yeah, you know, we don't have that many in North Mississippi. But uh, we got Greenwood, Greenville, Tupelo, and otherwise you got Memphis and uh, as far as what we can get. I know there are other, others in the state, great stations, but Channel 9 also, the Tupelo station has a lot, I mean, with what's going on in Lee County and Alcorn County and Pontotoc, Itawamba. You have a lot of court cases up there. And so, uh, Terry, I would hope if you haven't done so, maybe to try to sit down and talk with Judge Gardner. I know I saw him I think on TV on night on Channel 9 one weekend and when he was expressing his views on, on cameras in the courtroom. But uh, certainly I would hope uh, Channel 9 would talk to Judge Gardner and the court administrators, and uh, Joyce Loftin, the clerk up there, and, and get it, and help them to make it work, let it work.

Bell: Dave.
(two people talking at once)

Van Slyke: Excuse me, I'm sorry.

Vincent: I just had a question. I know the judge has the final decision. I'd like to ask the judges how much uh, input, I know they get the input from the uh, trial lawyers. I mean, the, who represents the two different parties. How much influence is that going to be? Will we have a chance to, if the judge says no, they say they have a good reason why not, will the media have a chance to uh, talk uh, to the judge before that final decision is made?

Van Slyke: Well, are you speaking - if I might ask, are you asking, talking about the Rule 7 on the objections, if a, if a party objects? I have that same concern so. (talking from several others at same time) There is a provision that if, that a party, uh, if it objects, uh, to electronic coverage, may file a written motion uh, with the, that must be done 15 days before the hearing. Uh, my concern there is will there then be a hearing in which the press would be allowed to intervene and there would be a balancing of the interests there?

Justice Carlson: That certainly is envisioned by the rule and that's the reason and, and the, the judges saw this as a discrepancy, but it was intentional on a 15-day notice for the parties to file a motion to object versus 48 hours for the media to inform the court that you want to cover it. That was an intentional act on the part of the committee, and the Rules Committee, the initial committee, the Rules Committee and the court, knowing that media - you are deadline-oriented. What is important today or what is going to be import to you on Monday, say, you don't know yet. Anything can happen. So we recognize that you may not know up until 48 hours as to whether or not there is a trial going on locally that you want to cover. On the other hand, and this is what I mentioned to the uh, judges back in April. Dennis, as he mentioned, was there, and Justice Graves to talk to them about this. And that was, "Now come on, judge, be fair." You know, I never, in 19 years as a circuit judge, I never got surprised over media coverage. As soon as a case got into the system and maybe months away from trial, I knew good and well whether or not that case was going to get media attention. There is no surprise so 15 days is certainly more than fair to the parties. They know well more than 15 days whether or not there is any reason why they should object. Uh, is there going to be a violation under the rule? There is a circuit and county court rule on what can't be disclosed like whether or not the defendant uh, in a criminal trial has

given a confession, and so forth and so on. And, uh, so, uh, it's, it is designed that way and certainly I think in what Leonard inquires about, I think certainly a hearing is envisioned under the rules for the judge to perform that balancing, uh, and, and let the media be heard on, uh, if there is an objection by a party.

Justice Graves: I guess in terms of my very specific response to that, and I may be, I don't know if I am envisioning anything any different from what Justice Carlson articulated. But the rule says 15 days for parties to file a, a motion to object to it. I don't think that rule requires that the parties notify the media that they've set that motion for a hearing. Uh, and I understand that you think that's problematic, but let me finish, and then I'm going to leave and you can...

(audience laughter drowns out speaker)

I understand that you don't think that's problematic, but we didn't want to create any additional notice requirements of the parties at the time they file the motion. And so that is to say that the parties ought to know whether or not they want to exclude media coverage pretty early, fairly early on in the proceedings. I think they can file their motion. They can have a hearing. If the media moves to intervene, just like any other motion, I think the judge has to consider that motion and so if the media becomes aware that there is this hearing - ju-, I mean, it's like I tell people about, "Can I sue? - people are calling up and say, "Can I sue for this?" I say, "The beauty of this country is anybody can sue anybody for anything." The beauty of filing motions is anyone can file a motion, and I think the media has a right to file a motion, and I think the judge has an obligation to consider that motion once it's filed. And so I think if there is a hearing, the media has a right to move to intervene and I think the judge would have to consider it, and even further I would say, that if there is this hearing which is, which is filed from 15 days out, and if the final disposition is that the media should be excluded, and if that decision was made without any input from the media, I think the media has a right to file a motion to set aside that order or reconsider it or whatever the motion is styled or called. That would be up to the media lawyers to determine what to, what to call it. But I think the media has a right to file that motion.

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And so if the court has determined that the proceedings ought to be closed from the media, and the media didn't even know it, later learns of it, and determines that they have an interest in it, they have a right to raise that with the court and the court has an obligation to consider it.

Van Slyke: If, if I might respond, your honor, I, I do agree - (audience laughter drowns out speaker) that, that, what this tells you as a media representative out here is that you are going to have to be diligent in following the court file, looking at the court file and on any high profile case, as you should already be doing, to see if there are any motions on file, because I'm not going to know it. You just heard him say they have no obligation to tell me or you, but you have every right to go review the court file. You must do that. So that's, that's the first step. Second step, if uh, there is such a motion, then we want to intervene, "we" meaning the press. I, I believe uh, - he didn't say this, but I believe we will have an absolute right to intervene. Uh, nevertheless we certainly should move to intervene and be heard.

Now the, the final thing I'd like to say about that is uh, there has been a lot of discussion about discretion. And certainly there is discretion uh, of the judiciary in these rules. However, I read the rule to say that there shall be electronic coverage unless there is a finding that there is a, a problem with the fair administration of justice, uh, so I believe that on the, on going into the proceeding that there should be, except in those cases that are specifically named, uh, which are basically chancery matters, divorce, child custody and so forth, they are specifically mentioned in the rule. On other matters, I think there will be a presumption that there should be media coverage unless the court makes a specific finding that

it would somehow interfere with the fair administration of justice.

Justice Graves: I agree with that interpretation.

Justice Carlson: I think Leonard nailed it. Right. I mean, that's it. That's exactly right.

Dennis Smith: One observation I think that uh, is interesting here. You realize you can't take your electronic uh, cameras like this tripod and this camera here, except in recesses and during, before or after proceedings, but there is a stipulation there. And maybe you can give me some guidance on this, judge. This prohibition should not apply to small hand-held electronic devices. I don't know that we ever got into the specifics of that, but it would seem to me that, you've got a small hand-held camera, you could probably sit there in in in the back presumably, if you are unobtrusive with it, you don't have to leave back and forth, uh, that you could actually use that without having to, to uh, wait, if you want to leave, without having to wait for a recess. Does that make sense?

Justice Graves: That makes sense and I think that's exactly what that rule contemplates. The concern was just disruption and distractions uh, in the courtroom and to the extent that you can, you can avoid all of that with these small hand-held devices, there, there would be no reason to have this prohibition applicable to those kinds of devices.

Justice Carlson: Initially in the Rules Committee I know we were talking about this particular point. And uh, initially, I think it read like "small hand-held tape recorders." And then we said, "Well, wait a minute. That may not cover everything." That's, uh, and so we came up with this wording hopefully to cover it. Something like, that I mean, if you've got it small enough, whether it's video or audio or whatever, where you can move in and out just as easily with that small video as you could with the hand-held recorder, or your cell phone or whatever, then, then fine. It's just those that require setting up with some movement and perhaps distraction that we were trying, we just wanted to make sure it was not constant moving in and out. As a spectator, somebody with a notepad or small hand-held device, you can come and go at will unless the judge has some general rule, not just as to media but general as far as courtroom movement, you can come and go at will.

Ryan Bohling: I've got a question on that. How do you address the pooling issue with that? And does that mean, if I've got a hand-held camera, can we have more than one station in the, in the courtroom?

Justice Carlson: The way I interpret that, and I'm one of nine - now keep in mind, I found out when I got to the court they had said that where as a trial judge, you were used to whatever you said goes, and you are the final arbiter, but as a member of the Supreme Court, uh, if you say anything, you've got to have four others to back you up and so, and there are a lot of five-four votes. So, but as one person I don't think that comes under the pooling requirement. If you can come and go at will, whether it be a small hand-held uh, camcorder or video or audio or whatever it might be, a cell phone, uh, whatever that might be, if you can come and go easily without distraction other than the normal movement of any other spectator in the courtroom, then I don't think that comes under the pooling requirement.

Bohling: Does that require the filling out of a form and that be accepted, the application?

Justice Carlson: I think you ought to go ahead and fill out the form. I think you would be better to fill this out. I'm sure, as Dennis mentioned and held it up, I'm sure at some point you've already probably talked about it and I should give credit to Beverly Kraft. (Carlson holds up a copy of the Camera Coverage Notice form.) She did a great job with devising this form and I think it covers, but, I think I would go ahead and still fill out that form so there wouldn't be any question.

Unidentified speaker: Your honor -

Justice Carlson: Because, see, it talks about medium, it talks about still photography, video tape, so if you've got a small hand-held device, uh, then you are still with, you know, that comes under audio recording only. Spot coverage. Complete coverage. And, but, so, but I don't see this coming under the pooling requirement unless somebody can correct me. And maybe Beverly has some thoughts on that.

Vincent: You know, one thing on the pooling. If we had a case like the Beckwith case, maybe the Sherry case or some other high profile, we're really going to have to work together as journalists because uh, I would imagine aside just being inside the state on the Beckwith case, you would have had the major networks here. You could have had 10, 12 video outlets from across the country.

Justice Carlson: Absolutely.

Vincent: Maybe six or seven here in Mississippi or whatever, so that's what it's going to take, maybe the media may have to in the home town or wherever the trial is going to be held, may have to kind of get, get all of the media together and try to work out something.

Van Slyke: Dave, let me make a comment on that. I, in, in my comments to the court regarding the rule, I had suggested and hoped that there be some format uh, to work that out. Not that it would involve the judiciary, but just that there would be a format. That didn't happen, uh, for whatever reason. I'm sure the reasons were good. But it, short of that uh, it is incumbent upon the media to establish some organization uh, to, to get together and work out how that's going to happen. Uh, there was some suggestion earlier today in a, in a meeting prior to this one that perhaps the AP Broadcasters Association might be a vehicle uh, to establish a committee to do that, so uh, something, but something must happen or otherwise we will have chaos on a high profile case.

Dennis Smith: Leonard, as a matter of fact my chief photographer just Friday had pulled off a web site that, and Dave, you'll find this interesting, along with Bruce. There is a an audio video mult-box that has 12 hookups and so you know once we get to that stage we need ....

(blank spot on tape)

Barkley: We'll do the cost based on ratings.

(audience laughter)

Justice Carlson: From a judge's standpoint, one suggestion I would have for, for trial judges and certainly would convey to them at an appropriate time, I can recall back to the Ralph Hand case and, uh, he ended up pleading guilty. Uh, if you recall, this was one back in about 1989, uh, that he had killed his wife and set her body on fire out in a field outside, in rural Tallahatchie County, over on the west side of the county, and it got a lot, it got a lot of national attention. We were getting calls from ABC out of New York and even they came down and visited. Uh, uh, Leonard had occasion to show up once or twice, and I think maybe Beverly. And uh, uh, so, and Art Harris, I think, uh, CNN out of Atlanta. And so we had a lot of folks and I was getting to the point as we approached the trial date of talking to my, and had already talked to him, a local newspaper editor there in Batesville and I was going to ask him to be more or less my media representative and line up - of course back then we were not dealing with cameras in the courtroom but we were dealing with national media coverage - and to deal with media and set up a mechanism for, uh, to get them in the courtroom, to make sure they were able to cover, and so I will probably suggest to the trial judges that in the really really, the Beckwith-type situations and you've got

national coverage, to maybe have a media representative who you, who the judge knows in the hometown, or wherever, to more or less head things up for the judge and take that burden off the judge and court administration.

Bell: All right, uh, let's, one quick question and we need to wrap up. Ralph?

Ralph Braseth: I was wondering if we could start with Leonard Van Slyke and go down the row. Do you really think this helps the citizenry of Mississippi (inaudible)?

Van Slyke: Oh absolutely. That's why I spent 10 years or more working toward it. I think it is a great informational tool. We, if you recall, some of you were around during the Beckwith case. We filed suit at that time, uh, and as Justice Graves noted, the, the profession and the judiciary is slow to change, and at that time Justice Graves as the trial judge ruled in favor, the Supreme Court ruled against, and I might add, that Chief Justice Pittman, one of those that voted against it, and he has now come to the view that, and led the charge to say that it is so important that the public understand the judiciary, and understand the judicial system. The judicial system has been under a lot of fire but a lot of it just results from misunderstanding, and I believe this will be a big step. It won't solve everything but it will be a big step in helping the public to understand what goes on in the courtroom and that it is a real serious effort to get at justice.

Judge Alfonso: Although I have stated how I feel today, I fully intend to follow the law. Uh, I, um, frequently speak to children's groups, and one of the first things they invariably ask me is, "Are you like Judge Judy?" and I always say, "I hope not." (audience laughter) I know that there does need to be change. Uh, our courts are not reflective of what you see on TV and what children see on TV. I would hope that we can all get together in December of 2004 after having this experience and really assess if this rule has served its stated purpose of educating the public.

Luckett: No doubt it's very helpful uh, when you think about the high profile trials we've seen in the state. Luke Woodham, uh, Sam Bowers, uh, Beckwith, some of the Jackson cases, extortion of city councilmen - uh, just a number of cases. And if you had a camera in there you could have been inside the case, inside the courtroom with that and not rely solely on what we came back out as reporters to tell you about. Uh, it would help, not that we don't tell you the truth, (laughs) but it helps us to do our job better, and it would help you to go inside that courtroom.

Uh, the trial that is going on right not, the Chante Mallard out in Texas with CNN coverage, we'll never see that, I don't think, here in the state with round-the-clock coverage like that in a case. But that takes me into, into a courtroom that I wouldn't have been in and it helps me understand how jury, a jury arrives at that verdict. It's just a window inside. It's just an opportunity to be in there. Uh, and I think that's invaluable, and it helps people get involved in the judicial system, whereas you know we have a lot of people that say they are interested and they complain a lot about coverage and the things that happen, but I think this would energize them to actually feel like they are an active participant uh, to see what's going on, if we do everything right.

Dennis Smith: Ralph, a survey nationwide in April indicated 12 percent of the people in the country get their news from newspapers, 44 percent from television news. I submit, I submit that's probably more substantially in the weight of television in Mississippi based on our, our demographics and all. One of the most powerful things that I can recall that I think that is very effective that I've seen on televison is in the pre-sentencing phase of a, of the defendant, where the victim's family members come up there and address that person, uh, personally before the court. It's very powerful television. And it seems to give me the impression and I daresay the viewers, that the system is working. Now these people are able to cleanse themselves at some point and get, get their pent-up emotions out. That to me would be a very

effective method of communicating to our viewers that the process does in fact work. And I look forward to that.

Justice Carlson: I had not thought about what Dennis just said, but I can see also it could be maybe a, a, a healing process for, for those who have had similar experiences as they, as they see victims on the stand testifying and maybe the, some of the viewers have gone through that and, or are going through it, maybe have not gotten to the point of going to trial and victims and victims' families and they are able to experience that, but overall just for the general public I think certainly it will be educational.

I know we are fighting the, for lack of a better phrase, the Peyton Place syndrome. Maybe people think, "Well it's just going to be something the media just wants to jump in, something that's juicy or sensational, a high profile murder or something," but I really see it as hopefully taking away the mystery of the courts. I know I'm concerned about that.

Quite candidly, we know the negative publicity the trial courts received in 2002 and now the negative publicity the Supreme Court of Mississippi is experiencing right now, we want that openness so that the public can see that certainly maybe there are some negatives but there are a whole lot more positive things going on with the court, both the appellate courts and the trial courts, and the public needs to, to know that and, and you need to know, those of you in this area, that Judge Alfonso has worked under very tough circumstances here on the coast and we at the court in Jackson are very much aware of the fact that, uh, she is doing a great job under trying circumstances and she's got three other great chancery court judges, and certainly on the circuit side, uh, you've got a great circuit, and also county court bench here on the coast, and, and the people need to know that. I think cameras will help that, uh, if you've got a Judge Alfonson on the bench uh, and I don't say this for political reasons for any judge, but if you've got a Judge Alfonso on the bench, the public is going to get a good perception of how the courts operate.

They are going to be able to eliminate - and I'll get, I don't watch, I can't, I, every so often I'll look at Judge Judy for a few minutes, (laughter) but I can't keep it on very long because folks, and you know that's not how it really work. But yet the public, we can't fault the public for that. That's all they've got to watch is Judge Judy, uh, and maybe some, some of the other TV judges. They are real judges but they are certainly playing up to the TV cameras. I mean, when Judge Judy goes on uh, uh, Jay Leno and David Letterman and all, you think, what is she doing? I mean, she's not pumping the court system. She is pumping herself. And uh, so the public needs to know how the courts really operate and the courts are about taking care of the people's business in a fair and impartial way. So I think it's great, and I think it will serve that purpose.

Vincent: With HDTV which is coming about of course uh, this year and the years to come, uh, television stations will have more than uh, one channel to program. And what the future may bring, we don't know yet, but you never know, if you had a Beckwith trial, you had a Sherry trial, the sation may decide to on that extra channel be able to broadcast the entire trial. I, I, I see a day in Mississippi when, when that will occur because now broadcasters have, with HDTV, have that extra channels to do stuff with, and so I think if we are smart we'll be able to take advantage of that.

And I think what we are doing is great uh, and Ralph, to answer, "Is it going to help?" I look at the other 49 states. Are they wrong? Are we wrong in not doing it already? I, you know, I think we've been a little slow. Uh, it's worked in other states. And most research I've done says it's worked uh, quite well for the most part, so I think really we are joining the rest of the nation in doing this now.

Bell: All right, finally, some of you have alluded to it, uh, in your comments, uh, but I have been asked to ask one of our judge and one of our journalist panelists the following question: Do you believe that

improving the relationship between the judges and journalists will also benefit Mississippians? Just that uh, that new relationship we've already built with the formation of this committee and now with this new rule taking effect, uh, Judge Carlson, you want to take that from the judicial perspective, just this new relationship that we are building, how is that going to uh, to improve things for Mississippians in general?

Justice Carlson: Well, obviously you know a very positive uh, situation. Again, where we've had, the, I mean, it's just a built-in distrust that we've had through the years, judges toward the media and media toward the courts. Judges playing games with the media and, and the media being denied access and, and so there has not been an effort in, under the old Code of Judicial Conduct, uh, when cameras were excluded from the courtroom, uh, there was no reason for a judge to cooperate. As a trial judge, I've said many times to somebody, Channel 5 out of Memphis or somebody. "Well, we want to cover, come down to DeSoto County and cover that murder trial and bring cameras in." "Oh, I've got the Code of Judicial Conduct that says you can't do it." That's all, and that's all I had to say. Uh, but it, it would, by its very nature, will, will build I think a working relationship uh, with media and the courts. I see it as very positive for all Mississippians. I see it, you know, I think it is a way also for us to get a positive image nationally for, for people to be able to see - maybe a little slow, but see, "Look what they are doing in Mississippi. Uh, they are opening up their courtrooms." Uh, and courts and media are working together for a better relationship and in turn certainly uh, better educating the public of what is going on.

Bell: Dennis, do you want to take that for the journalists?

Dennis Smith: I can't think of a - just take the words "journalists" and "judges," and can you find the two other professions that more clearly define a single word that probably determines what their mission is, and that's fairness? Stop and think about it. That's the one thing judges really really uh, look at being and, and in talking to the judges around the state at judicial conferences and prosecutors' conferences, it's very very important that the, that the judges convey that to the, to the folks. And I think the same holds true, clearly, those of us in our profession, and I think that again my experience is the dialogue that's got to take place, the intimidation that heretofore may have prevailed with a lot of our staff members by virtue of them not understanding the judicial system has got to end and we've got to maintain some dialogue and not be afraid to make the roads and take those steps and let the judges know we want to be fair. We are here for the benefit of our, our viewers and our public just as they are and I think it will work fine.

Bell: All right, we had planned to get done at 11:30 and we are 30 seconds early. How about that? I want to thank our panelists here, Dave Vincent, Judge Carlson, (audience applause) Dennis Smith and of course Justice Graves had to leave early, Beverly, Judge Alfonso and Leonard of course. I also want to thank Dick Rizzo and Beverly Pettigrew Kraft for putting this whole thing together. They did all the leg work to uh, get all these people here and to get it all set up and they deserve the thanks too. Thanks, Dick, appreciate that. Also want to thank you for joining us. And hopefully we are going to be in good shape for this new rule. Thanks a lot.

EXHIBIT 6

CAMERAS IN THE COURTROOM

Report on Rule 980

May 2000

Prepared by

Administrative Office of the Courts
Research and Planning Unit

RESEARCH & PLANNING

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CAMERAS IN THE COURTROOM
Report Summary

Issue Statement

In 1997 the Judicial Council amended rule 980 of the California Rules of Court, concerning photographing, recording, and broadcasting in the courtroom. To monitor the implementation of the amended rule, Chief Justice Lucas requested that the trial courts submit to the Administrative Office of the Courts (AOC) copies of all forms filed pursuant to the rule. This report summarizes the data received from the trial courts and provides an update on the implementation of the amended rule 980.

Summary of Report Findings

- From January 1997 through December 1999, the AOC received 3,224 *Media Request to Photograph, Record, or Broadcast* forms (MC-500) from 32 counties.
- In the same period, the AOC received 2,116 *Order on Media Request to Permit Coverage* forms (MC-510).
- Eighty-one percent of the orders granted the media's request for coverage; 19 percent denied the media's request.
- There was substantial variation among counties, with some granting as few as 59 percent of media requests and others granting as many as 98 percent of media requests.
- Arraignments were the type of proceeding the media most often requested permission to cover (28 percent), followed by verdict or sentencing hearings (16 percent), pretrial hearings (14 percent), and trials (12 percent).
- The media most often requested permission to use television cameras in court (55 percent), followed by still cameras (23 percent) and audio equipment (22 percent).
- At least 48 percent of media requests did not comply with the requirement that they be filed five days before the hearing they sought to cover. (Forty-three percent of requests do not contain information sufficient to determine compliance with the five-day rule.)
- Hearings were held on 8 percent of media requests for coverage.

- Thirteen percent of media request forms contained an acknowledgment of responsibility for increased court costs resulting from the media's coverage. None of the forms included an estimate of the increased costs.
- The media request forms were often filled out incompletely or incorrectly, and all were missing at least one piece of requested information.
- There are serious problems with the nature and quality of the data that limit its usefulness.
- A review of local court rules, appellate cases, and news and law review articles suggests that rule 980 is not currently a topic of great public controversy.

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CAMERAS IN THE COURTROOM
Report on Rule 980

In January 1997 the Judicial Council amended rule 980 of the California Rules of Court, concerning photographing, recording, and broadcasting in the courtroom. This report is an update on the implementation of the amended rule 980. In Section I we summarize the data provided by the trial courts about the application of rule 980. In Section II we consider some outside sources of information about rule 980. Section III contains recommendations about the data collection process, rule 980, and its accompanying forms.

Background

In 1994 and 1995 California saw extensive media coverage of a few high-profile court cases.[1] The perception that the media coverage of these cases created a "circuslike" atmosphere in the court led to calls for new rules governing the use of cameras in court. Some called for a complete ban on cameras, while others argued that the media should be granted broad access to photograph and film court proceedings.

On October 27, 1995, Chief Justice Lucas announced the appointment of a special task force to review rule 980 of the California Rules of Court. The 13-member task force conducted a statewide survey of judges, public defenders, and prosecutors and solicited the views of many bar groups. The task force members attended an educational forum and hosted a public hearing on the topic of cameras in the courtroom. In addition, they reviewed scores of letters, telephone calls, reports, newspaper and journal articles, earlier studies, and other information. In 1996 the task force circulated a proposed amended rule 980 for comment.

As a result of the task force's efforts, the Judicial Council adopted an amended rule 980, which went into effect January 1, 1997. The council also adopted two mandatory forms to implement the rule: *Media Request to Photograph, Record, or Broadcast* (Form MC-500) and *Order on Media Request to Permit Coverage* (Form MC-510).

To monitor the implementation of the newly amended rule 980, Chief Justice Lucas requested that the courts send copies of all forms filed pursuant to the rule to the Administrative Office of the Courts (AOC). From those forms, the AOC has created a database of information about the use of rule 980.

[1] See, e.g., *People v. Simpson*, No. BA097211 (Cal.Super.Ct.); *People v. Menendez*, No. BA068880 (Cal.Super.Ct.).

Section I: Data From Rule 980 Forms

Since January 1, 1997, the trial courts have been submitting rule 980 forms to the AOC. The resulting database is a large, statewide sample of media requests and orders over a three-year period. It provides a broad overview of how the amended rule 980 is functioning in the California courts.

It is important to note that the data does not constitute a precise accounting of all media activity in the California courts. Only 32 of the 58 counties submitted media requests and orders to the AOC, which means that nearly half of the counties did not submit any media requests or orders. Given that some of the nonreporting counties are large urban counties, it is likely that at least some nonreporting counties had media requests for coverage that went unreported. In addition, because some highly populated counties reported very small numbers of media requests, it seems likely that the numbers of forms sent by some counties do not represent the total numbers of media requests made in those counties.[2]

Overall Results

As depicted in Figures 1 and 2, the trial courts submitted 3,224 media requests (Form MC-500) and 2,116 court orders on media requests (Form MC-510) to the AOC. Thus, more information is available about what the media have requested than there is about how the courts ruled on their requests. The 2,116 court orders represent the dispositions of 67 percent of the media requests.

Statewide, the courts granted 81 percent of the media requests for which orders were received.[3]

Figure 1. Total Requests, Orders, and Dispositions (n = 3,224)

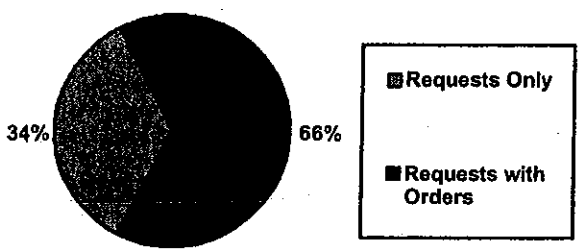
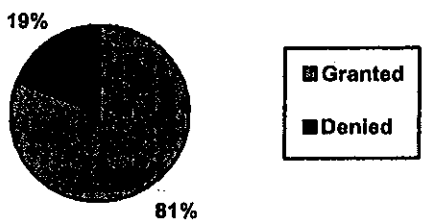


Figure 2. Rulings on Media Requests for Coverage (n = 2,116)



[2] It is unknown whether the assumed unreported media requests were made without rule 980 forms or whether some rule 980 forms were not submitted.

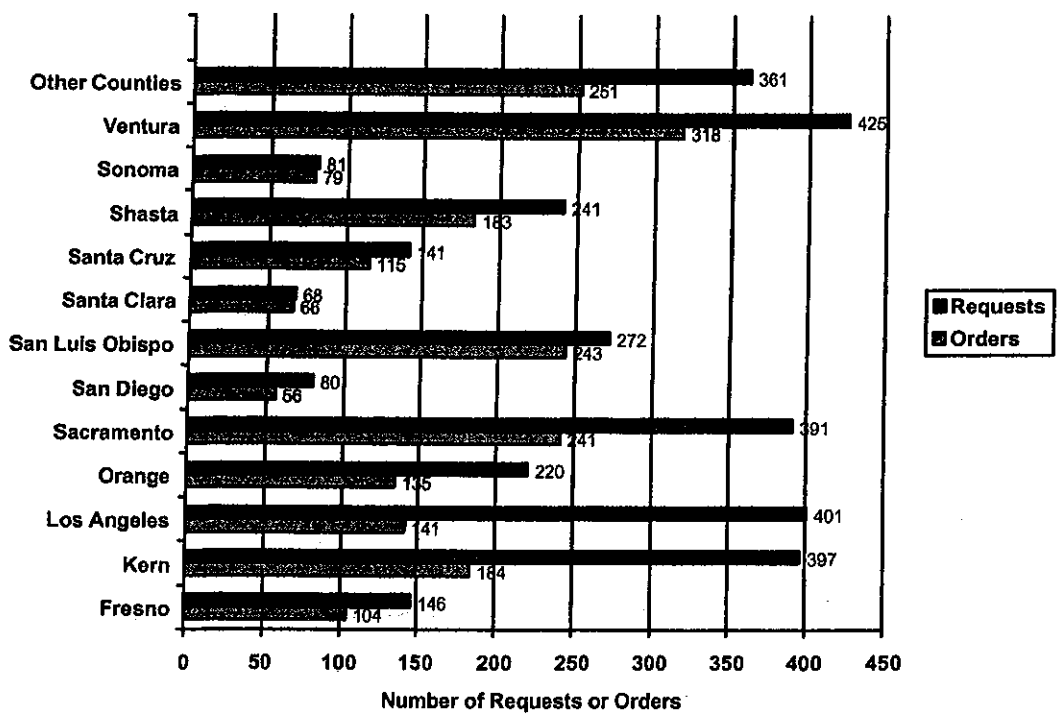
[3] This percentage is particularly interesting in light of the fact that 55 percent of judges surveyed by the task force in 1996 stated that they would prefer that video cameras be banned from the courtroom. Judicial Council of California, *Report From the Task Force on Photographing, Recording, and Broadcasting in the Courtroom* (May 10, 1996) p. 7.

Media Requests and Dispositions by County

Twelve counties accounted for the vast majority of media request forms. The remaining counties each submitted less than 2 percent of the media request forms. Thirty counties submitted no request or order forms. The counties reporting the most media requests for coverage are represented in Figure 3 below, and the remaining counties are aggregated into a single group of "other counties."

Figure 3 also indicates how many rule 980 orders were received from each county. The orders, which were submitted less frequently than the requests, contain information that cannot be found elsewhere about the dispositions of the media requests. The difference between number of request forms submitted and number of order forms submitted varied among counties. For example, we have data for the dispositions of almost all requests in Sonoma, Santa Clara, and Santa Cruz counties, but in counties such as Los Angeles and Kern, we know the outcomes of less than half of the requests.

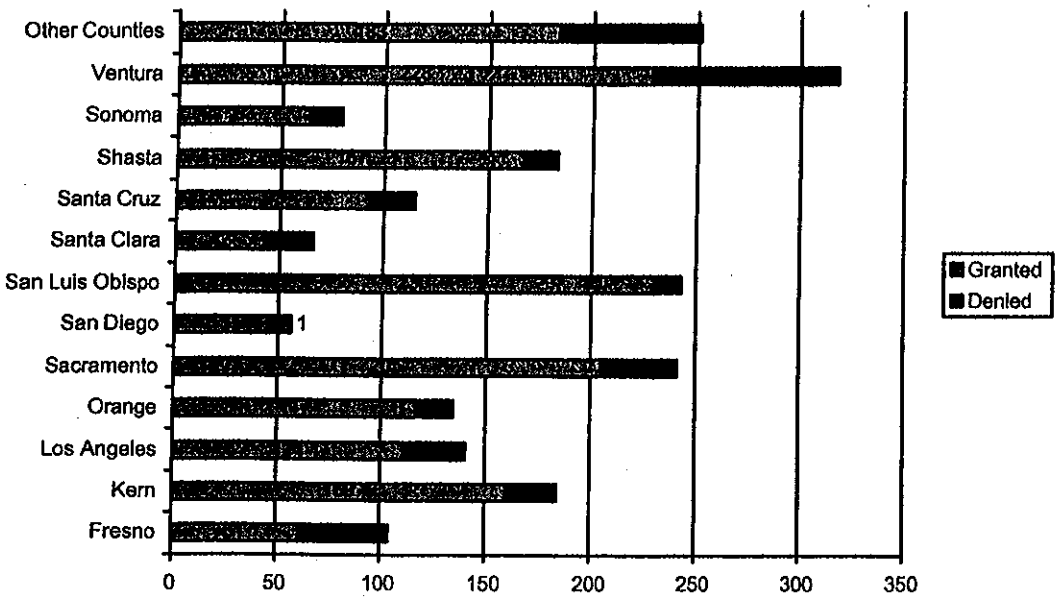
Figure 3. Media Requests and Orders by County



The dispositions of media requests varied by county. Whereas 81 percent of media requests were granted statewide, individual counties varied as much as 23 percent from the average. The three counties granting the greatest percentages of requests were San Diego (98 percent), San Luis Obispo (94 percent), and Shasta (91 percent). The three counties granting the

smallest percentages of requests were Fresno (59 percent), Santa Clara (64 percent), and Ventura (72 percent). Figure 4 depicts the media requests granted and denied, by county.

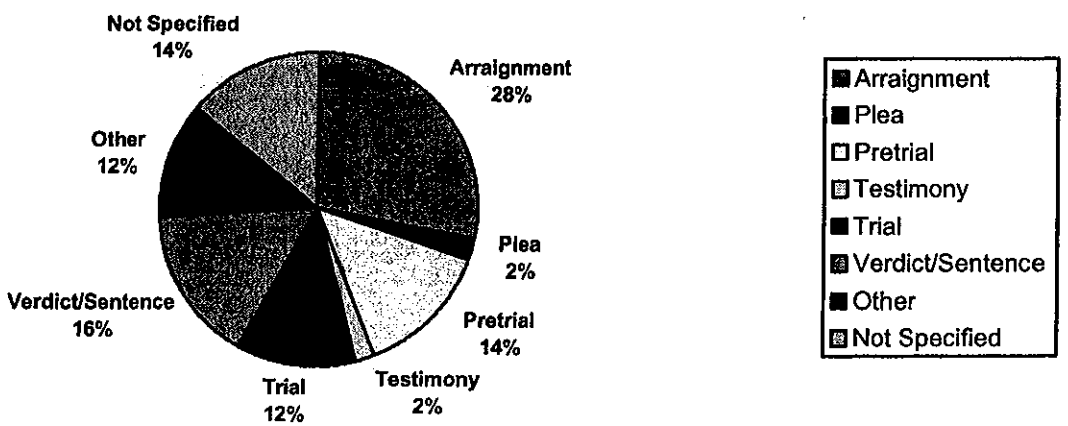
Figure 4. Dispositions of Media Requests by County



Types of Court Proceedings

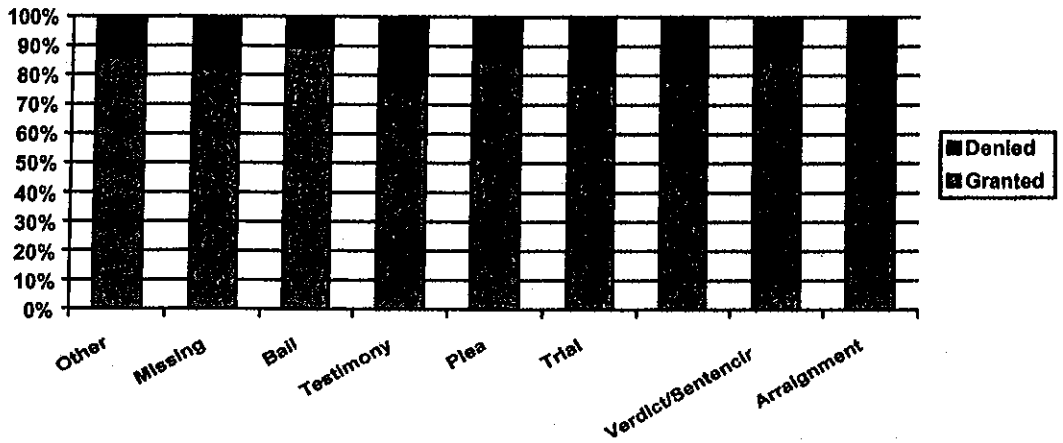
The media most frequently sought to cover hearings that occurred before trial. Arraignments, pleas, and pretrial hearings accounted for 44 percent of all requests; testimony and trials, 16 percent of requests; and post-trial proceedings such as verdicts and sentencing, 16 percent of requests. Figure 5 depicts the percentage of requests for each type of proceeding. The category "testimony" consists of media requests that stated "testimony" without specifying the type of hearing they sought to cover. The "other" category consists of media requests to cover any proceedings not specifically addressed in Figure 5, such as bail hearings. None of the proceedings included in the "other" category composed more than 2 percent of the media requests.

Figure 5. Types of Proceedings the Media Sought to Cover (n = 3,159)



As depicted in Figure 6, courts were least likely to grant permission for media coverage of testimony or trial (76 and 77 percent granted, respectively) and most likely to grant permission for coverage of bail hearings (90 percent granted). Requests to cover verdicts and sentencing were granted 85 percent of the time.

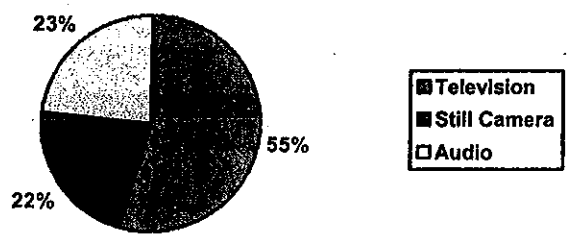
Figure 6. Percentages of Media Requests Granted and Denied, by Type of Proceeding



Types of Media Equipment Requested

Television cameras were the equipment the media most often sought to use in the courtroom (Figure 7). Fifty-five percent of requests made from July 1998 through December 1999 were for television coverage. Requests for the use of audio equipment and still cameras represented 22 percent and 23 percent, respectively, of the total number of requests. In some cases, the media asked to use multiple types of equipment.

Figure 7. Types of Coverage Requested July 1997–December 1999 (n = 2,029)



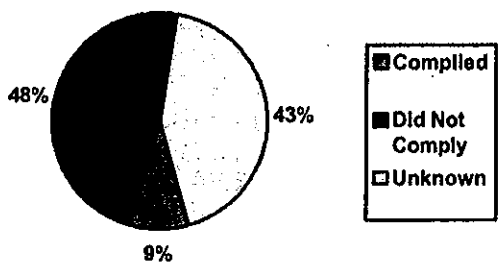
The courts granted 82 percent of requests to use television cameras in court, 79 percent of requests to use still cameras, and 84 percent of requests to use audio equipment.

Media Compliance With Five-Day Notice Rule

Rule 980 requires that media request forms be filed five days before the date of proposed coverage, but permits the court to waive this requirement for good cause. The media request form provides a space in which to explain why a request does not comply with the five-day rule.

Of the media request forms containing complete date information, 84 percent did not comply with the five-day notice rule. Forty-three percent of the total requests did not include sufficient date information to determine whether they were in compliance with the five-day notice rule (Figure 8).

Figure 8. Compliance of Requests With Five-Day Rule (n = 3,159)



Looking only at the orders resulting from media requests that contained complete date information, courts were more likely to grant requests that complied with the five-day notice rule. As depicted in Figures 9 and 10, 94 percent of requests that complied with the five-day rule were granted, and 85 percent of requests that did not comply were granted.

Figure 9. Rulings on Requests That Complied With Five-Day Rule (n = 223)

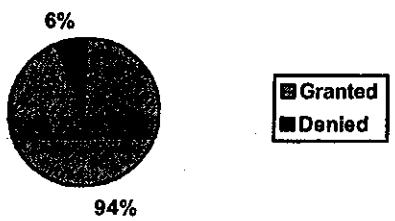


Figure 10. Rulings on Requests That Did Not Comply With Five-Day Rule (n = 1,047)

There are certain pretrial proceedings, such as the arraignment of an in-custody defendant, that are not set five days in advance. For such proceedings, it would be nearly impossible for the media to comply with the five-day rule. Rule 980, by permitting the court to waive the five-day rule for good cause, prevents the rule from being applied unfairly in these situations.

A review of the data from July 1998 through December 1999 suggests that the five-day rule was not applied to deny media access to proceedings the media could not have known about five days in advance. Only 7 percent of requests to cover arraignments adhered to the five-day rule. Of the requests to cover arraignments that did not comply with the five-day rule, 79 percent were granted. This figure is only 2 percentage points lower than the overall percentage of media requests granted (81 percent).

Requests to cover events that occurred later in the case, such as pretrial hearings, trials, and sentencing hearings, complied with the five-day rule more frequently than requests to cover arraignments (35 percent for pretrial hearings, 23 percent for trials, and 13 percent for verdicts and sentencing hearings).

Increased Court Costs

The amended rule 980 provides that a judge may condition an order permitting media coverage on the media agency's agreement to pay any increased court-incurred costs resulting from the media coverage.[4] The media request (Form MC-500) contains a section where the media agency is asked to acknowledge "that it will be responsible for increased court-incurred costs, if any, resulting from [this] media coverage." The form also asks the media to estimate the amount of increased court costs or to specify if the amount is unknown. On only 416 of the forms received (13 percent) did media personnel mark the section of the form acknowledging responsibility for increased court costs. No estimates of increased court costs were provided on any of these forms. The forms do not disclose whether the media actually paid for any court costs.

Hearing on Media Request

Rule 980 provides that the judge "may hold a hearing on the request or rule on the request without a hearing."[5] Both the media request (Form MC-500) and the order on media request (Form MC-510) solicit information about whether a hearing was held on the request. The forms received by the AOC indicate that court hearings were held on 260 media requests (8 percent). The AOC received the orders that resulted from 192 of those requests; the courts granted 172 requests (90 percent) and denied only 20 requests (10 percent). When the courts held a hearing on a media request, the request was more likely to be granted (90 percent versus 81 percent).

Section II: Outside Information About Rule 980

Looking outside the database of media requests and orders, there are several sources of information about how rule 980 is functioning in the courts. This section describes some local rules addressing rule 980 issues, considers the number of appeals of rule 980 issues, and discusses the quantities of news and law review articles that mention the rule.

[4] California Rules of Court, rule 980(e)(4).
[5] *Id.* at rule 980(e)(2).

Local Rules on Rule 980 Issues

Local rules concerning photographing, recording, and broadcasting in the courtroom have been identified in 11 courts. Most of those rules either incorporate rule 980 of the California Rules of Court or make a general statement that there will be no photographing or recording of court proceedings without a written court order.[6]

In a few courts, local rules that differ from rule 980 have been adopted since the amendment to rule 980. Rule 4.1 of the Superior Court of Los Angeles County Local Rules contains several specific limitations on media coverage.[7] The rule makes explicit that areas outside the courtroom, such as hallways and elevators, are subject to the procedural requirements of rule 980.[8] The local rule also specifies that, except by court order, cameras and recording devices must be turned off and lens caps placed on cameras while they are transported in the courthouse.[9]

Los Angeles County rule 4.1 prohibits photographing the interior of any courtroom through the windows of glass doors or from between double doors. No microphones or cameras are permitted in a courtroom without a written order of the court.[10] In addition, the rule prohibits the filming or photographing of any person wearing a juror badge in the court.[11] This prohibition clearly includes prospective jurors as well as sworn jurors.

In the Superior Court of San Luis Obispo County, local rules prohibit photographing, recording, filming, or broadcasting the testimony of a witness who is not employed by a governmental agency without the permission of both the witness and the court.[12] The requirement that the witness give permission goes beyond the requirements of rule 980. Rule 980 lists the privacy rights of witnesses as a factor for the court's consideration, but does not require the permission of a nongovernmental witness for media coverage of his or her testimony. San Luis Obispo's rules also differ from rule 980 in that they prohibit the broadcast of audio recordings of court proceedings without court permission.

The local rules of the Superior Court of Santa Barbara County contain specific provisions regarding media coverage of criminal cases. Rule 605 states that no order for electronic media coverage shall be made in a criminal case until the defendant has had adequate opportunity to secure counsel.[13]

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[6] See Superior Court of Fresno County, Local Rules, rule 17.4; Superior Court of Colusa County, Local Rules, rule 13.02; Superior Court of Del Norte County, Local Rules, rule 18; Superior Court of Shasta County, Local Rules, rule 13.02; Superior Court of Siskiyou County, Local Rules, rule 13.02; Superior Court of Yolo County, Local Rules, rule 4.5. See also Rules of Procedure of the State Bar of California, rule 32, adopting the provisions of rule 980 of the California Rules of Court for its proceedings.

[7] Superior Court of Los Angeles County, Local Rules, rule 4.1.

[8] Superior Court of Los Angeles County, Local Rules, rule 4.1(c); The pressroom is exempted from this rule.

[9] *Ibid.*

[10] *Id.* at rule 4.1(c).

[11] *Id.* at rule 4.1(e).

[12] Superior Court of San Luis Obispo County, Local Rules, rule 10.09.

[13] Superior Court of Santa Barbara County, Local Rules, rule 605.

The local rules of the Superior Court of Santa Barbara County also consider that, for security reasons, the court may need to have media personnel removed from the courthouse or court grounds. The rule states that the court shall give notice, as practical, to all members of the media who would be affected by such a ruling and give them an opportunity to be heard on why the action is unnecessary. The rule states that it is not intended to affect rule 980 procedures.[14]

The local rules of the Superior Court of Yuba County incorporate rule 980 except that they include a blanket prohibition of all media coverage in court areas outside the courtroom. The local rule concerning media coverage does not retain the discretion of judges to permit coverage in the common areas of the courthouse.[15]

Appeals of Rule 980 Issues

Since the 1997 amendment to rule 980, there have been no reported appeals concerning rule 980.[16] Before the amendment, appeals of rule 980 issues were infrequent. A search of appellate cases discussing rule 980 found only six appeals since the previous rule 980 took effect in 1984. The first appeal was in 1984 and the second in 1988.[17] There were two appeals in 1990 and one in 1993.[18] The most recent appeal of a rule 980 issue took place in 1996.[19] None of these appellate cases address the constitutionality of the previous rule 980. Rather, the cases discuss the application of the previous rule in a broad range of circumstances.

An accounting of these appellate cases shows that the amendment to rule 980 has not caused an increase in the number of appeals. However, we cannot conclude that the amendment has reduced appeals. Between 1984 and 1997 there were gaps of up to four years between appeals concerning rule 980. Thus, the fact that there have been no appeals in the three-year period since the amendment of rule 980 does not necessarily indicate a decline in appeals.

News and Law Review Articles Discussing Rule 980

A review of newspaper, magazine, journal, and law review articles suggests that the media and the legal community are not currently discussing rule 980 as often as they were in the years immediately preceding the amendment of the rule. A discussion of the results of two

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[14] Superior Court of Santa Barbara County, Local Rules, rule 603.

[15] Superior Court of Yuba County, Local Rules, rule 2.13.

[16] See West's Ann.Cal.Rules of Court, Rule 980; A search of WESTLAW was conducted.

[17] *People v. Spring* (1984) 153 Cal.App.3d 1199 (permitting television cameras in courtroom during defendants trial for murder did not violate rule 980 merely because the request for television coverage did not precede voir dire, nor did it violate defendant's Sixth Amendment right to a fair trial); *KCST-TV Channel 39 v. Municipal Court* (1988) 201 Cal.App.3d 143 (television station could not be constitutionally restrained from disseminating drawing of defendant, despite court order prohibiting frontal photographs of defendant).

[18] *People v. Ashley* (1990) 220 Cal.App.3d 919 (defense request to use tape recorder during cross examination for the purpose of record keeping fell within scope of rule 980); *KFMB-TV Channel 8 v. Municipal Court* (1990) 221 Cal. App.3d 1362 (court lacked authority to limit broadcasting of previously recorded trial court proceeding pursuant to court's permission); *Marin Independent Journal v. Municipal Court* (1993) 12 Cal.App.4th 1712 (confiscation by court of film taken by journalist in deliberate violation of rule 980 is not a First Amendment violation).

[19] *People v. Jackson* (1996) 13 Cal.4th 1164 (videotaping testimony of witness who could be unavailable in the event of a retrial is not a violation of rule 980).

electronic database searches follows. Both searches focused on articles that mentioned rule 980 specifically.[20]

A search of Nexis, a comprehensive electronic news database, shows 49 news articles discussing rule 980 since 1985. Most of the articles (39 of 49) were printed in the three years before rule 980 was amended. The search found only one article that discussed rule 980 after 1997.

Similarly, a search of law review articles indicates that rule 980 is being discussed less frequently now than in the past. Seven California law review articles that discuss rule 980 have been published since 1985. Five of the seven were published in 1996 and 1997, the years in which the amendments to rule 980 were considered, made, and put into effect. No California law review articles focusing on rule 980 have been published since 1997.

Section III: Conclusions and Recommendations

Rule 980 Should Not Be Modified

The current rule 980 is the result of a great deal of effort and thought by the Task Force on Photographing, Recording, and Broadcasting in the Courtroom and by the Judicial Council. A modification of this rule should not be undertaken lightly, as it would require a large investment of time and resources.

The data that was collected to evaluate rule 980 does not indicate that the rule needs amendment. In fact, there are several indications that rule 980 is accomplishing its objectives. Much of the data we have summarized here speaks to the fact that the rule is working. At the very least, the data demonstrates that the new rule and forms are being used.

The data does indicate that the rule's five-day notice requirement is rarely complied with. Although there are occasions in which the five-day notice requirement cannot be complied with, it appears that the good cause exception to the five-day rule is operating to prevent an unfair application of the rule in these situations. For that reason, it is not necessary to change the five-day rule at this point.

Information acquired from sources outside the AOC data also does not suggest problems with rule 980. Several courts have specifically integrated rule 980 into their local rules. A review of news and law review articles suggests that rule 980 is not a topic of great controversy. In addition, a review of appellate cases shows that appeals of rule 980 issues are infrequent and have not increased as a result of the amendment. There is no indication, in the data or elsewhere, that rule 980 currently needs further study or amendment. Given the absence of

[20] The search results are not a comprehensive listing of all news and law review articles discussing media photographing, recording, and broadcasting in the courtroom, which would be a much larger group of articles than the group discussed here, particularly in the area of news articles. Rather, the search results described are intended to be a sample of media and legal community interest in rule 980.

reported problems with the amended rule 980, it is recommended that the special data collection be terminated.

Forms MC-500 and MC-510 Should Not Be Revised

The data collection revealed that the Forms MC-500 and MC-510 are being used on a more informal and ad hoc basis than was envisioned by their designers. Every media request form received was missing at least one piece of requested information. That situation, however, is not unique to these forms and does not call for their revision.

Information about completing the forms is available on the California Courts Web site (*www.courtinfo.jud.ca.gov*) in the manual *Photographing, Recording, and Broadcasting in Courtrooms*. Courts wishing to further educate representatives of the media about completing the forms can refer them to the Web site or provide copies of the information contained therein.

EXHIBIT 7

GARY HENGSTLER

Media Guidelines for Brazos County, Texas

IN RE	§	IN THE DISTRICT COURT OF
	§	
MEDIA ACCESS TO	§	BRAZOS COUNTY, TEXAS
	§	
COURTROOM PROCEEDINGS	§	361ST JUDICIAL DISTRICT

STANDING ORDER AND GUIDELINES FOR PHOTOGRAPHING, RECORDING AND BROADCASTING COURTROOM PROCEEDINGS

I. POLICY STATEMENT

It is the constitutional policy of the United States of America and of the State of Texas that the rights of the people to freedom of the press and freedom of speech will be jealousy guarded. It is our constitutional protections and responsibilities that secure the blessings of liberty so sacred to free people.

The 361st Judicial District Court of Brazos County, Texas, consistent with the Texas Code of Judicial Responsibility, amended Rules of Civil Procedure, and public policy considerations for the facilitation of the free flow of information to the public concerning the Texas judicial system, as well as the Court's responsibility for the enhanced education of the public regarding the administration of justice, does hereby adopt the following Orders and Guidelines for Photographing, Recording and Broadcasting in Courtroom (herein referred to as "Guidelines"), subject to the approval and promulgation of the Texas Supreme Court for the provisions applicable to civil cases.

These guidelines will be interpreted by the Court to provide the greatest access possible while, at the same time, maintaining the dignity, decorum, privacy considerations, and impartiality of the Court proceedings, and said guidelines are subject to immediate change and modification as deemed necessary to assure justice in the sole discretion of the trial Court.

II. DEFINITIONS

The following definitions apply to these guidelines and to any and all consent forms and orders that refer or are applicable to these guidelines.

(1) "Media Coverage" means any visual or audio coverage of Court proceedings by a media organization or such coverage of the conduct or comment of any individual in the Courtroom during, prior to, and/or following said Courtroom proceeding.

(2) "Visual Coverage" is coverage by equipment that has the capacity to reproduce or televise an image,and includes still and moving picture photographic equipment and video equipment.

(3) "Audio Coverage" is coverage by equipment that has the capacity to reproduce or broadcast sounds, and includes tape and cassette or other sound recorders, and radio and video equipment.

(4) "Media" or "Media Organization" means any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, in-house publication, professional journal, or other news reporting or news gathering organizations.

(5) "Trial Court" or "Court" means the 361st Judicial District Court of Brazos County, Texas.

III. MEDIA COVERAGE

IT IS ORDERED THAT IN:

A. CIVIL CASES -

Media coverage is allowed in the Courtroom in civil cases only as permitted by Rule 18c of the Texas Rules of Civil Procedure and these Guidelines.

If media coverage is of investiture or ceremonial proceedings as allowed by Rule 18c of the Texas Rules of Civil Procedure, permission for, and the manner of such coverage are determined solely by the trial Court, with or without guidance from these Guidelines. If media coverage is for other than investiture or ceremonial proceedings, that is, under rule 18c(a) or (b) of the Texas Rules of Civil Procedure, the provisions of these Guidelines shall govern.

Whether or not consent of the parties or witnesses is obtained, the Court may, in its discretion grant, deny, limit, or terminate media coverage. In exercising such discretion the Court shall consider all relevant factors, including, but not limited to, those listed below in these guidelines.

Media coverage under Rule 18c(a) and (b) of the Texas Rules of Civil Procedure is permitted only on written

order of the trial Court. A request for an order shall be made on the form included in these guidelines. The following procedure shall be followed, except in extraordinary circumstances and only then if there is a finding by the Court that good cause justifies a different procedure:

(1) The request should be filed with the District Clerk, with a copy delivered to the trial Court and

(2) such request shall be made at least thirty (30) minutes prior to the Court proceeding the media desires to cover.

The Court shall rule upon said request without hearing, but shall inform the parties and/or counsel of such request or order and allow argument on any objection to such media coverage. Following any objection and argument the Court may decline to withdraw its order allowing media coverage; may amend such order and set out any conditions or limitation to the coverage as deemed necessary by the Court; or may withdraw its order and not allow such media coverage.

MEDIA COVERAGE WITH CONSENT: If media coverage is sought pursuant to Rule 18c(b) of the Texas Rules of Civil Procedure, the consent forms included in these Guidelines shall be used to evidence the consent of the parties and witnesses. Original signed consent forms of the parties shall be attached to and filed with the Request for Order. Consent forms of the witnesses shall be obtained in the manner directed by the trial Court.

It is ORDERED that no witness or party shall give consent to media coverage in exchange for payment or other consideration of any kind or character, either directly or indirectly. It is further ORDERED that no witness or party shall give consent to media coverage in exchange for payment or other consideration of any kind or character, either directly or indirectly. It is further ORDERED that no media agency, organization or individual shall pay or offer to pay any consideration in exchange for such consent.

MEDIA COVERAGE WITHOUT CONSENT: If media coverage is sought without consent of the parties or witnesses, pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the decision to allow such coverage is discretionary with the trial Court and will be made by the trial judge on a case-by-case basis.

In determining an application for coverage, the Court shall consider all relevant factors, including but not limited to:

(1) the type of case involved;

(2) whether the coverage would cause unfair harm to any participants;

(3) whether the coverage would interfere with the fair administration of justice, the advancement of a fair trial, or the rights of the parties;

(4) whether the coverage would interfere with any law enforcement activity;

(5) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceedings of which coverage is sought;

(6) the physical structure of the Courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the Courthouse;

(7) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought; and

(8) the fact that any party, prospective witness, victim, or any other participant in the proceeding is a child, to which fact the Court shall give great weight.

The existence of any one or more of the said considerations shall not necessarily result in prohibition of media coverage, but the Court shall consider all relevant factors and give such weight to such factors as the Court deems necessary and proper.

B. CRIMINAL CASES -

Media coverage is allowed in the Courtroom in criminal cases only as permitted by the trial Court.

Whether or not consent of the parties or witnesses is obtained, the Court may, in its discretion grant, deny, limit, or terminate media coverage. In exercising such discretion the Court shall consider, and give such weight as the trial Court, in its sole discretion, deems necessary, all relevant factors, including, but not limited to, those listed below in these Guidelines. Media coverage pursuant to the discretion of the trial Court is permitted only on written order of the trial Court. A request for an order shall be made on the form included in these Guidelines. The following procedure shall be followed, except in extraordinary circumstances and only then if there is a finding by the Court that good cause justifies a different procedure:

(1) The request should be filed with the District Clerk, with a copy delivered to the trial Court, and:

(2) such request shall be made at least thirty (30) minutes prior to the Court proceeding the media desires to cover.

The Court shall rule upon said request without hearing, but inform the parties and/or counsel of such request or order and allow argument on any objection to such media coverage. Following any objection and argument the Court may

decline to withdraw its order allowing media coverage; may amend such order and set out any conditions or limitation to the coverage as deemed necessary by the Court; or may withdraw its order and not allow such media coverage.

It is ORDERED that no witness or party shall give consent to media coverage in exchange for payment or other consideration of any kind of character, either directly or indirectly. It is further ORDERED that no media agency, organization or individual shall pay or offer to pay any consideration in exchange for such consent.

If media coverage is sought, and any party or witness objects to such coverage, the decision to allow such coverage is discretionary with the trial Court and will be made by thetrial judge on a case-by- case basis.

In determining an application for coverage, the Court shall consider all relevant factors, including but not limited to:

(1) the type of case involved;
(2) whether the coverage would cause unfair harm to any participants;
(3) whether the coverage would interfere with the fair administration of justice, the advancement of a fair trial, or the rights of the parties;
(4) whether the coverage would interfere with any law enforcement activity;
(5) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought;
(6) the physical structure of the Courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceeds or any other proceedings in the Courthouse;
(7) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought;
(8) security concerns for any party, witness, counsel, juror, or other persons in the Courtroom;
(9) privacy concerns for victims of sexual offenses; and
(10) the fact that any party, prospective witness, victim, or any other participant in the proceeding is a child, to which fact the Court shall give great weight.

The existence of any one or more of the said considerations shall not necessarily result in prohibition of media coverage, but the Court shall consider all relevant factors and give such weight to such factors as the Court deems necessary and proper.

IV. PROHIBITED MEDIA COVERAGE
CIVIL AND/OR CRIMINAL CASES

It is ordered that media coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. It is further Ordered that audio coverage and close-up video coverage of conferences between an attorney and client, witness or aide, between attorney or between counsel and the Court at the bench is prohibited. It is further ordered that visual coverage of potential jurors and jurors in the courtroom or outside the Courthouse is prohibited. It is further ordered that media coverage of any victim of a sexual offense or of any witness, party, or other Court participant under the age of 18 years is strictly prohibited.

V. EQUIPMENT AND PERSONNEL

The Court may require media personnel to demonstrate that proposed equipment complies with these Guidelines. The Court may specify the placement of media personnel and equipment to permit reasonable coverage without disruption to the proceedings.

Unless the Court in its discretion and for good cause orders otherwise, it is Ordered that the following Guidelines apply:

(1) One television camera and audio equipment that does not produce distracting sound or light is permitted.
(2) One still photographer, with not more than two cameras and four lenses, whichdoes not produce distracting sound or light are permitted.
(3) Equipment shall not produce distracting sound or light. Signal lights or devices that show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden lighting shall not be used.
(4) Existing Courtroom sound and lighting systems shall be used without modification. An order granting permission to modify existing systems is deemed to require that the modifications be installed, maintained, and removed without public expense. Microphones and wiring shall be unobtrusively located in places approved by the Court and shall be operated by one person.
(5) Operators shall not move equipment or enter or leave the Courtroom while the Court is in session;

or otherwise cause a distraction. All equipment shall be in place in advance of the proceeding or session. Operators shall assume fixed positions within the designated areas and shall not move about in any way as to attract attention through further movement. Still photographers shall not move about in order to photograph Court proceedings.

(6) Identifying marks, call letters, words and symbols shall be concealed on all equipment. Media personnel shall not display any identifying insignia on their clothing.

VI. DELAY OF PROCEEDING

It is Ordered that no proceeding or session shall be delayed or continued for the sole purpose of allowing media coverage, whether because of installation ofequipment, obtaining witness consents, conduct of hearings related to the media coverage or other media coverage questions.

To assist media organizations to prepare in advance for media coverage, and when requested to do so, (1) the trial Court will attempt to make the Courtroom available when not in use for the purpose of installing equipment; (2) counsel [to the extent they deem their client's rights will not be jeopardized] should make available to the media witness lists; (3) and the Court administrator, upon specific request, will inform the media organizations of settings of proceedings.

VII. POOLING

It is Ordered that if more than one media organization of any type wish to cover a proceeding or session, they shall make their own pooling arrangements, without calling upon the Court to mediate any dispute. If they are unable to agree, the Court may deny media coverage by that type of media organization. Any media representative who has obtained Court permission for coverage shall pool its tape or photographs at the request of other media representatives without requiring said other representatives to obtain further Court approval.

VIII. OTHER VISUAL OR AUDIO COVERAGE

It is Ordered that any other visual or audio coverage of Court proceedings is strictly prohibited unless specifically authorized by the Court.

IX. OFFICIAL RECORD

It is Ordered that the official Court record of any proceeding is the transcript of the original notes of the Court reporter made in open Court. Films, videotapes, photographs or audio reproduction made in the proceeding pursuant to these Guidelines shall not be considered as part of the official Court record.

X. SANCTIONS FOR VIOLATION

All persons, agencies, and/or organizations affected by this order are hereby informed that violations of this Court may result, in the trial Court=s discretion, in one or more of the following sanctions being imposed:

1. Prohibition of the photographing, recording and broadcasting of said proceeding;
2. Prohibition of the violating organization from participating in the pooling of any photographing, recording and broadcasting or said proceeding;
3. Temporary or Permanent expulsion of said violating organization from photographing, recording and broadcasting of any proceedings in the Court and the participating of any pooling of same;
4. Contempt of Court finding whereupon the Court may assess a fine not to exceed Five Hundred Dollars ($500.00) and may assess confinement in the county jail for a term not to exceed Six (6) months;
5. Confiscation of any video, audio, and/or photographic recording taken in violation of the Court's Order; and
6. Any such other Orders, relief, or penalty deemed by the Court to be just, equitable, and necessary.

Each media organization shall sign an acknowledgment that they have received a copy of these Orders and Guidelines, that they have read and understand same, and that they expressly agree to abide by the terms and conditions set out in these Guidelines and such other requirements set out by the Court. Said acknowledgment must be signed and filed with the Court prior to said media organization being permitted to participate in the privileges set out in these Orders.

SIGNED AND ORDERED on March 18, 2009.

STEVE SMITH
Judge, 361st Judicial District Court
Brazos County, Texas

EXHIBIT 8

May 29, 2009 **www.triallawyersiowa.com**

Indiana Supreme Court Authorizes News Cameras In Trial Courts

Evansville, Ind.—Chief Justice Randall T. Shepard announced today that the Supreme Court has authorized a pilot project to test the use of still and video news cameras and tape recorders in Indiana's trial courts.

The Supreme Court's decision came in response to a request from the Indiana Broadcasters Association and the Hoosier State Press Association. The 18-month pilot project will involve eight trial judges who have agreed to participate in the project.

"I hope that this experiment will help inform the public about the workings of the judicial system and remove any mystery about what happens in a courtroom. The ultimate success of the project will be determined by how much the public benefits from this greater access afforded the working press," said Chief Justice Shepard.

Under the terms of the order, news cameras and news radio station recorders will be allowed only in the courts of the eight trial judges who are part of the project. The trial judge and all parties must also agree to allow cameras or recorders into the courtroom.

The project will allow one video camera, one still camera and up to three tape recorders in a courtroom at each time. The news media must agree to "pool" or share the coverage under an arrangement approved by the trial judge.

The judges who are participating in the project are:

- Judge Nancy E. Boyer, Allen Superior Court, Fort Wayne
- Judge Robert R. Aylsworth, Warrick Superior Court, Boonville
- Judge Robert Barnett, Jr., Delaware Circuit Court, Muncie
- Judge Robert R. Altice, Marion Superior Court, Indianapolis
- Judge Patricia J. Gifford, Marion Superior Court, Indianapolis
- Judge Thomas K. Milligan, Montgomery Circuit Court, Crawfordsville
- Judge Michael G. Gotsch, St. Joseph Circuit Court, South Bend
- Judge Wayne Trockman, Vanderburgh Superior Court, Evansville

At the conclusion of the project, the entire effort will be evaluated to determine its future. The project was approved by a 3-2 vote. Chief Justice Shepard, Justice Frank Sullivan, Jr., and Justice Theodore R. Boehm voted in the majority. Justice Brent E. Dickson issued a dissent in which Justice Robert D. Rucker joined.

EXHIBIT 9

GARY HENGSTLER

Supreme Court of Nevada

MEDIA ADVISORY

March 10, 2009

SUPREME COURT ORAL ARGUMENTS SCHEDULED FOR MARCH 11-12-16

Sessions Will be Webcast

A panel of the Nevada Supreme Court will hold oral arguments on Wednesday, March 11, and Thursday, March 12, in Carson City.

Another panel will hold oral arguments on March 16, also in Carson City.

Video of the arguments will be streamed live on the Supreme Court website, www.nvsupremecourt.us. While the video will not be archived, a podcast of the arguments will be posted (usually by the end of the day) on the website. The podcast "detail" link specifies who is speaking.

Below is a calendar and synopses of cases.

CONTACT
Bill Gang
Public Information Officer, Nevada Supreme Court
702-486-3232 office 702-279-6375 mobile

NEVADA SUPREME COURT ORAL ARGUMENTS

Wednesday, March 11, 2009
Carson City – Justices Cherry, Saitta, and Gibbons

- 10:00 a.m. AMATO (GREGORY) VS. STATE
- 10:30 a.m. SAINTAL (PRISCELLA) VS. STATE
- 11:30 a.m. FLEETWOOD CORP. VS. TOWNE and DOROTHY TOWNE TRUST VS. FLEETWOOD CORP.
- 1:30 p.m. EVANS VS. EVANS

Thursday, March 12, 2009
Carson City – Justices Cherry, Saitta, and Gibbons

- 10:00 a.m. GIBBENS (TYLER) VS. STATE
- 10:30 a.m. BRADFORD (JULIUS) VS. STATE

- 11:30 a.m. RESORT PROPERTIES OF AMERICA VS. CHERRY INV. & DEV.

Friday, March 13, 2009
Carson City – Justices Cherry, Saitta, and Gibbons

- 10:00 a.m. IN RE: PARENTAL RIGHTS AS TO RALEIGH
- 10:30 a.m. MURPHY (MICHAEL) VS. STATE

Monday, March 16, 2009
Carson City – Justices Parraguirre, Douglas, and Pickering

- 1:00 p.m. HANNON (SEAN) VS. STATE
- 1:30 p.m. MCGEE (SARAH) VS. STATE

SYNOPSES OF SUPREME COURT ARGUMENTS

(**Disclaimer:** These synopses are intended to provide only general information about the cases before the Nevada Supreme Court. They are not intended to be all inclusive or reflect all positions of the parties.)

AMATO (GREGORY) VS. STATE, Docket No. 39515

10:00 a.m., Wednesday, March 11, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

Appeal of a Clark County criminal conviction of first-degree murder, robbery, burglary, grand larceny auto, possession of stolen vehicle and fraudulent use of credit card. Amato and the victim were seen leaving a bar together; the victim's dead body was later found in the desert and Amato was seen driving the victim's car and using the victim's credit card. A portion of the trial transcript was not produced by the court reporter; the district court was required to reconstruct the missing portion of the record. **ISSUE:** Did the improper preservation of trial transcript prevent a meaningful review by the Supreme Court and, if so, is a new trial warranted?

SAINTAL (PRISCELLA) VS. STATE, Docket No. 49646

10:30 a.m., Wednesday, March 11, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

This is an appeal of Saintal's conviction in Clark County for burglary, grand larceny, and conspiracy to possess stolen property. She was adjudicated a habitual criminal and given two life sentences. The grand larceny charges were based on the stolen items being worth more than $250, but the conspiracy to possess stolen property charges were based on same items being valued at less than $250. **ISSUES:** Were appellant's constitutional rights violated by the inconsistent verdicts that valued the same items differently? Was Saintal's designation as a habitual criminal and the life sentence for each count amount to cruel and unusual punishment?

DOROTHY TOWNE TRUST VS. FLEETWOOD CORP. and FLEETWOOD CORP. VS. TOWNE, Docket Nos. 50330/50983

11:30 a.m., Wednesday, March 11, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

These consolidated appeals arise from a lease dispute over geothermal resources in Washoe Valley. The district court granted summary judgment for Fleetwood but denied its post-judgment

motion for attorney fees. Fleetwood is appealing the denial of the awarding of attorney fees. Towne Trust is appealing the summary judgment order. **ISSUES:** Did the district court err in its grant of summary judgment and denial of attorney fees?

EVANS (DARREN) VS. EVANS (VALERIE), Docket No. 50979

1:30 p.m., Wednesday, March 11, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

This is an appeal of a divorce decree entered in Washoe County. **ISSUES:** Did the district court err in determining custody without an evidentiary hearing? Was child support properly calculated? Did the district court abuse its discretion in dividing community assets unequally?

GIBBENS (TYLER) VS. STATE, Docket No. 50131

10:00 a.m., Thursday, March 12, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

Gibbens is appealing his conviction as an adult of first-degree murder with the use of a deadly weapon in the shooting death of his 12-year-old friend in Nye County. Gibbens, who was 15-years-old at the time, was at his house with two friends when he used one of his father's rifles to shoot and kill the other boy. **ISSUE:** Did the State present sufficient evidence to support the conviction?

BRADFORD (JULIUS) VS. STATE, Docket No. 50630

10:30 a.m., Thursday, March 12, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

This is an appeal from a Clark County conviction of first-degree murder with the use of a deadly weapon and attempted robbery with the use of a deadly weapon. In the incident, Bradford and two friends attacked the victim on a sidewalk in a residential neighborhood. One of Bradford's friends shot the man several times, killing him. **ISSUES:** Did the district court abuse its discretion in allowing the State to question appellant as to his gang affiliation? Did the district court err in its instructions to the jury regarding the deadly weapon enhancement and adoptive admissions?

RESORT PROPERTIES OF AMERICA VS. CHERRY INV. & DEV., Docket No. 51098

11:30 a.m., Thursday, March 12, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

This appeal arises from an action to recover a real estate broker's commission that the appellant claims was stolen from him by the respondent. The Clark County district court granted summary judgment in favor of respondent. **ISSUE**: Did the district court err in granting summary judgment in favor of respondent?

IN RE: PARENTAL RIGHTS AS TO RALEIGH, Docket No. 51668

10:00 a.m., Friday, March 13, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

This is an appeal of a Clark County district court judge's order terminating the parental rights of a biological mother. The district court found, in part, that the mother had financially and emotionally abandoned the child, and that she was an unfit parent who posed a serious risk to the child's well-being. **ISSUE:** Did district court properly terminate parental rights?

MURPHY (MICHAEL) VS. STATE, Docket No. 50757

10:30 a.m., Friday, March 13, 2009 – 30 minutes – Carson City – Justices Cherry, Saitta, and Gibbons

Murphy is appealing his second-degree kidnapping conviction in Clark County, arising from the abduction of a child. **ISSUE:** Did district court abuse its discretion in admitting evidence of Murphy's prior bad acts, specifically, an alleged sexual assault of an 11-year-old child in Missouri?

HANNON (SEAN) VS. STATE, Docket No. 50594

1:00 p.m., Monday, March 16, 2009 – 30 minutes – Carson City – Justices Parraguirre, Douglas, and Pickering

Hannon is appealing his conviction for possession of a controlled substance that was discovered after police were dispatched to his apartment in Washoe County on a domestic violence call. The police found a brick of marijuana after entering Hannon's apartment against his objections. **ISSUE:** Were the police justified in entering appellant's apartment?

MCGEE (SARAH) VS. STATE, Docket No. 50696

1:30 p.m., Monday, March 16, 2009 – 30 minutes – Carson City – Justices Parraguirre, Douglas, and Pickering

This is an appeal from a conviction of two counts of driving under the influence with substantial bodily harm. McGee claimed she was involuntarily intoxicated at the time of the incident in Washoe County. **ISSUE:** Did the district court err in not allowing an instruction to the jury based on appellant's contention that she was involuntarily intoxicated?

EXHIBIT 10

Newsletter of the Federal Courts

THE THIRD BRANCH

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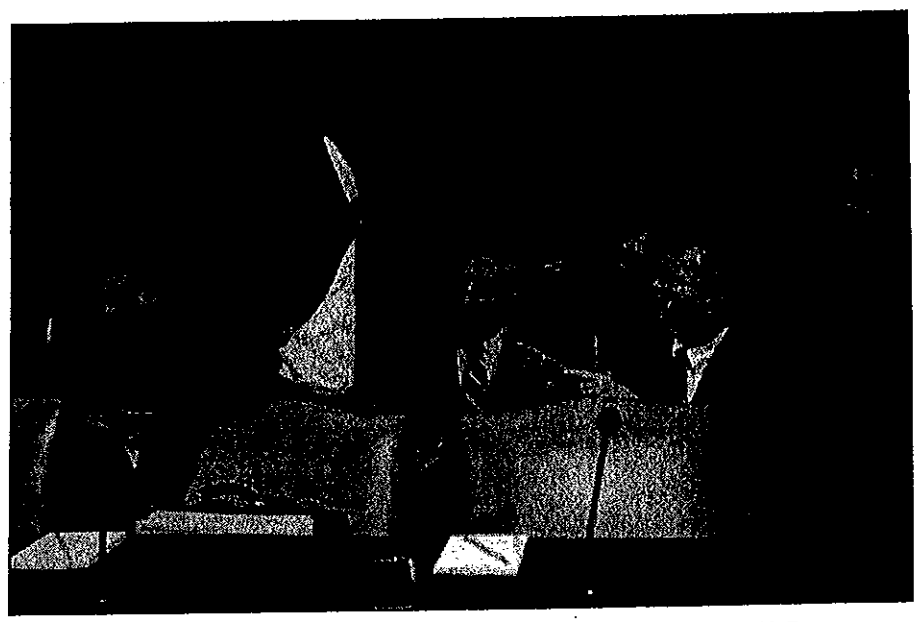
Masthead

Vol. 37, Number 12—December 2005

First Session Legislation Waits for 2006, Continued

Court Security Bill Passes House With Cameras in Courtroom Provision

H. R. 1751, the Secure Access to Justice and Court Protection Act of 2005, which passed the House in November, moved on to the Senate for consideration by the Senate Judiciary Committee.



Judges Diarmuid O'Scannlain (9th Cir.) and Judge Jan E. DuBois (E.D. Penn.) talk with Dan Cunningham from the AO's Office of Legislative Affairs, prior to the start of the Senate Judiciary Committee hearing on cameras in the courtroom.

The bill addresses several aspects of judicial security. Provisions in the bill would make it a federal offense to file fictitious liens against a federal employee, require the U.S. Marshals Service to consult with the Administrative Office regarding security requirements for the Judicial Branch, prohibit dangerous weapons in federal court facilities; fund the hiring of additional U.S. Marshals to protect the Judiciary; grant authority to federal judges and prosecutors to carry firearms, subject to regulations; and repeal the sunset of authority to redact personal and sensitive information from financial disclosure reports for security reasons. (Redaction authority also is in Senate bill, S. 1558, which would amend the Ethics in Government Act of 1978 to extend for four years the authority to redact financial disclosure statements of judicial employees and judicial officers.)

H.R. 1751 also would establish mandatory minimum penalties for certain federal offenses and allow broadcast media coverage of federal court proceedings at both the appellate and trial court level, at the discretion of the presiding judge.

The Judicial Conference, while supporting the judicial security provisions, opposes both the mandatory minimums, which severely distort and damage the federal

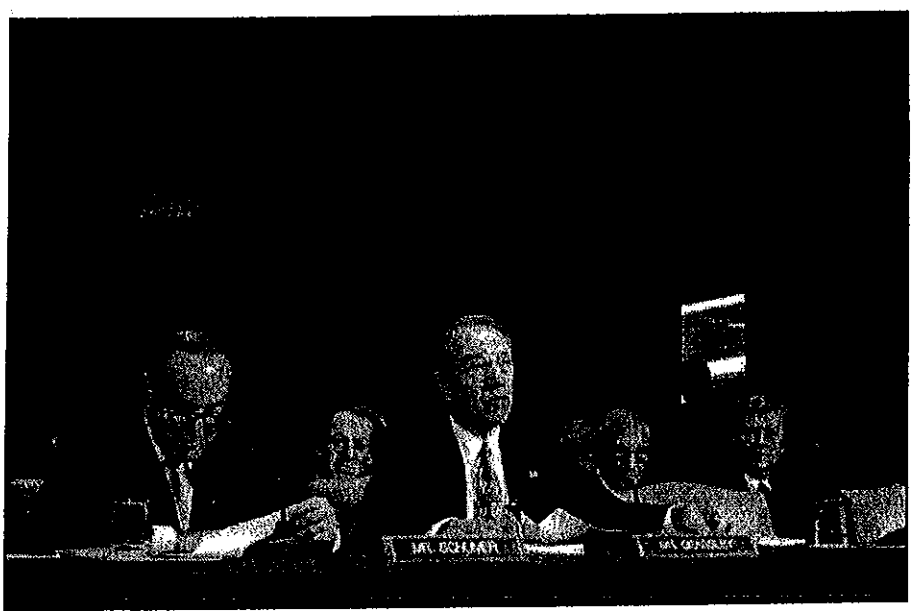
sentencing system, and the bill's provision on cameras in courtrooms. The Conference has concluded that it is not in the interest of justice to permit cameras in federal trial courtrooms.

The White House said, in a Statement of Administration Policy, that it supports the passage of H.R. 1751 to strengthen judicial security; "A Nation founded on the rule of law must protect the integrity of its judicial system, which must apply the law without fear or favor. Enactment of this bill is important to vindicate the essence of the rule of law." The White House also weighed in against cameras in the courtroom.

"The Administration opposes Section 22 of the bill. . . that would allow media coverage of Federal court proceedings under certain circumstances," the statement read, "While the Administration understands the public interest in viewing trials . . . Section 22 has the potential to influence court proceedings unduly and to compromise the security of participants in the judicial process."

Senate Considers Allowing Broadcast Media in Courtrooms

Two federal judges, Judge Diarmuid O'Scannlain (9th Cir.) and Judge Jan E. DuBois (E.D. Penn.) appeared before the Senate Judiciary Committee in November to testify on cameras in the courtroom, specifically on S. 829, the Sunshine in the Courtroom Act of 2005. S. 829 was introduced by Senator Charles E. Grassley (R-IA) in April 2005. A companion bill, H.R. 2422, was introduced in the House by Representative Steve Chabot (R-OH) in May 2005. A separate Senate bill, S. 1768, introduced by Senator Arlen Specter (R-PA), would apply only to the Supreme Court, requiring the Court to permit television coverage of its sessions, unless the justices decide, by majority vote, that such coverage would violate the due process rights of one or more of the parties.



Senators Charles E. Schumer and Charles E. Grassely appeared before the Senate Judiciary Committee in support of S. 829, the Sunshine in the Courtroom Act of 2005. Grassley introduced the legislation and Schumer is a co-sponsor.

"The Judicial Conference in its role as the policy-making body for the federal Judiciary has consistently expressed the view that camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial," O'Scannlain testified on behalf of the Conference.

The federal Judiciary has a number of concerns with S. 829. The bill would allow the photographing, electronic recording, broadcasting, or televising to the public of court proceedings. The presence of cameras might make witnesses less willing to appear in court, increase pressure on jurors, and tempt both attorneys and witnesses to try their cases in the court of public opinion rather than in a court of law.

DuBois was one of a relatively few federal judges who participated in a pilot program providing for camera coverage of civil proceedings in the federal trial courts. His district, the Eastern District of Pennsylvania, had the greatest application and coverage activity of the six participating district courts.

"My personal view is that, at the trial level" said DuBois, "the disadvantages of cameras in the courtroom far outweigh the advantages. In such a setting the camera is likely to do more than report the proceeding—it is likely to influence the substance of the proceeding."

"This is not a debate about whether judges would be discomfited with camera coverage," said O'Scannlain. "Nor is it a debate about whether the federal courts are afraid of public scrutiny. . . . Rather this is a decision about how individual Americans—whether they are plaintiffs, defendants, witnesses, or jurors—are treated by the federal judicial process. It is the fundamental duty of the federal Judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. The Judicial Conference believes that the use of cameras in the trial courtroom could seriously jeopardize that right."

Presently, two of the 13 appellate courts, the Second and Ninth Circuits, permit camera coverage in appellate proceedings; cameras are not permitted at the trial court level.

The majority of states impose restrictions on the use of cameras in the court or have banned cameras altogether. Approximately 31 states that permit cameras have restrictions of some kind written into their authorizing statutes; 13 states do not allow coverage of criminal trials; and nine states only allow cameras in appellate courts. Only 19 states provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation.

The presence of cameras in the trial courtroom also raises the profile of judges, witnesses, jurors, and U.S. Marshals Service personnel, who may be put at risk. The number of threats against judges has escalated over the years, and widespread media exposure could exacerbate the problem.

O'Scannlain's individual testimony and his testimony on behalf of the Judicial Conference is available on-line at www.uscourts.gov/testimony/exhibit4CameraTest05.pdf.

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EXHIBIT 11

ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Background on Cameras in the Federal Courts

Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. It states:

> *"The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."*

In 1972 the Judicial Conference of the United States adopted a prohibition against *"broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto..."* The prohibition, which was contained in the Code of Conduct for United States Judges, applied to criminal and civil cases.

In October 1988 Chief Justice Rehnquist appointed the Ad Hoc Committee on Cameras in the Courtroom.

At its September 1990 session, the Judicial Conference adopted the report of its Ad Hoc Committee on Cameras in the Courtroom. The report recommended a pilot program permitting electronic media coverage of civil proceedings in six district and two appellate courts. The Conference also struck the prohibition contained in the Code of Conduct and adopted a policy on cameras that was published in the Guide to Judiciary Policies and Procedures.

The new policy, as published in the Guide, states:

> *"A Judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such proceedings, only:*
>
> *(a) for the presentation of evidence;*
> *(b) for the perpetuation of the record of the proceedings;*
> *(c) for security purposes;*
> *(d) for other purposes of judicial administration; or*
> *(e) in accordance with pilot programs approved by the Judicial Conference of the United States."*

A three year pilot program commenced July 1, 1991 in the U.S. Courts of Appeals for the Second and Ninth Circuits and the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and the Western District of Washington.

At its September 1994 session, the Judicial Conference considered a report and recommendation of the Court Administration and Case Management Committee to authorize photographing, recording, and broadcasting of civil proceedings in federal trial and appellate courts. Based upon the data presented, a majority of the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for serious concern and the Conference declined to approve the Committee's recommendation to expand camera coverage in civil proceedings.

At its September 1994 session, the Conference also did not approve a proposed amendment to Criminal Rule 53, which would have allowed cameras in criminal proceedings if authorized under guidelines subsequently promulgated by the Conference.

The cameras in the courtroom pilot program concluded on December 31, 1994.

At its March 1996 session, the Judicial Conference adopted a resolution stating that "Each court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt."

At its March 1996 session, the Judicial Conference voted to strongly urge each circuit judicial council to adopt pursuant to 28 U.S.C. Sec.332(d)(1) an order reflecting the Conference's September 1994 decision not to permit the taking of photographs and radio and television coverage of proceedings in U.S. district courts. The Conference also voted to strongly urge circuit judicial councils to abrogate any local rules of court that conflict with this decision, pursuant to 28 U.S.C. Sec.2071(c)(1).

For more information: Administrative Office of the U.S. Courts, Office of Public Affairs
202-502-2600

EXHIBIT 12

Exhibit 4

STATEMENT OF JUDGE DIARMUID O'SCANNLAIN ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES REGARDING S. 829 AS APPLIED TO FEDERAL TRIAL COURTS

Introduction

The Judicial Conference strongly opposes S. 829, a bill that would "allow media coverage of court proceedings," so far as it applies to the federal trial courts. Of course, the Judicial Conference cannot and does not speak for the Supreme Court.

The federal judiciary has examined the issue of whether cameras should be permitted in the federal courts for more than six decades, both through case law and Judicial Conference consideration. The Judicial Conference in its role as the policy-making body for the federal judiciary has consistently expressed the view that camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial. On the other hand, since 1994 the Judicial Conference has permitted "the photographing, recording, or broadcasting of appellate arguments" in the Circuit Courts of Appeals. But, as to the trial courts, we believe that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly

negative impact on the trial process. Moreover, in civil cases cameras can intimidate civil defendants who, regardless of the merits of their case, might prefer to settle rather than risk damaging accusations in a televised trial. Cameras can also create security concerns in the federal courts. Finally, cameras can create privacy concerns for countless numbers of persons, many of whom are not even parties to the case, but about whom very personal information may be revealed at trial.

These concerns are far from hypothetical. Since the infancy of motion pictures, cameras have had the potential to create a spectacle around trial court proceedings. Obvious examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnapping trial, the murder trial in 1954 of Dr. Sam Sheppard, and the more recent Menendez brothers and O.J. Simpson trials. We have avoided such incidences in the federal courts due to the present bar of cameras in the trial courts, which S. 829 now proposes to overturn.

The federal courts have shown strong leadership in the continuing effort to modernize the litigation process. This has been particularly true of the federal judiciary's willingness to embrace new technologies, such as electronic case filing and access, videoconferencing, and electronic evidence presentation systems. The federal courts have also established community outreach programs in which

several thousand students and teachers nationwide have come to federal courthouses to learn about court proceedings. Our opposition to this legislation, therefore, is not, as some may suggest, borne of a desire to stem technology or access to the courts. We oppose the broadcasting of federal trial court proceedings because it is contrary to the interests of justice, which it is our most solemn duty to uphold.

Today I will discuss some of the Judicial Conference's specific concerns with this legislation, as well as with the issues of cameras in the trial courtroom, generally. However, before addressing those concerns, I would like to provide you with a brief review of the Conference's experience with cameras, which will demonstrate the time and effort it has devoted to understanding this issue over the years. I must emphasize at the threshold that today, as in the past, the federal courts, both appellate and trial, are at all times open to the public.

II. Background on Cameras in the Federal Courts

Whether to allow cameras in the courtroom is far from a novel question for the federal judiciary. Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that "[t]he taking of photographs in the courtroom during the progress of judicial

proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

In 1972, the Judicial Conference adopted a prohibition against "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto. . . ." The prohibition applied to criminal and civil cases. The Conference has, however, repeatedly studied and considered the issue since then.

In 1988, Chief Justice William Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended that a three-year experiment be established permitting camera coverage of certain proceedings in selected federal courts. In 1990, the Judicial Conference adopted this recommendation, and authorized a three-year pilot program allowing electronic media coverage of civil proceedings in six district and two appellate courts, which commenced July 1, 1991. The courts that volunteered to participate in the pilot project were the U.S. Courts of Appeals for the Second and Ninth Circuits, and the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of New York.

The Federal Judicial Center (FJC) conducted a study of the pilot project and

submitted its results to a committee of the Judicial Conference in September 1994.[1] The research project staff made a recommendation that the Conference "authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms. . . ." It is important to note that the recommendations included in the report were reviewed within the FJC but not by its Board.

The Conference disagreed with the conclusions drawn by the FJC staff and concluded that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. The paramount responsibility of a United States judge is to uphold the Constitution, which guarantees citizens the right to a fair and impartial trial. Taking into account this considerable responsibility placed upon judges, the Conference concluded that it was not in the interest of justice to permit cameras in federal courtrooms.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue. At that session, the Conference voted strongly to urge each circuit judicial council to adopt, pursuant to its rulemaking authority articulated in 28 U.S.C. § 332(d)(1), an order reflecting the Conference's September 1994

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[1] In 1994, the Federal Judicial Center published a report entitled *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals.* The period used by the Federal Judicial Center for its study was July 1, 1991, to June 30, 1993.

decision not to permit the taking of photographs or radio and television coverage of proceedings in U.S. district courts. The Conference also voted strongly to urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

The Conference, however, made a distinction between camera coverage for appellate and district court proceedings. Because an appellate proceeding does not involve witnesses and juries, the concerns of the Conference regarding the impact of camera coverage on the litigation process were reduced. Therefore, the Conference adopted a resolution stating that "[e]ach court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt."

The current policy, as published in the *Guide to Judiciary Policies and Procedures* states:

> A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:
>
> (a) for the presentation of evidence;
> (b) for the perpetuation of the record of the proceedings;
> (c) for security purposes;

(d) for other purposes of judicial administration; or
(e) for the photographing, recording, or broadcasting of appellate arguments.

When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will be consistent with the rights of the parties, will not unduly distract participants in the proceeding, and will not otherwise interfere with the administration of justice.

Presently, only two of the 13 appellate courts, the Second and Ninth Circuits, have decided to permit camera coverage in appellate proceedings. This decision was made by the judges of each court. As for cameras in district courts, most circuit councils have either adopted resolutions prohibiting cameras in the district courts or acknowledged that the district courts in that circuit already have such a prohibition.

Finally, it may be helpful to describe the state rules regarding cameras in the courtroom. While it is true that most states permit some use of cameras in their courts, such access by the media is not unlimited. The majority of states have imposed restrictions on the use of cameras in the court or have banned cameras altogether in certain proceedings. Although it is somewhat difficult to obtain current information, it appears that approximately 31 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as allowing coverage only in certain courts, prohibiting coverage of certain types of

proceedings or of certain witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Thirteen states do not allow coverage of criminal trials. In nine states, cameras are allowed only in appellate courts. The District of Columbia prohibits cameras altogether. Utah allows only still photography at civil trials. In fact, only 19 states provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation. It is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the courtroom.

III. Judicial Conference Concerns Regarding S. 829, As Applied to Trial Courts

I would now like to discuss some of the specific concerns the Judicial Conference has with S. 829, as well as the more general issue of media coverage in trial courtrooms.

A. Cameras Negatively Impact the Trial Process

Supporters of cameras in the courtroom assert that modern technology has made cameras and microphones much less obvious, intrusive or disruptive, and that therefore the judiciary need not be concerned about their presence during proceedings. That is not the issue. While covert coverage may reduce the bright

lights and tangle of wires that were made famous in the Simpson trial, it does nothing to reduce the significant and measurable negative impact that camera coverage can have on the trial participants themselves.

Proponents of cameras in the courtroom argue that media coverage would benefit society because it would enable people to become more educated about the legal system and particular trials. But even if this is true, increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases. While judges are accustomed to balancing conflicting interests, balancing the positive effects of media coverage against an external factor such as the degree of impairment of the judicial process that camera coverage would bring is not the kind of thing judges should balance. Rather, our mission is to administer the highest possible quality of justice to each and every litigant. We cannot tolerate even a little bit of unfairness (based on media coverage), notwithstanding that society as a whole might in some way benefit, for that would be inconsistent with our mission.

The Conference maintains that camera coverage would indeed have a notably adverse impact on trial court proceedings. This includes the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses,

and judges. We believe, for example, that a witness telling facts to a jury will often act differently when he or she knows that thousands of people are watching and listening to the story. This change in a witness's demeanor could have a profound impact on a jury's ability to accurately assess the veracity of that witness. Media coverage could exacerbate any number of human emotions in a witness from bravado and over dramatization, to self-consciousness and under reaction. In fact, even according to the FJC study (which is discussed in more detail later in this statement), 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous. In addition, 46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses.

Such effects could severely compromise the ability of jurors to assess the veracity of a witness and, in turn, could prevent the court from being able to ensure that the trial is fair and impartial. Likewise, television cameras could have a profound impact on the deliberations of a jury. The psychological pressures that jurors are already under would be unnecessarily increased by the broader exposure resulting from the broadcasting of a trial and could conceivably affect a juror's judgment to the detriment of one of the parties.

B. S. 829 Inadequately Protects the Right to a Fair Trial

The primary goal of this legislation is to allow radio and television coverage of federal court cases. While there are several provisions aimed at limiting coverage (*i.e.*, allowing judges the discretion to allow or decline media coverage; authorizing the Judicial Conference to develop advisory guidelines regarding media coverage; and requiring courts to disguise the face and voice of a witness upon his or her request), the Conference is convinced that camera coverage could, in certain cases, so indelibly affect the dynamics of the trial process that it would impair citizens' ability to receive a fair trial.[2]

For example, Section 1(a) and (b) of the bill would allow the presiding judge of an appellate or district court to decide whether to allow cameras in a particular proceeding before that court. If this legislation were to be enacted, we are confident that all federal judges would use extreme care and judgment in making this determination. Nonetheless, federal judges are not clairvoyants. Even the most straightforward or "run of the mill" cases have unforseen developments. Obviously a judge never knows how a lawyer will proceed or how a witness or party will testify. And these events can have a tremendous impact on the trial

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[2]We recognize that the legislation would sunset the authority for district court judges to permit cameras three years after the date of enactment of the Act. There is no comparable sunset provision for the appellate courts.

participants. Currently, courts have recourse to instruct the jury to disregard certain testimony or, in extreme situations, to declare a mistrial if the trial process is irreparably harmed. If camera coverage is allowed, however, there is no opportunity to later rescind remarks heard by the larger television audience. This concern is of such importance to the Conference that it opposes legislation that would give a judge discretion to evaluate in advance whether television cameras should be permitted in particular cases.

We also are concerned about the provision that would require courts to disguise the face and voice of a witness upon his or her request. Anyone who has been in court knows how defensive witnesses can be. Frequently they have a right to be. Witnesses are summoned into court to be examined in public. Sometimes they are embarrassed or even humiliated. Providing them the choice of whether to testify in the open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community. It would not be in the interest of the administration of justice to unnecessarily increase the already existing pressures on witnesses.

These basic concerns regarding witnesses were eloquently described by Justice Clark in *Estes v. Texas*, 381 U.S. 532:

The quality of the testimony in criminal trials will often be impaired.

> The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward over dramatization. Furthermore, inquisitive strangers and 'cranks' might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot 'prove' the existence of such factors. Yet we all know from experience that they exist. . . .

Estes, 381 U.S. at 547.

It is these concerns that cause the Judicial Conference of the United States to oppose enactment of S. 829.

C. Threat of Camera Coverage Could be Used as a Trial Tactic

Cameras provide a very strong temptation for both attorneys and witnesses to try their cases in the court of public opinion rather than in a court of law. Allowing camera coverage would almost certainly become a potent negotiating tactic in pretrial settlement negotiations. For example, in a high-stakes case involving millions of dollars, the simple threat that the president of a defendant corporation could be forced to testify and be cross examined, for the edification of the general public, might well be a real disincentive to the corporation's exercising its right to a public trial.

D. Cameras Can Create Security Concerns

Although the bill includes language allowing witnesses who testify to be disguised, the bill does not address security concerns or make similar provision regarding other participants in judicial proceedings. The presence of cameras in the trial courtroom is likely to heighten the level and the potential of threats to judges. The number of threats against judges has escalated over the years, and widespread media exposure could exacerbate the problem. Additionally, all witnesses, jurors, and United States Marshals Service personnel may be put at risk because they would no longer have a low public profile.

Also, national and international camera coverage of trials in federal courthouses would place these buildings, and all in them, at greater risk from terrorists, who tend to choose targets for destruction that will give their "messages" the widest exposure. Such threats would require increased personnel and funding to adequately protect participants in court proceedings.

E. Cameras Can Create Serious Privacy Concerns

There is a rising tide of concern among Americans regarding privacy rights and the Internet. Numerous bills have been introduced in both the Congress and state legislatures to protect the rights of individual citizens from the indiscriminate dissemination of personal information that once was, to use a phrase coined by the

Supreme Court, hidden by "practical obscurity,"[3] but now is available to anyone at any time because of the advances of technology. Broadcasting of trials presents many of the same concerns about privacy as does the indiscriminate dissemination of information on the Internet that was once only available at the courthouse. Witnesses and counsel frequently discuss very sensitive information during the course of a trial. Often this information relates to individuals who are not even parties to the case, but about whom personal information may be revealed. Also, in many criminal and civil trials, which the media would most likely be interested in televising, much of the evidence introduced may be of an extremely private nature, revealing family relationships and personal facts, including medical and financial information. This type of information provided in open court, is already available to the public through the media. Televising these matters sensationalizes these details for no apparent good reason.

Involvement in a federal case can have a deep and long-lasting impact on all its participants, most of whom have neither asked for nor sought publicity. In this adversarial setting, reputations can be compromised and relationships can be damaged. In fact, according to the FJC study on live courtroom media coverage,

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[3] United States Department of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749, 764 (1989).

56% of the participating judges felt that electronic media coverage violates a witness's privacy. This is not to say that the Conference advocates closed trials; far from it. Nevertheless, there is a common-sense distinction between a public trial in a public courtroom—typically filled with individuals with a real interest in the case—and its elevation to an event that allows and encourages thousands to become involved intimately in a case that essentially concerns a small group of private people or entities.

The issue of privacy rights is one that has not been adequately considered or addressed by those who would advocate the broadcasting of trials. This heightened awareness of and concern for privacy rights is a relatively new and important development that further supports the position of the Judicial Conference to prohibit the use of cameras in the courtroom.

F. S. 829 Does Not Address the Complexities Associated with Camera Coverage in the Trial Courts

Media coverage of a trial would have a significant impact on that trial process. There are major policy implications as well as many technical rules issues to be considered, none of which are addressed in the proposed legislation. For example, televising a trial makes certain court orders, such as those sequestering witnesses, more difficult to enforce. In a typical criminal trial, most

witnesses are sequestered at some point. In addition, many related technical issues would have to be addressed, including advance notice to the media and trial participants, limitations on coverage and camera control, coverage of the jury box, and sound and light criteria.

Finally, S. 829 includes no funding authorization for implementation of its mandates. Regardless of whether funding is authorized, there is no guarantee that needed funds would be appropriated. The costs associated with allowing cameras, however, could be significant. For example, costs would be incurred to retrofit courtrooms to incorporate cameras while minimizing their actual presence to the trial participants. Also, to ensure that a judge's orders regarding coverage of the trial were followed explicitly (*e.g.*, not filming the jury, obscuring the image and voice of certain witnesses, or blocking certain testimony), a court may need to purchase its own equipment, as well as hire technicians to operate it. When considering that these expenses may have to be incurred in each of the 94 districts, the potential cost could be significant. An additional considerable cost would be creation of the position of media coordinator or court administrative liaison to administer and oversee an electronic media program on a day-to-day basis. According to the FJC report, the functions of the media liaisons included receiving applications from the media and forwarding them to presiding judges,

coordinating logistical arrangements with the media, and maintaining administrative records of media coverage.

G. There is No Constitutional Right to have Cameras in the Courtroom

Some have asserted that there is a constitutional "right" to bring cameras into the courtroom and that the First Amendment requires that court proceedings be open in this manner to the news media. The Judicial Conference responds to such assertions by stating that today, as in the past, federal court proceedings *are* open to the public; however, nothing in the First Amendment *requires* televised trials.

The seminal case on this issue is *Estes v. Texas*, 381 U.S. 532 (1965). In *Estes*, the Supreme Court directly faced the question whether a defendant was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. The Court held that such broadcasting in that case violated the defendant's right to due process of law. At the same time, a majority of the Court's members addressed the media's right to telecast as relevant to determining whether due process required excluding cameras from the courtroom. Justice Clark's plurality opinion and Justice Harlan's concurrence indicated that the First Amendment did not extend the right to the news media to televise from the courtroom. Similarly, Chief Justice Warren's concurrence, joined

by Justices Douglas and Goldberg, stated:

> [n]or does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. . . . So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgement of the freedom of press.

Estes, 381 U.S. at 584-85 (Warren, C.J., concurring).

In the case of *Westmoreland v. Columbia Broadcasting System. Inc.*, 752 F.2d 16 (2d Cir. 1984), the Second Circuit was called upon to consider whether a cable news network had a right to televise a federal civil trial and whether the public had a right to view that trial. In that case, both parties had consented to the presence of television cameras in the courtroom under the close supervision of a willing court, but a facially applicable court rule prohibited the presence of such cameras. The Second Circuit denied the attempt to televise that trial, saying that no case has held that the public has a right to televised trials. As stated by the court, "[t]here is a long leap . . . between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history." *Westmoreland*, 752 F.2d at 23.

Similarly, in *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986), the court discussed whether the First Amendment encompasses a right to cameras in

the courtroom, stating: "No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials. To the contrary, the Supreme Court has indicated that the First Amendment does not guarantee a positive right to televise or broadcast criminal trials." *Edwards*, 785 F.2d at 1295. The court went on to explain that while television coverage may not always be constitutionally prohibited, that is a far cry from suggesting that television coverage is ever constitutionally mandated.

These cases forcefully make the point that, while all trials are public, there is no constitutional right of media to broadcast federal district court or appellate court proceedings.

H. The Teachings of the FJC Study

Proponents of S. 829 have indicated that the legislation is justified in part by the FJC study referred to earlier. The Judicial Conference based, in part, its opposition to cameras in the courtroom on the same study. Given this apparent inconsistency, it may be useful to highlight several important findings and limitations of the study. As I noted earlier in the statement, the recommendations included in the FJC report, which were proposed by the research project staff, were reviewed within the FJC but not by its Board.

First, the study only pertained to civil cases. This legislation, if enacted,

would allow camera coverage in both civil and criminal cases. As this Subcommittee is acutely aware, the number of criminal cases in the federal courts continues to rise. One could expect that most of the media requests for coverage would be in sensational criminal cases, where the problems for witnesses, including victims of crimes, and jurors are most acute.

Second, the study's conclusions ignore a large amount of significant negative statistical data. For example, the study reports on attorney ratings of electronic media effects in proceedings in which they were involved. Among these negative statistics were the following:

- 32% of the attorneys who responded felt that, at least to some extent, the cameras distract witnesses;
- 40% felt that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;
- 19% believed that, at least to some extent, the cameras distract jurors;
- 21% believed that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 27% believed that, at least to some extent, the cameras have the effect of distracting the attorneys; and
- 21% believed that, at least to some extent, the cameras disrupt the courtroom proceedings.

When trial judges were asked these same questions, the percentages of

negative responses were even higher:

- 46% believed that, at least to some extent, the cameras make witnesses less willing to appear in court;
- 41% found that, at least to some extent, the cameras distract witnesses;
- 64% reported that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;
- 17% responded that, at least to some extent, cameras prompt people who see the coverage to try to influence juror-friends;
- 64% found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 9% reported that, at least to some extent, the cameras cause judges to avoid unpopular decisions or positions; and
- 17% found that, at least to some extent, cameras disrupt courtroom proceedings.

For the appellate courts, an even larger percentage of judges who participated in the study related negative responses:

- 47% of the appellate judges who responded found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 56% found that, at least to some extent, the cameras cause attorneys to change the emphasis or content of their oral arguments;
- 34% reported that, at least to some extent, cameras cause judges to change the emphasis or content of their questions at oral arguments; and
- 26% reported that, at least to some extent, the cameras disrupt courtroom

proceedings.

While the Conference did allow each United States court of appeals to determine whether to permit the use of cameras in that circuit, these high negative responses give us a very real indication as to why only two out of 13 courts of appeals have allowed their proceedings to be televised. The two courts that do allow camera coverage are the Second and Ninth Circuits, which voluntarily participated in the pilot project.

These negative statistical responses from judges and attorneys involved in the pilot project dominated the Judicial Conference debate and were highly influential in the Conference's conclusion that the intimidating effect of cameras on witnesses and jurors was cause for alarm. Since a United States judge's paramount responsibility is to seek to ensure that all citizens enjoy a fair and impartial trial, and cameras may compromise that right, allowing cameras would not be in the interest of justice. For these reasons, the Judicial Conference rejected the conclusions made by the FJC study with respect to cameras in district courts.

Carefully read, the FJC study does not reach the firm conclusions for which it is repeatedly cited. The negative responses described above undermine such a reading. When considering legislation affecting cameras in the courtroom with such permanent and long-range implications for the judicial process, the negative

responses should be fully considered. Certainly that is what the Conference focused on. In reality the recommendations of the study reflect a balancing exercise which may seem proper to social scientists but which is unacceptable to judges who cannot compromise the interests of the litigants, jurors, and witnesses, even for a public benefit.

IV. Conclusion

When almost anyone in this country thinks of cameras in the trial courtroom today, they inevitably think of the O.J. Simpson case. I sincerely doubt anyone believes that the presence of cameras in that courtroom did not have an impact on the conduct of the attorneys, witnesses, jurors, and judge—almost universally to the detriment of the trial process. Admittedly, few cases are Simpson-like cases, but the inherent effects of the presence of cameras in the courtroom are, in some respects, the same, whether or not it is a high-publicity case. Furthermore, there is a legitimate concern that if the federal courts were to allow camera coverage of cases that are not sensational, it would become increasingly difficult to limit coverage in the high-profile and high-publicity cases where such limitation, almost all would agree, would be warranted.

This is not a debate about whether judges would be discomfited with camera coverage. Nor is it a debate about whether the federal courts are afraid of public

scrutiny. They are not. Open hearings are a hallmark of the federal judiciary. It is also not about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. The judiciary strongly endorses educational outreach, which could better be achieved through increased and targeted community outreach programs.

Rather, this is a decision about how individual Americans—whether they are plaintiffs, defendants, witnesses, or jurors—are treated by the federal judicial process. It is the fundamental duty of the federal judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the trial courtroom could seriously jeopardize that right. It is this concern that causes the Judicial Conference of the United States to oppose enactment of S. 829 as applied to federal trial courts. As the Supreme Court stated in *Estes*, "[w]e have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." 381 U.S. at 540.

I have mentioned in my oral testimony that there is a fundamental distinction between appellate and trial proceedings. The Judicial Conference has serious concerns, which I share, that cameras are inappropriate in the trial court

setting, while acceptable, with discretion, in the Circuit Courts of Appeals.

EXHIBIT 13

TESTIMONY OF THE HONORABLE NANCY GERTNER, U.S.D.C.
Re: S. 721
September 6, 2000

I want to thank you for giving me this opportunity to speak before you. I am strongly in favor of this bill.

Let me say at the outset, that I speak only for myself, and surely not for the other judges of my Court. Opinion is divided on the issue of cameras in the courtroom in my Court, as it is in other federal courts around the country.

I come to this issue both as a judge and as a former litigator. I was a trial lawyer for twenty-two years, representing clients in both civil and criminal cases, in federal and state courts. Because Massachusetts has had cameras in the courtroom for a considerable period of time, I have had the privilege of participating in a number of televised trials and other proceedings: A high-profile murder case involving a battered woman accused of killing her abusing spouse in Springfield, Massachusetts; a less well-known murder case involving a young man accused of killing a neighbor in Natick, Massachusetts; and my last case, the infamous case of Matthew Stuart, the brother of Charles Stuart, accused of participating in an insurance scam. Charles Stuart, as you may remember, was alleged to have killed his pregnant wife.

I have been a judge for six years. During that period of time I have presided over a number of cases which attracted media attention and would have been televised had that option been available.

I would like to address two broad areas today. First, public proceedings in the twenty-first century necessarily mean televised proceedings. Television is the means by which most people get their news. Moreover, at a time when polls suggest that the public is woefully misinformed about the justice system, more information, and relatively unmediated information, is better than less information.

Second, the concerns raised by the opponents of this bill are, to a degree, misplaced. In any event, the disadvantages do not compensate for the advantages. There is concern that the participants in televised trials somehow skew their presentation because of the gaze of the cameras. I believe that if such behavior occurs at all, it is a function of two things: The fact that most of the televised trials are high-profile cases, where the participants are already acutely aware of the publicity surrounding them, and the fact that televised trials, particularly in federal courts, are a relative novelty.

There is also concern that televised proceedings will somehow undermine the legitimacy of our courts with the public. The data on this is mixed. On the one hand, the public learns an enormous amount from actually seeing trial proceedings. Given the strength of our system, seeing it in operation can only bolster the public's confidence. On the other hand, televised proceedings do give the public an opportunity to second guess the jury, believing -- mistakenly -- that they have seen all of the trial, that they are in the same position as the jurors, when they are not. When the outcome is different than they expected, they become cynical. As I describe below, I believe that

these concerns can be addressed by judges, by commentators, by educators, and that, in any event, they do not outweigh the advantages.

On the first point: Public proceedings in the twenty-first century necessarily mean televised proceedings. In a study published over twenty years ago, it was reported that some 54% of the American public indicated that they get their news from the television.1 I can only assume that that number is substantially higher today. Information about the courts -- from whatever the source -- is notoriously distorted. Former Judge Thomas Hodson, for example, described the situation as follows:

> When I sat on the bench I always wondered about any reporter I saw in my courtroom. Often I knew that the reporter had no idea what I was doing, what the judicial system was about, what the language being used in the courtroom meant, and what rights were being protected and advanced through the legal system. Rarely do reporters have any expertise in the law; the vast majority come from journalism or liberal arts schools, no law schools. Covering 'cops and courts' is usually an entry level position at newspapers and is subject to general assignment reporting at television stations. Trained court reporters are a dying breed. Turnover is high.2

I am not suggesting that the televising court proceedings necessarily means accurate, unedited, undistorted coverage. Obviously, television reporters can edit the proceedings, take snippets out of context, sprinkle it with inappropriate commentary. But when they offer the so-called "gavel to gavel" coverage, when people have an opportunity to hear the actual words of the participants, I think the result can only be beneficial.

Let me bring up a particularly controversial example, the O.J. Simpson trial. That trial was credited with most of the backlash to cameras in the courtroom, and with good reason. There was much to criticize, much to be concerned about in the way the trial was conducted and covered. But one thing was clear: More people were talking about legal issues in more sophisticated ways than I, for one, had ever heard. There were discussions on television, and in the print media, as well as on the streets as to whether Mr. Simpson was "probably" guilty, but the government had not proved its case "beyond a reasonable doubt." That distinction -- the difference between "probably guilty" and "proof beyond a reasonable doubt" -- is a sophisticated one. It was all the more telling given the fact that most polls suggest that the majority of Americans harbor substantial misconceptions about the criminal justice system -- what "beyond a reasonable doubt" means, who has the burden of proof, etc.

Let me draw an analogy here. I recently had the opportunity to visit courts in a country in the former Soviet Union. Trial proceedings were open, my hosts told me, but the courtrooms were small and had only a single bench for the "public." It was formally open to everyone, but practically speaking, public access was extremely limited.

In this country, we understand that to make something public requires affirmative efforts on our part -- courtrooms big enough to include the people who will be interested in the proceedings, handicapped access, provision for the media, etc. Indeed, we are trying to use our technology to enhance that access. The Federal Courts are moving rapidly towards electronic case filing, enabling lawyers and the public to get access to the written files through their computers. And the public's interest in court proceedings is growing, not only for the more bizarre and scandalous cases.

The point is a simple one: When the majority of Americans get their information through a screen, our obligation to make proceedings public has to include allowing those proceedings to be televised.

Now I want to address the very important concerns that have been raised by opponents of this bill. First, there are concerns that the participants will somehow "play to the audience," distorting their presentations because of the insistent cameras. To the extent that this happens at all, I believe it is more a function of the fact that many of the televised cases have been high-profile cases. In such cases, all of the participants are already acutely aware that there is a larger audience. The question is whether the presence of cameras materially changes that, and in my experience, it does not.

Moreover, in many jurisdictions, cameras in courtrooms are novelties. Whatever impact derived from their presence would surely be lessened as time passes, as everyone becomes more and more used to their presence. This is especially the case as the technology improves, as cameras become less and less physically intrusive in the courtroom.

That has been the experience of the Massachusetts court system and court systems across the country. There are cameras in the courtrooms of forty-seven states. Numerous studies have been conducted by these jurisdictions to test the impact of the cameras on the proceedings. The results have been favorable -- that televised coverage does not impede the fair administration of justice, does not compromise the dignity of the court, and does not impair the orderly conduct of proceedings. Indeed, the opposite is the case -- that public education about the system is greatly enhanced.

Second, there are concerns about the impact of televised trials on the public, that televising the proceedings in fact undermines their legitimacy with the public. I would be remiss if I did not admit that this problem gives me pause as well. The public watches a televised trial and believes that it is sitting in the shoes of the juror when it plainly is not. The citizen will answer the phone, take a bathroom break, make popcorn, and miss critical testimony. He or she is watching the proceeding in their home, on their couch, relaxed, and without the obligation to make any decisions about the case. The jurors sit in a formal courtroom, the American flag at the front, and they are sworn to be attentive, to be fair. They are instructed about their awesome responsibilities; ideally, they have no other distractions. When the jury's decision is different from the viewing public's decision, the public may well become cynical about the system.

There is a wonderful moment in the movie, "Twelve Angry Men" that illustrates the point. A juror is recounting the testimony of a witness. The witness reported that he heard the sound of a body hitting the ground on the floor above him. He then ran to the door, opened it, and saw the defendant running down the stairs. The juror remembered that the witness, an elderly man, walked with a limp to the witness stand. The juror concluded that the witness' testimony about "running to the door" was less than credible. The point was that there is a difference between experiencing a trial within the four walls of a courtroom and experiencing it through a television screen.

I think these concerns can be addressed. Attorneys and judges must work with the media to make it clear to the public that their experience of trials is not the same as the participants. More "real time" court coverage should be encouraged, not just of the high-profile cases but of the ordinary cases.

I believe that there will be a greater crisis of legitimacy were this means of access to our courts through television to be denied. More and more of our governmental proceedings are being televised. The judicial system should not be excluded.

Finally, the strength of this bill is that it does not require cameras, insist on them, encourage them. Rather it allows judges to exercise their discretion to permit cameras in appropriate cases, subject to fair limitations.

EXHIBIT 14

From Minnesota Federal judge Donovan Frank:
``I have been a trial judge for more than 22 years. The first 13 plus years as a State District Judge here in Minnesota. The last 9 years as a Federal District Court Judge. During this entire period, the pros and cons of cameras in the Courtroom has been debated. There are presently four bills that have been introduced in Congress to allow television or other electronic media coverage of federal court proceedings.
Television and other electronic media coverage of federal district (trial) court proceedings is prohibited in criminal cases under current federal rules, and for civil and criminal proceedings under the policy of the Judicial Conference of the United States.
From July 1,1991 to June 30th, 1993 the Federal Judicial Center conducted a pilot program with 6 federal district and 2 appellate courts allowing cameras in civil proceedings. Criminal proceedings were excluded from the pilot project. On the basis of the pilot project, the FJC study recommended that federal courts of appeals and district courts be authorized to allow camera access to civil proceedings subject to the discretion of the presiding judge. Based on data presented to the Judicial Conference, the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was a cause for concern, and declined
To approve the recommendation to allow cameras in civil proceedings.
The current bills would allow the presiding judge of district and appellate courts of the United States to permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides subject to discretion of the judge. The bills would require the district courts to obscure the faces and voices of witnesses (other than a party in the case) upon their request, The bill would also require the presiding district judge to inform each witness of his/her right to request that his/her image and voice be obscured during testimony.
No one can seriously question the educational value of the public having greater access to and a greater understanding of federal court proceedings. This perhaps assumes balanced reporting and coverage of such proceedings. So too, no one questions the public's right to attend civil and criminal proceedings including trials, although few members of the public ever attend court proceedings. It is my view that because we have a very fine and fair if not perfect civil and criminal justice system where the interests of justice and the public interest are well served everyday with few exceptions, the more access the public has to federal trial proceedings, the more confidence and trust the public will have in the federal court system. Such confidence and trust is certainly important in a civil and democratic society.
However, having said that, whether to allow television and other electronic coverage of federal court proceedings, involves a very delicate balance between the benefits of greater public access and the adverse impact cameras have in the courtroom as it concerns witnesses, victims, litigants, and jurors.
My primary responsibility as a federal trial judge is to uphold the Constitution, which guarantees and promises citizens the right to a fair and impartial trial. In my view, cameras at the trial court level in many instances can have an intimidating effect on witnesses, victims, litigants, and jurors in criminal and civil cases. If so, the quality of justice would not improve for litigants, but to the contrary, the quality of justice for litigants and witnesses would lessen.

It is this overriding concern for witnesses, litigants, and jurors that cause many trial lawyers, judges, and victim-witness experts and advocates to oppose cameras in federal court proceedings, even with the protections built in for witnesses, litigants and jurors. A separate issue of less concern is that such camera and other electronic coverage will be used as negotiating leverage in pretrial settlement discussions in civil cases and plea negotiations in criminal cases if a party does not want to exercise their right to a trial if televised.

The issue is here to stay. But, until I can be persuaded that the quality of justice will be enhanced by the use of cameras in federal court proceedings, I believe the disadvantages of cameras in the courtroom outweigh the advantages However, in a genuine effort to be proactive, if there is to be such use of cameras in the courtroom, any rule should leave the decision to the discretion of the trial judge, including the discretion to protect witnesses, litigants, and jurors along with advisory but uniform guidelines established by the Judicial Conference.

To continue the dialogue, selected members of Congress along with Judges, trial lawyers, public citizen groups, media representatives, former litigants, witnesses, victim-witness advocates, and others should form a task force or commission to once and for all try to reach a consensus on cameras in the courtroom without compromising the interests of justice.

The delicate balance of which so many speak is not likely to be an all or nothing approach.

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Donovan W. Frank
United States District Judge

EXHIBIT 15

Testimony
United States Senate Committee on the Judiciary
Cameras in the Courtroom
November 9, 2005

The Honorable Jan E. DuBois
Judge , District Court for the Eastern District of Pennsylvania

"Cameras in the Courtroom"
Wednesday, November 9, 2005, 9:30 a.m.
Dirksen Senate Office Building Room 226
Washington, D.C.

Written Testimony of JAN E. DUBOIS
United States District Court Judge
United States District Court for the
Eastern District of Pennsylvania
United States Courthouse
601 Market Street
Philadelphia, PA 19106

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE, MY NAME IS JAN E. DUBOIS. I AM PRESENTLY A JUDGE ON THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, HAVING SERVED ON THAT COURT FOR OVER 17 YEARS. I AM APPEARING BEFORE YOU TODAY IN MY PERSONAL CAPACITY. I APPRECIATE THE INVITATION TO TESTIFY AND HOPE MY TESTIMONY WILL BE USEFUL TO YOU.
AS YOU REQUESTED, MY STATEMENT WILL COVER THE PILOT PROGRAM PROVIDING FOR ELECTRONIC MEDIA COVERAGE OF CIVIL PROCEEDINGS IN SELECTED FEDERAL TRIAL AND APPELLATE COURTS, INCLUDING MY TRIAL COURT, FROM JULY 1, 1991, TO DECEMBER 31, 1994. THE PILOT COURTS FOR THAT PROGRAM WERE, IN ADDITION TO MY COURT, THE U.S. DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF INDIANA, DISTRICT OF MASSACHUSETTS, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DISTRICT OF NEW YORK, WESTERN DISTRICT OF WASHINGTON; AND THE U.S. COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS. THOSE PILOT COURTS WERE SELECTED FROM COURTS THAT HAD VOLUNTEERED TO PARTICIPATE IN THE EXPERIMENT. SELECTION CRITERIA INCLUDED SIZE, CIVIL CASE LOAD, PROXIMITY TO MAJOR METROPOLITAN MARKETS, AND REGIONAL AND CIRCUIT REPRESENTATION.

THE PILOT PROGRAM AUTHORIZED COVERAGE ONLY OF CIVIL PROCEEDINGS. GUIDELINES WERE ADOPTED BY THE JUDICIAL CONFERENCE AND I HAVE APPENDED A COPY TO MY WRITTEN TESTIMONY. THE GUIDELINES REQUIRED REASONABLE ADVANCE NOTICE OF A REQUEST TO COVER A PROCEEDING; PROHIBITED PHOTOGRAPHING OF JURORS IN THE COURTROOM, IN THE JURY DELIBERATION ROOM, OR DURING RECESSES; ALLOWED ONLY ONE TELEVISION CAMERA AND ONE STILL CAMERA IN TRIAL COURTS AND TWO TELEVISION CAMERAS AND ONE STILL CAMERA IN APPELLATE COURTS; AND REQUIRED THE MEDIA TO ESTABLISH "POOLING" ARRANGEMENTS WHEN MORE THAN ONE MEDIA ORGANIZATION WANTED TO COVER A PROCEEDING. THE GUIDELINES ALSO PROVIDED THAT THE PRESIDING JUDGE HAD DISCRETION TO REFUSE, TERMINATE OR LIMIT MEDIA

COVERAGE.
FROM JULY 1, 1991, THROUGH JUNE 30,1993, MEDIA ORGANIZATIONS APPLIED TO COVER A TOTAL OF 257 CASES IN ALL OF THE PILOT COURTS. OF THESE, 186 OR 72% OF THE APPLICATIONS WERE APPROVED, 42 OR 16% WERE DISAPPROVED AND THE REMAINDER WERE NOT ACTED ON. OF THE TOTAL OF 257 CASES IN WHICH APPLICATIONS WERE MADE, 78 WERE SUBMITTED IN THE EASTERN DISTRICT OF PENNSYLVANIA. OF THE 78, 54 OR 69%WERE APPROVED, AND THE REMAINDER WERE DISAPPROVED OR NOT RULED ON.

THE EASTERN DISTRICT OF PENNSYLVANIA HAD THE GREATEST APPLICATION AND COVERAGE ACTIVITY. THE FEDERAL JUDICIAL CENTER REPORT ON THE PROGRAM ATTRIBUTED THAT RESULT, AT LEAST IN PART, TO THE FACT THAT IT WAS THE SECOND LARGEST DISTRICT COURT IN THE PILOT PROGRAM AND HAD A VERY ACTIVE MEDIA COORDINATOR.
OF THE 186 CASES APPROVED FOR COVERAGE, 147 WERE ACTUALLY RECORDED OR PHOTOGRAPHED. NINETEEN OF THE REMAINING 39 APPROVED CASES WERE EITHER SETTLED OR OTHERWISE TERMINATED, AND NINE APPLICATIONS WERE WITHDRAWN. IN 11 CASES, THE MEDIA FAILED TO APPEAR.
THE EASTERN DISTRICT OF PENNSYLVANIA, IN A STUDY UNDERTAKEN AT THE COMPLETION OF THE PILOT PROGRAM ON DECEMBER 31, 1994, REPORTED A TOTAL OF 117 BROADCASTING REQUESTS FROM THE MEDIA, 86 OR 74% OF WHICH WERE APPROVED, 16 OR 14% OF WHICH WERE DISAPPROVED, AND 15 OF WHICH WERE IN CASES THAT WERE SETTLED. THE BREAKDOWN OF THE 117 CASES IN WHICH APPLICATIONS WERE APPROVED DISCLOSES THAT ALMOST HALF, 57 OR 49%, WERE IN CIVIL RIGHTS CASES. OF THE 57 CIVIL RIGHTS CASES IN WHICH APPLICATIONS WERE MADE, 42 OR 74% WERE APPROVED, AND 15 OR 12% WERE DISAPPROVED. NEXT IN TERMS OF PERCENTAGE OF REQUESTS WERE TORT CASES, 21 OR 18%.

THE FEDERAL JUDICIAL CENTER EVALUATED THE PILOT PROGRAM AND IN 1994 PUBLISHED A REPORT ENTITLED ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS; FEDERAL JUDICIAL CENTER, 1994 ("FEDERAL JUDICIAL CENTER REPORT"). THAT REPORT INCLUDED RATINGS OF EFFECTS OF CAMERAS IN THE COURTROOM BY DISTRICT JUDGES WHO PARTICIPATED IN THE PROGRAM. A COPY OF THAT PART OF THE REPORT - TABLE 2 - IS APPENDED TO THIS WRITTEN TESTIMONY AND IS SUMMARIZED IN THE WRITTEN TESTIMONY SUBMITTED ON BEHALF OF THE JUDICIAL CONFERENCE.
THE RATINGS BY THE JUDGES WHO PARTICIPATED IN THE PROGRAM WERE BOTH FAVORABLE AND UNFAVORABLE. FOR ME, THE MOST DISTURBING RATINGS ARE THESE:
• 64% OF THE PARTICIPATING JUDGES REPORTED THAT, AT LEAST TO SOME EXTENT, CAMERAS MADE WITNESSES MORE NERVOUS.
• 46% OF THE JUDGES BELIEVED THAT, AT LEAST TO SOME EXTENT, CAMERAS MADE WITNESSES LESS WILLING TO APPEAR IN COURT.
• 41% OF THE PARTICIPATING JUDGES FOUND THAT, AT LEAST TO SOME EXTENT, CAMERAS DISTRACTED WITNESSES.
• 56% OF THE PARTICIPATING JUDGES FOUND THAT, AT LEAST TO SOME EXTENT, CAMERAS VIOLATED WITNESSES' PRIVACY.
THE FEDERAL JUDICIAL CENTER REPORT RECOMMENDED THAT THE JUDICIAL CONFERENCE "AUTHORIZE FEDERAL COURTS OF APPEALS AND DISTRICT COURTS

NATIONWIDE TO PROVIDE CAMERA ACCESS TO CIVIL PROCEEDINGS IN THEIR COURTROOMS . . . ." THOSE RECOMMENDATIONS WERE REVIEWED AND APPROVED BY THE JUDICIAL CENTER STAFF, BUT WERE NOT REVIEWED BY ITS BOARD. AS YOU KNOW, THE JUDICIAL CONFERENCE DISAGREED WITH THE CONCLUSIONS DRAWN BY THE FEDERAL JUDICIAL CENTER REPORT AND BARRED CAMERAS IN DISTRICT COURTS BECAUSE OF THE POTENTIALLY INTIMIDATING EFFECT OF CAMERAS ON PARTIES, WITNESSES AND JURORS.

BEFORE GRANTING OR DENYING AN APPLICATION FOR TELEVISION COVERAGE IN CASES BEFORE ME IN THE PILOT PROGRAM, IT WAS MY PRACTICE TO CONVENE A CONFERENCE OR TO ADDRESS THE MATTER AT THE FINAL PRETRIAL CONFERENCE. THE MOST COMMONLY ADVANCED OBJECTIONS DURING SUCH CONFERENCES WERE THESE:
1. ADVERSE EFFECT ON PARTIES. IN SOME CASES PLAINTIFFS WERE CONCERNED ABOUT DISCLOSING MATTERS OF AN EXTREMELY PRIVATE NATURE SUCH AS FAMILY RELATIONSHIPS, MEDICAL INFORMATION, AND FINANCIAL INFORMATION. DEFENDANTS EXPRESSED CONCERN ABOUT THE RISKS OF DAMAGING ACCUSATIONS MADE IN A TELEVISED TRIAL. IN AT LEAST ONE CASE, A DEFENSE ATTORNEY SAID THE THREAT OF A TELEVISED TRIAL WOULD CAUSE THE DEFENDANT TO CONSIDER SETTLEMENT REGARDLESS OF THE MERITS OF THE CASE FOR THE SOLE PURPOSE OF AVOIDING THE TELEVISION COVERAGE.
2. ADVERSE EFFECT ON WITNESSES. COUNSEL WERE CONCERNED THAT CAMERAS WOULD MAKE WITNESSES LESS WILLING TO APPEAR AND, WHEN IN COURT, WOULD MAKE WITNESSES MORE NERVOUS. THAT PRESENTS A REAL CONCERN FOR A TRIAL JUDGE. AS A RESULT, I WAS PREPARED TO DIRECT THAT THE TELEVISION CAMERA EITHER BE REMOVED FROM THE COURTROOM OR NOT BE OPERATIONAL DURING THE TESTIMONY OF ANY WITNESS WHO OBJECTED TO THE CAMERA.

I APPROVED REQUESTS FOR TELEVISION COVERAGE IN 3 CASES - A PRODUCT LIABILITY CASE ON THE FIRST DAY OF THE PROGRAM, JULY 1, 1991, A CLASS ACTION ON BEHALF OF ALL STATE PRISONERS IN PENNSYLVANIA IN WHICH PRISON CONDITIONS WERE CHALLENGED AS UNCONSTITUTIONAL, AND A CASE FILED BY A REPUBLICAN CONGRESSMAN AGAINST A DEMOCRATIC LIEUTENANT GOVERNOR OVER THE FAILURE TO CALL A SPECIAL ELECTION AT AN EARLY DATE FOR THE CONGRESSMAN'S VACATED STATE SENATE SEAT. THERE WERE CAMERAS IN THE COURTROOM FOR ONE DAY OF THE PRODUCT LIABILITY CASE. THERE IS NO RECORD OF CAMERAS IN THE COURTROOM IN THE TWO OTHER CASES.
IN THE ONE CASE IN WHICH CAMERAS WERE PRESENT IN MY COURTROOM, THE PRODUCT LIABILITY CASE, THERE WERE NO OBJECTIONS TO THE TELEVISION COVERAGE EITHER FROM THE PARTIES OR FROM WITNESSES. I DID NOT ALLOW CAMERAS IN THE COURTROOM DURING JURY SELECTION. AFTER THE JURY WAS CONVENED, I ASKED WHETHER ANY JURORS HAD ANY OBJECTION TO CAMERAS IN THE COURTROOM WITH THE PROVISO THAT THE CAMERAS WOULD NOT FOCUS ON THEM. THEY HAD NO OBJECTIONS.

I WAS ALSO CONCERNED DURING THE PRODUCT LIABILITY TRIAL THE CAMERA WOULD BE IN THE COURTROOM ON ONE DAY AND THEN BE REMOVED, AND THAT IS EXACTLY WHAT HAPPENED - THE CAMERA WAS IN THE COURTROOM ONLY ONE DAY. ANTICIPATING THAT POTENTIAL PROBLEM, I TOLD THE JURORS THAT THERE WAS NO GUARANTEE THAT THE MEDIA WOULD TELEVISE THE ENTIRE TRIAL AND

THAT IT MIGHT BE "HERE TODAY AND GONE TOMORROW." I ALSO INSTRUCTED THEM THAT THEY WERE NOT TO CONCLUDE THAT EVIDENCE OR ARGUMENT PRESENTED DURING A TIME WHEN A CAMERA WAS IN THE COURTROOM WAS ANY MORE OR LESS IMPORTANT THAN ANY OTHER PART OF THE TRIAL.
OVERALL, THE VIEWS OF MY COLLEAGUES WHO PARTICIPATED IN THE CAMERAS IN THE COURTROOM PILOT PROGRAM WERE NOT UNFAVORABLE. HOWEVER, MOST OF THE JUDGES WHO COMMENTED WERE CONCERNED ABOUT THE ADVERSE IMPACT OF CAMERAS IN THE COURTROOM ON PARTIES, WITNESSES AND JURORS AND DEEMED IT OF CRITICAL IMPORTANCE TO RETAIN THE AUTHORITY TO DISAPPROVE OF USE OF CAMERAS, PARTICULARLY IN HIGH PROFILE CASES, AND TO LIMIT THE USE OF CAMERAS IN CASES SUCH AS BY NOT TELEVISING THE TESTIMONY OF A WITNESS WHO OBJECTED AND NOT FOCUSING ON JURORS. SOME JUDGES WHO PARTICIPATED IN THE PROGRAM WERE ALSO CONCERNED THAT THE MEDIA WOULD NOT BE INTERESTED IN TELEVISING AN ENTIRE PROCEEDING, AND WOULD USE ONLY SHORT SEGMENTS OF A PROCEEDING WITH VOICE-OVERS. I AM NOT GOING TO COMMENT ON THE EDUCATIONAL BENEFIT OF TELEVISING A SMALL PORTION OF A TRIAL EXCEPT TO SAY THAT IT WOULD BE VERY DIFFICULT TO PROVIDE MUCH VALUABLE INFORMATION ABOUT THE JUDICIAL SYSTEM IN THAT TYPE OF PRESENTATION.

MY PERSONAL VIEW IS THAT, AT THE TRIAL LEVEL, THE DISADVANTAGES OF CAMERAS IN THE COURTROOM FAR OUTWEIGH THE ADVANTAGES. IN SUCH A SETTING, THE CAMERA IS LIKELY TO DO MORE THAN REPORT THE PROCEEDING - IT IS LIKELY TO INFLUENCE THE SUBSTANCE OF THE PROCEEDING. I SAY THAT BECAUSE OF THE CONCERNS I HAVE EXPRESSED REGARDING OBJECTIONS OF PARTIES TO TELEVISED PROCEEDINGS AND THE POTENTIAL IMPACT OF A TELEVISION CAMERA ON WITNESSES AND JURORS.
THE PARAMOUNT RESPONSIBILITY OF A DISTRICT JUDGE IS TO UPHOLD THE CONSTITUTION WHICH GUARANTEES CITIZENS THE RIGHT TO A FAIR AND IMPARTIAL TRIAL. IN MY OPINION, CAMERAS IN THE DISTRICT COURT COULD SERIOUSLY JEOPARDIZE THAT RIGHT.

APPENDIX

CAMERAS IN THE COURTROOM
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EXHIBIT 16

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Some judges open to cameras in courtroom

Associated Press

By Mark Sherman, Associated Press Writer | February 13, 2007

MIAMI --Reflecting on closely watched controversial cases, federal judges say the public would have benefited from televised trials.

The judges' comments at an American Bar Association meeting came as lawmakers are considering bills that would open up federal courtrooms, including the Supreme Court, to cameras.

U.S. District Judge John E. Jones barred television cameras from covering the lawsuit over the teaching of "intelligent design" in biology class in Dover, Pa.

"I might have gotten it wrong," Jones said. "The lawyering was so good. We might have benefited from the public seeing the witnesses and the process."

Similarly, U.S. District Judge Myron Thompson said he wished cameras could have recorded the trial in his courtroom over the presence of a Ten Commandments monument that former Alabama Chief Justice Roy Moore installed in the state's judicial building.

"The public could have heard it and decided for themselves whether they agreed with my decision," said Thompson, who ordered the monument removed because it violated the separation of church and state. "Having the camera in the courtroom allows the public to get both sides of the argument."

The weekend session focused on practical and personal issues the judges faced in handling the controversies.

U.S. District Judge James Whittemore, who turned down requests to block the removal of a feeding tube from the brain-damaged Florida woman Terri Schiavo, said he presided at televised trials while a state judge and never encountered problems.

The three judges presided over bench trials, without juries and the complications that could arise from the presence of cameras.

Judge Rosemary Barkett of the Atlanta-based 11th U.S. Circuit Court of Appeals said appellate arguments should always be televised because juries never are involved at that level.

"Legitimately, I can't for the life of me see why you wouldn't televise an

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appellate argument," Barkett said.

Recalling her time on the Florida Supreme Court, she said: "Many of us lost our tempers and were just as obnoxious after the cameras as before the cameras. You forget about them."

Several Supreme Court justices have raised objections to cameras at their oral arguments, although the two newest court members, Chief Justice John Roberts and Justice Samuel Alito, have said they could be open to the idea.

Since the Bush v. Gore case in the disputed 2000 presidential election, the court has released same-day audio in some major cases.

Supreme Court Justice Ruth Bader Ginsburg spoke about the virtues of diversity in classrooms when she helped dedicate the new law school building at Florida International University in Miami.

A diverse student population promotes cross-racial understanding, Ginsburg said, quoting retired Justice Sandra Day O'Connor's writing in a 2003 decision upholding the use of racial preferences at the University of Michigan law school.

Ginsburg and O'Connor were part of a 5-4 majority in that case.

FIU's student body is 42 percent Hispanic, the highest percentage of any law school in the United States, said law school Dean Leonard Strickman.

Yet FIU gives no preference to minority applicants because Florida rules prohibit it, Strickman said.

"When you're in Miami, you get an applicant pool that is 50 percent Hispanic," he said.

The 420,000-member ABA came to the defense of judges during its Miami meeting, expressing support for a pay raise for federal judges and pledging to defend aggressively against ballot measures that compromise judicial independence.

ABA President Karen Mathis told her membership Monday that district judges, who earn $165,200 a year, certainly should be paid more than first-year lawyers at New York City firms. Starting annual salaries there now are $160,000.

Former Federal Reserve Chairman Paul Volcker recently wrote that district judges would be making roughly $100,000 a year more today had their pay risen at the same pace as U.S. salaries generally.

Roberts also highlighted judicial pay in the chief justice's year-end report, noting that judges were leaving their lifetime-tenure jobs at an alarming rate for much better-paying jobs in the private sector.

On the Net:

American Bar Association: http://www.abanet.org

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Editorial/Opinion

Posted 12/7/2005 9:04 PM Updated 12/7/2005 9:06 PM

Keep cameras out

By Jan E. DuBois

Why do we prohibit the use of cameras in federal trial courts? The answer is simple: If there is even a remote chance camera coverage will harm a citizen's right to a fair and impartial trial, cameras have no place in the courtroom. **(Related:** Our view)

As a district court judge for more than 17 years, I am intimately familiar with the workings of federal trial courts and the very human emotions that arise in the course of any trial — whether civil or criminal. I also have firsthand experience with cameras in federal courtrooms.

Several years ago, I was one of a relatively few federal judges who participated in a pilot program providing for camera coverage of civil proceedings in federal trial courts. My court, the Eastern District of Pennsylvania, had the greatest application and coverage activity of the six participating district courts.

In my opinion, the potentially intimidating effect of cameras on litigants, witnesses and jurors could have a profound impact on the trial process. And I am not alone in this view.

More than half of the judges who took part in the cameras pilot program believed that to some extent cameras violated witnesses' privacy. Well over half the judges reported that cameras made witnesses more nervous. This is likely to cause jurors to question whether witnesses are telling the truth. And almost half the judges concluded that the presence of cameras made witnesses less likely to appear in court.

Some have suggested that televised trials would increase public knowledge of the courts. While that might be so, I believe that sound bites cut from days of trials and then broadcast for 30 seconds or less on the nightly news will shed little light on our judicial system.

As a judge, I am called upon daily to consider competing arguments. In my experience, the disadvantages of cameras in the courtroom far outweigh the advantages.

The paramount responsibility of a district judge is to uphold the Constitution, which guarantees citizens the right to a fair and impartial trial. A judge has the responsibility to keep the courtroom free of anything that could jeopardize that right — and that includes cameras.

Jan E. DuBois is a U.S. District Judge in Philadelphia.

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FEATURE *The News Media & The Law* Winter 2006 (Vol. 30 , No. 1), Page 28 .

Shuttered justice

Momentum is gaining on allowing cameras into federal courtrooms.

By Amanda Buck

A November vote in the U.S. House is sparking optimism that photographers and television cameramen could soon be allowed into federal courtrooms.

The 375-45 vote to give federal appellate and district court judges discretion to allow still and video cameras in civil and criminal trials marks the third time a bill related to cameras in federal courts has passed one branch of Congress. Attitudes toward the issue seem to be changing, said Barbara Cochran, president of the Radio-Television News Directors Association.

"I think a number of things are coming together," Cochran said. "I think that having new justices being confirmed for the Supreme Court has really focused public attention on the fact that the Supreme Court and other federal courts are still largely invisible to the public."

Supreme Court nominees navigate intensely public nomination hearings only to be whisked away to obscurity upon confirmation, she pointed out.

After Chief Justice John Roberts was confirmed Sept. 30, RTNDA offered to work with the Court staff on television and radio coverage. Roberts responded that he looks forward to working with RTNDA "if the Court explores the idea of opening its proceedings to electronic coverage."

Cochran is hopeful that could happen given "the fact that he has already, just within a few weeks of taking office, released audiotapes immediately after arguments," she said, referring to cases on military recruiting on college campuses and parental notification in cases of teenagers seeking abortions.

"That shows an understanding of the need to allow the public to see and hear what happens — or at least to hear what happens — as rapidly as possible," said Cochran, a former journalist and news executive, most recently with CBS News.

A decade ago, Justice David Souter told a congressional committee that "the day you see a camera come into our courtroom, it's going to roll over my dead body."

Souter is far from alone in his opposition. Although cameras are allowed in at least some level of courts in all 50 states, sentiment has long been against allowing them in federal courts.

In 1972, the Judicial Conference, the chief policy-making body of the court system, adopted a prohibition against "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto" in criminal and civil proceedings. Bills designed to open the federal courts have been introduced in Congress for years, but none have passed.

Opponents say television should be barred from federal courts to protect the welfare of witnesses, prevent potential grandstanding by attorneys or judges, and prevent the loss of prestige and respect for the courts.

Some also argue that cameras would interfere with a defendant's ability to receive a fair trial.

But in 1981, the U.S. Supreme Court in *Chandler v. Florida* rejected a defendant's claim that cameras in his criminal trial had denied him due process. Under Florida law, cameras were allowed in the courtroom despite the defendant's objection.

Today, with televised court proceedings common, it is not unusual to find judges who support ending the camera prohibition. During his nomination hearings in January, Judge Samuel Alito told the Senate Judiciary Committee that he supported allowing cameras into his courtroom in U.S. Court of Appeals in Philadelphia (3rd Cir.). Alito danced around direct questions about allowing television coverage of the nation's highest court. "The issue is a little bit different" there, he said, pledging to keep an "open mind."

When the House passed the "Secure Access to Justice and Court Protection Act" (H.R. 1751) Jan. 9, a cameras-in-federal-courtrooms provision was tucked into the bill. The provision, advanced by Rep. Steve Chabot (R-Ohio), would give appellate and district court judges discretion to allow televising of civil and criminal trials. To protect the privacy of non-party witnesses, the proposal would allow their faces and voices to be obscured upon request.

The proposal is expected to become a negotiating point when House and Senate versions of the bill are in conference committee.

The same day H.R. 1751 passed, the Senate Judiciary Committee held a hearing on cameras in federal courtrooms. Iowa Republican Sen. Chuck Grassley's "Sunshine in the Courtroom Act of 2005" (S. 829) is similar to Chabot's proposal, while S. 1768, sponsored by Senate Judiciary Committee Chairman Arlen Specter (R-Penn.), would allow televising Supreme Court arguments. Both bills await committee action.

If the idea becomes law, it won't be the first time television is allowed in federal courtrooms.

In 1990, a Judicial Conference committee started a three-year pilot program allowing electronic media coverage of civil proceedings in eight federal district and appellate courts: the U.S. Courts of Appeals in New York (2nd Cir.) and San Francisco (9th Cir.), and U.S. District Courts in southern Indiana, Massachusetts, eastern Michigan, southern New York, eastern Pennsylvania and western Washington.

A Federal Judicial Center report on the experiment concluded that "[o]verall attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program."

The committee advised the Judicial Conference to authorize federal courts to allow camera access to civil proceedings, but the conference voted by a 2-1 margin to reject the recommendation, citing the potentially intimidating effect of cameras on parties, witnesses and jurors.

Members revisited the issue in 1996, again voting against cameras in federal courts. Since then, all but two federal appellate courts — in New York and San Francisco — have adopted camera prohibitions.

Two federal judges who have experienced televised court coverage testified at the Senate hearing, including Judge Jan E. DuBois of Philadelphia.

"My personal opinion is that, at the trial level, the disadvantages of cameras in the courtroom far outweigh the advantages," DuBois testified. "In such a setting, the camera is likely to do more than report the proceeding — it is likely to influence the substance of the proceeding."

DuBois told the committee that he granted camera access in three trials during the pilot program, one of which the media attended. Cameras were present only on the trial's first day, he said.

Among his concerns are the potential impact of cameras on jurors and witnesses, the possible objection of parties and the potential to "seriously jeopardize" a defendant's fair trial right.

Judge Diarmuid O'Scannlain of the appeals court in San Francisco told the panel that his court continues to allow cameras at its judges' discretion and that prohibition on televised coverage of federal appellate courts should end.

However, O'Scannlain noted "important" differences between appellate and criminal courts, saying he has concerns about the effect of television coverage in the latter.

Nevertheless, O'Scannlain rebutted common arguments against televised coverage at the federal level, including the idea that the courts would become more politicized under the camera's eye.

Instead, he said, a glimpse into the "thoughtful, deliberative" process of the appellate courts might help eliminate the perception that appellate courts are "results-oriented bodies."

"Contrary to the politicization concern expressed by camera opponents, I believe that greater media access might depoliticize appellate proceedings and the public's perception of the appellate legal process, not the other way around," O'Scannlain testified. "When barred from the courtroom, the news media is able only to report on court holdings, rather than process."

Barbara Bergman, president of the National Association of Criminal Defense Lawyers, offered qualified support, suggesting that federal criminal trials be televised only if both the accused and the government agree.

Seth Berlin, a Washington, D.C., media attorney who also testified, said that if Congress and judges allow cameras into the Supreme Court or the federal courts, the real benefit will be for the public, not the media.

"I think the significance is that a larger number of people would understand what happens in the courtroom, in a way that would be of substantial benefit to the public," he said in an interview.

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TV JURY

Have cameras in the courtroom undermined the U.S. justice system?
January 20, 1998

Questions asked in this forum:

- **Would only allowing trials to be broadcast after the verdict solve the problems?**
- **Do lawyers and judges dress and act differently when they're infront of a camera?**
- **How do legal shows like "The People's Court" affect America's view of its justice system?**
- **Why aren't there cameras in the Supreme Court?**
- **How does Court TV decide what cases to cover, and how do cameras in the courts affect the careers of lawyers and judges?**
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In his testimony before a congressional panel, Supreme Court Justice David Souter said: "The day you see a camera come into our courtroom, it's going roll over my dead body."

Understanding the Justice's aversion to TV court coverage is easy; just consider the biggest case in recent memory, the "Nanny Trial" of Louise Woodward. In this case, a British au pair was accused of shaking a Massachusetts couple's son to death, and coverage of her trial was likened by some to a sporting event, with its play-by-play commentary and crowd reactions broadcast from both the United States and England.

TV had good intentions.

Except for South Dakota, Indiana and Mississippi, all states allow TV cameras in courtrooms. Video cameras were placed in courts to offer the American public the opportunity to become better educated about the judicial process, and prevent the abuses that can take place in closed proceedings. TV cameras can also provide the level of public access needed to build genuine public support for the justice system.

The court of public opinion.

But the passionate public response to trials such as that of Louise Woodward and O.J. Simpson has worried some legal analysts about the impartiality of today's justice system. Today, 59 percent of judges surveyed said that the media circus surrounding the Simpson trial convinced them TV can negatively affect courtroom proceedings. Despite this, however, 96 percent of those same judges reported that TV cameras did not affect the outcome of proceedings in their courtrooms.

Public involvement in a controversial court case isn't new. In the 1950s, the Supreme Court overturned the murder conviction of Sam Sheppard, who was accused of bludgeoning his pregnant wife to death. The Justices ruled that the pre-trial TV reports declared

Justice Department

Sheppard guilty and that "bedlam reigned at the courthouse."

With cameras in the courtroom, however, even mundane legal routines become public drama. According to Peter Neufeld, a criminal defense attorney who was on O. J. Simpson's defense team, cameras in the courtroom create a kind of "environment where lawyers start acting out, where judges start acting out, and it's not very healthy for those who are pursuing justice."

Is a trial still fair if the public gets involved? To what extent do judges, jurors and lawyers change their behavior when they know the world is watching?

Our guests are Court TV reporter Tim Sullivan and Steven Lubet, a Professor of Law at Northwestern University.

Questions asked in this forum:

- **Would only allowing trials to be broadcast after the verdict solve the problems?**
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- **How do legal shows like "The People's Court" affect America's view of its justice system?**
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Patricia Schwarz of Pasadena, CA asks:

What about if we videotape trials but only show them after the verdict has been rendered? I think the public has an interest in actually witnessing the justice process. Why can't it be done after the fact instead of in real time? Wouldn't that avoid an OJ situation?

Tim Sullivan, of Court TV responds:

Court TV videotapes trials for broadcast after the verdict all the time. Because we typically air only one trial live at a time (sometimes two), we are constantly taping trials for later broadcast. Usually, this is done at our discretion; it's a programming/scheduling decision. But there have been several cases over the years in which judges have allowed us to tape trials only on the condition that we don't show them until after a verdict. Sometimes we've agreed to do that, but we don't like to do it. The reason we prefer not to do it is because a trial is a news event; it's news while it is happening, not several weeks later.

In the OJ example, if the trial were not aired until after the verdict, that would have been something like nine months after the trial started. In the meantime, newspapers, radio and TV newscasts would have been reporting the action daily -- so why should the general public have to wait nine months to see the trial for itself?

I don't believe delaying the broadcast of the OJ trial would have changed the situation in court very much. Those lawyers were going to act the way they did regardless of whether the trial was telecast live or on tape-delay. They were performing for the jury, the gallery and the press corps that was covering the case daily; a tape-delay would not have encouraged them to behave better.

The ultimate problem with the conduct of the OJ trial was not that a camera was present -- it was that Judge Ito did not exercise authority over those lawyers. The length of the trial, and the public behavior of the lawyers, should have been under his control.

Law Professor Steven Lubet responds:

This is a good idea. It would satisfy the desire for an

accurate public record and it would provide an excellent safeguard against "star chamber" or semi-secret proceedings. At the same time, it would prevent the sort of play-to-the-audience atmosphere that was criticized at the Simpson trial.

You might be interested to know that similar approaches are already in use, though not usually with videotape. For example, the transcripts of conferences in chambers are often withheld from the public until the trial is over. The recent deposition of President Clinton was conducted under seal, but (I assume) it will eventually be made public.

The one drawback to this plan is expense. Videotaping a trial isn't cheap, and doing a good job is even more expensive. Right now, it is worthwhile for T.V. stations to cover the expense, since they can make money showing the trial in real time. I don't know if they would want to go to all that trouble for delayed coverage. The court system is perpetually strapped for cash, so public funds would probably be better spent on other things.

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Sara of Roanoke Rapids, NC asks:

I noticed that during the Simpson Trial, some TV viewers seem to be more interested in what the attorneys and witnesses were wearing than the trial itself. I am curious as to whether or not people tend to dress and act differently when there is a camera in the courtroom and if so, why and how?

Law Professor Steven Lubet responds:

We can only guess. My guess would be that most lawyers and witnesses still "dress for the jury," since their primary goal is winning the case. Now and then someone might be influenced by the T.V. camera, but it doesn't do you too much good to look good while losing.

Tim Sullivan, of Court TV responds:

In my experience, people don't dress differently, but they do act differently. I doubt, however, that they alter their behavior very much. Lawyers may showboat a little more with a camera present, but it's not going to have much impact on the outcome of a case. Remember, lawyers are peforming for the jury -- they always have and always will; that's their job.

I've heard advocates of cameras in court say the camera does nothing to change the situation. I disagree. Any correspondent/producer who's spent any time in the field with a camera crew will tell you that, anytime you put a camera into a situation, it changes that situation; it simply changes the reality. Sometimes, it has very little effect, sometimes it can have a great effect. I've been in scores of courtroom with camera crews and I believe the impact is not major in most cases. Judges may behave better with a camera there, and lawyers may grandstand a little more, but the outcome is rarely affected.

I do think there's a downside to camers in courts, especially in high-profile cases. That is, the presence of a camera could increase the pressure participants in a trial feel; they may feel, for example, like someone is looking over their shoulders. Of course, someone is -- the public. I believe there is a public interest in cameras being in courtrooms, but I also think the increased pressure they bring to bear can sometimes be

detrimental to the process.

Remember, when the Founding Fathers decreed that criminal defendants would get public trials, the purpose was to protect the rights of the accused -- to avoid star chambers, or secret kangaroo courts. The purpose was not to provide a spectacle for the community. I believe that in the vast majority of cases, the camera does no harm. But I can understand there are cases when perhaps camers should not be permitted. As the laws are now written in virtually every state, the trial judge has the discretion to ban cameras if he/she believes they would harm the process. I have no problem with that.

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Browse the NewsHour's coverage of law.

Outside Links

Justice Department

Spencer Lang of Lancaster, PA asks:

Do you believe that the rash of legal shows like the "People's Court" with Ed Koch and "Judge Judy" and other daytime programming which brings high profile attorneys together for yelling matches is the biggest problem that the public must over come to better understand our legal system?

Tim Sullivan, of Court TV responds:

I don't know if it's the biggest problem, but it's one. I don't think thoseshows necessarily do any damage, if viewers understand they're not witnessingan authentic courtroom situation.

One big problem I see that prevents people from understanding the system isthe fact that the media and the system itself -- judges, lawyers, etc -- keepperpetuating myths about the process that only mislead people. These myths arebasically the ideals of justice -- presumption of innocence, reasonable doubt,etc -- that represent goals: they depict the way things would work in an idealdemocratic society. The reality is much less laudable, but lawyers andjournalists insist on portraying the myths as the way things work, rather thanas the ideals they are.

Criminal defense lawyers know, for example, that it's extremely rare for adefendant to truly enjoy a presumption of innocence. Did anybody reallypresume Timothy McVeigh to be innocent? Lawyers also know that many jurorsdon't understand reasonable doubt. Some jurors demand that prosecutors prove acase beyond the shadow of a doubt; other jurors convict people because theyhave a hunch they're guilty, even in cases where there is clearly amplereasonable doubt to acquit.

In the Oklahoma City bombing trials, Judge Richard Matsch did a great job ofexplaining the true meaning of the system's principles. He defined thepresumption of innocence, for example, as a willingness to give the defendantthe benefit of any reasonable doubt about the evidence. And he definedreasonable doubt as the kind of doubt that would make one hesitate to act on avery important decision in his/her personal life.

If lawyers would stop preaching that these myths about

the fairness of thesystem exist in reality, and if the media would do a better job of explainingthat these ideals are rarely achieved, perhaps the public would understand thesystem better -- and would not feel so much like the system is a failure.

Law Professor Steven Lubet responds:

Sorry, I've never seen either show. Are they really as bad as yousay? At least we don't have "Jerry Springer's Court."

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ONLINE FORUM

TV JURY

Have cameras in the courtroom undermined the U.S. justice system?
January 20, 1998

Questions asked in this forum:

- Would only allowing trials to be broadcast after the verdict solve the problems?
- Do lawyers and judges dress and act differently when they're infront of a camera?
- How do legal shows like "The People's Court" affect America's view of its justice system?
- How does Court TV decide what cases to cover, and how do cameras in the courts affect the careers of lawyers and judges?
- Additional comments.

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Justice Department

Lauren Alpine of Madison, WI asks:

There are cameras in the Congress, why shouldn't there be cameras in the Supreme Court? It is unfair that there is a whole "class" of people who are privy to what happens in the Supreme Court (lawyers who can afford expensive Lexis services) but the general public has to rely on reporters and "experts." Isn't this damaging to democracy? Especially since some of the most important issues are settled in the courts (Roe v. Wade, Assisted suicide, affirmative action) and not in the Legislative Branch.

Law Professor Steven Lubet responds:

I agree completely. There is no good argument for keeping camerasout of the U.S. Supreme court. Surely the court can enforce decorum, andthere are no witnesses or jurors to worry about. No lawyer would be foolishenough to play to the camera at the cost of alienating the Justices (andanyone who did would certainly deserve to lose!).

So why doesn't the Court allow cameras? You'd just have to say thatconservative institutions are slow to change.

Tim Sullivan, of Court TV responds:

I agree absolutely. There is no logical reason to ban cameras from theSupreme Court. There are good reasons to keep cameras out of trial courtssometimes -- in the reare instance when they really could endanger a fairtrial, or expose minors to psychological damage, etc. -- but none of thosearguments apply in an appellate court.

The bottom line is, the ban in the Supreme Court cannot be defendedlogically. It's simply an example of the Court's anachronistic vision ofitself as a place separate from society.

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Justice Department

Mike McConnel of Boston, MA asks:

What are the fringe benefits of cameras in the courts? Can they help a judge run for public office? Have they made millionaires out of lawyers?

Court TV has a lot of power over what cases we get to peek into. How do the editors decide what to cover? How does Court TV make money?

Tim Sullivan, of Court TV responds:

I'm not an expert in this area, but it appears to me the fringe benefits are few. Certainly televised trials have made some lawyers into national celbrities -- Leslie Abramson and Johnnie Cochran, for example. But I don't think they've made millionaires out of many.

I don't know of any judges getting rich or famous as a result of cameras in court.

Keep in mind that Court TV alone has televised about 400 trials in six years. Most people have heard of no more than a handful of those cases. The trials that have a huge impact -- OJ and The Nanny Trial, for example -- are not only rare, but they would have been tremendous news events even if the camera had not been in the courtroom.

As for how Court TV decides which cases to cover, it's a matter of news judgment more than anything else. We look for trials that have made, or will make, news. We also look for trials that present issues we think are important and will be of interest to our viewers. About one-third of the trials we cover are civil suits; the rest are criminal.

Court TV basically has two sources of income, the same sources newspapers have, i.e., advertising and subscribers. We sell advertising on the network, and we get paid by cable distribution companies based on the number of households they have as subscribers. As has been reported in the business press, Court TV does not yet make a profit.

Law Professor Steven Lubet responds:

I don't think any judge has ever benefitted personally from presiding over a televised trial. It might happen

someday.

The only lawyers to get rich from televised trials have probably been the paid commentators, who wouldn't get paid if they didn't have high profile trials to cover.

Sure, the trial lawyers enhance their reputations, but that would happen with or without the cameras. For example, Roy Black won the William Kennedy Smith trial. Mr. Black is a great cross-examiner with an extensive reputation. He was no doubt turning clients away before that trial, so the additional publicity probably didn't mean much to him financially. There's only so much business that a trial lawyer can handle, so a broader reputation doesn't necessarily turn into dollars.

It might surprise you to learn that there was a judge in New Jersey who appeared on television over 50 times as a commentator on the Simpson trial (he wasn't paid, though). The New Jersey Supreme Court ordered him to stop, however, on the ground that it violated the state's Code of Judicial Conduct.

This has caused some controversy. Do judges have the same First Amendment rights as everyone else, or is the "no comment" rule a reasonable restriction that contributes to public confidence in the judiciary?

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ONLINE FORUM

TV JURY

Additional questions and comments
January 20, 1998

Questions asked in this forum:

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Justice Department

Harry Mee of Grants Pass, OR

In the "Nanny" case, the prosecution focused on the fact that Louise behaved much as many teenagers would given the circumstances of being away from home and in a new and exciting culture, while the defense portrayed her as an innocent dupe, and tried to bring up the medical facts of the case.

Under the eye of the TV camera does Justice cast off her blindfold and play to the emotions of the public, or does justice play out this way even in a closed courtroom? Does the adversarial court system negate the concept of cold, reasoned justice?

Jerry Moore of Chicago, Illinois

As a journalist, I find it disturbing to hear legal analysts blame the news industry for a problem in the judicial system. If judges and attorneys feel the need to act up when they see TV cameras, that's their fault. They shouldn't ban some media coverage just because they can't control themselves. Did judges and attorneys ham it up when newspapers first covered high-profile trials before the advent of TV and radio? I have no doubt they did. But would this have justified prohibiting all reporters from doing their jobs? Absolutely not. The answer is not to restrict the free press but rather to make cameras commonplace in as many courtrooms as possible. Once people grow accustomed to their presence, those running the legal proceedings will learn to ignore the cameras and focus on their duties. A democratic society works best when citizens have access to more information, not less. A free press has always been vital to this process.

Ruth Ann Strickland of Boone, North Carolina

Legal matters in the U.S., especially trials, have always been "public matters." The U.S. Constitution states that the accused shall enjoy the right to a speedy and "public" trial. My question would be: "Is a trial still fair if the public doesn't get involved?" The framers of our Constitution obviously believed that public scrutiny of the trial process worked to the advantage of the defendant--that courtroom actors under public observation would be better prepared, more careful and more likely to accord the defendant

all the due process protections afforded under our Constitution. If the public is excluded from courtroom proceedings (because cameras are taken out of courts and because there's not enough courtroom space to accommodate all interested parties), watch out -- the Star Chamber may become fashionable yet again.

Gerald Cooper of Skillman, NJ

Do you believe this hunger by the Public, for courtroom 'drama', is any different than their hunger for it in the Tabloid Press?

And, if there seems to be a connection, can we not see the potential behavioral impact, if we stand back and look at all parties involved in the Princess Diana tragedy? Historically, given the opportunity, substantial numbers of people have always gathered to watch the misfortunes of others unfold. Consider the crowds at the Roman persecution of the Christians or the French beheadings during the Inquisition. "Real Life Drama"! There is always an "Audience" who loves it, regardless of the outcome! Sort of like Shirley Jackson's "The Lottery." With no audience, the TV cameras would soon be gone. No audience, No sponsors, No money, No TV!

Paul X. Fox of Cincinnati, Ohio

Prosecutors and defense attorneys ought to be under automatic gag orders, prohibiting public comment on any trial they are currently involved with. There are very sound reasons our judicial system was developed with, and still has, strict rules on what EVIDENCE can and can't be entered into a trial before a jury. These rules are meant to prevent unfounded assertions or wild statements not based upon fact and these rules do not apply to statements made to/in the media, by either the defense or prosecution, before a jury is seated. And make no mistake as to WHO the attorneys are trying to reach with those media statements.

It is not the job of the media to censor these statements, they need to be prevented as a matter of law. I also think prosecutors ought to be prevented from running for any other public office for a period of time, say 10 years, after their term as prosecutor expires. Other than a crooked judge, nothing undermines the legitimacy of our judicial system more than the possibility of a grandstanding prosecutor using the power of the office, unfairly, to further personal political aspirations. The merest hint of this should never be allowed.

David J.W. Vanderhoof of Pembroke, NC

As a former trial attorney [20 years in federal courts dealing with civil rights issues throughout the country] before I became Prof David - I often ponder how I would have "acted" had my trials been on TV. And then reflecting on the sensitivity of some of the issues and the reluctance of some witnesses to testify I wonder how their appearance on the tube would have

influenced their decision.

I now teach criminal justice and on a final exam in a Courts course last semester asked the following questions:

Question: 11 Should criminal trials be televised? Should any of the following participants or interested observers have a "veto" [prevent the trial from being televised]; defendant, victim, witness, prosecutor, or the media.

Question: 4 Can public passion taint a justice system that is intended to be impartial?

Omer C Abner of McClellanville, SC

I believe that the administration of justice is just about the most important aspect of a free society. There should be NO distractions in any courtroom. Nothing to detract from the proceedings. The freedom of the press and freedom of speech and the publics right to know are all noble and worthy concepts...but we must set priorities every day of our life where these various liberties conflict.

In a courtroom, where someone's freedom, assets, or even their life is at stake, the complete attention of the judge and jury should always be focused on every nuance of the trial at hand. In capital cases, I believe that a single reporter with an obligation to feed all other news media should be the maximum allowed.

Bev Conover of Silver Springs, Florida

A reading of the Sixth Amendment should be enough to settle this question: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

Courtrooms were once spacious enough to accommodate, in most instances, all members of the public who wished to witness a trial. Since this is no longer the case, what better way to make a trial public than by televising it?

Lillian Adams of Carbondale, Illinois

I believe that cameras in the courtroom subvert a fair trial. I watched just a little of the Simpson case, and I could not see what there was about the case which brought about such involvement. He was a sports hero, and the fact that he was black and the two murdered people were white, made it a case in which people took sides.

However, during the period of the long, long trial several people were murdered in my primarily rural-small town area, under somewhat the same conditions that were alleged in the Simpson trial. Many, many people were killed in auto accidents, some by drunk drivers. They all brought about a half minute on the local tv news, short items in the local paper, and

nothing outside the area.

I believe that television makes the news. What is emphasized over and over becomes what every station carries, then the radio and then the newspapers. If it's not on television, it's not news.

Last night I saw "Wag the Dog" and it was frightening how a slick production can make people believe anything. I think it's that way with courtroom trials on television. I think producers, but not reporters, should be banned.

Leo A. Luebbehusen of Hurst, Texas

I am a fifty-one-year-old white male who has voted Republican in every election since I turned twenty-one, except my first (Humphrey over Nixon in '68). I became a lawyer three and one-half years ago. I practice criminal defense law. Two things shock me - the large number of factually innocent defendants who plead guilty or are found guilty, and the amount of police perjury.

If television would force my fellow citizens to see the truth, I support it. All trials should be at least video-taped for later viewing to show the incompetence and preserve the lies.

George McRoberts of Bothell,WA

I enjoy watching Court TV, but I think a delay of the tv transmission until the verdict is announced would be for all parties. Programs like Trial Story are a good approach since they can be condensed and give the whole picture. It also reduces lawyers and others from posing for TV.

Maurice DeAndrade of Westport,MA

Human nature what it is the cameras will cause those involved to take up acting. This is more so if it is a case that draws national attention. I have served on juries in both civil and criminal trials, and find that is the best way to get educated on the court system.

Gerald P. Kreisberg of Clifton Park, NY

I am a retired NY State Supreme court reporter. Though, not a lawyer or a judge, I do have a quasi-judicial view gleaned from 30 years courtroom experience as a court reporter.

My impression on cameras in the courtroom is that they cause the viewing public to be, in most cases, mislead as to what actually happened. What the vast majority of the public sees of an entire day's proceedings is a 30-second TV blurb on the local news, which serves more to distort than to educate. After all, in order to garner ratings, a TV news person will choose to show what is the most sensational and not necessarily what is truly representative of the court day, that is, if a 30-second blurb can serve to educate

at all.

It is impossible to make an informed judgment on the guilt or innocence of a defendant without hearing and seeing ALL of the testimony and hearing the charge on the law given by the Court. The current system leads to misunderstandings. Witness the death threats made against a juror who did not vote the death penalty in the Oklahoma bombing case; and also the call by some for a recall of the judge who altered the verdict in the Nanny case.

It might be best to use the British system of no news articles of a trial during the trial. After the trial, of course, the media -- electronic and print -- can and should report on the proceedings.

Fred W. Triem (attorney) of Petersburg, Alaska

Please do not overlook the potential benefits of televising appellate court proceedings. (Underline: "appellate") All of the discussion about courtroom t.v. seems focused on trial courts. But what about appeals!? This is where our law is made -- not in highly publicized criminal trials, but before panels of appellate judges who are not accountable to the American public. The appellate judges who decide, inter alia, First Amendment issues seem to think that the First Amendment does not apply to them, as demonstrated by Justice Souter's quote from his Congressional testimony.

As an aspiring appellate attorney, I could learn a lot and improve my modest skills if I could get a videotape of courtroom proceedings. And I'd be thrilled to watch some of my judicial heros, like Judges Posner and Easterbrook of the 7th Circuit. The American public -- lawyers and laypeople -- would achieve a greater understanding of the Third Branch if we could see how our laws are really made: in the common law system of judge-made law in appellate courts.

Michael Green of Brooklyn, New York

I recently served on a jury for a civil case in Brooklyn, New York. I was very concerned with what I saw.

First the trial took place in a second floor court room into which no uninvited citizen would enter. It was not that it was illegal to enter, but there was no window on the door and the entire atmosphere was not conducive to the public entering. There was no notice of which trial was being conducted or of any schedule.

Second the judge repeatedly gave testimony for the witnesses and then asked them, "Is that what you mean?" He also asked questions for the plaintiffs attorney. He also overruled the questions of the defense attorney for the sake of time even though the attorney was trying to show that a police officer was giving false or misleading testimony.

During deliberations the judge refused to clearly explain to the jury what the state law meant. Insisting on reading it to us in a low monotone voice.

I think there is a problem that the public is not seeing what is going on in our courtrooms. I don't necessary believe that the solution is cameras in a few courtrooms. Maybe a percentage of the jury pool should be used as court observers in every court proceeding. We need someone to be looking at what is going on in low profile cases.

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EXHIBIT 17

THE JUDGES' JOURNAL
A QUARTERLY OF THE JUDICIAL DIVISION
SPRING 2007 · VOL. 46 · NO. 2 · AMERICAN BAR ASSOCIATION

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INTRODUCTION

Maintaining and Improving the Public's Trust in the Judiciary

By Hon. Janet Berry

As judges we know instinctively that our authority rests on that fragile premise that the citizens we serve trust that we are maintaining the degree of fairness and impartiality required under the rule of law. Indeed, as Lord Gordon Hewart articulated in the 1923 English case of *Rex v. Sussex*, public confidence requires that "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Hon. Janet Berry is a district court judge in Reno, NV, and serves as chair of the Advisory Council for the Donald W. Reynolds National Center for Courts and Media, located on the campus of the National Judicial College in Reno. Her e-mail is judge.berry@washoecourts.us.

In this age of instant communication via the Internet, expanding cable television options and other technological advances, courts must take into consideration—to a degree never before experienced—how they are represented and reported on in the media.

And dealing with reporters, editors, and news directors is not something we were trained for in law school.

That is why the Donald W. Reynolds National Center for Courts and Media was created in The National Judicial College. It is also the reason we are so pleased that the editorial board of The *Judge's Journal* invited our participation in this issue. Our goal is to focus on the important relationship between courts and the media.

The inherent tensions built into our Constitution through the First and Sixth Amendments present a variety of issues that fundamentally affect our democratic system today. Absent a strong mutual understanding between the courts and media, public confidence in the entire system erodes, and democracy, as we know it, is imperiled. In collaboration with the editors of *The Judge's Journal*, we have asked some of our expert faculty to share their observations and recommendations for judges on dealing with some of the key issues in the following pages of this issue.

It is an honor to join with the ABA's Judicial Division in advancing a mission we share—doing our best to maintain and improve the public's trust in the judiciary.

I commend this information to your attention. ■

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WHY GOOD MEDIA RELATIONS Are Increasingly Important to Courts Today

By Gary A. Hengstler

Thirty years ago, Paddy Chayefsky's biting, but prescient, *Network* gave us an angry newsman who captured the public's fancy by asking viewers to stick their heads out their windows and scream "I'm as mad as hell, and I'm not going to take this anymore."

Yes, in the Oscar-winning satire, an insane Howard Beale had become "a latter-day prophet denouncing the hypocrisies of our time."[1] His newscast had morphed into entertainment, because television's leadership had discovered rage and conflict sell.

Now thirty years later, when a childish spat between Rosie O'Donnell and Donald Trump elbows its way past the war in Iraq on the nightly news, perhaps fiction has become reality.

For many of us, that's the rub. The esteemed jurist Learned Hand once observed, "The hand that rules the press . . . rules the country; whether we like it or not, we must learn to accept it."[2] And he said that in 1942 *before* the advent of television or the Internet.

He recognized the pervasive power of the media. What the media say—and now show—about life has influence. This power gives pause to the judiciary because all judges have concerns about maintaining public trust and confidence in our system. Public confidence rests on public perception, something largely shaped these days by the media, as Judge Hand said, "whether we like it or not."

That being the case, logic would suggest that it is in the interest of the judiciary to establish a positive working relationship with the media. Indeed, that is one of the chief reasons why the Donald W. Reynolds National Center for Courts and Media was created—to promote improved relations between the courts and media.

But this goal presents some special problems, not the least of which is the fact that the landscape of journalism itself is currently experiencing seismic tremors of change. With readership and viewership of traditional mainstream news sources declining, the media are searching for ways to interact with and involve the public to a greater degree than ever before.

Newspaper Web sites are adding videos, and television Web sites are expanding their reporting beyond the limited minutes on air. We also are seeing expanded collaboration between print and electronic media these days. All mainstream media are apprehensive about the new kids on the block—Internet bloggers with their citizen reporters and commentators.

What do the swirling changes in both the courts and media today mean for public trust? Ironically, for both of them to perform their public service function in a democracy necessitates that the public possess a requisite degree of trust and confidence in them.

In this regard, there is cause for unease. A January 2002 survey commissioned by the Section of Litigation of the American Bar Association and released in April that same year finds that, among institutions and professions, lawyers, judges, and even the media, despite the de facto power and influence of the press, do not fare well in terms of public confidence.[3]

According to the survey, only 19 percent of U.S. citizens say they are "extremely or very confident in" lawyers and the legal profession.[4] The judiciary rated higher at 33 percent and the media came in last at 16 percent.[5] The medical profession led the list of possibilities at 50 percent.[6]

While this indicates an appallingly low level of public confidence in two elements of our society crucial to its successful functioning, there may be a glimmer of hope in the fact that the January 2002 findings are up slightly from the 1998 results—lawyers, 14 percent; judiciary, 32 percent; and media, 14 percent.[7]

Still, the findings demonstrate that both the courts and the media need to shore up the degree of trust citizens place in them because of the key role each plays in safeguarding our democratic system.

Fear of Government Overreaching

To understand how critical those roles are, we need to appreciate the frame of mind of the founders of this nation

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when they drafted the Constitution. It was no accident that of the first ten amendments, nine are written in the negative—i.e., the emphasis was on what the government cannot do.

When you think about it, those who created the United States, generally speaking, were the rejects of other lands. Let's face it. If those who began the European exodus to the new land had power and influence in their native countries, they would have had no reason to leave. But they were dissatisfied with life there and chose to embark on a great adventure. One common trait they tended to share was a strong and deep distrust of the potential for abuse by individuals who held governmental power, a trait still present in U.S. citizens to this very day.

That is why in drafting the Constitution, the founders were so concerned about creating limits to the potentially oppressive powers of government. Two of the most important safeguards put in place were a fair and impartial judiciary—judges with the power to tell both the executive and legislative branches when they had gone too far—and an unfettered press, free to expose and criticize the activities of government.

In my view, no one has summed up how critical the roles of the courts and media are to the democratic form of government better than Judge Alexander Sanders, the former president of the College of Charleston, former chair of the National Judicial College Board of Trustees and a current member of our Center's National Advisory Council. Speaking at one of our Council meetings, Judge Sanders said:

> There is an infinite number of variables that determine the quality of democracy. We could list them for the rest of our lives, and we wouldn't list them all. But there are only two on which the survival of the democracy depends, and they are a free press and an independent judiciary. You can't have a democracy without those two things. There never has been one, and there never will be one. So it's critically important for those two elements to understand each other, and they do not always.
>
> People obey the orders and the decisions of courts because of one thing—the respect that the court has in the minds and hearts of the American people. And that respect doesn't come from the Constitution or any statutory authority. It comes from the understanding that the people have of the function of the judiciary. For most, there is but one place to get that understanding, and that is from the media. The media depends on the courts for obvious reasons. Courts also depend on the media for somewhat less obvious reasons, but nevertheless, reasons that need to be critically understood.

There is the irony in a nutshell: to be successful, the courts and media need each other to perform their respective roles.

Judicial and Journalistic Symbiosis

There is no freedom of the press unless a fair and impartial judge says so in individual cases. The First Amendment provides journalists only such latitude as the courts determine. "Journalists should heed the words of (Justice) Potter Stewart, himself once a reporter, who said at a Fred Friendly discussion group: 'Where do you journalists think you get your rights?'"[8]

Journalists are dependent upon judges to construe the Constitution in their favor when the press is challenged in a court action by those who do not like what the press has done or wish to prevent the press from reporting on some issue.

In a like manner, the independence of the judiciary is largely dependent upon the media. As has been pointed out many times, the judiciary has no mechanism of its own to enforce its rulings. The rule of law works only when the citizenry has the requisite degree of trust and confidence in the integrity and inherent fairness of the court system.

But because most people do not personally attend court regularly to check for themselves how the system is working, public trust and confidence, as stated earlier, are perceptions gained through reports in the media. As the First Amendment Center has stated in one of its publications, "How a judge's actions are reported by newspapers and on television is crucial to public attitudes about that judge and to public respect for and confidence in criminal justice."[9]

This is not a view held solely by the press. Justice Felix Frankfurter once said, "The public's confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system."[10] Thus, a symbiotic relationship naturally exists.

As Michael Gartner, a 1997 Pulitzer Prize-winning editor and publisher, said at a national conference at the National Judicial College, "You'd think we'd be best friends. After all, we're the two underpinnings of democracy . . . Neither of us can exist without the other, and the nation can't exist without both of us . . . And yet we usually don't understand each other. We often don't trust each other. We sometimes don't believe each other. That's why we need to talk."[11]

Which brings us back to the need for improvement between the courts and media. Talking to each other is the first step in building relationships. But that isn't something many judges are interested in doing with the media. I routinely run into judges whose basic attitude is: "I never talk to the media. They never get it right. They are just interested in making you look bad so they can sell newspapers."

These judges see the press as the enemy. But such views also raise the question: How are sincere journalists going to get it right unless somebody talks to them and helps them under-

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stand the intricacies of the legal system in order to make their reports accurate?

Nor is the view that judges and journalists are natural antagonists one-sided.

In an issue of *Editor & Publisher*, a national trade magazine for newspapers, a lead editorial was headlined "Bullies in Black Robes."[12] The editorial began

> Lately, we've seen an epidemic of unreasonable, and unreasoning, actions by judges who seem more motivated by personal pique than a quest for justice. Lawyers call this syndrome 'black robe-itis.' Reporters are apparently its latest favorite targets.

After commenting on rulings in three cases that went against the press, the editorial concluded that

> The notion that (the reporters and newspapers) should be punished for informing Americans is worrisome enough. What's truly frightening is the idea they were singled out because judges believe the people's courtroom is a personal fiefdom.

Roots of Tension

Much of the tension is rooted in who has control. Judge Samuel H. Monk II, of the Calhoun County Circuit Court in Anniston, Alabama, acknowledged as much when he wrote

> Judges, at least within their individual courts, are accustomed to being in control and enjoying the luxury of having a final say. They do not like interference from those outside the legal profession or public criticism of their decisions, least of all by the press.[13]

In essence, neither judges nor journalists like anyone outside their respective chains of command interfering with them or telling them what they have to do.

Journalists don't want judges blocking their access to sources and information through gag orders and the sealing of documents. Judges don't want their case tried in the media, and they fear the consequences of juries learning of evidence and information through the media that they have ruled inadmissible in the trial.

Again, it is the clash of wills over control. Journalists resent the judges' use of their official power to maintain the integrity and dignity of the trial when such usage hinders them from gathering the facts. Judges lament their inability to control a press free with their unofficial, but real, power to affect the dynamics of a trial through news coverage.

Although it is often risky to generalize, it probably is fair to say that judges place greater emphasis on process than journalists who are more results oriented. Journalists are focused on getting the story and less on how they get it. They know that, in some circumstances, the information can only come out unofficially through confidential sources and, occasionally, the secret document leaked to them surreptitiously.

Judges, on the other hand, are required to oversee an orderly unfolding of the information at trial through a series of well-developed procedural rules. When they see end-runs around the process by individuals not directly under their jurisdiction, the resentment builds.

The resentment appears for a variety of causes. Sometimes it is simply the inaccuracy of the story. Sometimes it is sensationalized coverage. Most journalists take pride in their work and want to know when they get it wrong. Particularly at the local level, if the reporter seems to be conscientious, there can be benefits if someone at the court can help reporters better understand the processes and terminology, which may help ensure accuracy.

More judges are taking the initiative to get to know the reporter and, staying within ethical restrictions, finding ways to help the reporter do the job better. With that rapport established, the judges can call the reporter when the story is wrong or, in a judge's view, appears to be sensationalized.

Of course, one key issue when complaining about erroneous reporting is whether to seek a correction. Often the mistake is relatively minor, so nothing is to be gained by resurrecting the issue in a correction. But if the error is serious enough to chip away at public confidence, then the correction should be sought.

In talking with the judges at the National Judicial College who have established press relationships at the local level, I have yet to meet a judge who has been burned by a local reporter.

Certainly, if a reporter doesn't have the requisite ethical approach to the job, a judge would want to minimize contact. In other words, establishing a relationship with a reporter or editor doesn't always mean it is a cozy one. It can be for a reporter that a judge respects, but the relationship is minimized when a judge has reason to be wary of a reporter who is simply out to build his or her resume.

Such journalists usually are fairly easy to spot. Prone to look for something to uncover, they tend to hype the negative and deemphasize the counter-information. In short, their work is palpably unbalanced.

More difficult situations for judges occur when commentators criticize individual decisions. It then becomes a question of whether to engage the criticism or ignore it. Usually, ethical rules prevent a judge from reacting publicly because the case is still pending.

And at their worst, television's talking heads, in their bid to make their "news" commentary entertaining, easily slide into distortions, smears, or bias. When their target is a judge, it can get ugly.

An example occurred last year when Bill O'Reilly, Fox Network's ultrashrill modern-day Howard Beale, repeatedly blistered an Ohio judge who granted probation in a sex case, a ruling with which O'Reilly took issue.

When the judge tried to explain to one of the show's producers that ethical rules prevented his commenting on the case, O'Reilly sneered on air: "This is what *they all* hide behind: 'The Supreme Court of the state told me that I can't

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talk.' That's bull. That's a lie. The only thing he can't do is say something that would tilt the case one way or the other. The case is finished . . . he can comment on why he did it and he already has commented. So he's lying."

It's that kind of sweeping, all-encompassing attack on the judiciary that should be challenged. All people have a First Amendment right to criticize any judge's decision, including O'Reilly. No one is contesting that. Judges may not like it but it comes with the territory.

But to dismiss important ethical rules as something all judges "hide behind" is an irresponsible distortion and simply not true. Even in the case that O'Reilly was ripping, the case remains pending and could resurface before the judge if the probation is violated, so the judge really was obligated not to speak.

So a strident and smug journalist went overboard about the judiciary, why should we care?

Howard Beale said it best in explaining his newfound influence: "Because you're on television, dummy! You have 40 million Americans listening to you." Now, Howard was insane. O'Reilly is merely calculating for ratings.

The irony is that O'Reilly and the other would-be Howard Beales enjoy their right to be irresponsible because of the courts.

Chief Justice Warren Burger summed it up when he wrote, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues, it cannot be legislated."[14]

But is the fact that some of the media are irresponsible, sensational, and erroneous a valid reason for the judiciary to stay above the fray?

On one hand, another O'Reilly target, *Dayton (Ohio) Daily News* Editor Jeff Bruce, responded to O'Reilly's blast at him with: "They say only two things happen when you wrestle a pig. You get muddy and the pig enjoys it."

By this standard, judges would do well to avoid the fray and stay out of the mud.

On the other hand, if no one challenges the serious inaccuracies, distortions, and imbalance in the media, the field is left open to the critics to characterize the judiciary and legal developments as they see fit.

No one is in a better position to explain the role of judges and the importance of our judicial system than the judges themselves. Certainly, one has to pick his or her battles, be mindful of ethical considerations, and choose one's words carefully.

With the growing number of options as media outlets expand, a judicial response doesn't always have to be in the same medium in which the attack occurred. One of the by-products of the new rush for infotainment is that the media will attack each other.

For example, O'Reilly's tirade itself became the subject of MSNBC's *Countdown with Keith Olbermann.* In one part, Olbermann's guest, David Brock, says, "But I think it's fair to say in the past couple of years that Bill O'Reilly has gotten more scrutiny. More people are aware of the dishonesty, the serial lying that goes on on that show, and that he systematically is misinforming the public, and he doesn't have a lot of humor about that criticism."

In law school, we all learned of Justice Louis Brandeis's view that the antidote to bad speech isn't suppression, but more speech.[15] In today's rapidly evolving media that wields powerful influences on the public, courts no longer enjoy the luxury of relative isolation. Sooner or later, even at the local level, courts will need to determine what relationships with the media best serve the goal of maintaining the public's support for the judicial system. ■

Endnotes

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10. *See* Seigenthaler & Hudson, *supra* note 8 .
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12. EDITOR & PUBLISHER, Nov. 26, 2001, at 12.
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14. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974).
15. Whitney v. California, 274 U.S. 357 (1927).

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High Profile Trials—The Need for a Court to Have a Media Plan

By Ron Keefover

The high profile trial—coming to a court near you soon! These are chilling words for most judges, unless they have been through the experience at least once in their career. Indeed, the media-interest court proceeding can arise in any court at any time and frequently does so without warning. It can be as intense as a Kobe Bryant proceeding or as seemingly routine as a civil contract case. Although a high profile case may be as hard to define as obscenity, when one arrives at your court, you will know it.

Consider the judge who wound up with a simple contract dispute involving a $9,000 engagement ring. The issue was whether the prospective bride should be required to return the ring to the prospective groom after the wedding was called off. The judge's decision that the ring or its equivalent value should be returned to the would-be groom was not only reviewed by his state's supreme court, but also by numerous radio talk show hosts and a prominent national television talk show. The court of public opinion, as is often the case, did not focus on the legal issues involved. Rather, the radio and TV hosts wanted to know if it mattered who broke off the engagement, what troubles led to the break-up, if a love triangle of any sort was involved, and so on. The vociferous debate resulted in a swarm of national media descending on the appellate court at oral argument. (Our erstwhile trial judge was affirmed, with the Kansas Supreme Court holding that the ring was a conditional gift that must be returned. *Heiman v. Parrish*, 942 P2d 631, 262 Kan. 926).

Fortunately for that court, its staff was prepared for the onslaught because long before the matter arose, a thoughtful media plan for such an event had been prepared and needed only to be implemented for the hearing. The plan not only made for good relations with the media, many of whom had never been in that state supreme court before, but also allowed the justices to focus on the case before them rather than the myriad issues involving the news media (e.g., courtroom seating, broadcast feeds, video and audio streaming, access to court records, etc.).

You can bet that the media *will* be prepared *and* have a plan, so it is critical that we in the courts be prepared as well. By doing so, we are making that all-important first impression that we are organized, that we are professional, and that we are in control. Having a plan already in place should obviate the need for emergency meetings to decide issues that easily could have been decided long before the media crisis. Even more, external partners, such as law enforcement, courthouse officials, and others, will appreciate having had their input in the plan before being called upon to assist with any ensuing media frenzy.

The typical architects of a basic high profile media plan for a court generally include the judge, clerk of the court, district court administrator, and court public information officer. It is these people who arrive at an initial plan. Addendums to the plan usually are made in follow-up meetings with law enforcement, parking management, court facility representatives, and other potential representatives that, depending on the magnitude of the case, may be involved in its implementation.

Once the basic plan is developed, it is vital that it be communicated to co-workers so that their job duties can be explained, the person representing the trial judge can be identified as the source to respond to media inquiries, and other components of the plan are made clear. The time demands, emotional toll on affected employees, and disruption in their routines can be daunting. Indecision resulting from a lack of prior planning can have brutal consequences for those on the front line when the media arrive at the counter *en masse*. Whether it is a high profile celebrity case or something as simple as a diamond ring, being prepared ahead of time with a thoughtful media plan will reflect favorably on both the court and the judge.

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Judges and Journalists

Defusing Tensions and Building Relationships

By Mark Curriden and Hon. Patrick Higginbotham

Hamilton County, Tennessee, Criminal Court Judge Samuel McReynolds awoke the morning of a major death penalty trial to find the evidence in the case splashed on the front page of the *Chattanooga Daily Times*. There were witness statements and a quote from the sheriff that the defendant's guilt was never in doubt. A defense attorney is quoted as saying "the fix is in" by the prosecutor and judge against his client.

The reporter even printed the name and address of the rape victim and, at the end of the article, listed the names, home addresses, and occupations of thirty-four of the thirty-six potential jurors who had been summonsed for the trial. Infuriated, the judge immediately called the sheriff demanding an explanation.

"I am very upset at this," Judge McReynolds said, slapping the newspaper. "I want you to find those two jurors and find out why they didn't show up and why they think they can ignore my call for jury service."

The year was 1906. There were no motions for a mistrial due to pretrial publicity. No complaints about tainting the jury pool. No one was upset that names and personal information about the jurors and rape victim were made public. No disciplinary proceedings were initiated by the bar.

Of course, the *State of Tennessee v. Ed Johnson* was far from a model case for judges or journalists. It was proven later that court officials had indeed railroaded an innocent man. Eventually, inflammatory newspaper coverage sparked a mob riot that ended in a lynching.

Thankfully, much has changed during the past century. Journalists today are considerably more conservative and thoughtful and professional. They would never print the names of jurors prior to a trial, and identifying a rape victim is extremely rare and frowned upon by most news organizations. In fact, most newspaper coverage of trials is so antisensational that it borders on boring.

At the same time, trial and appellate judges across the country have ruled overwhelmingly that court proceedings must be open to the public and that court records are presumed to be public records. Courts have been nearly uniform in turning back efforts of prior restraint. Even cameras in the courtroom have become commonplace in state courts across the country.

Yet, tensions between judges and journalists appear to be at an all-time high.

Judges complain that today's reporters, especially those on television, sensationalize their stories to sell newspapers or attract viewers and that the facts in their stories are usually wrong. They claim that few journalists understand legal proceedings and many have no respect for the Sixth Amendment.

By contrast, reporters contend that some judges try to control and limit information about their cases. They say that some judges improperly place their concerns about a fair trial over the rights of free speech, free press, and an open court process.

To gain a better understanding of what is happening and why, we turned to some of the leading experts and practitioners in the field:

"Over the past few years, we have seen a significant increase in the number of legal conflicts between journalists trying to cover courts and court officials trying to deny access to proceedings or information," Lucy Dalglish, executive director of the Washington, D.C.-based Reporters Committee for Freedom of the Press, told the Conference of Chief Justices meeting in Indianapolis in July 2006.

"We have witnessed an increase in the number of undocketed court hearings, secret case filings, cases that are sealed, and closed court hearings," says Dalglish. "And there is a dramatic increase in the number of cases where judges have ordered journalists to testify or turn over their notes or identify confidential sources of information."

Judge Terry Ruckreigle of Eagle, Colorado, agrees that confrontations between journalists and court officials seem to be on the rise. Judge Ruckreigle presided over the case of

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National Basketball Association star Kobe Bryant, who was charged with rape.

"Part of the problem is judges who simply don't trust reporters," he says. "Judges, and lawyers too, are used to being in control. When reporters are involved, the judges lose control of the information and that scares many judges. So the judges overreact and overreach."

"But there is a problem on the journalism side of things, too," according to Judge Ruckreigle. "The problem is that not all the journalists are from the *New York Times* or the local television or radio station. Some are tabloid journalists or bloggers who have no ethics and don't care to follow the rules."

"Part of the problem is that most judges have no idea about journalism or how journalists operate or what they need," says Gary Hengstler, director of the National Center for Courts and the Media (NCCM), and former editor/publisher of the *ABA Journal*. "At the same time, most journalists don't understand the law or court process. There is a major disconnect."

"To judges, process and procedure are of utmost importance," he says. "To journalists, outcome or results are what matters most."

Hengstler, who is a lawyer, made his comments to about seventy reporters and editors in August 2006 at a NCCM-sponsored conference designed to educate journalists about the nuts and bolts of covering courts. The NCCM is affiliated with the National Judicial College in Reno, Nevada.

Tom Leatherbury, a partner at Vinson & Elkins in Dallas, a nationally recognized expert in media litigation, believes that most of the conflicts between journalists and judges have arisen in the major media markets on the East and West Coasts, but less so in the middle of the country or in the South.

"In Texas, for example, most state judges are media friendly and just try to follow the law on access to courts and judicial proceedings," says Leatherbury, who has represented the *New York Times*, the *Dallas Morning News* and CBS's *60 Minutes* in high-profile media cases. "We do, of course, encounter some judges out there who simply ignore the law. But the appellate courts have been very good about stepping in and reversing."

Texas District Judge Steve Smith of College Station believes that while most journalists try to do the right thing, they are not properly equipped with the knowledge and resources to adequately cover courts and legal issues. He voices a sentiment echoed by many jurists.

"I have sat through a day of testimony in a trial, then watched the television news or read the newspaper in the morning, and wondered if I had missed something or if I was in the same courtroom as these reporters," Judge Smith told a group of journalists attending a three-day seminar conducted by the NCCM. "The stories only vaguely reminded me of the actual testimony. That is very bothersome."

To be sure, both sides deserve some blame.

Most journalists covering courts are not lawyers. In fact, the court beat at many newspapers and television stations is an entry level position filled by reporters straight out of journalism school. We are reminded of the cub reporter who approached prosecutors as jurors were deliberating.

"If the jury finds him not guilty," the television journalist asked, "will you appeal?"

The prosecutor then berated the reporter for not knowing the legal principle of double jeopardy. "It is basic civics class 101," the prosecutor responded.

That story was repeated again and again around the courthouse in Atlanta, undermining the credibility of all journalists who covered the courts.

The sad truth is that newspapers and television stations do not educate their reporters as to the intricacies of the legal system. Due to staffing reductions, there are fewer journalists who have to write more articles in a shorter period of time. In addition, budget cuts at most newspapers and television stations prevent the news organizations from sending their journalists to educational workshops or seminars.

However, that's not to say that all is hopeless. Judges can make a difference and improve the legal journalism in their communities.

Open Courts and Records

Judges must not forget that journalists have the right, even a responsibility, to cover courts and to turn the spotlight on the operations and actions of the courts. Courtrooms are public institutions and, absent special and limited circumstances, the courthouse should be open to the public at all times. Most of the time, the public cannot be in the courtroom to see what is happening, so the job rests with the news media.

Nearly every journalist who covers courts has a handful of stories about being locked out of voir dire and denied access to court files. In 2005 and 2006, the NCCM conducted a series of daylong workshops that brought together scores of judges and journalists in nearly every state. In state after state, journalists pointed to examples of judges who closed the courtroom for a proceeding or clerks who denied that the case file was available because it was being kept by the judge in chambers.

This is disappointing and troubling and involves an issue that was resolved two decades ago when the U.S. Supreme Court decided *Press Enterprise Co. v. Superior Court of California* (464 U.S. 501, 1984). Since then, a handful of state and federal trial courts have chosen to exclude the public and press from various hearings. But in nearly every case, the appellate courts

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reversed the trial judge.

For the record, we believe that most judges understand that all court proceedings, including jury selection, are open to the public, except under extreme circumstances, such as when there is a judicial finding that jurors have been threatened, jury tampering is suspected, or the cases involve trade secrets. In the sometimes difficult task of protecting the rights of media and the rights of the parties on trial, judges usually perform well.

Developing Relationships

Every judge should know the beat reporters who cover their courts. Introduce yourself and your clerk to them. A journalist's job is to get the news, and judges should help facilitate that goal when at all possible.

Unfortunately, many judges are hesitant when risk is involved. They don't want media coverage because they cannot control it. So, these judges ignore or even avoid the media at all costs, persuading themselves that doing so will protect the integrity of the court. While the goal is laudable, this is probably not a good way to achieve it. Judges need to recognize that the news media can actually be beneficial to the administration of justice. Journalists can achieve things that judges cannot simply by turning the spotlight on the problems.

A good example of this occurred recently in Texas. The state's judges and bar association had been trying for a decade to increase juror pay, which stood at $6 a day. The last juror pay increase was 1954. But each year, the Texas legislature failed to act, despite the lobbying by the judges.

In 2005, the news media in the state, led by the *Dallas Morning News*, published article after article about the difficulty of getting lower-income, hourly wage earners to jury service. The media quoted experts as saying one of the big problems was the low juror pay.

The newspapers then editorialized over and over about the need to increase the amount paid to jurors. The result: the state legislature increased juror pay from $6 a day to $40 a day.

"There is no doubt that the role of the news media in putting the spotlight on this issue was the reason it passed," says Texas Supreme Court Justice Nathan Hecht, who advocated for the juror pay increase.

Media Stories: Good and Bad

The bottom line is that judges should realize that the news media are not their enemy, but not their friend, either. However, there are numerous examples of the news media advocating for judges and the courts.

"The judges have no better ally in exposing attacks on the independence of the judiciary than the news media," says Hengstler. "The media is there to be a watchdog. Sometimes that means to expose corruption or problems within the courts. But sometimes, that means to show how the courts are being unfairly attacked."

A perfect example of this occurred in 1999. A Dallas judge faced a situation that undermined the ability of a citizen to attend jury duty. A woman had shown up for jury service in tears. She had just been fired by her employer, which was a Fortune 200 company, because she refused to ignore her jury summons.

The judge called the company lawyers but the officials refused to cooperate, telling the judge that there was nothing he (the judge) could do because it wasn't illegal in Texas to fire someone for going to jury duty.

Stunned, the judge agreed that the company's actions were not illegal. But he didn't let the issue drop either. The judge called the legal affairs writer for the *Dallas Morning News*, whom he had met at a local bench-bar conference, and told the reporter the story in an on-the-record interview.

The next morning, the newspaper ran a front page story about the company and its actions. The result: the woman was offered her job back, the company publicly apologized and required its corporate leaders to attend jury appreciation training, and the state legislature immediately passed a law making it a crime to fire someone for going to jury service.

Nevertheless, there are going to be media inquiries and stories that, to judges, seem wrongheaded or even improper. But this conflict is not new.

A good example of such tension surfaced three decades ago when the U.S. Marshals Service withdrew the 24-hour protection it had provided to U.S. District Judge Frank Johnson of Alabama for 15 years. The judge, who had courageously implemented *Brown v. Board of Education* and ruled against segregation in Alabama, and his family for many years had needed round-the-clock federal protection because of numerous death threats.

When the federal service decided in 1975 that there was no longer a threat to Judge Johnson or his family, the protection was quietly dropped. However, the *Montgomery Advertiser* learned of the development and published a front page story about it.

"Judge Johnson was furious and feared that the article would endanger his family again," says Peter Canfield, who clerked for Judge Johnson and is now a media lawyer in Atlanta, Georgia. "But the fact that Judge Johnson no longer needed marshals' protection was a newsworthy event because it told a lot about how attitudes had changed in the South."

Was the story unfair to Judge Johnson and his family? No doubt. But was it a legitimate news story? Absolutely.

What Can Judges Do?

State and federal judges have told the authors of this article repeatedly that there is nothing they can do to improve media coverage of the courts. In view of the need for good public relations and public confidence in our courts, this approach seems lacking. There are very basic things that judges in every jurisdiction—large and small—can do to improve the accuracy of the stories that are written about them and their courts.

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OFF THE RECORD

Taking Time to Educate the Press

By Sylvan A. Sobel

On my first day as the county court beat reporter for a daily newspaper in a mid-size community, my predecessor introduced me to the prosecutors, defenders, court clerks, courthouse staff, and most importantly, to the county judge. We spent about five minutes in the judge's chambers, and he told me to come to him whenever I had questions about the law or court procedures. He said he could not discuss pending cases with me, but if I needed background information to help me write knowledgeably about the legal matters I was covering, he could give it to me.

That night, I wrote my first article as the court beat reporter, about a sentencing by the county judge. I said the judge had sentenced the defendant to such-and-such under a plea bargain, and I got it wrong.

The next day, when I made my rounds of the courthouse, the judge's secretary politely handed me a note. "Judge asked me to give this to you," she said. In the note that he had typed himself (so as not to embarrass me in front of his chambers staff), the judge advised me of my error, explaining to me the difference between a plea agreement as to the sentence and an agreement to plead guilty to reduced charges without an agreement on the sentence.

I was mortified. I asked to see the judge and apologized for my mistake. "That's all right," he told me once inside his chambers. He said he did not want the newspaper's readers to think that the District Attorney's office was making the sentencing decisions in his court. He also said he wanted to make a point to me: He wanted me to understand that I could—and should—come to him whenever I needed to clarify my understanding of the legal system before I tried to write about it.

Thus began an informal but intensive two-year education in the law largely at the hands of the county judge, but also from other judicial officers, prosecutors, and attorneys who worked in the courts I covered. This is not to say that I did not make mistakes. Looking back on some of the articles I wrote, I realize how dangerously shallow was my understanding of the legal system and how often my news judgment influenced me to highlight the most sensational, yet often legally insignificant, aspects of a case. Yet, I learned enough about the law to explain to my readers the context in which judicial decisions were made and their effect, and enough about ethical rules to know which questions I could ask a judge for background, and which matters I should not expect the judge to discuss.

True, the judges had as much to gain as I did by making sure my stories were well-informed: They served in jurisdictions in which judges were elected to office. Their reputations in their community were important to them, particularly if they wanted to be returned to the bench.

But I believe there were larger benefits to educating the reporter than simply the political benefits received by the judges. The readers of the newspaper benefited from reading reasonably accurate, balanced accounts of the administration of justice in their community. Individuals and businesses also benefited from accurate descriptions of their dealings with the legal system that were reported in the local news media. And the legal system as a whole benefited from a more informed citizenry that better understood how the courts worked and perhaps, just perhaps, realized that a system of laws, and not the individual whims of judges, governed judicial decision making.

Whether, and how, to talk with the news media is a decision that is decidedly up to the individual judge. My impression is that, if not for the necessity of maintaining a good public image in jurisdictions in which judges are elected, most judges would take the view that the best way to deal with the news media is not to deal with them. This is not necessarily because of malice toward the news media. Rather, many judges analyze the potential benefits of talking with the news media and weigh them against the potential risks and their obligations under judicial codes of conduct, and conclude that the risks outweigh the rewards.

I would like to try to tip the balance and make the argument for judges to maintain a cooperative working relationship with the press, particularly with reporters who cover the courts on a regular basis. The reasons for doing so run the gamut from inspirational and altruistic, to moderate self-interest, to complete self-interest. Perhaps by themselves not one of the reasons I will advance outweighs the potential risk of being misquoted, or perhaps worse, being quoted about something

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that you thought was "off the record." But together, they present a persuasive case for opening the door to your chambers for at least some background briefings for reporters, and letting reporters know that if they need an occasional primer on legal procedure or jurisprudence, you can give it to them.

Rules of Engagement

Before arguing for the benefits of working with the news media, it is important to discuss the ground rules for interacting with them. Specifically, when should a judge go "off the record," and what exactly does this phrase mean?

With respect to the second question, I have never learned a single, universally-accepted definition of what "off the record" means.[1] I have, however, heard several different definitions ranging from "Do not quote me by name," to "I will deny this conversation ever happened." How can such a simple phrase have so many definitions? Think of "off the record" as roughly the journalistic equivalent of the term "voir dire." Just as you can put five lawyers in a room and find five pronunciations of "voir dire," you could probably question a roomful of journalists and come up with almost as many definitions of "off the record." Part of the reason for the variety of meanings may have to do with a community's standards: "Off the record" in New York City may not mean the same thing as it does in Yazoo City.[2]

Instead of trying to define "off the record," you should clarify in advance how a reporter may use what you say. Can the reporter quote a statement of yours and attribute it to you by name? Can the reporter attribute your statement to "a court official"? Is the information you give the reporter strictly for background, to help the reporter write an informed story?

Consider, for example, a press account of sentencing in a high profile case under a guideline sentencing system. An uninformed story might simply report that the judge sentenced the defendant to a certain penalty, creating the impression that the judge's sentence was purely arbitrary. At a minimum, you may think it important for the news media to understand, and to report, that a guideline sentencing system exists that guides the judge's determination of sentence. Going one step further, you may want the media to understand how the guidelines worked in your case, and to report what factors you could and, perhaps more importantly, could not consider in the case. But if you were to educate the news media about these sentencing nuances, would you want your rationale to be quoted, or would you prefer to see an unattributed, neutral explanation of the sentencing process appear in the story? It is therefore critical that you and the reporter clearly understand how the reporter will use the information you provide.

Just as you should be clear up front about your ground rules, you should also make the reporter aware of the rules that govern your contact with the media. Show the reporter the applicable provisions in the code of conduct governing your contact with the news media. Let the reporter know that you are not being obstinate or evasive when you say that you cannot discuss a pending case, but that ethical rules prohibit it. Maybe an informed reporter will some day write that "Ethical rules prohibit the judge from commenting" rather than "The judge refused to comment."

Educating the Public

So now let's try to answer the question, why should you speak with the press? The first reason, pure and simple, is that it is your civic duty. You are a public official charged with the administration of justice in your community. You therefore have an obligation to help inform the public about the work of the courts. The press will cite "the public's right to know." Whatever that right is and whatever its source, I would argue that it is not satisfied simply by giving the press and public access to the public record, but that it also entails providing sufficient insight into the legal system and court procedures so that news media accounts can describe the significance of legal decisions and what they say about the quality of justice in the community.

In her thoughtful essay on press coverage of the Supreme Court,[3] *New York Times* reporter Linda Greenhouse presents the argument for informed press coverage of court business in general, and of the Supreme Court in particular.

> Especially in an era when the political system has ceded to the courts many of society's most difficult questions, it is sobering to acknowledge the extent to which the courts and the country depend on the press for the public understanding that is necessary for the health and, ultimately, the legitimacy of any institution in a democratic society.[4]

Ms. Greenhouse cites many examples of Supreme Court decisions implicating important public policy issues,[5] all of which demonstrate the need for a knowledgeable press that can inform the public not only of the meaning but also of the background, context, and significance of the Court's actions.

Even decisions of less national importance than those of the Supreme Court deserve informed coverage. Every court case involves individuals, institutions, and businesses. Their standing in their community and, indeed, their very well-being, can hinge on accurate and balanced coverage of legal proceedings in which they are involved.

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For example, I spent several days covering a medical malpractice trial in our community involving a venerable local practitioner and the largest public hospital. It was a high profile case involving allegations of misdiagnosis leading to unnecessary surgery on a teenage girl that left her deformed. Several days into the proceedings, the judge, counsel, and parties adjourned to the judge's chambers and spent hours in discussions. My courthouse sources—none of them judges in this instance—told me that settlement discussions were taking place. That seemed reasonable to me. After all, with my limited knowledge of legal proceedings at that time, I wondered what else they could be talking about. So my article in the next morning's paper reported that the parties were talking settlement.

Defense counsel for the hospital was livid when he saw me that morning. "How could you write that we're talking settlement?" he lamented. "If anything will poison the jury, that will." I confess that, at the time, the possibility of influencing the jury had not occurred to me. He told me that as a result of my article, hospital officials and he had decided they had no choice but to settle, which they did later that day.

Even taking the attorney's complaint with a grain of salt, I have still wondered whether my reporting did a disservice to the doctor and hospital, which now had a hefty malpractice settlement to deal with, and to the community, whose opinion of these prominent health care providers no doubt suffered. Should I have simply not reported the settlement speculation? Should I have asked the judge to explain to me, without commenting on the case pending before him, what lawyers, parties, and a judge would spend hours talking about in the middle of a trial, if not settlement (e.g., admissibility of expert testimony)? Should I have framed a question for him such as: "I am going to report that the parties are talking settlement. Would I be wrong?" In response, he might have replied: "Even if you are right, consider the effect of that story on the jury if they should happen to hear about it."

I believe that the more knowledgeable the press is about the legal system, the more accurate and evenhanded will be its coverage of court business and the more informed the public will be about what is happening in the courts and why. While ensuring justice in a case may be your first duty, enhancing the public's understanding of the legal system should not be far behind.

Good of the Institution

Perhaps you do not agree that educating the public about the judicial system is part of your judicial duty. But certainly you can appreciate that the courts' interests would be served by correcting misimpressions the public holds about the courts, particularly those that have helped to fuel anticourt sentiment and challenges to judicial independence.

People learn about the courts in several ways: through their own experiences with the legal system, which may be biased; through printed decisions and other written documentation, which most people do not read; through fictionalized accounts in books, movies, television, and other forms of popular entertainment, which may not be accurate; and through the news media. How much does the press know about the courts? Ms. Greenhouse writes about the diminution of media coverage of the Supreme Court, in the sense that fewer reporters cover the Court on a full-time basis now than when she began reporting on the Court, and that reporters who cover the Court often do so in tandem with another beat.[6] But even if the number of reporters covering the Court is declining, the reporters who cover such a prestigious beat are undoubtedly among the most able and accomplished in the profession, often attorneys or otherwise informed about the workings of the legal system, and capable of interpreting the Court's actions and the consequences.

The quality of the reporters who cover local courthouses is less consistent. Many, like I was, are a year or two out of college or journalism school, with no particular background in the law other than what they may have learned in college-level courses. While covering the courts was at one time a prestigious, specialized beat, it is apparently less so as newspapers and other media outlets cut back on staffing; reporters who cover the courts often cover county government, the police department, and other matters as well.

Perhaps some of the public's misperceptions about the courts stem from uninformed reporting about them. I once returned from a hearing on a summary judgment motion and summarized the lawyers' arguments to my city editor. The editor asked me what the witnesses said. I tried to explain to him that there were no witnesses and that this was a summary judgment motion; however, I had a hard time making my editor understand how a court could decide a case without having a trial. Shortly thereafter I spoke with the judge and learned enough to be able to explain later that in some cases, if the judge determines that no factual disputes exist between the parties, the judge can decide the case simply by interpreting the law.

Similar misperceptions exist about how courts get involved in public policy issues. I was once asked to write a story on local reaction to a Supreme Court abortion decision. One woman said to me: "Why is the Supreme Court sticking its nose into the abortion business anyway? Who asked them?" At the time, that seemed to be a fairly typical response, and I did not think much of it. It was only after I went to law school and heard a similar line that I realized how, on one level, such statements reflect complete ignorance of how the judicial system operates. It suggests that some people believe courts roam around unfettered looking for issues to take on, and inter-

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ject themselves simply to exert their will over the public. More informed reporting—which could at least provide sufficient background of a controversial case's history and educate the public that courts do not decide cases unless someone asks them to—may help alleviate some of this ignorance.

Many popular myths about the courts' unimpeded discretion in areas such as sentencing, application of the exclusionary rule, and bail also could be debunked if news media accounts provided enough background for the public to know that there is a method, if not always a statutory framework, that sets boundaries for judicial decision making. At a time when courts and judicial independence are under attack by politicians and pundits, a better-informed public may be the institution's best ally for self-preservation.

Self-Interest

If promoting the good of the public and the good of the courts are not sufficient reasons for you, think about your own good and that of your family. Certainly one of the hazards of judicial office is the need to take the heat for unpopular decisions, but who wants to bear the injury to reputation that uniformed and inaccurate reporting could cause? Obviously, it is easier to convince elected judges of the need to promote accurate reporting. But even appointed judges, no matter how thick-skinned, should appreciate that the job is difficult and stressful enough without ignorant reporting making it worse.

About a year into my courthouse beat, our investigative writer exposed a suspect land deal involving the county's development authority. A grand jury was convened and its report was issued, citing but not indicting county officials and other prominent pillars of the community for their conduct. The county judge, however, placed the report under seal.

Our paper somehow obtained a copy of the report, and in its initial coverage of the story implied that the judge was trying to bury the report, that is, prevent it from ever going public. The judge called me in the next day and explained that he did not intend to keep the report secret, but stated that, "I am required to put it under seal." Sure enough, he showed me a provision in state law that required grand jury reports to be placed under seal for thirty days so that persons named in the report could have an opportunity to respond. I went back to the paper and made sure that all of our subsequent coverage of the story, at least until the thirty days was up, included the fact that the judge was required by state law not to release the report.

A small favor? Sure. But because of it the judge and the judicial system were no longer implicated as part of a cover-up, and the public better understood how the legal system balanced the need for prompt investigation and action with individual rights and the public's right to know. I think that was worth the time the county judge spent trying to educate me, and my guess is that he did, too. ■

Endnotes

1. Perhaps one reason that I am so ignorant of the definition of "off the record" is that I took only one formal journalism course in college, yet still worked as a journalist over parts of six years. My point is that my experience—or actually, lack of experience—is not atypical among many young reporters on small and midsize newspapers, and thus may explain why there is such a variation in the meaning of "off the record," as well as such variation in understanding of the legal system.

2. The story is told of a civic affairs luncheon in the community I worked in. Apparently, it was not unusual at affairs of this type for local public officials to tell tales that they did not want generally publicized, on the understanding that they were "off the record." One elected official was about to tell such a story, and prefaced it with the customary, "Of course, this is off the record." Our paper's newly appointed publisher, with loads of big-city newspaper experience under his belt, growled from the back of the room: "There are fifty people in this room. You can't go off the record." And that's how our community was suddenly introduced to a new standard for going "off the record."

3. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537 (1996).

4. *Id.* at 1538.

5. *E.g.*, Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995) (affirmative action); Miller v. Johnson, 115 S. Ct. 2475 (1995) (race-based congressional districting); McIntyre v. Ohio Elections Commission, 115 S. Ct. 1511 (1995) (First Amendment right to distribute anonymous campaign literature); Lee v. Weisman, 505 U.S. 577 (1992) (school prayer); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (abortion).

6. Greenhouse, *supra*, at 1541.

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Courthouse Reporters

Are They Really the Enemy?

By Hon. Steven Smith

The trial has been difficult and contentious. It has generated quite a bit of publicity in your community. It is now time for you to render your decision. You carefully consider all of the evidence and craft what you believe is the appropriate decision in the case. You deliver your opinion to a packed courtroom, noticing a reporter sitting in the back. You leave the bench confident in your ruling. The next morning you pick up your local paper and read the story written by the reporter, and you come unglued. She got it wrong. There are errors in the story.

Most judges have had this experience at one time or another. Despite what you believe are clear rulings and cogently delivered statements made by you throughout the trial, the media gets it wrong. You are probably not alone in feeling some level of anger that the story has not been reported accurately.

I have had the opportunity to team-teach media issues in a course entitled "General Jurisdiction" at the National Judicial College with Gary Hengstler, Director of the Donald W. Reynolds Center for the Courts and Media. During these sessions, he begins by asking judges what their primary complaints were with media coverage in their courts. Almost always the overwhelming response is, "They are not accurate in their reporting."

In a discussion during "Justice and Journalism: A Conference on the Federal Courts and the News Media," co-sponsored by the Freedom Forum's First Amendment Center and the Judicial Branch of the U.S. Judicial Conference, U.S. Court of Appeals, Judge Harry T. Edwards expressed the feelings of many judges when he said that judges' mistrust of the press is fueled by the belief that "the media makes as much news as it reports." What, then, is our response? Many judges are convinced that the reporter has an agenda or an ulterior motive—that the reporter is purposefully inaccurate in an attempt to discredit the judge or simply make the judge look bad. Other judges report that there have been occasions where reporters have apparently let their bias with a judge creep into the story. For those journalists, it may well be that no amount of media training or attempts by judges to provide accurate information will be successful. But I would argue that the malevolent reporter (who often engages in what is euphemistically referred to as "gotcha" journalism) is the exception to the rule, and that most inaccuracies in the reporting of legal affairs are due to one simple reason—reporters have a serious lack of knowledge about the legal system and how it works.

Impediments to Accurate Reporting

At this juncture a judge might ask, "What responsibility do I have for making sure the reporters get it right?" This is a legitimate question. Shouldn't journalism schools teach students how to cover courts in their undergraduate courses? In 1986, Professor Don Tomlinson, who teaches media law at the University of Houston Law Center, studied the faculties of hundreds of journalism programs in the country to see how many persons teaching media law also had a background in the legal profession. Of all faculty members listed in the records of the Association for Education in Journalism and Mass Communication (AEJMC) at that time, only six professors possessed a Juris Doctorate degree. In the late 1990s he reviewed the records again and found that the number of law-trained individuals teaching media law in journalism programs had grown tenfold.

According to Tomlinson, most schools do not offer specific courses about reporting on the legal system. Instead, covering legal cases is often just a small component of a larger course in reporting, and will often be taught by journalism professors with no legal background themselves. Thus, it should not be surprising that many journalism graduates do not have a significant understanding of our legal system when they enter the world of court reporting. In most areas of the country, the individuals reporting on the courts are some of the newest and most inexperienced reporters. Because of their general lack of understanding of how courts operate the chances for inaccurate reporting are heightened.

> Another impediment to accurate reporting on the courts is that the media are limited in the time (electronic) and space (print) they afford to coverage. Merely providing access to the courtroom or copies of documents may not be enough to ensure fair and accurate reporting of the legal issues at hand.

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Ethical Guidelines and Canons of Conduct

When I discuss the possibility of being proactive with the media, many judges instinctively default to their state's judicial conduct rules, believing that they can never comment on anything (and even if they can, they may cite these rules as a way to avoid having to respond). Most states have adopted a version of the American Bar Association's Model Code Canon 3 (9):

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Clearly, the authors of the Model Code were concerned with judges making public pronouncements that could affect the public's perception of the integrity of any particular proceeding. Although Canon 3 (9) permits a judge to publicly explain procedures of the court, even while a trial is in progress, some judges choose not to speak to any media member for any reason during a trial (or any other time, for that matter). Others take a different approach. One example is Judge Hiller Zobel of Massachusetts. While presiding over the trial of Louise Woodward (the British *au pair* accused of killing the baby in her care), he met with reporters following each day of the trial to explain procedures in general, without getting into specifics about the case.

In another high profile case, Judge Patricia Gifford had her law clerk meet with reporters at day's end to answer procedural questions during the Mike Tyson sexual assault trial. In the event the clerk was in doubt as to the propriety of a question, she checked with Judge Gifford before answering. While I have never spoken to the reporters covering these two trials, I am confident that they appreciated the information that they were given and that it enhanced the accuracy of their reporting.

When discussing the relationship between the judiciary and the media, another Model Code Canon might apply as well. Canon 4 permits a judge to:

> ... speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

Establishing a Relationship with the Media

What good results if our default position is to let the media report on us, and then complain when they get it wrong? Perhaps there is a better way to educate the media about what we do: instead of waiting until the trial is either imminent or in progress, why not establish a relationship with reporters when they first begin to cover your court activities? While you may object to this strategy, perhaps after witnessing what investigative journalists have done to members of the judiciary in different states, I still believe that the vast majority of judges in our country can establish a professional working relationship with the media that inures to the benefit of both.

This is the approach I have taken. For informational purposes, I live in a community of about 175,000 people that is host to the seventh largest university campus in the United States. We have one daily town paper, one university paper, two television stations, and several radio stations.

Whenever I learn that a new reporter will be covering our courts, I invite the reporter to come to the courthouse, to talk. Because most news stories involving trials tend to be criminal, I inquire about the reporter's understanding of how our legal system works. Usually, that understanding is rudimentary at best. To help educate the reporter, I begin with the concepts of reasonable suspicion and probable cause and explain the legal requirements imposed on officers before they can stop or arrest. After explaining *Miranda*, I then clarify that the absence of warnings does not always mean we will not hear what a defendant had to say. I will also discuss how the indictment process works, and will cover pretrial matters such as bail setting and writs of *habeas corpus*. I also explain to the reporter that judges sometimes have no alternative but to lower an unreasonable bond that has been set by a magistrate. We will also discuss motions to suppress testimony or evidence, and what can happen when they are granted or denied. We will chat about the trial process, from *voir dire* to verdict, including the Rules of Evidence that pop up frequently and how they are handled. I have also found that post-verdict matters such as motions for new trials and appeals are matters about which many reporters have never given serious thought.

Generally, I spend about forty-five minutes with a reporter. I always end our session by encouraging the reporter to call me if he or she ever has any questions, even during a trial. I explain that while I may not be able to answer the question, I will try to ensure that the reporter gets the help he or she needs if I cannot comment at the time.

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During my time as an elected judge, I have had the opportunity to have these kinds of sessions with about a half dozen reporters from all areas of the media. The first reporter I counseled later decided to attend law school and now clerks for a federal judge. She has mentioned on several occasions that the time we spent together made her a better and more accurate reporter of legal matters. I have had similar comments from others with whom I have spoken, and one of the local TV stations even asked me to come to the station to speak with all of their reporters and anchors in an effort to improve their coverage of the courts.

Has it made a difference? You bet. Both the print and electronic media coverage of our courts (not just mine) has improved since I undertook my efforts. Now, when reporters have a question, instead of taking a shot in the dark they will either call the trial judge handling the case or another judge or knowledgeable attorney for information. Do they still make mistakes? Yes. More often than not, do they get it right? Yes. One thing should be understood, however. When the headline is dead wrong, do not blame the writer of the story. It is very likely that the writer will be even more incensed than you that the headline writer got it wrong.

Other Strategies for Improving Media Accuracy

Having a conversation like the one I outlined above can be educational and helpful, but there are many other things a judge can do to improve the accuracy of media coverage. One is letting the media know of events that they would likely wish to cover. Many courts now have public access to dockets, but we know that the case style does not always tell the true story of a case's interest. For example, if I am aware of a case that might merit media attention, I notify the media with a simple phone call regarding the time the case will be heard. Most courthouse reporters are also general beat reporters, meaning they cover a variety of stories and do not always have the time to know what is coming up at the courthouse.

Recently, my usual practice of notifying reporters about upcoming events was reaffirmed by a reporter. I had called him the day prior to a hearing that I knew he might wish to cover. He thanked me for calling and was there at 8:30 AM for the quick five-minute matter. Later that day, I received an e-mail thanking me for having given him a "heads-up." He said "I could have gotten the information from others, but it is not the same as being there." Exactly! Anything we can do within the boundaries of the Code to provide for more accurate coverage of our work can only enhance the public's trust and confidence in what we do.

In addition to notifying news media of cases of interest, I permit television and photo coverage in my court. Because both television and newspapers like to have a visual to go along with their story, I allow them to have access to the courtroom, albeit under strict guidelines. The news director or editor is given a copy of the guidelines, and must sign a document indicating he or she has received and read them. Both the guidelines and the receipt make it clear that any violation of the rules will result in permanent banishment of cameras from the court for as long as I hold office. Not surprisingly, I have never even come close to having a problem. The media want access, and I find them more than willing to do anything I ask in return for that access. To be sure, that access is not unfettered. I have strict rules prohibiting the photographing of jurors, victims of sexual assault, any witness under the age of eighteen, and anyone who indicates their desire not to be photographed. Television cameras may be placed in one location only and may only be brought in or taken out when court is not in session. In addition, still photographers must use noise-deadening devices to surround their cameras.

Finally, I try to anticipate what the media might want to know. I am sure every judge has been asked at one time or another, "Why did you make the decision you did?" Clearly that is an area where you can run afoul of the Code very quickly by commenting. But if you are sure the public wants to know your reasoning and you feel comfortable in doing so, commit your decision and its reasoning to a written opinion. Then, either deliver the opinion in open court on the record or file your decision with the clerk, which makes it a public record. Many judges will not want to tread into this area (I have done so only once), but it can be an effective way of presenting "your side" of the issues without running afoul of ethical guidelines.

What if reporters get the legal issues wrong despite your best efforts to educate them? Do not be afraid to pick up the phone and call the reporter. Be courteous. You do not need to unduly criticize them. Instead, say something like: "I think the story may have given an incorrect impression and I would appreciate if you would issue a clarification." Give the station or paper a day to respond. If they do not, then call the station's news director or the newspaper's editor-in-chief. You still may not get the answer you desire, but I have found most journalists to be reasonable when calmly and courteously approached about a mistake. Never fail to remember that all media contacts, even ones asking for corrections, should be presumed to be "on the record." Do not expect the correction to be in the same location or same font size—just be thankful if it is printed or broadcast.

The Need to Be Proactive

By this point, you may now completely disagree with my approach and recommendations. There are many judges who refuse to ever deal with the media for a variety of reasons. Some may have been burned and never wish to be burned again. Some may say, "If I never talk with them in the first place,

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I will never get in any trouble." To those individuals, may I offer one piece of advice? At least take the time to return the media phone call and tell them you will not (or cannot) talk with them. It has been my experience that those who totally ignore the media often become targets of overzealous investigative reporters.

To those of you who see merit in becoming more proactive with the media, do not think that doing so comes with no peril. I am reminded of President Reagan's admonition on dealing with the former Soviet Union: "Trust, but verify." I have never and will never harbor the illusion that something bad cannot happen. I fully realize that if I stand between a reporter and a Pulitzer Prize, I am likely to be a casualty. On the other hand human nature makes it more difficult for a reporter to "get" somebody if he or she has an established relationship with them.

I am an advocate of proactive media relations for many reasons. One reason, however, is overriding. The public has developed a voracious appetite for things legal. I feel that we have left it to others to define who we are, what we do, and how we do it. While the judges on television shows may provide great entertainment, they do little to give the public faith in what we do. If we do not use the opportunities we have to educate the public about what justice really is we will continue to reap a harvest of public distrust. ■

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What Reporters Want

By Gene Policinski

When journalists sit in a courtroom, they are there as observers, representatives, and protectors—roles seen by the nation's founders as a necessary safeguard under the Constitution. In fact, journalists in courtrooms serve as an outside check on judicial and prosecutorial abuse, as observers on behalf of fellow citizens who cannot be in court on a given day, and as the most effective mechanism for the general public to learn about how and why its court system works.

In considering the question of "What do reporters want from the courts?" it is important to first step back and analyze whether the public and press should be provided a constitutionally implied (if not expressly guaranteed) seat in most courtrooms, an issue that has recently been the subject of much debate.

This question was first addressed years ago when then-Massachusetts high court Justice Oliver Wendell Holmes suggested in the 1884 case of *Cowley v. Pulsifer*[1] that the public had a right of access to civil trials. Holmes noted that it was not so much that such trials were a matter of public concern but that "... every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[2] Continuing this line of reasoning over a century later, the U.S. Supreme Court held for the first time in 1980 that the public enjoyed a First Amendment right of access to criminal proceedings in *Richmond Newspapers, Inc. v. Virginia*[3]—a right to be overcome only by a finding of certain specific threats to a fair trial that cannot otherwise be overcome. In *Richmond*, Chief Justice Warren Burger noted:

> The First Amendment, in conjunction with the Fourteenth, prohibits government from 'abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.' These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern or importance to the people than the manner in which criminal trials are conducted ..."[4]

In 1984 and again in 1986, the Court similarly extended public access to pre-trial proceedings and jury selection, thereby continuing the rationale that access bolstered public confidence through reports by its surrogate in the seats, the news media in the courtroom. As the Court stated in *Richmond*, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." [5] (In which 1984 and 1986 cases did the Court extend public access to pretrial proceedings and jury selection? I'm assuming, too, that the author is referring to Supreme Court decisions in these cases.)

The Court has therefore recognized that citizens expect their courtrooms to be open, that trials and hearings will not be conducted in secret (save for juvenile criminal proceedings and other limited instances), and that journalists will be able to attend and report on those proceedings on behalf of fellow citizens—before, during, and after trial.

Notice that none of these expectations concerns the quality of the reporting, the nature of the medium doing the reporting, or the ultimate impact of the report on the public. I am fond of reminding both the public and journalists that there is no mention of fairness, accuracy, or responsibility in the forty-five words of the First Amendment, although it is my profound hope such notions will color the work of everyone in the news profession.

But the nation now faces a new and increasing trend toward closed courtrooms, hidden cases, sealed documents, and secret jurisprudence—most notably in high profile cases often touching on national security concerns, but also in cases to protect divorce settlements, hide product liability damage settlements, and even to protect the identity of jurors on highly-reported or sensitive cases. Justifications for these closed-courtroom proceedings range from ensuring the safety of the country to guaranteeing the alleged privacy of individuals. Other rationales include protecting the corporate health of

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investor-owned businesses and preventing retaliatory gang or terrorist attacks.

Standing athwart this trend are journalists insisting on access, information, and accountability. The Reporters Committee for Freedom of the Press and most major news organizations have in recent years challenged decisions to close trials, a practice that the Committee maintains has also led to maintaining secret dockets, sealed documents, and nondisclosures related to jury selection and composition.

Reporters' Wish Lists: Nationwide Findings

What do reporters want from the courts? The question may perhaps be better framed as: "What do reporters want and need from the courts in order to do a proper job of keeping the public informed?"

Since 1999, the First Amendment Center and the Judicial Branch Committee of the Judicial Conference have conducted regional and national seminars entitled "Justice and Journalism" that involve meetings between print and broadcast journalists and federal judges at all levels. Regardless of the medium, location, and composition of the attendees, similar requests from journalists arise.

Most common on the media wish list has been timely access to a court official for explanation and information. Reporters, editors, and broadcasters seem quite aware of the restraints on judicial speech regarding pending cases or matters on appeal. Their requests, however, are more basic. Reporters new to the courts acknowledge that a lack of legal training may require follow-up conversations about legal tactics and rulings. Experienced reporters may want to probe a nuance that they see as bringing meaning or context to the case. A possible solution suggested during the conferences is to have a judge not involved in the particular case or an experienced member of the local Bar periodically serve as a "resource person" for the court to respond to inquiries—either on or off the record—on matters of procedure and basic legal information.

Other suggestions for dealing with court-media needs include developing a local or state "Reporter's Guide to Covering the Courts" to assist journalists, particularly new reporters, in correctly reporting court happenings and rules, and in using accurate legal terminology. Conducting regular—annual or more frequent—meetings between court staff, judges, and journalists from all media to talk about the philosophy and pragmatic needs of news coverage helps to avoid (for all sides) having to make hasty decisions about potentially complex matters when a deadline is looming.

Naming one courthouse official—hopefully, a technically oriented person—to become familiar with the detailed needs of broadcasters can also provide a solid contact with journalists as needed. Preparing an action plan so that a court will be ready to handle high profile cases involving major media coverage can also head off stressful moments—and asking local journalists to join in preparing such a plan provides expertise and may promote better understanding of mutual concerns.

Judicial participants often were surprised to learn that journalists also wanted to hear criticism and complaints from the courts—from court clerks, circuit executives, and occasionally from judges themselves. Time and again, reporters, editors, and broadcasters told judges that such constructive advice and comments were useful and welcome.

In one instance, a bankruptcy court judge at one of the seminars told colleagues and journalists of a report that incorrectly stated that she and her husband had themselves filed a bankruptcy petition. The story, the judge related, quickly went global as news services noted the irony—incorrectly, as it happened. Neither the judge nor her spouse sought correction of the story, or even contacted the legal journal reporter regarding the error. Even participating judges not inclined to talk with media representatives responded to the story with the admonition that, if no other time, this demanded direct and specific action to seek correction.

At the ongoing series of meetings and seminars, news organizations also reported that newsroom staffing is being reduced due to declines in circulation and profits and changing audience habits. One consequence is that experienced reporters with a courthouse "beat" are often replaced by new or less-experienced print and broadcast staff who "parachute in" when a major story breaks. Very often, these newer, younger staffers lack training or experience in reporting on legal matters.

Two Viewpoints on Reporters' Needs

Dick Carelli, a law-trained journalist, joined the Administrative Office of the U.S. Court's Office of Public Affairs in 2000 after spending more than thirty years as a professional journalist, reporting mostly on the U.S. Supreme Court for The Associated Press. According to Carelli, reporters' needs at any level of court coverage must focus first on access—timely access to documents and records throughout the course of the trial. He also believes that it is necessary to have a court representative who can provide information, context, and occasionally explain procedure or calendar issues. He also sees a need, on a basic pragmatic level, for a computer in the courthouse where reporters can find and read electronic documents, and for a place—a desk, a

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room—where journalists can spend time reading briefs, for example.

Acknowledging that in today's media it is increasingly rare to have a court specialist—a "beat" reporter—Carelli says that courts need to provide methods that will help reporters keep up-to-date on upcoming matters in a case as well as what has already happened.

Tony Mauro is a Supreme Court correspondent for *Legal Times, American Lawyer Media* (ALM), and law.com. He joined ALM in January 2000 after covering the Supreme Court for *USA Today* and Gannett News Service for twenty years. Mauro is also a legal correspondent for the First Amendment Center.

According to Mauro, "greater transparency" about the courts is a basic need. He also cited other needs, including the following:

1. Allowing as much electronic access as possible. This involves permitting coverage by television, radio, and the Internet. He noted that some courts at various levels now routinely post the audio of arguments online. The Supreme Court is taking some steps along this path, but needs to do more, he said.

2. Making greater efforts to make court opinions and rulings more understandable and accessible to the public and to the press. Mauro cited a practice in which judges may provide copies of opinions to the press ahead of time under an embargo arrangement, to aid reporters in reading and understanding opinions before they have to write deadline stories.

3. Creating more dialogue between judges, court personnel, and the media to increase mutual understanding. When a high profile case hits, it is extremely helpful for the judges and journalists to already know each other and to have considered each other's needs beforehand.

Cameras in the Courtroom

A long-standing area of contention involving the needs of some reporters—broadcasters and news photographers, to be specific—involves the issue of whether cameras should be allowed in the courtroom. In 1981, the U.S. Supreme Court held in *Chandler v. Florida*[6] that the Due Process Clause does not inevitably entitle the defendant, as a matter of right to a fair trial, to compel exclusion of television cameras from courtrooms. As analysts have noted, another way of interpreting the decision is that the U.S. Constitution does not prohibit states from adopting policies that allow news outlets to record and cover court proceedings electronically.

Currently all fifty states and the District of Columbia have rules regarding news coverage of court proceedings. Regulations among the states vary as do the access limits placed on the press. The District of Columbia is the only jurisdiction that prohibits both appellate and trial electronic news coverage. News organization outlets throughout the country continue to challenge the restrictions. At present, only the Second and Ninth U.S. Circuit Courts of Appeals allow electronic news coverage.[7]

The rationale cited by pro-camera advocates is that the public is better served by seeing actual courtroom proceedings, as immediate access to proceedings and procedure provides the public with knowledge "now." Over the long-term, having this type of access also creates credibility in the justice system irrespective of individual cases and decisions.

Opponents argue that cameras are inherently obtrusive, even as lighting needs, noise, and size have diminished through the years, and may encourage grand-standing by lawyers, judges, jurors, and witnesses. They also say access issues are settled by allowing broadcast reporters (without cameras) into courtrooms on the same basis as print writers.

The U.S. Supreme Court is not considered likely to anytime soon switch from its ban on photography of any kind. In 1996, Justice David Souter told a congressional panel, "The day you see a camera come into our courtroom it's going to roll over my dead body." Chief Justice John Roberts recently said that the Justices appear to be agreed on continuing to operate as the Court has done in the past—without cameras.

On February 14, in testifying before the Senate Judiciary Committee, the Associated Press (AP) reported that Justice Anthony Kennedy said cameras would damage the way justices relate to each other and lawyers during oral arguments: "Please don't introduce into the dynamics I have with my colleagues the insidious temptation that one of my colleagues is trying to get a sound bite for the cameras. We don't want that," Kennedy said.[8]

Still, there is some movement toward the kind of televised coverage that broadcast reporters have sought: At a February meeting of the American Bar Association in Miami, the AP reported that U.S. District Judge John E. Jones, who barred television cameras from covering a lawsuit over the teaching of "intelligent design" in Dover, Pennsylvania, said, "I might have gotten it wrong. The lawyering was so good. We might have benefited from the public seeing the witnesses and the process."[9]

The same AP report also noted that "U.S. District Judge Myron Thompson said he wished cameras could have recorded the trial in his courtroom over the presence of a Ten Commandments monument that former Alabama Chief Justice Roy Moore installed in the state's judicial building." According to Thompson, "The public could have heard it and decided for themselves whether they agreed with my decision" ordering the monument removed. He added that "[h]aving the camera in the courtroom allows the public to get both sides of the argument." At the same session, the AP report said that several federal appellate judges also remarked that they

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favored televising their proceedings that do not involve juries.

Electronic Access to the Courtroom

A new area of conflict over access involves "electronic media" in the form of bloggers, who can transmit trial accounts directly from laptop computers to the Web. While no definitive national policy has emerged, some courts have taken action on their own. For example, in the U.S. District Court criminal trial of former White House official Lewis "Scooter" Libby, two seats were credentialed for "bloggers" on a rotating basis in the media area.

"Bloggers can bring a depth of reporting that some traditional media organizations aren't able to achieve because of space and time limitations," Sheldon Snook, administrative assistant to Chief Judge Thomas F. Hogan, said, in a January 11, 2007, article in *The Washington Post*. Snook added that some bloggers also bring expertise that is welcome in court, the report said.[10]

Technology of all kinds raises new questions for courts and journalists to contemplate. Reporters have long implored courts to consider print and broadcast deadlines when setting up access to and from major trials, and in providing auxiliary vantage points from which to hear and report on testimony, for example.

The presence of hand-held communication devices and wireless laptop computer connections to the Internet—and the expectation of immediacy from Web readers and a twenty-four-hour-a-day television news world—will press judges to permit "real-time" news reports from journalists sitting in the courtroom.

Increased Court Coverage and the Resulting Benefits

Geneva Overholser, a professor for the University of Missouri School of Journalism in its Washington bureau, sees reporters' needs vis-à-vis the courts in a different, and succinct, light: Reporters want to be "left alone" to do their work.

Overholser, who formerly was a syndicated columnist, editor of *Des Moines Register*, and ombudsman at *The Washington Post*, said reporters want the courts to have "a strong awareness of the disservice to society when reporters cannot operate free of an expectation that their work might well be used in the service of government; that is, that they might be turned into an investigative arm of the government."

"Reporters feel that society needs them to be a brake on power, not an accessory to it," she said. "Judges must balance all kinds of principles, from the right to a fair trial to the right to privacy. Reporters want to make sure that the rock-bottom democratic need for a free and independent press gets due consideration as well."

The series of meetings that have taken place since 1999 between reporters, judges, and court administrators under the "Justice and Journalism" banner most often produce an acknowledgement of the needs of each profession—and a sense that regular contact, discussion before dispute, and mutual respect are cornerstones of creating a media-aware judiciary.

As part of an often-quoted set of articles about "Covering the Courts" in a 1998 edition of *Media Studies Journal*, federal judges Gilbert S. Merritt and Richard S. Arnold discussed why, in their view, increased coverage of the courts is as good for the judiciary as it is for the press and public.[11]

"Judges need to understand better that we operate only by the consent of the governed. And the press is a major part of the consent of the governed," Merritt said, in asking courts to take into account the need to better educate the press and public about court activities. Noting that he was a former newspaper reporter, Arnold said judges would do well to cultivate a good relationship with the press: "We can't control them. We can't manipulate them. But we can at least give them the tools that they can use, if they're well-disposed, to explain the subject better to the public." ■

Endnotes

1. Cowley v. Pulsifer, 137 Mass. 392 (1884).
2. *Id.* at 394.
3. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
4. *Id.* at 575.
5. *Id.* at 572.
6. Chandler v. Florida, 449 U.S. 560 (1981).
7. Beth Chesterman, *Restrictions on Courtroom News Coverage*, First Amendment Center (Nov. 8, 2006), *available at* http://www.firstamendmentcenter.org/analysis.aspx?id=17283.
8. Mark Sherman, *Justice Kennedy Says Best Judges Leaving Because of Inadequate Pay*, Associated Press, (Feb. 14, 2007).
9. Mark Sherman, *Some Judges Open to Cameras in Courtroom*, Associated Press, (Feb. 13, 2007).
10. Alan Sipress, *Too Casual to Sit on Press Row?*, THE WASHINGTON POST, Jan. 11, 2007, at D01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/11.
11. Richard S. Arnold and Gilbert S. Merritt, Justice by Consent of the Governed, Interview Transcript *in* MEDIA STUD. J., Winter 1998, at 80-91.

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The Bar's Role in Public Education about the Courts

By Keith Roberts

> "Political reasons have not the requisite certainty to afford rules of [judicial] interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."
>
> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting).

A fair and impartial judiciary and the rule of law are core values of American society and the legal community. This article, inspired by a panel discussion about judges and the media, reviews the American Bar Association's recent and current efforts to advance these values.

The ABA's efforts to explain the role of judges have been substantial and sophisticated, and through the Least Understood Branch project, the Coalition for Justice, staff efforts, and the work of various ABA sections they are intensifying.[1] This article suggests further efforts toward training bar leaders as public spokespeople, recruiting other spokespeople, and formulating more strategic responses to controversy.

The Problem and Responses to Date

In 1535 England's highest judge, Sir Thomas More, displeased King Henry VIII by ruling against his divorce and lost his head for it.[2] In 2005 U.S. District Court Judge Joan Lefkow, who had ruled in favor of a white supremacist's legal position, displeased him by obeying a Court of Appeals reversal on remand, and lost her husband and mother for it.[3] And in May 2006, five Turkish judges displeased an Islamic fundamentalist by enforcing a ban on head scarves and were shot in open court for it.[4]

Such actions, plus increasingly frequent threats,[5] public denunciations, and calls for the impeachment or personal liability of judges,[6] as well as efforts to exempt legislative or executive actions from judicial scrutiny[7] constitute a growing challenge to our fundamental concepts of the law and how American society should work. One of these fundamental legal concepts is that judges should be fair and impartial, unswayed by preconceptions or popular sentiment, so that litigants receive just treatment. The other, which legal historian Morton Horwitz calls our "civil religion,"[8] is the rule of law, the idea that anyone within our legal jurisdiction may have a fair and impartial judiciary to determine his or her rights, and to invoke the might of the state to enforce them.[9] As President Eisenhower explained when he sent federal troops to Little Rock to enforce the Supreme Court's integration decision against protesting mobs, "The alternative to supporting the law in such a situation is to acquiesce in anarchy, mob rule, and incipient rebellion. Ultimately, of course, such a course would destroy the Nation."[10]

The protection and advancement of these fundamental concepts are core goals of the American Bar Association,[11] and along with others it has a long history of fighting for them. ABA presidents have made many eloquent speeches in their support, and in recent years, blue ribbon ABA commissions have produced two major reports describing threats to these goals and suggesting how to alleviate them.[12] Despite all the ABA's efforts, both reports discern a decline in public understanding and respect for the judiciary, and call for measures to improve

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its standing. As the 1997 report on the federal judiciary, *An Independent Judiciary,* states, quoting the American Judicature Society:

> It is the obligation of judges to educate the public about important concepts of the rule of law and the independence of the judiciary. The media will not do so, and the public schools and colleges are apparently failing to do so. Therefore, judges are encouraged to reach out and educate the public. This does not mean giving speeches to attorney audiences, but to civic organizations, schools and colleges, and religious institutions.[13]

The Commission recommended that the ABA join with other organizations to support what has become Justice at Stake, an advocacy organization to safeguard "fair, impartial and independent courts." It promotes a legislative agenda and sponsors projects to promote public education about the role of judges and the judiciary.[14]

The second major report, *Justice in Jeopardy* (2003), concerns state courts, where elections loom large. It recommends that "courts take steps to promote public understanding of and confidence in the courts among jurors, witnesses, and litigants," host field trips to courthouses, and have judges and court administrators speak in schools and community settings.[15]

Public Education

In March 2006, the ABA's Judicial Division and Section on Individual Rights and Responsibilities[16] joined with the First Amendment Center of the Freedom Forum[17] to convene a distinguished panel on the topic "Defining the Judge: How the Media, Elected Officials and the Public Perceive Judges and the Judiciary."[18] It focused on how the media defines judges and the judicial process.

Panelists and audience members mentioned various ways to reach the public: using the secondary schools;[19] televising Supreme Court hearings; creating a public affairs network for the federal judiciary;[20] and having judges speak more often and more effectively to students and civic groups, provided they focus on the legal process rather than specific legal issues.[21] In addition, several panelists and guests noted that controversial decisions present excellent educational opportunities if surrogates like the bar associations and individual lawyers respond quickly,[22] and along with judges speak out more freely to explain such decisions.[23]

A surprising number of these ideas are controversial. While many believe that broadcasting Supreme Court or other judicial proceedings would educate the public, some panelists observed that only snippets would receive wide attention, while judges would lose their valuable anonymity.[24] The public affairs network idea would probably attract a very limited audience and would have similar drawbacks.

The suggestion that judges should speak out more frequently, also made in earlier ABA reports, turned out to generate the most heated discussion.[25] Joseph diGenova insisted that judges should speak less often, not more. His basic point was that familiarity breeds contempt. By appearing in the public eye too often, judges erode respect for the judiciary and blur the boundary between law and politics.[26] Too frequently, he added, their public speeches actually politicize the judiciary by discussing controversial legal issues instead of sticking safely to matters of process, as all the panelists agreed they should do.

But Tony Mauro observed that judges in the spotlight usually come out looking good and responsible, and can sometimes explain the decision in a very helpful way.[27] Polling by Justice at Stake, added Executive Director Bert Brandenberg, shows that the public wants to hear from judges. In any event, he noted, their silence would not prevent public attacks.

The least well-received idea of all was that of using the press to educate the public. The ABA annually presents its Silver Gavel award for exemplary presentations that foster public understanding of the law, but as several people noted, the press is now an entertainment medium and devotes few resources to the courts.[28] Although the Internet allows reporters to quickly learn about cases,[29] many don't read the decisions, and they have neither print space nor broadcast time to elucidate the judicial process.[30] Editors may even be indifferent to correcting factual errors.[31]

The panel discussion made no attempt, of course, to canvass all the possibilities for public education. The House of Delegates has repeatedly urged judges and lawyers to engage in public education efforts,[32] and the ABA has long advocated and pursued public education activities that cover a far broader range than those mentioned in the panel discussion. Perhaps most familiar is Law Day, May 1, when the ABA reaches millions of Americans through educational programs. For Law Day and on a continuing basis, the ABA's Division of Public Education, and both its Media Relations Group and Government Affairs office in Washington, D.C., provide an array of materials to legislators, administrators, judges, lawyers, schools, and the public about the role of the courts and the importance of the rule of law.[33] The Division of Public Education carries out an aggressive program of education aimed at high schools and colleges, consistent with the recommendation of the 1997 report on federal courts.[34] It collaborates with textbook publishers to include information about the role of judges and the courts in their history and civics books, publishes newsletters and magazines for high school and collegiate teachers, and works with such ABA groups as the Special Commission on the Jury to educate the public, in that case jurors,

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about the role of the courts.[35] It provides staff support to ABA projects like the Special Commission on Civic Education and Separation of Powers, which in May 2006 held a public "Conversation on Judicial Independence and Civic Education."[36] Several other ABA sections and groups, including prominently the Coalition for Justice[37] and the Least Understood Branch project, also generate materials and programs designed for public education.[38]

The ABA and other bar associations have also implemented another public education suggestion from the 1997 report; namely, that "state and local bar associations should develop effective mechanisms for evaluating and, when appropriate, promptly responding to misleading criticism of federal judges and judicial decisions in each federal judicial district."[39] The mechanism widely adopted has been a rapid response team or committee.[40] Unfortunately, experience has shown that members can be difficult to mobilize at the right time, and may not be acceptable spokespeople; as the president of one major local bar association noted, the press ignored his rapid response committee, and only wanted to hear from him, if anyone.[41] Of course, a bar president supported by a committee that has quickly mobilized the relevant facts and appropriate legal analyses stands a far greater chance of success than one who lacks such support.

Various other bar organizations have also developed positions and arguments advocating the rule of law and a fair and impartial judiciary. They have produced many publications, films, and programs. A financially serious and professional commitment to public communication clearly exists. The executive director of the ABA's Division of Public Education estimates that its various efforts reach some 20 to 25 million people a year.[42] And yet, as the "Defining the Judge" discussion shows, there remains a sense that the public understanding of the role of the judge and the importance of the rule of law is slipping. What more, then, should be done?

Public Representation

Business corporations are represented in public by their leaders. Virtually all large businesses, and many middle market companies as well, provide their CEOs with extensive coaching in preparation for such moments. Like business leaders, bar association leaders represent the bar to the public. Just as coaching, seminars, and retained public relations professionals help business leaders, so can bar leaders use this kind of help. Although the ABA's Media Relations Group tries to provide such assistance to ABA leaders, local and state bar leaders probably need more help than they currently receive. One important goal of the Least Understood Branch project, which works primarily with state and local bar associations, is to train judges and bar leaders in responding to controversies. It may be, however, that additional resources and training efforts are needed.

In addition to bar leaders, the public relations effort might make use of the enormous reservoir of understanding and goodwill for the law's noble cause that exists among popular and credible public figures. The rule of law and keeping the judiciary fair and impartial appeal to widely held values. Justice Sandra Day O'Connor has taken up these causes with great effectiveness since her retirement; others of comparable persuasiveness, perhaps not even lawyers, can also be asked to speak up.

Public Education Opportunities

The ABA and sister organizations devote great effort to reaching the press—television, radio, newspapers, magazines, Internet blogs, and whatever other media affect peoples' views. But the Defining the Judge Conference made clear how extremely difficult this job now is. While such efforts must certainly continue, perhaps in emulation of business practices, it would help to actually create educational opportunities, rather than just respond to them. The widely publicized Law Day is such an effort, but far more can be done in the context of an effective long-term campaign of public education. The appropriate professionals for such an effort are not lawyers or judges, but public relations specialists.

Responding to Controversy

As noted above, controversies present excellent public education opportunities.[43] Controversy arises for several different reasons, and the response must be shaped to the issues involved. Recent controversies fall into four main categories:

(1) Legitimate Criticism

Sometimes a decision or a court process comes to public attention because the court has mishandled the case or violated established norms of conduct. Public controversy may require a response before appeals to rectify such wrongs can be decided. These controversies need rapid response teams to determine the facts quickly and authoritatively. The defense of the indefensible must be avoided.

If the facts call for legal and judicial discipline, self-disciplining mechanisms must work promptly and properly, both to ensure fairness for the individuals involved and to assure the public that the indefensible is not being covertly defended.[44] If the bar is perceived as failing to do this, far more onerous approaches may well receive public support.[45]

(2) Ignorant Criticism

Often, critics have misunderstood or misrepresented the facts or law of the case in question, the constraints binding the judge, or the role of the court.[46] Attacks based on such ignorance, although commonplace, are perennially worrisome because their success would indeed subvert the rule of law, as happens in authoritarian countries.[47] As distressing as these occurrences are to the judges and other people involved, however, they also provide an excellent

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opportunity for public education. The controversy attracts media attention, and a timely and apt response from an appropriate spokesperson gets attention. Even better, the demonstrable error of such attacks casts a sympathetic light on the values being defended.

A special opportunity arises when either legitimate or ignorant criticism of the judiciary leads to punitive legislation.[48] The most flagrant contemporary instance may be the failed 2006 ballot initiative in South Dakota, the Judicial Accountability Initiative Law, which its sponsors described as addressing "ignored laws, ignored evidence, eminent domain abuse, confiscation of property without due process, probate fraud, secret dockets, falsifications of court records, misapplication of law, and other abuses."[49] While the sponsors could depict isolated judicial abuses, their nightmarish remedy, vigorously opposed by the state bar of South Dakota and other legal organizations, was soundly defeated.[50]

Whatever the motives behind them, punitive legislative proposals provide yet another splendid occasion for public education. The fear they strike in those who depend on impartial judges and the rule of law calls forth extraordinary resources and efforts, while the specific nature of the threat makes the issue highly newsworthy.

(3) Outcome Criticism

In many instances, the critics' goal is not legal reform, but a different outcome. They want the judges or the processes changed to ensure their preferred results. These critics include professionals and businesses that decry the destructive costs of tort litigation on their operations, and individuals and groups focused on sexual, religious, racial, ethnic, or other personal issues. They may claim that the judiciary is refusing to reach conclusions that the law demands, as Majority Leader Tom Delay did after the courts refused to apply his newly passed legislation to the Terry Schiavo case.[51] Or they may use a controversial case as an opportunity to publicize their view that the law is wrong. Such controversies provide the bar with an opportunity to distinguish between the judicial functions of interpreting and applying the law, and the legislative function of changing the law.

It is important, however, for the ABA not to become embroiled in disputes about what the outcome should be. While the bar speaks legitimately for all its members in seeking to protect core legal values, many members may well disagree with any particular outcome preference. In any event, to engage in an argument about outcomes implicitly concedes that the way to change the outcome is to change the judge or the system. Instead, responses to such criticisms might emphasize how the critic is attacking the wrong forum and asking the courts to impose legislative solutions.[52]

(4) Institutional Critics

In recent years, as political partisanship has increased, some legal scholars have formulated academic critiques of the judicial process, and sometimes proposed remedies that threaten the bar's core values. Owing to the respectability of these institutional critics, which greatly improves their chance of gaining legislative and public support, their proposals can present a more serious threat to the rule of law and the fairness and impartiality of the judiciary than those of other critics. Three somewhat contradictory criticisms are made:

Judicial activism. The accusation of "judicial activism" is a claim that courts trespass on legislative or executive functions.[53] It now comes primarily from those who dislike the liberal agenda that they think courts favor in such Supreme Court decisions as *Roe v. Wade* or *Kelo v. City of New London.*[54] But liberals make similar accusations against conservatives. President Franklin D. Roosevelt's court-packing scheme arose from that perspective.[55]

The charge of "judicial activism," which sophisticated commentators view as little more than an epithet,[56] has gained popular force in part, at least, because of widespread agreement with the principle it professes to protect, one perhaps most pithily expressed by a liberal icon, Justice Louis Brandeis. He warned that "we must be ever on our guard, lest we erect our prejudices into legal principles."[57] The Federalist Society, which speaks for many of the current *critics*, emblazons Alexander Hamilton's words on the home page of its Web site to express the same idea: "The Courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequences would be the substitution of their pleasure for that of the legislative body."[58]

There is obviously a fine line between criticizing a judge for misusing legitimate discretion, and criticizing the judge for using illegitimate discretion. When the Federalist Society and its allies seek the nomination of judges with a philosophical commitment to literal or narrow readings of constitutional rights and governmental powers,[59] their efforts do not constitute attacks on the bar's core values. Claims that such efforts threaten the rule of law have no more content than many accusations of "judicial activism."[60] On the contrary, the Federalist Society has expressed strong support for the bar's values. For instance, a Federalist Society White Paper on the popular election of judges says

> We want judges to be independent in the sense that they are not dependent on any individual or group that might exert some influence on their decisions, in the sense that they will apply the law fairly and without favoritism . . . We also want judges to be accountable to the public in the sense that they do not exercise their power arbitrarily, or in ways that undermine the judicial and political systems they have sworn to uphold.[61]

It is one thing to seek judges who have partisan ideological sentiments but would apply the law according to certain standards consistent with the core legal values, and another to strip citizens of their ability to seek justice. Since the ABA represents lawyers of

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all political views, taking a position on the partisan struggle over the ideological requirements for judicial candidates is probably beyond its legitimate authority. But very direct threats to those core values arise from proposals that seek to prevent decisions the critic dislikes by altering the prevailing institutional "architecture,"[62] supposedly increasing the accountability of judges, binding them to certain legal interpretations, or limiting the scope of judicial activity.[63] Opposition to such proposals is a matter of protecting the ability of the courts to defend the people's rights.

Judicial passivity. Some who criticize the courts for judicial activism also criticize them for excess passivity. They believe that the Supreme Court allows governments too much power, as when it upholds federal programs and agency actions under an expansive reading of the Commerce Clause, or affirms a city's right to condemn property for private uses.[64] They want the Supreme Court to limit the scope of government.[65] But these critiques, whatever their merit, seem purely ideological and represent no threat to the core values.

Unitary executive. Within the last two decades, Professor John Yoo and other conservative lawyers have argued that in delegating military authority and executive powers to the president, the Constitution confers unlimited discretion to act without legislative authorization or restriction. Since "all three branches of the federal government have the power and duty to interpret the Constitution," it follows that "the meaning of the Constitution is determined through the dynamic interaction of all three branches."[66] In other words, each branch may interpret the Constitution for itself, and the courts have no power or authority to review the president's determinations.

This position would appear to contradict the fundamental concept of checks and balances, and is therefore the most radical challenge to the rule of law that has yet been presented. Unlike other challenges to the core legal values, the claim of presidential hegemony derives from a conceptualization of the Constitution. It is perhaps the most dangerous challenge to the rule of law that now exists. As Professor Yoo takes great pains to demonstrate, presidents of all political stripes have sought to expand executive powers and gained the acquiescence of Congress at certain times, due to tactical political considerations.[67] The current president has arguably shown such a propensity more flamboyantly than most others,[68] but despite the Supreme Court rulings in *Hamdan v. Rumsfeld*, and *Hamdi v. Rumsfeld*,[69] Congress has supported some of these expansions in the 2006 Military Commissions Act.[70]

The threat to the rule of law is therefore clear and powerful. But the battleground is an intellectual one. If the expansive view of the president's powers achieves legitimacy, the tactical political acquiescence of Congress and the courts to particular exercises of that view will cement it into place. If the expansive view does not achieve legitimacy, then these will be mere inconsistencies, with no lasting effect.

The best way to meet an intellectual challenge of this sort is through scholarship and publication. In such matters the ABA can play little role. But when and if scholarship demonstrates that Yoo's position is fallacious, the bar can play a significant role in publicizing the scholarship and ensuring that it plays a prominent role in the ongoing debates about the allocation of power under the U.S. Constitution.

Conclusion

The ABA does a great deal in public education. Through the Least Understood Branch project it is now focusing on the important task of supporting state and local bar leaders in their role as spokespeople. Celebrities like Justice Sandra Day O'Connor seem particularly effective spokespeople. The ABA might consider seeking out more spokespeople of comparable stature and effectiveness as part of a long-term public relations strategy for attracting media attention to the core concepts and what threatens them. Another element in such a strategy would be to create newsworthy occasions for making its case.

In responding to controversy, the bar presently provides excellent materials, but rapid response committees need more support. The bar also needs to recognize that well-functioning disciplinary mechanisms are critical defenses against those who would undermine the judiciary's fairness and impartiality, and as such need scrutiny and maintenance.

This review has discussed certain specific types of controversy and the responses that would probably be most effective. When it is the outcome that is controversial, the bar's response should focus attention on the difference between legislation and judicial decisions. When the controversy concerns constitutional interpretations or legislative proposals to limit jurisdiction or discretion, the response should focus on how the proposals would strip away individual rights or distort the constitutional framework of checks and balances. The promotion and publicizing of relevant scholarship would often be helpful, but the bar should carefully avoid ideological partisanship, except for defending the core legal concepts. ■

The author wishes to thank Judge Jodi Levine and Judicial Division chair-designate Jack Brown for their great help and consistent encouragement in the creation of this article. They are not, however, responsible for any mistakes or infelicities that appear.

Endnotes

1. A joint project of the ABA's Standing Committee on Judicial Independence and the Judicial Division. The project has developed materials in the form of sample editorials, op-ed pieces, and letters to the editor on the subject, produced a soon-to-be-released DVD, Protecting Our Rights, Protecting Our Courts, and prepared a pamphlet titled COUNTERING THE CRITICS. It works primarily with state and local bar associations.

2. Henry, then His Catholic Majesty, declared his marriage to Catherine of Aragon annulled

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after the Pope refused and married Ann Boleyn. For insisting that the Pope's authority took priority, More was executed for treason.

3. Jody Wilgoren, *Haunted by Threats, US Judge Finds New Horror*, N.Y. TIMES, Mar. 1, 2005.

4. Sebnem Arsu, *Islamic Head Scarves at Issue in Killing of Judge in Turkey*," N.Y. TIMES, May 18, 2006.

5. Deborah Sontag, *In Courts, Threats Become Alarming Fact of Life*, N.Y. TIMES, Mar. 20, 2005.

6. *See* examples cited in REPORT of the ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY, Ch. 4, *Federal Judicial Independence: A Review of Recent Issues and Arguments*, http://www.abanet.org/govaffairs/judiciary/rdecind.html (1997). For liability, *see* the 2006 ballot initiative in South Dakota entitled the "Judicial Accountability Initiative Law," at www.jail4judges.org. *See also* Letter from James Sample, Brennan Center for Justice, to Mr. Thomas Barnett of the state bar of South Dakota (Dec. 15, 2005) (on file with the ABA).

7. In prepared remarks at the Defining the Judge Conference, on file with the ABA Judicial Division, panelist Mark David Agrast, Senior Fellow at the Center for American Progress, described various types of attacks that have recently been launched against judges and the judiciary. While no federal judges have been impeached because of their decisions, they have provoked recent laws reducing the scope of review in habeas corpus, immigration, and civil cases. Dissatisfaction with federal court decisions has also led to limits on judicial discretion, as in the Patriot Act's requirement that Foreign Intelligence Surveillance Act judges approve orders for business documents whenever the application contains the required representations. *See* http://www.abanet.org/jd.

Congressmen have also threatened to reduce the authority of the federal courts to determine the constitutionality of the laws Congress enacts. These "Constitution-stripping statutes," as Agrast calls them, would exempt legislation like the Defense of Marriage Act from constitutional oversight; another approach would be to forbid the enforcement of rulings, such as prohibitions against the display of the Ten Commandments on public property. One bill introduced last year, the Congressional Accountability for Judicial Activism Act, would allow Congress to override Supreme Court rulings against legislation by a two-thirds vote.

8. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 193 (Oxford University Press, 1991).

9. A recent meta-study of rule-of law-literature finds four basic components to the rule of law: a government whose actions are made to conform to properly enacted laws; equality before the law; law and order; and predictable and efficient rulings. *See* Rachel Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, RULE OF LAW SERIES NO. 55 (2005). Another critical element is that judicial decisions will be enforced. As Justice Steven Breyer colorfully put it in a recent talk, "When they see a decision they think is the stupidest decision they ever saw, and probably the worst and the most immoral, they'll still follow it. That's a blessing." Remarks at the ABA Panel Discussion, "Is the Independence of the Judiciary at Risk?," Aug. 2005, www.abanet.org/media/youraba/200509/article07.html.

10. Letter to Sen. John Stennis (Oct. 7, 1957), www.abanet.org/jd/judgesnetwork/activities.html.

11. Of the 11 goals of the ABA, #8 is "to advance the rule of law in the world," and #11 is "to preserve the independence of the legal profession and the judiciary as fundamental to a free society." *Profile of the American Bar Association*, www.abanet.org/media/profile.pdf.

12. COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997), http://www.abanet.org/govaffairs/judiciary/rdecind.html; COMMISSION ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY (2003), http://www.abanet.org/judind/jeopardy/information.html.

13. The Commission's recommendations are at http://www.abanet.org/govaffairs/judiciary/r6a.html.

14. Public education efforts include rapid responses to intimidation and impeachment threats against judges, voter guides in state judicial elections, educating political leaders, speaking out against attacks on court jurisdiction and discretion, building a network of judges to speak out, and developing message and issue papers. http://www.justiceatstake.org/contentViewer.asp?breadCrumb=8.

15. JUSTICE IN JEOPARDY, "Conclusions and Recommendations."

16. The Section on Administrative Law and Regulatory Practice and the Section on Criminal Law cosponsored the forum.

17. The Freedom Forum's First Amendment Center is an advocacy organization dedicated to protection of the First Amendment, diversity in the news media, and the creation of a $600 million Museum of News and Information in Washington.

18. John Siegenthaler, a founder of *USA Today*, former editor of the *Nashville Tennessean*, and assistant to Robert F. Kennedy at the Justice Dept., moderated four panelists. Mark David Agrast, a Senior Fellow at the Center for American Progress, oversees the Center's programs relating to civil and constitutional rights and the rule of law. He is a former chair of the ABA's Section of Individual Rights and Responsibilities. Joseph diGenova is a former U.S. Attorney for the District of Columbia, a litigator in private practice, and a television legal affairs commentator. He served as Independent Counsel in the Clinton Passport File Search matter, and Special Counsel to the House of Representatives investigating the election of Ron Carey as president of the International Brotherhood of Teamsters. Tony Mauro is the Supreme Court correspondent for the *Legal Times* and other legal media, and formerly held that position for *USA Today* and Gannett News Service. Deanell Reece Tacha is a judge on the U.S. Court of Appeals for the 10th Circuit, appointed in 1985, and is a former chair of the ABA's Judicial Division.

19. Comment by Judge Leslie Miller.

20. The "Sunshine for the Judiciary" bill sponsored by Sen. Schumer and Sen. Grassley would do this. Comment by panelist Mark David Agrast.

21. Comment by panelist Judge Deanell Reece Tacha, who emphasized that they should address legal processes, not legal issues.

22. Question by audience member Judge Herbert Dixon and response by panelist Joseph diGenova; comment by panelist Mark Agrast.

23. Panelist Tony Mauro.

24. Daniel Henninger, *Supreme Court Is Better Heard Than Seen*, WALL ST. J., May 10, 2006, editorial page. *See also* remarks on Feb. 14, 2007, by Justice Anthony Kennedy, judiciary.senate.gov/print_testimony.cfm?id=2526&wit_id=6070.

25. *See supra* note 12.

26. The conservative *Wall Street Journal* columnist Daniel Henninger makes the same point about the Supreme Court, opposing TV broadcasts of its hearings: "TV of its nature would surely diminish the Court. . . . to enter the Supreme Court and encounter the place, the people and its essential purpose is to feel carbondated to 1789. Though often maddening, its majesty remains intact." WALL ST. J., Apr. 28, 2006, at A14.

27. Citing Justice John Paul Stevens's speech explaining that while he strongly disagreed with the policy that his decision in the *Kelo* case upheld (Kelo v. City of New London, 125 Sup. Ct. 2655 (2005)), present law requires this result, so that any change in the policy must come from the legislature.

28. Comments by panelist Judge Deanell Reece Tacha, moderator John Siegenthaler.

29. Comment by panelist Joseph diGenova.

30. Comment by panelist Judge Deanell Reece Tacha.

31. Audience member Herbert Dixon told an anecdote about an editorial that falsely accused a judge of releasing an offender. Even after the chief judge called the editor, and then went on television to explain the decision, the newspaper refused to correct the editorial or respond in any way.

32. For instance, in the following resolutions:

February 1992: RESOLVED, that the American Bar Association reaffirms its support for citizenship education in elementary and second-

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ary schools, including, as essential components, study of the Constitution, the extended Bill of Rights and law generally . . .

August 1992: RESOLVED, that the American Bar Association urges judges, courts, and judicial organizations to support and participate actively in public education programs about the law and justice system, and further, that judges be allotted reasonable time away from their primary responsibilities on the bench to participate . . .

February 1995: RESOLVED, that the American Bar Association (1) commits its support for public education to foster understanding of the Constitution . . . and advance this goal of civil literacy as fundamental to the continued functioning of the United States as a constitutional democracy and a nation under the rule of law; and (2) urges the legal profession and the organized bar to engage the support of policy makers, educators, the media and the general public to further this goal through implementation of the national education goals and voluntary standards for civics education at the elementary and secondary school level.

33. Current materials relating especially to a public understanding of the role of judges and the legal system include LAW AND THE COURTS, vol. I: *The Role of Courts* (2000); vol. II: *Court Procedures* (1998); and vol. III: *Juries* (2001). Another pamphlet is PUBLIC EDUCATION AND THE COURTS (2003). And a series of Dialogue pamphlets (DIALOGUE ON *BROWN V. BOARD OF EDUCATION* (2003), DIALOGUE ON THE AMERICAN JURY (2005), and DIALOGUE ON THE SEPARATION OF POWERS (2006)) instructs lawyers and judges on how to address these topics with community groups or schools. The Division estimates that a million students and members of the public have participated in Dialogue programs since 2002.

34. *See* AN INDEPENDENT JUDICIARY, http://www.abanet.org/govaffairs/judiciary/r6b.html.

35. Personal communication from Executive Director Mabel McKinney-Browning (June 8, 2006). The cosponsor of "Conversation," Court TV, will air a show about it.

36. Letter from the Division's Associate Director Howard Kaplan to Keith Roberts (June 13, 2006).

37. The Coalition for Justice coordinates various ABA programs for improving the justice system on a state and federal level and sponsors numerous public programs in partnership with civic groups. *See* http://www.abanet.org/justice/description.html.

38. *E.g.*, the ABA's Coalition for Justice and Ad Hoc Committee on State and Local Justice Initiatives have jointly produced a pamphlet in the ABA's Roadmap series, INDEPENDENCE OF THE JUDICIARY (1998). The Judicial Division Lawyers Conference and the Special Committee on Judicial Independence produced another 1998 pamphlet, RESPONSE TO CRITICISM OF JUDGES, a model plan for responding to criticism that specifies when to respond, and how bar association response programs should operate. The ABA House of Delegates adopted this plan as its policy in 1998.

39. *See* AN INDEPENDENT JUDICIARY, "Recommendation," http://www.abanet.org/govaffairs/judiciary/r6b.html.

40. The American Judicature Society, for instance, has created a Task Force on Judicial Independence and Accountability, consisting of prominent judges, attorneys, and business leaders, to "monitor and respond to attacks on the judiciary. It will focus on the need for judges to be able to make decisions and rulings independent of outside influence. At the same time, the task force will reiterate the need for judges to be held accountable for their actions, and will consider the current mechanisms in place to handle such a review." http://www.ajs.org/cji/cji_task_force.asp.

41. Michael Hyman, president of the Chicago Bar Association, personal communication.

42. *See supra* text accompanying note 33.

43. Apart from the discussion of whether or not judges should defend or explain their decisions, the Defining the Judge Conference devoted relatively little attention to this aspect of public education.

44. The Judicial Conference on Sept. 19, 2006, issued new rules on federal judicial conduct, pursuant to the Sept. 2006 report by what is known as the Breyer Committee, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf. In addition, the ABA's House of Delegates adopted revisions to the Code of Judicial Ethics at its Feb. 2007 meeting.

45. *E.g.*, the call for creating an Inspector General, H.R. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006, introduced by Rep. F. James Sensenbrenner Jr. (R-WI) and introduced as S.2678 in the Senate by Sen. Charles E. Grassley.

46. In the case of Judge Joan Lefkow, the murder of her family was apparently carried out under the mistaken belief that she was exercising discretion when she reversed an earlier ruling pursuant to an order from the Court of Appeals. *See* Wilgoren, *supra* note 3. This horrible act was purely personal in nature, however, and based as it was on misunderstanding, it is difficult to see how it would affect judicial decision making in other cases.

47. For a graphic recent encounter with such a system, consider the experience of Judge Deanell Reece Tacha in Albania in 1992. She and Judge Patrick Higginbotham of the 5th Circuit were asked what U.S. judges would do with a ban on ethnic political parties that conflicted with a constitutional guarantee of freedom of assembly. The ban, they said, would be ruled unconstitutional. But if the President didn't agree? "Yet again we cavalierly responded 'tough.'" Then someone asked, "'But what if the military came after you?' Judge Higginbotham and I looked at each other. . . . In that moment, both of us experienced a new appreciation for the history and tradition of a judiciary where judges need not fret over the personal physical repercussions of a particular decision." Deanell Reece Tacha, *Federal Judicial Independence Symposium: Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 658 (1995).

48. California's Chief Justice Ronald George describes how his court's upholding an initiative that limited legislators' terms and ordered a 38 percent reduction in the legislative budget led to legislation to reduce the California court budget by 38 percent, *Brennan Lecture: Challenges Facing an Independent Judiciary, 80 N.Y.U. L. Rev. 1345, 1348 (2005)* As Justice O'Connor remarked about another threat, "Given the political climate, and the tenuous grip many people have on the concept of judicial independence, when I hear a threat to cut judicial budgets, even when it is only about cameras, I get really worried." *See infra* note 51, at 6.

49. Quoting the initiative's sponsor, Jail4Judges, at www.jail4judges.org.

50. *See* materials on file with the Judicial Division, American Bar Association.

51. Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1, 4 (2006). Justice O'Connor noted that the courts applied the legislation as written, although not as Mr. Delay thought it should be read.

52. I suggest this notwithstanding Judge Richard Posner's powerful argument that the Supreme Court (as distinct from lower federal courts) is fundamentally engaged in political decision making. *See* Posner, THE SUPREME COURT, 2004 TERM: FOREWORD: A POLITICAL COURT, 119 HARV. L. REV. 31 (2005). In most if not all instances, even Supreme Court rulings can be changed legislatively, as Posner notes with respect to *Kelo*, p. 98. As he also notes, unpopular rulings can be overcome through limitations and work-arounds. Hence, even *Roe v. Wade* has become something of a dead letter, p. 78 and note 131.

53. As Judge Richard Posner claimed recently, "viewed realistically, the Supreme Court, at least most of the time, when it is deciding constitutional cases is a political organ . . .." *See id.* at 35. Judge Posner dislikes the term "activist," preferring "aggressive," *see id.* n.28.

54. Roe v. Wade, 410 US 113 (1973); Kelo v. City of New London, 125 Sup. Ct. 2655 (2005). *See generally* MAX BOOT, OUT OF ORDER (1998). *See, e.g.*, the letter to the *Wall Street Journal*, Oct. 10, 2006, at A15, from Edward H. Stewart Jr. in response to an op-ed article by Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006.

55. *See* George, *supra* note 48 at 1389 . In 1938, frustrated by the Supreme Court's repeated rulings against his New Deal legislation, he

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proposed to add a new justice to the Supreme Court for every sitting justice over the age of 70. Historian William Leuchtenburg recently wrote that this "touched off the greatest struggle in our history among the three branches of government. It also triggered the most intense debate about constitutional issues since the earliest weeks of the Republic." William E. Leuchtenburg, *Showdown on the Court*, SMITHSONIAN MAGAZINE (May 2005). http://www.smithsonianmag.com/issues/2005/may/showdown.php.

56. Judge Posner notes that "judicial activism" has become "a portmanteau term of abuse for a decision the abuser does not like." *See supra* note 52 at 54 n.74.

57. Quoted by Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 19 (Alfred A. Knopf, 2005).

58. THE FEDERALIST NO. 78 (Alexander Hamilton), quoted at http://www.fed-soc.org.

59. "In recent years, however, it has been shown that legislation alone will not accomplish civil justice reform, because partisan judges will reject such laws. Legislatures and governors ought to settle for nothing less than changing the means of judicial selection to lessen the risk of such pernicious judicial partisanship." FEDERALIST SOCIETY, JUDICIAL WHITE PAPERS, THE CASE FOR JUDICIAL APPOINTMENTS (2003).

60. Judith Shklar caustically notes that "rule of law" is so often and variously used that it "may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians." Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY? (Allan C. Hutchinson & Patrick Monahan eds., 1987), quoted in Kleinfeld, *supra* note 9. Its corollary, judicial independence, seems to fall into the same category.

61. FEDERALIST SOCIETY, JUDICIAL WHITE PAPERS, THE CASE FOR PARTISAN JUDICIAL ELECTIONS (2003).

62. *See* D. Arthur Kelsey, *The Architecture of Judicial Power: Appellate Review and State Decisis*, JUDGES' JOURNAL, forthcoming; also, VIRGINIA LAWYER (Oct. 2004). Note also the President's use of "signing statements" to evade the prevailing architecture. *See* ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, *Report*, http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendtion-report_7-24-06.pdf.

63. These positions may be seen in the proposed legislation described by Agrast, *supra* note 7.

64. Kelo, n. 27 supra.

65. This would follow from the "originalist" approach to constitutional interpretation associated with Justice Scalia. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Princeton University Press, 1997).

66. Christopher S. Yoo, Steven G. Calabresi, & Anthony Colangelo, *The Unitary Executive in the Modern Era, 1945-2001*," http://law.vanderbilt.edu/faculty/pubs/yoo-unitaryexecinmodern-era.pdf, p. 7. The cited article references much of Yoo's writing on this subject. On the war powers, *see* Yoo, *War, Responsibility, and the Age of Terror*, STANFORD L. REV. 2004, http://ssrn.com/abstract=616062.

67. Among other examples, Yoo points to the Korean and Vietnamese Wars as examples of presidents making war without a congressional declaration of war. In both instances, Democratic presidents were supported by Democratic majorities in the House and Senate. *See* Yoo, *War, Responsibility, and the Age of Terrorism*, *supra*.

68. A series of Justice Department memoranda based on Yoo's position have advised President George W. Bush that he may construe the Geneva Convention, so as to disregard it; he may authorize the CIA to torture prisoners or "render" them to countries that do so; he may detain and hold citizens indefinitely, without habeas corpus or counsel; he may pursue surveillance on what he unilaterally determines to be foreign subjects without obtaining warrants from the Foreign Intelligence Surveillance Act (FISA) court; and he may, through signing statements or otherwise, interpret, enforce, or refuse to enforce the laws, such as those prohibiting torture, as he prefers. *See, e.g.*, Memorandum Opinion for the Deputy Counsel to the President, dated Sept. 25, 2001, http://www.usdoj.gov/olc/warpowers925.htm. For a discussion of Yoo and the Justice Department memoranda generally, *see* Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199 (2006), 1234-44.

69. *Hamdan*, 126 S. Ct. 2749 (2006), ruling that the military tribunals established by President Bush violated the Constitution; *Hamdi*, 542 US 507 (2004), ruling that a U.S. citizen cannot be denied habeas corpus by the president's claim that he is an enemy combatant.

70. United States Military Commissions Act of 2006, Chapter 47A, Title 10, US Code.

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Embracing Public Access in the Age of Internet-Inspired Privacy Concerns

By Bruce W. Sanford

If the tension between free speech and privacy is as old as the republic, then the concern that new technology will tip the balance at the expense of privacy is only a few years behind. First came cheap printing presses, then the telegraph, then radio, then television. Back in 1928, Justice Louis Brandeis warned in his famous dissent in *Olmstead v. United States* that "subtler and more far-reaching means of invading privacy" were becoming available. Justice Brandeis, meet the Internet.

So it should come as no surprise, even with a blackberry vibrating on your hip, that free speech and privacy are not as compatible as, say, your Macintosh and your i-Pod.

As we assess the effects of the Internet on access to courtrooms and court files, it is helpful to recall the historical nature of this tension and to keep our discussion rooted in fundamental principles, not techno-fears.

Just as technology can invade—who hasn't been jarred by googling his own name and seeing what turns up?—it can also enlighten. This February, I brushed up against webcasting, ironically, in the oldest appellate court in the western hemisphere, the Massachusetts Supreme Judicial Court. The occasion was the appeal in a libel suit brought by a state trial judge against the *Boston Herald*—a newspaper, I may mention, that was read by Justice Brandeis. It was standing room only at the John Adams Courthouse, and yet my colleagues back in Washington and reporters in the *Herald* newsroom could follow the proceedings live on the Internet. What a gas!

Such technological windfalls deserve mention because I worry that the explosion of online databases, sophisticated search engines, and instant posting of news and video content may be souring public opinion on access to that mother's milk of democracy: information. Indeed, in my representation of media companies all across the country, I have detected a perceptible shift toward restricting access in the name of privacy.

Back when a reporter—or a concerned citizen—had to haul herself down to the courthouse to look at a filing or view a hearing, it seemed less difficult to sell judges and court administrators on the benefits of access. But now that the same information can be attained with the click of a mouse, by a reporter—or, shock, a blogger!—in her pajamas, our fealty to public access seems less absolute.

But what, really, has changed? If we believe that court documents and court proceedings belong in the public domain, we cannot plausibly attach a series of conditions to their release. We cannot argue that they should be public, but only, ahem, if they aren't searchable, downloadable or otherwise really accessible with the modern tools of journalism.

Over the years, courts have achieved a delicate balance between privacy and freedom of information, but it has been anchored to a principle. And that principle is fairly straightforward. It cannot be altered by emerging technologies or a shifting political climate. If we are willing to permit access to court documents and legal proceedings, we cannot get trapped in an endless debate about what kind of access we will permit. If courts, under proper judicial standards, make certain records and hearings public, they should take advantage of new technology to make this access as simple, immediate, and meaningful as possible. ■

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Protective Orders—A First Amendment Lawyer's Perspective

By Kelli L. Sager

In virtually every case where there has been a significant amount of media coverage, the court is faced at some point with the question of whether to issue a protective order. Sometimes, such an order intends only to limit the public dissemination of very specific, confidential information obtained in discovery. An order preventing parties from revealing bank account numbers obtained through discovery, for example, is unlikely to raise eyebrows, or to be the subject of any media challenge. But much more troubling, and unfortunately all too common, are orders that broadly restrict the parties' ability to share or discuss information about an underlying case.

These kind of broad orders raise serious constitutional concerns, not only because they directly affect the rights of those who are prevented from speaking, but because they also affect the First Amendment rights of the public and press to receive information about court proceedings and records. Consequently, it is not surprising that courts have held on numerous occasions that broad gag orders and protective orders are improper, unless there has been a clear showing that the order is necessary to protect a party's rights.

Parties who have an interest in secrecy often misstate both the need for and benefit of broad-based protective orders. The justification offered for such orders often arises from the fallacy that one side or the other will be prejudiced by pretrial publicity—even though the Supreme Court, federal courts of appeals, and state appellate courts repeatedly have rejected the notion that jurors are likely to be unduly influenced by even intense media scrutiny. The assumption that all publicity is prejudicial also represents a significant change from the historical roots of the trial-by-jury system, which was intended to provide a mechanism for review by people who at least arguably were knowledgeable about the underlying circumstances and the people involved in a particular dispute. Somehow, "impartiality" has become synonymous for "ignorance," in the minds of these proponents, even though there is no historical or empirical basis supporting such a concept. And the demand for broad protective orders to protect against publicity ignores the many other mechanisms, including voir dire and careful instructions to the jury that exist to ensure a fair trial.

An even more practical reason for courts to be skeptical about a party's request for a broad protective order is that such orders typically have very little effect on the media's interest in or coverage of a high-profile case. Someone involved with the case—whether it is the prosecutor or defense lawyer, corporate spokesperson or individual plaintiff, witness or family member—is likely to have an interest in getting information out, so leaks inevitably occur. In one infamous example in the O.J. Simpson case, Judge Lance Ito's discussion in chambers with the parties about a possible protective order became known to the media almost instantly, and a challenge was mounted by the press before the ink had barely dried on the "confidential" proposed order. The information that ultimately is provided to the public may be less accurate, however, since it is more difficult to verify "leaked" information that cannot be checked against publicly available records, and an opposing party may feel constrained from responding. Moreover, once a "leak" happens, attempts to find out who violated the order simply distract from the proceedings at hand and can consume untold amounts of judicial time and resources, usually to no productive end.

A carefully crafted, limited protective order may serve a purpose in a given case. But such examples are the exception, not the rule. In the ordinary case, the spectrum of options available to a trial judge are more than enough to protect the parties' interests without resorting to draconian restrictions on competing constitutional rights. ■

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Irreverent for a TV Producer to Admit but TV Is Irrelevant

By Peter Shaplen

In the second half of the twentieth century television was a constant in our lives, documenting benchmarks, and often determining what was real and important.

But television's Achilles' heel is that it is, pound for pound, just about the dumbest piece of furniture we own. A box with tubes, a console with transistors and now a plasma screen, it remains totally dependent on someone sending it a signal and programming its content.

I believe that we have entered a transformative digital age where audiences reject what other's program for them and where watching passively has been replaced by vitality.

Whether it is a cell phone picture of Saddam's last moment on the gallows, the inappropriate outburst by a stand-up comic, or pictures from the front lines in Iraq—each was taken by a private individual, not a newsperson, and disseminated quickly, virally, and worldwide in an instant.

Welcome to the ubiquity of the digital age where content is streamed or downloaded and played on devices from screens to iPods to PCs.

Courts are not immune. I recall a visitor at the Scott Peterson trial who snapped a cell phone picture in court prompting allegations of a media violation of the court's order. However, it wasn't taken by the press but by a guest of the court! The presence of available, easy-to-use technology and a commonplace, almost second nature reaction to snap and capture every component of daily life made the opportunity irresistible for the individual.

In this transformative era, we live amidst images on a daily basis, and some of it from surveillance cameras to cell phones and PDAs is being proffered as legal evidence. One recent posting on YouTube purported to capture an alleged crime even before the paperwork was filed at the court!

Many jurists assert 'their ruling speaks for itself,' but in an environment where increasingly many individuals have already seen the images, it is reasonable to expect they will demand transparency from the court as well.

Indeed, video already has a toehold *inside* the courtroom thanks to Telepresence that displays life-sized images in high definition on video screens.

Video in this digital age is available live, on demand, archived, catalogued, sliced and diced in every way and language. Video streamed and downloaded, viewed on computers, Blackberries, iPods and cell phones is making contemporary television seem as arcane as sepia colored rotogravure prints.

Admittedly video is raw—often unedited, unprocessed but certainly revelatory and real. Video isn't about what some one else produces or edits but what our contemporaries think is worth seeing, capturing, and sharing.

The audiences today are myriad and niched, but as video connoisseurs they cannot, indeed will not, be denied personal and total access to their world. Unless they can see, assess, and consider it for themselves, they will find institutions that resist irrelevant and outdated, viewed with skepticism and denigrated in importance. Courts may be resistant, admittedly many will be uncomfortable, but it seems inevitable and irresistible. The discussion of whether courts will embrace TV has been upended by this question: will courts choose to be accessible as citizens demand and expect from all their institutions, or will the courts simply be deemed Jurassic? ■

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Florida Judge Shouldn't Be Courtroom Cameras' Poster Child

By Jerrianne Hayslett

Broward County, Florida, Circuit Judge Larry Seidlin is considered a judicial embarrassment by many other judges. They want to retreat behind the closed doors of their courtrooms from Seidlin's week-long Anna Nicole Smith hearing, replete with digressions, philosophical waxings and weeping, and make Seidlin the poster child for why court proceedings shouldn't be televised.

They shouldn't though.

Rather than ban cameras, judges should welcome them. As retired San Diego Superior Court Judge William Mudd said in the wake of the 1995 O.J. Simpson verdict and who permitted camera coverage of the 2002 Danielle van Dam murder trial of David Westerfield, if judges are competent, they shouldn't fear cameras.

Were cameras the norm, they would lose their voyeuristic appeal and novelty. Californians Aware General Counsel and open-government expert Terry Francke, says that "... to the extent you deliberately make camera access rare, it will ... have a greater impact on all in the room than if courts were to say, 'Cameras. They're here. They're staying; get used to it.'"

Los Angeles Superior Court Judge Larry Paul Fidler, in ruling that cameras could cover the murder trial of music producer Phil Spector, said it's time to get over the "fear of cameras" that has gripped judges since the Simpson trial made an unwilling celebrity of his fellow judge, Lance Ito.

Rather than Seidlin, the courtroom camera coverage poster child should be a Wisconsin high-profile trial of the horrific torture and murder of a young female photographer.

"The Steven Avery trial at the Calumet County Courthouse in Chilton is a good lesson in how the criminal justice system handles high-profile cases," editorialized the Manitowoc Herald Times Reporter in February 2007. "It is in sharp contrast to the image most television viewers have of what goes on in courtrooms. ... We have been broadcasting live video from the courtroom on our Web site (http://www.htmews.com). There is no narration or talking heads to tell you what you just saw. Just cameras set up in the courtroom to capture the sights and sounds of the trial as they happen."

Court TV Managing Editor Fred Graham says Court TV streams its coverage of many trials onto the Internet every day without incident.

And in New York state, where televising court proceedings is banned, a Poughkeepsie newspaper quoted a county prosecutor in Indiana where cameras were recently permitted as saying, "The more the public knows about how we do our jobs, the better off we all are in government. We have nothing to hide."

Neither do most judges. And cameras, appropriately installed and operated—preferably by the court—would enable the public to see that. Or would they rather that Seidlin remain the indelible—and only—image the public has of a judge presiding over a courtroom?

And as for Seidlin, shouldn't people be allowed to see him and decide for themselves if he's the kind of judge they want presiding in their courts? ■

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How Your Court Benefits from a Public Information Officer

By David Sellers

The governor will not visit a school without her public information officer (PIO) by her side. The director of public safety is always certain his PIO is at a crime scene before the media arrives. The secretary of transportation depends on his PIO to shape and manage the agency's message. How about the chief judge of your court?

While it is important for judges to maintain an appropriate relationship with local reporters, most do not have the time, training, or inclination to work with the media on an ongoing basis. That's where the PIO can help. The best PIOs have one ear turned to the court and its inner working and the other turned to the press so as to stay on top of what is on its radar screen. Many PIOs are former journalists, including some who have covered the very court in which they now work.

Being a PIO is time-consuming, and the work is demanding. The work should be performed by individuals with top-shelf oral and written communication skills. PIOs are trained professionals and not simply misplaced employees from the clerk's office who need a place to land while they await retirement.

While court PIOs perform different duties, most handle media relations as their primary responsibility. The duties range from fielding routine inquiries about caseload and dockets to managing all the logistics related to a high-profile proceeding. A PIO may track media coverage, prepare judges and court executives for speaking with the media, and write press releases. Some PIOs manage publications, oversee Web site content, handle internal communications, and develop educational outreach programs.

Most importantly, a PIO can promote good relations between the court and the media. This is an invaluable bridge to build, and one that every court should desire. Justice Felix Frankfurter said, "The public's confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media portrayal of the legal system." (from Liva Baker's biography *Felix Frankfurter*, p. 218 (1969).

While PIOs are an essential component of an effective court management and communication team, they occupy very different positions than their counterparts in the executive and legislative branches. This is an important factor, particularly for those judges who may not initially be comfortable with the idea of working with a PIO. Court PIOs do not "spin" the news, interpret or expand on judges' opinions, or engage in campaign activities. Court PIOs need to be a good fit for the unique culture that permeates courts at all levels. They also need to understand the parameters of their jobs. Not all communications professionals will be happy working as a court PIO. And, of course, a court needs to let its PIO into the inner sanctum and trust her as part of the management team.

In the end, the work can be uniquely rewarding. Court PIOs typically are present when decisions are made that impact their communities. It is the PIO's job to assist the press in getting it right. Judges, court staff, media, lawyers, and the public all benefit when this occurs. ■

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Commenting on Pending or Impending Matters

By Marla N. Greenstein

Ethics do not merely proscribe, they also prescribe. When faced with a phone call from a news reporter, too often judges rely on the proscriptions of the Code of Judicial Conduct and not its underlying prescriptions. While it is true that judges should not comment on pending proceedings, especially those pending in their own courts, judges have an affirmative obligation to educate the public about court process and the role of the courts in our society. A call from a news reporter is often an opportunity to fulfill that ethical obligation to teach, to educate, and to reach out to the community. It is one of those instances where many judges tend to hide behind the Code of Judicial Conduct rather than to fully embrace the larger obligations implied in the Code.

To this end there are several good resources for judges seeking guidance. Many appear in articles in this issue of the Judges' Journal. Specific ethical guidance in this area is available from state advisory opinions. Whether speaking to civic groups or responding to questions from the press, these diverse opinions guide judges on a steady course. Rule 2.10 (A) of the newly adopted 2007 ABA Model Code of Judicial Conduct retains the 1990 Code language (Canon 3B(9)) that prohibits any public statement that might "reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court" and continues to prohibit nonpublic statements that might "substantially interfere with a fair trial or hearing." The new Code also importantly retains the positive statement that allows judges to "explain court procedures." (Rule 2.10 (D))

The cautions for a typical judge handling a high-profile case are straightforward. Discussions with the media about pending cases should be confined to where the proceeding is in the course of a legal matter's procedural life. Questions about process can be answered; questions about witness credibility, likely outcomes, and comparisons with other cases are to be avoided. And what about commenting on cases pending before another judge? The same standards apply. Public confidence in the judicial process reasonably requires judges to withhold comment on their colleagues' decisions outside of the normal court process while a matter is pending.

Advisory opinions from various states agree that judges can and should discuss procedures in the current matter but not tactics or trial strategies. A judge can explain basic legal concepts but should not predict the application in the pending matter. A judge can outline the issues that will be presented in court that day as described by the lawyers, but should not indicate the strength or weaknesses of either side's positions. And finally, a judge should not explain what the judge's decision really meant outside of the written decision itself. Rarely do explanations not add to or reinterpret the original writing.[1]

But what is a matter that is not "pending" but "impending"? The Codes of Judicial Conduct continue the restrictions for "impending" matters as well. "Impending" is not meant to include every possible social or community issue that could come before the courts. Rather, impending matters are those that if they continue on their regular course will end up in a court. Examples of impending matters include criminal arrests, indictments, or official investigations. In short, judges should not comment any differently about an ongoing criminal investigation than a criminal case pending in a courtroom. In each situation, judges may and should describe the criminal process, the normal path of a case, and the role of the judge should the matter end up in a court.

Confidence in the impartiality of our courts is a hallmark of the American justice system, and maintaining that confidence is an important goal of the Code of Judicial Conduct. But public confidence also requires communication with the public. Our vehicle for that communication is largely through the media. It is only through responsible communication with the media in a consistent and ethical way that public confidence will be enhanced. A greater understanding of how our courts work is an important component of that enhanced confidence. ■

Endnotes

1. See, for example, Tennessee Advisory Opinion 89-13; Georgia Advisory Opinion 60 (1984); and a comprehensive look at the topic in "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 *Georgetown Journal of Legal Ethics* 589 (1989) by William G. Ross.

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Court Transparency in the Former Yugoslavia

By Jerrianne Hayslett

A common perception in the United States about a number of Central and Eastern European countries in general and their courts in particular is of closed and secretive systems emerging from the communist and totalitarian influences of years ago. Some of those systems are becoming more open, thanks in part to U.S. A.I.D.-funded programs and individuals in those regions who realize the importance of public access to and the understanding of their countries' legal systems. This may be occurring in Serbia, in small part, as a result of recommendations I made in 2003 as court media advisor to the Belgrade District Court to include a public information function in its newly created War Crimes and Organized Crime departments, and my association with the War Crimes Chamber's first spokesperson, Sonja Prostran.

Prostran, now a judge with the Second Municipal Court of Belgrade, has become a champion of court transparency in all courts in the former Yugoslavia, rather than simply in war crimes proceedings. Her advocacy on this issue has helped to significantly improve court-media and court-public relations. Following is an account of Prostran's evolution as an advocate for court openness along with highlights from a report on the subject that she co-authored with Serbian broadcast journalist Milos Milić and subsequently presented at forums in Serbia and in the United States.

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Prostran's Epiphany

Serbian Municipal Court Judge Sonja Prostran's epiphany about the need for the public to be able to witness court proceedings came early in her legal career as a twenty-two-year-old University of Belgrade law student observing a five-defendant murder trial. The country, she recalls, was in turmoil over whether to abolish a seldom-imposed death penalty.

The first defendant, the ringleader of the group standing trial, was condemned to death. The year was 1996 and it was only the second time since 1971 that a death sentence had been imposed. The other case was in 1992.

According to Prostran, "There was a public debate over the death penalty many years earlier. Twenty-one years went by without its imposition when all of a sudden just four years later someone was sentenced to death again." Recalling the defendant's lack of remorse and callous, cold-hearted demeanor, she said, "If the public could have seen his behavior in the courtroom, there would have been no doubt about whether he deserved to be put to death."

But that was not possible; except for the few relatives and other observers who squeezed into the Belgrade courtroom, Serbian courts did not—and still do not—allow camera coverage or audio recording of court proceedings. Neither did courts make verbatim records or allow public access to court files, policies that have since changed to some degree.

"That was the first time it occurred to me that it would be good to show pictures—moving pictures—from the courtroom," Prostran says.

The War Crimes Department

It was not until several years later, after she had graduated from law school, passed the bar, and held various staff positions in Belgrade's municipal and district courts, that a door opened that would give her a voice about the situation. The opportunity arose just a few months after she began serving as secretary general of the Belgrade District Court in 2003. In October, the District Court's presiding judge designated her to be the official spokesperson for the new War Crimes Department, created to handle cases related to the early and mid-1990s war in Bosnia-Herzegovina. The designation resulted after a media-relations report recommended creating a public information function for the War Crimes and Organized Crime departments, both of which were established within months of the March 2003 assassination of Serbian Prime Minister Zoran Djinić.

"I'm not happy about this appointment," Prostran announced at an orientation with her newly designated fellow spokespersons for the War Crimes prosecutor's office and the Organized Crime department and prosecutor's office. "But since I have been given this responsibility, I will do the best job I can."

The task was daunting. Not only was she already putting in long, arduous hours as the District Court's secretary general, she had to learn who the media covering the courts were and

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establish contact with them. An additional challenge was location. Prostran was headquartered at the Belgrade Palace of Justice while the War Crimes cases were to be heard some six kilometers away at the newly renovated Military Courthouse (now called the Special Courthouse), and her only means of transportation was taxis or walking.

The Internet became her ally. She used it to make and maintain contact with journalists covering war crimes proceedings via e-mails and news releases. She also created a Web site and developed informational brochures. Prostran also made a number of trips to the International Crime Tribunal for the Former Yugoslavia (ICTY) in The Hague. On one of those trips, only seven months after assuming her new duties, she collaborated with War Crimes Prosecutor spokesperson Bruno Vekarić and a contingent of journalists who covered war crime cases.

Advocating for Courtroom Openness

Upon returning to Belgrade from her latest trip to The Hague, she made a presentation to a large contingent of officials from Serbian courts, the United Nations, the U.S. Embassy, and a number of nongovernmental organizations (NGOs) with interests related to former Yugoslavia war crimes. In her presentation, she advocated for camera coverage, not just of war crimes trials, but of all Serbian court proceedings. She followed her presentation with a press conference in which she reiterated her recommendation.

With the recent history of regional conflicts still fresh in people's minds and their mistrust of the Serbian courts, she said, it was imperative that they be able to observe proceedings and judge the fairness for themselves. And, given the universal constraints of distance, work schedules and inadequate courtroom seating that face large numbers of people who would like to attend the trials, Prostran thought that the best way to provide access to court proceedings was through the media's cameras.

Less than two years later, though, Prostran was appointed to the Second Municipal Court of Belgrade. Although she presided over criminal cases, they were not war-crimes related and she no longer spoke for the District Court's War Crimes Department in an official capacity.

She had, however, become a recognized expert on war-crimes courts and human-rights issues. As a result, the media and officials in Serbia's legal community, various nongovernmental agencies, the United Nations, and the U.S. State Department continued to seek her counsel. That led Prostran to collaborate with veteran Serbian broadcast journalist Milos Milić, who had covered war crimes cases in The Hague, including the trial of former Serbian President Slobodan Milosević. Their work led to an investigation of and report on the state of court transparency in the former Yugoslavia. The report, entitled "Transparency of Trials for Breaches of International Humanitarian Law in the Region of Former Yugoslavia," was commissioned by the Youth Initiative for Human Rights, a Belgrade, Serbia-based regional nongovernmental organization founded in 2003 by young activists in the countries and territories of the former Yugoslavia.

The Report on Court Transparency

Based on interviews with representatives of local legislative bodies, NGOs monitoring war crimes proceedings, the media and media associations, and judges and parties to the proceedings, Prostran and Milić examined the openness of war-crimes court proceedings in Serbia, Kosovo, Croatia, and Bosnia-Herzegovina, and analyzed these countries' and territory's general criminal procedure codes and the measures their courts have taken to improve public access.

After publishing their paper on the former Yugoslavia, Prostran and Milić presented their findings at legal, media, and international relations forums in the United States (notably, at the National Judicial College's Donald W. Reynolds Center for the Courts and the Media at the University of Nevada, Reno; the Nevada Council for International Relations in Reno and Las Vegas; and at Pepperdine University Law School in Malibu, California).

They found that Croatia has by far the most open and publicly accessible legal system, one that permits camera coverage of proceedings. Trial monitors said the presence of electronic media did not negatively affect proceedings, and victims' representatives stated that they believed cameras had a positive impact. In fact, one representative was quoted as saying, "Judges are more professional and tend to respect the rights of all parties involved while cameras are in the courtroom."

Unlike the United States where high profile trials have tended to become a form of entertainment, Prostran told a gathering of the Nevada Council on Foreign Relations in Las Vegas that lawyers do not grandstand before courtroom cameras. "They would lose credibility if they did," she says. "They would not be believed."

Although Slobodan Milosević's trial at the International Criminal Tribunal for the Former Yugoslavia in The Hague was televised, Prostran says, "Other than Milosević (delivering lengthy speeches, grandstanding, and using delay tactics), proceedings were quite routine. No one tried to act out or play to the cameras."

Milić, whose Serbia-based broadcast network, B92, aired Milosević's trial between five and six hours every day the trial was in session, says the decision was made to do so, "so people could see that the tribunal did not eat him alive, and they could know what crimes occurred."

The biggest mistake of that trial, he says, was allowing Milosević to defend himself. Despite his antics,

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"That did not stop us from showing a fair representation of Milosević and of the crimes he committed in the former Yugoslavia." "But," says Prostran, "There is still a great state of denial in all countries of the former Yugoslavia. People deny that any such atrocities occurred."

"The shock of seeing that trial completely changed the minds of the people who saw it," says Milić . "More than 70 percent of the people [in Serbia] were in denial about Srebrenica [site of the July 1995 massacre of more than 8,300 Bosnian Muslim males], and that was reduced to 40 percent in just a matter of days."

Not only is the visual impact of watching war crime trial proceedings more compelling, Prostran says that trial testimony often becomes the only historical record of the crimes because, unlike war crimes committed during World War II, no written records were kept, so no paper trails exist. According to Prostran, "There is no evidence in hard copy, so they must rely on testimony."

Prostran also believes that the public deserves to see the defendant and victims and to hear their testimony. "But until they come before the court, they have spoken only to the police, the prosecutor, NGOs, and the Red Cross."

Croatian courts, which permit camera coverage and unrestricted access to proceedings and case files, lead courts in other areas of the former Yugoslavia in openness both by law and in practice, according to Prostran and Milić's findings. "Because of that transparency," Milić says, "public perception is changing. Initially, nine out of ten people said no Croats committed war crimes. Now, many acknowledge that, yes, they did."

The next most open court system is Bosnia, which does not allow media cameras in its courtrooms but makes and disseminates its own audio/visual recordings and has open courtroom files. "They have large, proactive public information officers who went to every village and explained war crimes court proceedings to the people," Prostran says. "In the early days, witnesses were considered traitors and would not testify. The defense always violated the law, which was also true in Serbia, by leaking classified documents and exposing protected witnesses. As a result, the decision was made to open the courts and let the public view the proceedings."

Kosovo is the least open, they found.

"Judges are afraid," Prostran says. "They would not talk to the media. Recording is allowed by law, but judges will not allow it, except under the most restricted conditions. And there are security issues. Judges are afraid for their safety and have bodyguards, yet there have been no incidents of judges being attacked."

Public access to court files in Kosovo is not required by law, Prostran adds. They are open to NGOs, such as United Nations officials, but not to the media.

While Serbian courts technically allow camera coverage, none has occurred so far, she says. "In order to broadcast a proceeding or to make recordings available, the media has to get the approval of the president of the Supreme Court. By law, the president of the Supreme Court also must obtain consent from all participants in the proceeding—the prosecutor, the defense and the council of judges (three judges who preside over the proceeding), and that has never happened."

The greatest concern about televising cases, she says, is the safety of witnesses. "That is very sensitive." For instance, she explains, "We (Serbia) had to sit down with officials in Bosnia and Croatia—people we, figuratively, were fighting with just a few years ago—and work out or establish how to handle defendants in courts, no matter which country they were from. They all have to be treated the same."

Interestingly, even though the war crimes trials in Belgrade are recorded in several formats, and although the war crimes courthouse there contains a large media center where journalists can view a closed video feed from the courtrooms, they cannot get copies of the video for broadcast.

But even though no trials held in Serbia have been televised thus far, Milić says no correlation was found that trials in Serbia are not well or properly conducted.

"On the contrary," he says. "International observers say they are very well conducted." But he believes when people can see the actual proceedings, it contributes to the public's trust and confidence in the courts and judges, and enhances their credibility.

With the ultimate goal to move all of the war crimes trials from The Hague to the countries where the crimes occurred and close down the ICTY, Prostran says that, "It is important to convince the public so they know that moving the trials to individual countries is not being imposed by international law, but is being done because it is the right thing to do."

What is being lost in the transfer of those cases to the countries where the crimes occurred, Milić says, is the ability in all of the new venues to broadcast the trials. Because of the distrust left over from the war, Prostran adds, it is even more important for cases involving crimes committed during the war to be televised. But transparency is not confined to just cameras and televising trials, she says. "It also requires access to court files, communicating with the media, and developing informational brochures to educate the public."

"Terrible things happened during the war," Prostran says. "Our goal is for the vast majority of the people to know what is going on in the trials so those kinds of things never happen again. We do not want to have what happened to us happen to our children."

Life after the War Crimes Department

Even though she is no longer with the War Crimes Department, Prostran's advocacy continues. She considers

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herself an expert not only in various aspects of war crimes cases and in promoting the need for transparency and outreach but in media relations as well, and is routinely engaged by various media and groups such as the Organization for Security and Cooperation in Europe and United Nations agencies to speak at and moderate conferences. She also maintains contact with the Belgrade District Court judge who was her supervisor during her tenure as a spokesperson at the War Crimes Department. In addition, she has gotten generally positive feedback to the report from her Serbian judicial colleagues, she says, which she finds encouraging.

At the urging of associates, she has enrolled in a post-graduate program in human relations and humanitarian law. "They said, 'You know so many things about human relations and humanitarian [issues], you should get a degree because you have been practicing [in those areas] for a very long time.'"

Beyond her studies, though, she is not sure what she will do.

"Right now, I feel like I have reached my limit—not of my ability, but of my capacity as a judge. There are probably many things I can do if I were not a judge. I can still push my ideas through NGOs and other organizations, and I can share them with the War Crimes Chamber, but I cannot impose myself too much because I'm no longer with that court anymore."

As far as becoming a war crimes judge herself, she says, "I would like to, but that's too far away to think about." She would need ten years of judicial experience either trying regular criminal cases or as a legal assistant to a war crimes court judge. "And who knows what's going to happen," she speculates, "there may no longer be a War Crimes Department because we no longer have any war crimes cases." No matter what, though, she will continue to advocate for court transparency: "Justice will not be served until all the people have a chance to see what is going on in the courtroom." ■

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As stated earlier, introduce yourself to the journalists. Tell them how your court operates, how to best access court records, and the basic rules you have in place.

Several states have bench-bar-media conferences, where reporters are invited to a daylong program with judges and lawyers to discuss how to better work together. These are wonderful opportunities to forge relationships and develop a dialogue.

Judges also should be aware of the media-related programs offered by the National Judicial College (NJC) and the NCCM. Together, the organizations, thanks to funding from the Reynolds Foundation, offer full scholarships for reporters and editors to attend an annual three-day program that educates journalists about the role of judges, the legal process, the strains between the First and Sixth Amendments, and the rights and responsibilities of journalists. The programs are taught by judges, lawyers, and seasoned legal journalists. Every judge should provide a brochure about the program to local journalists and encourage them to attend.

The NJC and NCCM also offer two-day seminars to judges on how to deal with the news media, especially in high-profile matters.

New York Times legal affairs writer and former media lawyer Adam Liptak says there are small things that judges can do to improve media coverage, including issuing written opinions earlier in the day.

"By waiting until 5 p.m. to issue a decision, reporters face a very difficult time trying to read and understand the opinion and get outside experts, such as the lawyers in the case or law professors, to give their interpretation and insight," says Liptak. "Better written and better organized opinions would be greatly helpful, too."

As a good example of how to handle a high-profile court opinion, Liptak points to the New Jersey Supreme Court's decision to inform reporters a day in advance that it would be issuing its opinion in a gay rights case. "There's no ethical prohibition against judges giving reporters (and the lawyers) the heads-up that a major opinion is about to be released," he says. "This allows the journalists to set aside the time he or she will need to report and write about the case, and allow time for the journalists to read the briefs in the case in order to gain a better understanding of the facts and arguments."

We conclude and agree with Liptak's final comment: "Helping the public better understand court decisions is never a bad thing." ■

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EXHIBIT 18

What a Difference a Lens Makes

By Jerrianne Hayslett

Editor's note: Jerrianne Hayslett is the director of public information for the Los Angeles Superior Court.

The first Menendez brothers trial was televised.

Their retrial wasn't.

The O. J. Simpson criminal trial was televised.

His civil trial wasn't.

Although the purpose for excluding cameras from the second Menendez and the Simpson civil trials was not to provide case studies of the difference television coverage can make in a trial, some lessons emerged nonetheless.

Advocates of cameras in the courtroom promote the basic premise that a trial is a public proceeding and that a television camera can be the most effective and unbiased means of putting the public in the courtroom. The television camera overcomes three obstacles to the public's ability to observe its judicial system at work:

- Geographic constraints
- Work schedules
- Limited courtroom seating

In other words, the television camera offers an opportunity for full spectatorship of court proceedings and participation in the justice system regardless of where individuals live, their work schedules, or the size of the courtrooms where the proceedings take place. Those are factors frequently cited by media attorneys, such as Kelli L. Sager, who represent the media on access questions in high-profile cases.

Sager and other media attorneys, however, also contend that cameras in the courtroom are not the cause of the circus-like atmosphere, distorted images, and inaccurate reporting that often accompany televised high-profile trials. In the May 1996 issue of the *Southern California Law Review,* Sager and Karen Frederiksen, her fellow law partner at the firm of Davis Wright Tremaine, present a case for the electronic media's presumptive right of access to court proceedings, and echo other media attorneys' assertions that a camera in the courtroom has no effect on jurors, witnesses, judges, counsel, or courtroom decorum.

The Menendez and Simpson experiences have demonstrated, however, that televising a trial does change the nature of the media beast and could support an argument for banning television coverage in certain high profile cases. Consider these aspects of the first Menendez brothers and the Simpson criminal trials:

- Both trials held all the trappings of the stereotypical media circus;
- Throngs of photographers, reporters, producers, and camera crews assaulted attorneys, witnesses, family members, and associates with microphones, cameras, and rapid-fire questions from car to courthouse door and back before and after every court session throughout the trials;
- A super-charged media demanded copies of case documents almost before they were filed, and some became belligerent when materials weren't available as fast as they wanted or when copies could not be placed in every outstretched hand simultaneously;
- Stories appeared in print and on the air about everything that moved in the courtroom and much that didn't, such as female attorneys' hairdos, floral arrangements on the clerks' desk, and even clocks on the walls;
- Trial proceedings were interrupted to deal with camera and court order violations and with media motions for access to various things such as sealed documents and juror voir dire questionnaires;
- The press often tried to end run official answers they didn't like, hoping to get what they wanted, such as shots during trial of the jury deliberations room, even though the court had arranged for the media to get pool footage of a jury room before the trials began;
- The Simpson criminal trial court clerk and court reporters became much sought-after interviewees during the trial, and
- The Menendez and Simpson criminal trial judges became the subjects of parodies and spoofs.
- By contrast, the second Menendez and the Simpson civil trials were almost devoid of those aspects. For instance:
- Although questioning of jurors for the Simpson civil trial began on September 30, the media didn't file a motion for access to their written questionnaires until October 11. When the trial judge set the motion for hearing on October 28, well after the jury would have been seated and opening statements completed, the media didn't protest. At the hearing, although the judge allowed the blank questionnaire to be released, he ordered the sitting jurors' and alternates' completed questionnaires sealed until after the trial. The media did not challenge the judge's ruling, despite a precedent set in the state Rodney King beating trial four and one-half years earlier in which the media successfully argued that the juror questionnaires were a part of the public voir dire process and that, therefore, the media were entitled to see them during voir dire. By contrast, in the first Menendez and the Simpson criminal trials, the media had their attorneys in court successfully arguing for access to the jurors' completed questionnaires before the first prospective juror ever stepped into the jury box.
- In the King beating and the Simpson criminal trials, when the judges would not make the blank jury questionnaires available to the press until all of the prospective jurors had completed them, by hook (in the King trial) and by crook (in the Simpson criminal trial) certain news organizations obtained blank questionnaires and published them before the authorized release dates. Nothing close to that happened in the second Menendez or in the Simpson civil trials.
- Throughout the first Menendez trial, not one of the twelve media seats in the courtroom went begging, yet after opening statements in the retrial most days found only three to five members of the media in the courtroom. There wasn't even enough media presence in the second trial to justify setting up a media center for press work space.
- While the Simpson criminal trial became *the* place for celebrities to be seen, not one big name showed up at the civil trial, unless you count Mark Hamill of *Star Wars'* Luke Skywalker fame lining up a couple of days for the public seating lottery (which he didn't win).
- In contrast to the ongoing requests to interview the Simpson criminal trial clerk and although the clerk in the Simpson civil trial is a professional musician and composer

with two albums and countless engagements to her credit, not one member of the media made any inquiries about her or requested to interview her, even though a TV reporter saw her perform at an evening event during the pendency of trial.

These are not arguments for what is good or bad, desirable or repugnant, they are merely examples of the differences in trials with the same defendants that were reported to the public by essentially the same news organizations, and in many instances by the very same reporters, producers, editors, and news directors. In both cases, the first trials were treated like horse races, complete with scorecards, favorite steeds, and an eye on the ratings. That specter was minimal in the second trials.

There is no question that the more mellow press in the later trials made the job of the court's media liaison easier. What was puzzling, however, was the media's less voracious appetite during the nontelevised trials, particularly the Simpson civil trial. One might have thought the opposite would occur, that reporters would be even more persistent and demanding because, without the aid of a camera capturing courtroom images, they would have to work harder to report the story to the public. When that turned out not to be the case, a number of explanations came to mind, such as:

- Instead of being sequels to the first trials, in both cases, the second trials were reruns, which the media generally does not like;
- The press was bored--they had been there, done that. They were sick of the story, which itself had been hacked to death;
- The media did not want to mess with judges who they felt had already cut their access to the bone. (Although the same judge presided over both Menendez trials, he was more restrictive with the media in the second trial);
- The civil attorneys, while probably as competent as the "dream team" and prosecution in the criminal trial, lacked the flamboyance, flair, diversity, and bent for the dramatic that make for good copy and air time;
- The media felt some chagrin over their performance during the Simpson criminal trial;
- Media managements were tightening the purse strings in the wake of very expensive coverage and legal representation during the Simpson criminal trial and the first Menendez trial, and
- Except for the verdicts, neither of the second trials would produce much *new* news. That turned out to be substantially true in the second Menendez trial, except for the revelation that a defense expert had altered his notes, which resulted in one of the attorneys being accused of misconduct. It was also true in the Simpson civil trial, except for Simpson's days on the stand, a "tabloidesque" distortion of an exchange between the defendant and a court intern, and the photographs of Bruno Magli shoes.

No doubt all of those were contributing factors. But as both trials wore on, more and more evidence indicated that a major difference was the absence of the TV camera. For example:

- Although about the same amount of public showed up for courtroom seats in the second trials as the first, the number of telephone calls and faxes the court received from the media and from the general public was minuscule during the nontelevised trials compared to what the court received during the two televised trials. A large percentage of the public calls and faxes during the first trials were from people expressing outrage, radically polarized opinions, and emotionally charged reactions to out-of-context snippets of courtroom proceedings that appeared on TV shows,
- Throughout the Simpson civil trial, TV reporters and producers confided to court officials again and again that they thought the judge had done the right thing in banning cameras. "Having cameras in there would have made a circus out of this trial like it did the first one," one said. Others said that although it sounded like heresy coming from someone in the broadcast business, not televising the trial made their jobs much easier, despite not having the courtroom images for their stories. Why? Less competitive pressure and less demand from newsroom managers who were not able to monitor courtroom proceedings and, consequently, not able to call for stories on what they otherwise would have been able to see or hear.
- Despite an insatiable appetite for information and tidbits about the Simpson criminal trial jury, the press demonstrated a marked lack of interest in the civil trial jury, as exemplified in an incident near the end of the Simpson civil trial when the judge instructed a juror who had sent him a note to confer with him and the attorneys at sidebar. Court was in session and the media were present. None, however, asked about the subject of the juror's note or the sidebar conference, and the news carried no reports about it that night or the next day. By contrast, if a juror in the criminal trial so much as burped, the press would have been full of questions. One reporter during the criminal trial even asked for the details of the jurors conjugal visits. When asked about the media's lack of curiosity about the civil juror's sidebar conference with the judge and lawyers, a print reporter said, "Well, there's no camera in here. No one saw it, so no one asked me about it."

Contrary to those who argue in favor of cameras in the courtroom, the camera is not just another courtroom spectator, at least not the way it is typically operated. Courtroom spectators cannot zoom their eyeballs in to peer over the defendants' or attorneys' shoulders at counsel tables, to gaze within a nose length into the faces of the witnesses or judge, or to get up close and personal with grieving victims or their relatives. Such camera work serves, not to report the trial, but to embellish and in some cases even create courtroom drama and pathos.

That is why it's fair to say that the TV camera *can* be an effective and unbiased means of putting the public in the courtroom. But that is only if it has the same access as any other spectator--with no zooming in for closer shots of anyone in the courtroom--and if it simply records or broadcasts the courtroom proceedings without the creative interpretation of its operator or station news directors. **CM**

EXHIBIT 19

FACTS AND OPINIONS ABOUT CAMERAS IN COURTROOMS

JANUARY 1997

COURT TV

January 1997

FACTS AND OPINIONS ABOUT CAMERAS IN COURTROOMS

INTRODUCTION

What you are about to read has been written by the journalists of Court TV. We have written it because we believe in what we do -- serious journalism about the U.S. judicial system, a serious, and seriously misunderstood, branch of government. We are alumni of some of the world's leading newspaper, magazine and television news organizations. At Court TV, we see ourselves as being involved in an exciting effort to provide viewers in America and ultimately around the world with a new, unique source of ethical, purposeful journalism about the American legal system.

We are proud of what we do. And we are eager to answer questions about it.

Thus, the purpose of this paper is to provide perspective and factual background on the issue of camera coverage of courtroom proceedings.

Indeed, there is quite a bit of factual background. Despite recent interest in this issue arising out of the O.J. Simpson criminal case, this is not a new debate.

Nor should it be in any way a speculative debate about "what might happen" when cameras come to court. For in almost all of the 48 states that allow camera coverage of court proceedings there was first an experiment or study of the issue; thus, whereas other favorite legal system debate topics -- tort reform, the death penalty, the exclusionary rule -- are permeated with speculation about the effects of various suggested changes, in the case of cameras there is concrete, empirical evidence. And it all goes in one direction.

All the studies of the last two decades have concluded that camera coverage of the least understood and most often misportrayed branch of government -- and the only branch of government which the Constitution requires to do its business in public -- provides a dignified, important view of how the legal system is actually working, that it fulfills the essence of journalism's mission in a democracy, and that it does not impede the process or negatively affect the participants. Thus, despite the controversy generated by the Simpson case, many countries including Italy, Australia, Argentina, Norway, Mexico, Spain, France, Paraguay, Greece, Israel, Russia, and El Salvador as well as the World Court at The Hague, have now allowed camera coverage of trials. Several other countries, including England, Ireland, Scotland, Canada, and New Zealand are now conducting or considering experiments with cameras.

On the other side of the argument are old concerns -- articulated anew because of the Simpson criminal case. These concerns include:

- **Cameras in the courtroom create a "media circus."**

Sensational trials and sensational press coverage existed long before television cameras. In the last 75 years a dozen or more American trials have been dubbed "the trial of the century" and generated enormous media and community interest. Until the Simpson criminal trial none of these sensational legal battles were recorded by a television camera.

In fact, the camera inside the courtroom acts as an antidote to the abuses of the "circus" -- outside the courtroom -- by allowing viewers to make their own judgments independent of the circus elements.

- **The camera's supposed effect on participants.**

The empirical evidence shows that while participants may, indeed, be affected by the pressure and publicity of high-profile cases, they are not affected in any special way by the presence of a silent camera in the courtroom and certainly less affected than they were in the last century when major community trials were much-heralded spectator events and the talk of the town.

- **The camera prolongs trials.**

In fact, the evidence shows that, if anything, cameras tend to keep trials moving. In some states high-profile murder cases are often long, drawn-out affairs, but this is true with or without cameras. In California, for example, the "Hillside Strangler" case took 23 months and the Charles Manson case nine months; neither case was televised. Similarly, if the "Chicago Seven" trial had been televised, the camera surely would have been blamed for the antics of the defendants and judge. And, to take a more recent example, if one compares the two Menendez trials, the first trial, which had a camera, two juries **and 51 more witnesses** took 88 days and the second trial, with no camera and one jury, took 87 days.

- **The media only want to televise sensational cases.**

Court TV has televised more than 200 civil cases in areas including torts, product liability, civil rights, parental custody, copyright, and sexual harassment. Ironically, federal rules currently prohibit camera coverage of the most important civil and criminal cases. Thus, proceedings like the Oklahoma City Bombing trial, the Noriega drug trial, the Michael Milken sentencing, the Microsoft antitrust settlement hearing, or the Waco trial cannot be shown, while the Joan Collins trial can -- a situation that allowed coverage of the Simpson criminal case but not the World Trade Center terrorist bombing conspiracy trial that started at the same time.

• **This is really entertainment, not journalism.**

In fact, however intriguing or even "entertaining" courtroom trials may be (and always were for spectators in old-time large-gallery courtrooms), camera coverage of the Simpson criminal case generated the most intense debate in recent memory about the criminal justice system. It showed people the legal system and provoked them to debate it. However, this new debate would have been distorted by the exceptional nature of the Simpson case if, as a result of the Simpson case, it had become more difficult for cameras to cover more typical trials.

And while important trials may involve an element of "entertainment," this is not a new phenomenon or one related to television. In 1965, legal studies cited by the Supreme Court noted: "In early frontier America, when no motion pictures, no television, and no radio provided entertainment, 'trial day in the county was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and spectaculum of old rural America.'"

• **The media profit from coverage of these cases.**

All free enterprise media, print as well as broadcast, hope to profit from their coverage of news events. But to a degree unparalleled in other arenas of news coverage, courtroom camera coverage is now being used in numerous non-profit educational efforts from grade school to law school.

• **Camera coverage fosters disrespect for the system.**

In fact, camera coverage has been shown to enhance respect for the system in most cases. The camera shows what happens; it does not create it. When the camera shows the system working well, it tends to boost public confidence. Conversely, the camera becomes a catalyst for change when it shows some aspect of the courts (or government, generally) that is not working well.

• **Camera coverage is just plain distasteful.**

In fact, in-court camera coverage is, by definition, as dignified as the process and arguably more "tasteful" than out-of-court tabloid coverage or docudramas of courtroom trials. Moreover, everything in the American tradition and American law suggests that such taste decisions are not the province of government rulemakers.

We will return to the "taste question" in a later section. First, however, let's review the facts -- lots of them. For amid the post-Simpson controversy it has occasionally been forgotten that this is an issue that is actually long on facts.

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APPENDIX A: INFORMATION ON COURT TV AND THE PEOPLE BEHIND IT

I. EMPIRICAL EVIDENCE REGARDING THE EFFECTS OF CAMERAS IN COURTROOMS:

Coverage of court proceedings with modern audio-visual equipment is now allowed in some fashion in 48 states. The opening of courts to cameras began long before Court TV aired the first nationally televised trial in 1991.

Since 1974, 41 states have conducted studies or surveys concerning the effects of cameras on thousands of court proceedings. These studies have examined the impact of audio-visual coverage on the dignity of the proceedings, the administration of justice, and the effect of in-court cameras on witnesses, jurors, attorneys, judges and other interested and involved parties.

A. THE STATE EXPERIMENTS:

The evidence gathered by the states' studies has repeatedly and overwhelmingly concluded that television coverage does not disrupt court proceedings or impair the administration of justice. In fact, the evidence points to significant benefits to the public and often to the process itself.

Of the 28 states that produced evaluative or empirical studies, 24 focused specifically on the effect of cameras on judges and/or attorneys, as well as the attitudes of judges and attorneys toward cameras. Twenty-three of these 24 states (all but Virginia) concluded that cameras did not alter the behavior of judges and attorneys. (Virginia's report was based on the evaluation of judges who had, for the most part, no direct experience with cameras. A contemporaneous Virginia survey of judges and trial participants who actually had experienced cameras yielded conclusions more consistent with the other states.)

These concrete results should not be forgotten after the controversy over the O.J. Simpson criminal case -- a controversy that reflects understandable disdain for the out-of-court media circus and, in some instances, the in-court, unflinchingly accurate depiction of how the court system operated in this particular case.

Here are some examples of these studies:

<u>Alaska</u>

Alaska, reported that "[m]any of the judges interviewed originally had grave reservations about the presence of cameras in their courts. Paradoxically, these were the same judges who were placed in situations where they had to face cameras in their courts on a daily basis and the result was most surprising to them." After the

Alaskan experiment, the Alaska Judicial Conference found that "a great majority of judges [viewed this] as a great step forward."

Indeed, Alaska found that "[f]ar from creating a courtroom spectacle, cameras in the courtrooms have become accepted tools for bringing elements of our justice system into the everyday lives of the public."

Arizona

Following Arizona's one-year experiment, 82 percent of judges responding to the question "How would you classify your experience with cameras and recorders in the courtroom?" reported a "favorable" experience, with 64 percent responding that permitting camera coverage to continue would be "beneficial" to the administration of justice. Ninety-one percent of responding judges said the media equipment did not affect the dignity of the proceedings, and the same percentage said the presence of media equipment did not affect the conduct of business. Similarly, 84 percent of attorneys responding said that during trial the presence of the media and its equipment was not distracting, and 64 percent of responding attorneys said the presence of media personnel and their equipment did not affect the dignity of the proceedings.

Connecticut

Similarly, following a one-year experiment, Connecticut found that its experience with cameras was "a success. We believe that the introduction of electronic coverage by the media into Superior Court proceedings has been accomplished without threatening the rights of parties and without interfering with the orderly disposition of cases."

Hawaii

In authorizing its two-year experiment with cameras in the courtroom, Hawaii noted that "[t]he empirical evidence does not support the hypothesis that cameras disrupt proceedings." Following its experiment with cameras in the courtroom, Hawaii reported that of jurors responding to the question "Did media exposure influence your deliberations?" 264 responded "no," and only 5 responded "yes," with 24 giving no response or responding "difficult to determine."

Iowa

The Iowa Committee on Media Coverage in the Courts noted in its 1979 preliminary report, which followed a two-year experiment, that "[p]articipants who have responded to follow-up questionnaires, including many who had some negative responses on specific questions, largely agree that in their opinion the presence of cameras and electronic media did not affect the fairness of the proceedings." Following a two-year experiment with cameras in the courtroom, 83.7 percent of Iowa judges polled responded that they did not feel that the presence of expanded media jeopardized a fair trial.

Massachusetts

After experimenting for two years, a Massachusetts advisory committee concluded that "the presence of the electronic and photographic media in the courtroom during the past two years has been without any serious adverse incident." The committee concluded, "[t]he problems encountered have been minor. They are of a type which can be remedied or minimized in the future. They are not of a nature that would argue for the removal of the electronic and photographic media from the courtroom."

Michigan

Michigan discovered that throughout its one-year experiment with cameras, "[n]o problems were reported by the courts regarding the recording of courtroom proceedings by the film or electronic media."

Nevada

Following a one-year experiment in Nevada, "as a group, judges were the most supportive of the rule governing cameras, with 75 percent completely in favor and 11 percent slightly in favor."

New Jersey

In New Jersey, 92.5 percent of that state's judges responding to a survey on the effects of cameras in the courtroom reported no distraction by the presence of camera equipment and personnel, and 94.4 percent of the judges believed the presence of camera equipment and personnel had no effect on the conduct of any other trial participants.

New York

After two lengthy experiments, New York's committee "concluded that the benefits of the program are substantial, with little or no adverse effect on anyone. Cameras in the courts serve a valuable educational function and promote public scrutiny of the judicial system. This in turn provides a deterrent against injustice and fosters a sense of confidence and respect for the judicial process."

B. STUDIES OF WITNESSES AND JURORS:

"I was in the [O.J. Simpson trial] courtroom a couple of weeks ago, and my colleagues will be pleased to know it wasn't really much different from any other courtroom that we try cases in. The judge, the jury, the witnesses, the spectators -- all of the circus atmosphere -- is created outside the courtroom and doesn't affect the jurors in any way. And the camera was very unobtrusive."

-- former U.S. Attorney General Richard Thornburgh, *Charlie Rose, June 23, 1995*

The various state studies have also found that witnesses and jurors behave the same whether or not there is a camera in the courtroom.

Twenty-five of the 28 states producing evaluative or empirical studies reviewed the effect of cameras on jurors and/or witnesses, as well as the attitudes of jurors and witnesses toward cameras. Fifteen of these states relied on polls or surveys of witnesses or jurors. Overall, 24 of the 25 states focusing on this issue concluded that cameras did not pose a problem regarding jurors and witnesses, and only one state (Virginia) arguably reached negative conclusions on this issue. These evaluations demonstrate that cameras in the courtroom do not result in adverse effects on jurors and witnesses, both in the view of jurors and witnesses themselves and also in the view of judges and attorneys.

It is also important to remember that every state that permits camera coverage requires that witnesses be shielded when appropriate to protect their safety, to protect those who are children, and to protect those for whom the camera will, indeed, pose a particular burden.

The Federal Judicial Center, as part of its study of cameras in federal courts, examined the reports and conclusions of 12 states (Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio, and Virginia) of the potential effects of cameras on witnesses and jurors. The Federal study concluded that "[r]esults from state court evaluations of the effects on

jurors and witnesses indicate that most participants believe electronic media presence has minimal or no detrimental effects on jurors or witnesses."

New York State's committee reported in 1994 that it "has learned of no prosecutor or defense attorney who has lost a witness because of camera coverage."

Indeed, state studies have refuted arguments that witnesses become overly distracted or nervous or that they distort or modify their testimony when cameras are present. Although witnesses in high-profile cases are sometimes nervous, their nervousness may be attributable to publicity surrounding a trial or anxiety about speaking in front of a group. There is no evidence that it is related to the camera, or that they would be less nervous in the presence of the judge, jury, defendant and three dozen furiously-scribbling reporters.

Jurors, who have the central and most sensitive and difficult jobs in any jury trial, also tend to have the least familiarity with the legal system and court procedures. The evidence from all of the studies shows that jurors are not adversely affected by the presence of cameras.

II. THE COURT TV JUDGES' SURVEY:

It may be true that a judge whose reputation has suffered, rightly or wrongly, because of camera coverage may regret that coverage (just as a judge whose reputation has suffered, rightly or wrongly, as a result of a newspaper article may wish that his courtroom were not opened to print reporters).

Nonetheless, Court TV's own survey of 339 judges who had hosted Court TV's cameras as of June 1996 corroborates the various states' conclusions about judges and cameras. The survey, which drew 239 responses (71%), including responses from 29 federal judges, found that 96 percent of the judges agreed that the presence of Court TV's cameras had not impeded the fairness of the judicial process. In fact, only three of the judges disagreed -- and one of them added that "[t]he value of your presence greatly outweighs the negative." (Five judges did not answer either "yes" or "no.")

A California judge echoed a frequent comment when he wrote, "After the first 5 minutes we didn't even notice the camera in the courtroom." A number of the respondents referred to the cameras as "unobtrusive" and several remarked they "forgot the camera was there." A Texas judge commented, "I confess to having some significant concerns prior to the beginning of the trial, but was actually reassured by another judge who had been televised by Court TV. That judge had advised me that actually Court TV's professionalism had brought the level of other media personnel to what he believed was a higher professional standard. My experience was very similar."

Court TV's study is corroborated by the recent survey conducted by the Judicial Council of the State of California which found that although judges without experience with cameras in their own courtroom harbored unfounded fears of cameras in courts (70% feared cameras would impair fair trials) those with experience were virtually unanimous (96%) in reporting their belief of how cameras do not impair fair trials.

III. CAMERAS AND THE FEDERAL COURTS:

> *"If changes in the administration of justice are needed, cameras are likely to hasten such reforms....I am always reluctant to take any decisions away from trial judges, but lifting the federal courts' ban on cameras, within reasonable limits, to allow proper balance between fairness and accessibility is a worthy cause.....The public has a right to see how justice is carried out in our nation. Such public scrutiny will help reform our legal system, dispel myth and rumors that spread as a result of ignorance and strengthen the ties between citizens and their government."*
>
> -- *(Former U.S. Attorney General Griffin Bell, Los Angeles Times* Op Ed, *January 17, 1996)*

Oklahoma City. Affirmative action. Microsoft. Waco. Whitewater. The NBA antitrust case. Abortion. School prayer. These are all major legal and social issues that affect us and that are being played out in our courts today. They are prime subjects of journalism at its best. But they cannot be shown on television, because cameras are still barred from almost all federal civil and criminal courts.

A. THE FEDERAL EXPERIMENT:

In July 1991, the federal Judicial Conference authorized an experiment allowing camera coverage in federal civil trials in six trial court districts and two appellate districts. Thus, Court TV and other media were able to cover a wide range of civil rights, copyright, antitrust, contract, torts and other cases, often with high viewership.

The judges who participated in that experiment overwhelmingly supported its continuation and expansion. A study by the federal Judicial Conference's own Federal Judicial Center found that "[o]verall, attitudes of judges toward coverage ... were initially neutral and became more favorable after experience with electronic media coverage ..."

As in the case of the states' studies, those judges and attorneys involved in the initial federal experiment reported significant educational and social benefits and, according to the Federal Judicial Center's report, "generally reported observing little or no effect of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice."

The report recommended that the Judicial Conference "authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms..."

B. REACTION TO THE FEDERAL EXPERIMENT:

Nonetheless, in September 1994 (in the aftermath of the initial burst of television coverage of the Simpson pretrial hearing), the Judicial Conference, faced only with a choice of extending camera coverage to all courts or allowing the experiment to die at the end of 1994, voted to allow the experiment to die. However, the Conference subsequently re-opened the door to new experimentation and the issue could be considered again.

The irony here, of course, is that it may be that some judges have allowed their distaste for what has transpired and been shown to the American people in the Simpson criminal case to influence their decision about cameras in federal courts. And in doing so, they have now caused the Simpson criminal case -- rather than the federal cases that they preside over -- to become the abiding image that Americans have of their justice system. This is an irony that is not lost on many other judges, and, thus, the issue of camera coverage in federal courts is far from resolved.

C. THE CONTINUING DEBATE:

"[R]esponsible camera coverage is arguably an extension of Americans' right to an open trial. And the federal courts, no less than the state courts, belong to the people who come before them seeking justice, more than to the judges behind the bench."

-- *Los Angeles Times* editorial, September 29, 1994

In our democracy, the informed tend to be more robustly engaged in public issues. Information received by direct observation is often more useful than that strained through the media. Actually seeing and hearing court proceedings, combined with commentary of informed members of the press and academia, provides a powerful device for monitoring the courts."

-- *Hamilton v. Accu-Tek*, No. 95 CV 0049 (JBW) (E.D.N.Y. Oct. 18, 1996), Slip Op. at 6 (Weinstein, J.)

In March 1995, another committee of federal judges charged with proposing long range plans for the improvement of the federal courts, recommended that "[t]he Judicial branch should act to enhance understanding of the federal courts and ensure that the fundamentals of the litigation process are understood by all who use it. The federal courts should encourage feedback from the public on how

successfully the judicial branch meets public expectations about the administration of justice."

Then, in June 1995, the federal judges' Committee on Court and Case Management reiterated to the Judicial Conference its recommendation that the successful 1991-1994 experiment be extended, while at the same time 13 of the 15 chief judges of the federal appellate circuits urged that the appeals courts be open to cameras.

In March of 1996, the Judicial Conference of the United Sates did vote by a slim margin to permit each of the federal courts of appeals to "decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments." (News Release, Administrative Office of the United States Courts, March 12, 1996.) Since that time, two of those courts have enacted rules very much like those in force in most states -- permitting television cameras, subject to each courts' ability to assess risks on a case-by-case basis. On the other hand, five courts have said "no" to television. Once again, it is worth noting that both the circuits whose judges had experienced cameras (as part of the federal experiment) immediately opened the doors to cameras. The judges who have refused to do so are without personal experience.

Federal civil trial court proceedings are similarly limited: only fourteen of the eighty-nine trial courts have enacted local rules of court that even arguably grant discretion to permit judges to allow proceedings to be televised to the general public and, as of the time we are writing this, only four proceedings (in a total of two federal districts) have been televised on the authority of those rules. These four federal cases, *Hamilton* v. *Accu-Tek*, *Sigmon* v. *Parker Chapin*, *Katzman* v. *Victoria's Secret Catalogue*, and *Marisol A.* v. *Giuliani*, represented the first time, in the camera context, that federal courts had recognized that the Judicial Conference, despite prior practice, did not possess enforceable power over district courts.

In *Marisol* v. *Giuliani*, Judge Robert J. Ward, a judge in the Southern District of New York, ruled that Court TV could televise oral arguments. In his decision -- called by *The New York Times* on March 9 a "breakthrough for public justice" -- Judge Ward determined that he had discretion under the rules of the Southern District and that "the public interest would be served" by allowing cameras to televise the proceedings.

As a result, the Judicial Conference at the same meeting in March 1996 that allowed the Circuit judges the right to make rules regarding appeals also urged the abolition of all permissive local rules for the federal trial courts such as the one relied upon by Judge Ward. Subsequently, Court TV applied again in New York's Southern District. This time, Judge Robert W. Sweet not only allowed Court TV's cameras in, but also wrote:

"During the last thirty years, studies conducted by state and federal jurisdictions to evaluate the effect on the judicial process of the presence of cameras in courtrooms have demonstrated that televised coverage of trial court proceedings does not impede the fair administration of justice, does not compromise the dignity of the court, and does not impair the orderly conduct of proceedings.

"The results of studies of these experiments, conducted between 1979 and 1994, establish that a silent, unobtrusive in-court camera can increase public access to the courtroom without interfering with the fair administration of justice...."

Judge Sweet also noted that camera coverage might, in fact, be constitutionally protected: "in the context of the right of press access to the courtroom, there can no longer be a meaningful distinction between the print press and the electronic media....Advances in technology and the above-described experiments have demonstrated that the stated objections can readily be addressed and should no longer stand as a bar to a presumptive First Amendment right of the Press to televise as well as publish court proceedings, and of the public to view those proceedings on television." U.S. District Court Judges Peter K. Leisure (Southern District of New York) and Jack B. Weinstein (Eastern District of New York) have now joined in allowing Court TV's cameras into proceedings in their courtrooms, but such access remains the exception rather than the rule.

The irony and illogic of federal civil cases not being open to cameras has not been lost on well-informed observers of the federal courts:

"It is my understanding that the report prepared by your committee showed that the experiment was a success and that the feared disadvantages did not materialize. Thus, the Federal Judicial Center's favorable report is consistent, of course, with the experience of the 47 states that now allow televised coverage of trials.

"When I was Chief Justice of the Supreme Court of Alabama, it was decided to open the courts to television cameras... It is my understanding that this has worked well over the years, with virtually no problems... I hope that you and your colleagues do not view the matter as closed..."

-- *(October 13, 1994 Letter to Chief Justice William Rehnquist from Sen. Howell Heflin (D-AL), Chairman of the Senate Subcommittee on the Courts and Administrative Practice)*

"I was surprised and disappointed to learn of the Judicial Conference's decision to terminate the pilot program of camera access to the federal courts. I am writing to ask you, as Chairman of the Judicial Conference, to urge reconsideration of this unfortunate decision."

-- *(October 14, 1994 Letter to Chief Justice William Rehnquist from Sen. Herb Kohl (D-WI), Chairman of the Senate Subcommittee on Juvenile Justice)*

"I request that the Judicial Conference review this decision [to terminate the pilot program] and, at a minimum, opt to continue its experimentation with television cameras in federal courtrooms.

"The Conference's decision appears to run counter to the recommendations of the Federal Judicial Center and its Committee on Court Administration and Case Management and Committee on Long Range Planning. Each of these entities reviewed the pilot program and concluded that federal judges should have discretion to allow cameras into their courtrooms."

-- *(February 22, 1995 Letter to Chief Justice William Rehnquist from Sen. Arlen Specter (R-PA), Chairman of the Senate Subcommittee on Terrorism, Technology and Government Information)*

"I am writing to communicate my view that experimentation should continue with cameras in the federal district and circuit courts...[C]ontinued experimentation based on the recent experience is warranted."

-- *(February 7, 1995 Letter to Chief Justice William Rehnquist from Rep. Carlos Moorhead (R-CA), Chairman of the House Subcommittee on Courts and Intellectual Property)*

"Cameras have been in hundreds of state and local courtrooms across the country for a number of years. There is absolutely no valid reason for still and television cameras being kept out of the nation's federal courtrooms. We are living in an electronic age and many people (regrettably) do get their information solely from radio or TV. To deny reporters who work in these media equal access to court proceedings is to deny access to a large segment of the nation's population. To deny those reporters equal access is to make a mockery of the principle of open judicial proceedings."

-- (*Houston Post* editorial, *October 1, 1994*)

"Are federal trials inherently so different that television would, despite the recent experimental evidence to the contrary, undermine the judicial process? Or is it more likely that federal judges, who have life tenure, are simply more resistant to change in their routines? The federal Judicial Conference should reconsider its total ban on cameras. If it doesn't, Congress ought to think about making its own rules in this area... [R]esponsible camera coverage is arguably an extension of Americans' right to an open trial. And the federal courts, no less than the state courts, belong to the people who come before them seeking justice, more than to the judges behind the bench."

-- (*Los Angeles Times* editorial, *September 29, 1994*)

"Unfortunately, the Judicial Conference could not consider extension of the pilot program as an option: rules governing adoption of policy required it to choose between maintaining its total ban on cameras in federal courts or reversing its ban and permitting electronic media coverage of civil proceedings in all district courts and courts of appeals at the discretion of the presiding judge...

"The Standing Committee on Federal Judicial Improvements therefore recommends that the House of Delegates adopt the attached resolution which urges the Judicial Conference to authorize experimentation with electronic media coverage of federal civil proceedings by re-instituting a pilot project to allow electronic media coverage of civil proceedings in selected federal courts under guidelines promulgated by the Judicial Conference.

-- *(Report of the American Bar Association's Standing Committee on Federal Judicial Improvements accompanying Recommendation 106 (adopted by the ABA House of Delegates, February 13, 1995)*

"Likewise, Congress needs to rethink the Federal law that bans cameras

in all Federal criminal cases. There is no excuse for denying Americans who rely heavily on the electronic media for information the chance to follow firsthand proceedings like the Oklahoma City bombing trial.....But beyond strong public-policy reasons for allowing courtroom coverage, there are principled constitutional arguments. To ban cameras totally trespasses on freedom of the press and Americans' right to have public trials. The camera-shy Supreme Court, which still forbids broadcasting of its oral arguments, has yet to address these issues squarely. It should, and soon."

-- (*New York Times* editorial, *March 9, 1996*)

"Some worry that allowing gavel-to-gavel exposure, similar to C-Span's valuable coverage of Congress, would demystify the Court, thereby diminishing the institution and creating new pressures on its decision-making. That is backward. The Court is not some private club. It is not supposed to be mysterious to the public it serves. Making it more accessible, and promoting greater public understanding of the complex questions it addresses, is the best way to honor the institution. As for pressure, a justice who allows the currents of public opinion influence decision-making does not belong on the nation's highest court in the first place."

-- (*New York Times* editorial, *January 16, 1997*)

In short, the fight for federal access is very much alive and the cumulative evidence of the numerous state and federal studies and the experience of the American judiciary point to only one conclusion: cameras in the courtroom do not harm the process, and do provide significant social and educational benefits. As a *Washington Post* editorial put it on April 9, 1995: "No state that has allowed cameras in criminal trials has ever rescinded that decision. Since Court TV went on the air in 1991 it has televised approximately 272 trials in 28 states. During that time not one verdict has been overturned nor one charge dropped against a defendant because of a Court TV broadcast."

Nonetheless, despite what we already know, questions are still being raised regarding the influence of cameras on court proceedings, about whether there is any legitimate educational value associated with camera coverage, and about whether the image of the judicial system is being tarnished and public confidence in the judiciary eroded. Let's look at some of those issues.

IV. THE SIMPSON CRIMINAL CASE EXPERIENCE:

Should the experience of the Simpson criminal case -- however one interprets it -- negate all of this prior experience?

Some judges and lawyers might think so, because they believe the Simpson criminal case has cast the legal system in a bad light; but if it did, then isn't that usually a reason to favor journalistic sunlight?

> "Critics charge that cameras in the courtroom can create a media circus like the one surrounding the O.J. Simpson trial. However, "circus" trials occurred long before cameras were allowed in courtrooms. In any event, despite some questionable media values that caused the Simpson case to be overplayed, television coverage of the Simpson trial contributed greatly to public understanding of the judicial process. It raised many important questions about the justice system in this country -- questions about court efficiency, judicial demeanor, the behavior of lawyers, the treatment of jurors, the role of race. It shed light on the difference in representation received by those with and those without money. And it aided understanding of legal principles such as the presumption of innocence, proof beyond a reasonable doubt, and the suppression of illegally seized evidence."
>
> -- (*Committee for Modern Courts, Statement on Television in the Courts, Fall 1996*)

The Simpson criminal case should not be allowed to overwhelm all of the prior experience. Some may be distressed by much of what the courtroom camera has shown. But if the camera has revealed flaws in the legal system, the correct response is to fix the problems -- not bar the medium that identified them. For example, a twenty month study by the director of the UCLA Statistical Consulting Center reported in the *Los Angeles Times* on December 3, 1996 found that over a five year period "cases turn out differently...depending on where charges are filed and trials are held." At the courthouse where the Simpson criminal trial was held, the vast majority of murder trials end in dismissals or acquittals with only about one third resulting in murder convictions. The attention focused on the Simpson trial which led to this kind of public scrutiny is one of the strongest arguments for maximizing the public's exposure to what actually transpires in courtrooms.

But what about the argument that the cameras are what caused the Simpson criminal case to drag on and the lawyers to engage in delay and histrionics? The fact is that high-profile, high publicity cases in California often take a long time -- even when they do not have camera coverage. For example, the "Hillside Strangler" case took 23 months -- without a camera. The Manson case took nine months without a camera. The second Menendez trial, without a camera, was only one day shorter than the first trial with a camera, which also had 51 more witnesses.

On the other hand, there have been dozens of high profile murder cases tried in courtrooms outside California that have taken a week or ten days -- with a camera present. Indeed, in June of 1995, during the 12th week of the Simpson criminal trial, Court TV televised another trial involving alleged spousal murder, *Florida* v. *Trice*. Locally, the case was arguably as high-profile as the Simpson case, and the forensic issues every bit as complicated. But the medical and forensic testimony took less than a day, and the entire trial -- again, with cameras present -- took six days.

It should be noted, too, that the judge has the responsibility and authority to control courtroom decorum regardless of the presence of cameras. If an attorney or even a judge behaves inappropriately, he or she should be stopped. Improper behavior by trial participants is not a reason to exclude the camera. No one would argue that a newspaper reporter to whom an inappropriate comment is made should be kicked out.

As articulated 32 years ago in a remarkably prescient argument promoting courtroom cameras: "True, some lawyers -- relatively few -- are frustrated matinee idols and will always create a nuisance by their courtroom histrionics, on or off camera. Ironically, however, they may be the very ones who stand to lose most from being televised. If a lawyer is exhibitionist or phony or truculent, the subtlety of the lens will be quick to probe and dismember. The judge will soon be made aware of his excesses." (*Television in Courts? Yes.* John McLaughlin, *America, January 16, 1965)*

While the media since the Simpson criminal case have featured stories about the backlash against cameras in courtrooms, the facts are far more encouraging. In fact, although individual legislators in several states tried to diminish access, none were successful. Indeed, no anti-camera bill in any state received more than three votes.

A. CALIFORNIA'S RESPONSE

"In the vast majority of the cases, the public's ability to observe a trial firsthand is more likely to be beneficial than detrimental. Live coverage will neither increase trust in the judiciary nor reduce it. It merely opens it up for public inspection. In a democracy, why should anyone fear that?"

-- (*Sacramento Bee* Editorial, *October 21, 1995)*

"Banning cameras is a bad idea in an open society, where trials should be viewed by as many as possible in order to protect defendants, educate the public and ensure justice is done."

-- (*San Francisco Chronicle* Editorial, *March 11, 1996)*

"I believe there is often great value in the public seeing the reality of the legal system or of a particular case rather than being left with unchallenged myths and media distortions. The courts are a public institution."

-- *(Judge Robert H. Bork,* letter to California Judiciary Committee Chairman William Morrow, *April 2, 1996)*

On the day of the verdict in the Simpson criminal trial, California Governor Pete Wilson declared that cameras should be banned from criminal trials.

Governor Wilson called for a legislative ban and requested that the California state judges review the issue of cameras in that state's courts and make recommendations. After an exhaustive period of testimony, hearings, and studies, the members of the Task Force created in response to the Governor's request, on a vote of 12-0, voted NOT to ban electronic photographing, broadcasting and recording from California courtrooms. Similarly, on a vote of 11-1, the task force voted NOT to ban live, contemporaneous electronic photographing, broadcasting and recording from California courts.

Echoing the near universal experience reflected in other jurisdictions, the Task Force found that those judges who have experienced cameras in their courtrooms were overwhelmingly in favor of the practice. They also supported the premise that trials are meant to be public: "Society's interest in an informed public, recognized in the planning and mission of the Judicial Council, is an important objective for the judiciary, which would be severely restricted by a total ban. Today's citizen relies too heavily on the electronic media for information; yet actual physical attendance at court proceedings is too difficult for the courts to countenance a total removal of the public's principal news source."

In January 1996, Governor Wilson's legislation (Assembly Bill 2023) which sought to ban cameras from all California courtrooms was introduced. On April 10, that bill failed in committee, receiving only one courtesy vote. In February Assemblyman Tom Woods introduced legislation (Assembly Bill 2344) to protect camera access. The Woods bill passed committee 9-0 and when it reached the floor of the Assembly on April 25, passed by a landslide 59-7.

This authoritative victory for cameras in both California's legislature and judiciary is in many ways reflective of the triumph of careful consideration and study of the facts over the instinctive distaste which caused many to cry for the removal of cameras following the Simpson trial.

B. NATIONWIDE REACTION IN HIGH PROFILE TRIALS

On the heels of the Simpson criminal trial, several judges opted to keep cameras out of their courtrooms in high profile trials. Examples of such instances were the Susan Smith trial, the Selena murder trial, the Polly Klaas murder trial, the Menendez brothers' retrial, the Snoop Doggy Dogg trial, Michael Jordan's father's murder trial and the John Salvi abortion murder trial. Circumstances in some of these cases made the denial of access understandable and several of the judges qualified their rejections with specific reasons while commenting favorably about cameras in courts in general.

After the decision was made to bar cameras from the trial of Richard Allen Davis, the man accused of kidnapping and killing Polly Klaas, *The Oakland Tribune* ran an editorial on the subject:

> "A judge's decision to bar cameras from the trial of Richard Allen Davis.....is an unfortunate byproduct of the sensational O.J. Simpson trial. The judge in the Davis trial....acted against the best interests of the American democratic system. Cameras in courtrooms aren't the cause of problems in American jurisprudence. If anything, they can help shine a light on whatever problems do exist and thus help fix them."
>
> -- *(Oakland Tribune* Editorial, *February 9, 1996)*

On the other hand, when Justice Herbert P. Wilkins of the Supreme Judicial Court in Massachusetts affirmed a prior ruling denying camera coverage of the John Salvi abortion-bombing case, he nonetheless offered a strong endorsement of camera coverage and of the presumption that cameras should be allowed in courts unless there is a specific, special reason not to allow it. The judge banned cameras because the defendant had demonstrated an established pattern of disruptive conduct and because of the risk of harm to the abortion clinic employee-witnesses if their faces were shown on television. However, Judge Wilkins noted in his decision that in light of the Simpson case, camera coverage in Massachusetts as a general matter would be desirable. He wrote:

> "The circumstances of People v. Simpson in California should not be permitted to influence the operation of our Massachusetts rule. I see no indication that it has in this case. It would be instructive to record electronically how an able Massachusetts judge conducts a high publicity trial, but in the circumstances the trial judge was warranted in her discretion in barring the electronic media from the courtroom in this case." (Hearst et al. v. Justices, SJ-96-0047, February 1, 1996, Memorandum Decision, at 5.)

State District Judge Mike Westergren of Corpus Christi, who presided over the trial of Yolanda Saldivar, the woman charged with murdering music star Selena, also rejected requests to televise the trial. Though he said the networks' arguments to televise the trial were persuasive, he wanted to guard against publicity adversely affecting the trial. Interestingly, several months after the trial, the judge conceded to a citizens group that cameras might not have disrupted the trial:

> "In retrospect, it might have been ok to have tv cameras there. I'm not saying I didn't make the right decision. But in this case, we had very excellent lawyers who conducted themselves honorably...Overall, I think there will come a time when [cameras] won't be a problem. I think the public has the right to know what is going on in the courtroom."
>
> -- *(Associated Press, April 14, 1996)*

C. THE POSITIVE REACTIONS TO CAMERAS NATIONWIDE

> *"Many observers adamantly maintain that a major villain in the Simpson trial was the camera. We disagree. Televised coverage is an accepted part of society, and it is the primary means by which people learn about the world. The nation's founders intended trials to be public. Television offers the best way for people to see for themselves what occurs in the courts, unfiltered by secondary sources such as news reports and commentary.*
>
> *To blame the cameras for the frustrations of the Simpson trial, and to call for an absolute ban on televising court proceedings, is to kill the messenger for the content of the message. Enhancing public understanding of the courts demands that televised coverage of court proceedings, with proper safeguards, should be standard operating procedure."*
>
> -- *(Judicature Volume 79, Number 2 September-October 1995)*

After the Simpson criminal trial, several judges actually requested camera coverage to show the country that the Simpson trial was not symbolic or typical of how the majority of judges oversee their courtrooms.

This "frontlash" took its form in other areas as well. In mid-March, the state of Georgia, which had actually been considering reducing camera access in light of Simpson, instead passed a bill that established standards for state judges to weigh in determining whether to allow cameras in courts.

As noted above, in no state where individual legislators introduced bills to ban or restrict cameras did any such bill receive any more than three votes. Instead, the renewed focus on the policy merits of televised trials led to authoritative rejections of

such initiatives. And, in some cases it is leading to greater camera access than ever before.

For example, in September 1996, Indiana, a state that has never allowed cameras in any of its courts, began to experiment with them in its state Supreme Court. "The Court is taking this step in hope of increasing both the public's awareness and understanding of how courts work," Chief Justice Randall T. Shepard has stated. "We hope a successful experiment . . . will lead to regular use of cameras in Supreme Court decisions." There have been reports that a successful experiment with the appeals courts could lead to experimenting at the trial level as well.

In Tennessee, in December 1995, a much liberalized camera rule proposed by the Tennessee Supreme Court was adopted on an experimental basis and for the first time, cameras were able to televise criminal trials in the state. In mid-April 1996, the Tennessee Court of Criminal Appeals in Nashville recognized "a presumption in favor of in-court media coverage of judicial proceedings" and said that any finding that coverage is restricted "must be supported by substantial evidence." As of January 1, 1997, the new Tennessee rule has been made permanent.

As the Tennessee Supreme Court found after surveying parties, jurors, witnesses, attorneys, judges, and court personnel actually in trials covered by cameras, television "coverage has served the public interest by providing full and accurate information without interfering with or disrupting the fair and impartial administration of justice." And, as Chief Justice Adolpho A. Birch, Jr. said, "The court is committed to keeping the public informed about the judicial system. One method for doing that is to allow cameras in courtrooms." (*Supreme Court Adopts Rule Governing Courtroom Cameras*, News Release, Supreme Court of Tennessee Administrative Office of the Courts, December 30, 1996)

D. THE MEDIA RESPONSE

"Pre-O.J., we weren't entirely sure what we thought of cameras in the courtroom. Post-O.J., we've formed the opinion that they're probably a good idea. What better way for the public to get a grip on the slow, messy system that passes for justice in this country than to broadcast what goes on in the courtroom? For some judges, however, that appears to be precisely the problem. The message we're getting from their opposition is that they don't want the courts to be held publicly accountable for the behavior and procedures that now constitute justice in America. Instead, seating - and public oversight - is to be limited to the few bodies that can squeeze inside. The intense and persistent media focus on the Simpson trial has now provided an excuse for doing just that - shutting out the cameras and along with it the public's right to know."

-- (The Wall Street Journal, October 5, 1995)

"[N]othing in this case's handling was worthy of much respect, except the camera, which did its work efficiently and professionally."

-- (A.M. Rosenthal, The New York Times Op-Ed, October 6, 1995)

"Yet given the swirling of wild rhetoric in the trial's aftermath - including allegations by some that the mostly African American jury voted for race over evidence - having a video record of what went on inside the courtroom becomes all the more valuable when it comes to understanding motivation.

Much of the complicated blood evidence for and against Simpson was more understandable in print than on the screen. Yet many of the trial's elements were fully experienced only through television. And to the extent that some of these may have been key to the jury's thinking, their tv exposure made us smarter about this trial and its possible social underpinnings.

If anything, it's courtroom cameras that deserve to prevail."

-- (Howard Rosenberg, Los Angeles Times, October 5, 1995)

"States that allow cameras in their courtrooms would be mistaken to pull the plug based on the circus of the Simpson trial. And states that don't have them - including Indiana - shouldn't be dissuaded by the event.

Properly administered, cameras in courtrooms have lifted the veil of mystery that surrounds the judicial process. The public puts its faith in three branches of government and deserves to see all three in action."

-- *(Post Tribune (Indiana),* Editorial, *October 5, 1995)*

V. SENSATIONALISM AND THE MEDIA CIRCUS:

"A frequently expressed objection to cameras in courtrooms is that they tend to create a "circus" atmosphere that detracts from a court's pursuit of justice. History does not support that objection...Throughout our nation's history, there have been celebrated legal proceedings that have been sensationalized by the news media...there is little evidence to suggest any correlation between televised coverage of legal proceedings and news media sensationalism."

-- (Daniel Popeo, Richard Samp, *Washington Legal Foundation*, July 30, 1996 comments to United States Court of Appeals for the Fifth Circuit)

A. "TRIAL(S) OF THE CENTURY":

It has by now become fashionable to think that the Simpson case has become "the trial of the century" because of cameras. In fact, in this century at least a dozen cases have been dubbed (at the time they happened) "the trial of the century." Most were accompanied by lurid and sensational tabloid headlines, interviews of lawyers and witnesses on the courthouse steps, self-promotion and books by trial participants, news reports of public obsession with the trial, and general public distaste for the whole circus. None of these trials were televised.

They include:

1. The three trials of comedic actor Fatty Arbuckle for rape and murder. The first two ended in hung juries and he was acquitted in the third.

2. The Scopes "Monkey Trial" case.

3. The Bruno Hauptmann trial (Lindbergh kidnapping)(which was attended by hordes of photographers and reporters using technology inside the courtroom that clearly would violate current rules that require no special lighting or wiring and no more than one pool camera).

4. The Sacco and Vanzetti trial.

5. The trial of "Murder Inc." boss Charles "Lucky" Luciano.

6. The Charlie Chaplin paternity suit.

7. The espionage trial of Ethel and Julius Rosenberg.

8. The Sam Sheppard murder trial.

9. The trial of Patty Hearst.

10. The trial of Charles Manson (which took nine months in a California courtroom).

11. The "Boston Strangler" case.

12. The trial of the "Chicago Seven."

Pull the old clips or television news soundbites of these trials and it becomes clear that the circus atmosphere, the lurid sensationalism, baseless speculation, and inaccurate reporting are neither unique to the Simpson criminal trial nor dependent on the presence of television cameras.

And certainly if a trial like the "Chicago Seven" had been on television the camera would have been blamed for the antics of the defendants and the judge.

Indeed, what is different about the Simpson criminal case and other televised trials is that there is a full, sober record of what actually goes on in court available to balance -- and correct -- the abuses of the media circus.

B. CAMERAS INSIDE COURTROOMS ARE PART OF THE SOLUTION, NOT PART OF THE PROBLEM:

"Because of the Simpson case, the subject of cameras in courtrooms has become almost synonymous with sensationalism and everything that is bad about journalism. That's particularly ironic because most of America's courtroom coverage is broadcast by the cable network Court TV -- which is one of the most informative, fair minded, serious journalistic enterprises in America, print or broadcast. The reporters are knowledgeable, and they treat trials with the respect they deserve. Citizens who care about public understanding of the law should welcome Court TV into their homes -- and judges who care about the public understanding of the judicial system should welcome Court TV into their courtrooms."

-- *(Jeffrey Toobin, Why America Should See This Trial, TV Guide, November 9, 1996)*

"[W]ithout the ability to witness the actual proceedings on television, many Americans could be left only with the sensationalist distillations of the supermarket tabloids."

-- *(New York Times* editorial, *September 22, 1994)*

We may or may not like what we saw in court in the Simpson criminal case, but at least we knew what happened in court. We did not have to rely on tabloid headlines or courthouse spin-session interviews to evaluate what happened when the defendant tried on those gloves. Or on a witness' "up close and personal" television interview a few weeks later. Witnesses and lawyers could go on television interview shows -- and put their best spins on trial developments -- or they could leak their spins anonymously, but people saw what actually happened in court where witnesses were under oath and cross-examined by lawyers rather than celebrity interviewers.

As Marvin Kitman wrote in *Newsday* on June 15, 1995, "Everybody is saying the trial is out of control because of TV -- let's pull the plug on TV coverage. That is not the answer. Court TV is doing a responsible, intelligent job. What's bad is the desperate media frenzy to annotate, comment on, go beyond the actual proceedings, notably the tabloid magazine shows."

Early in the case, Judge Ito made the same assessment himself when he noted that the damage done by an erroneous local news report about some forensic test results had been mitigated by his own comments about it in open court -- because those comments had been televised. "It is to the [defendant's] benefit that the false reports in the press have been unmasked" on television, he stated.

Although Judge Ito could do little about media abuses, such as the one he deplored in the instance cited above, because of cameras in the courtroom he could have -- and other judges have -- done more to prevent the interviews and courthouse-steps post mortems that were common in the Simpson criminal case <u>and that are much more common when cameras are not in the courtroom</u>. When a judge knows that the news media can record what happens inside the courtroom that judge usually feels more comfortable requiring the lawyers to keep silent outside of court during the trial. Moreover, their comments are not nearly as important when the media can use actual trial footage to report on the case.

Similarly, indictment press conferences by prosecutors -- which used to be the only way that the people who vote for them saw them perform -- become not nearly as important to a public assessment of their work when there is also camera coverage available showing them and their subordinates at work in the courtroom.

Now, a new "trial of the century" is on the horizon: the one involving the alleged Oklahoma bombers. In just the early pretrial phases of that case, with no cameras allowed, we saw the first signs of a circus in the making -- unsubstantiated media speculation about the case and an attempt by one defense lawyer to secure interviews with his client that will make him seem sympathetic.

As reflected in the comments of one journalist, himself a former prosecutor, many Americans believe that this trial needs to be televised to the widest audience possible.

> *"I believe there is actually a specific cure for the legacy of the Simpson case right in front of us: televising the Oklahoma City bombing trial. By any standard, the Oklahoma City Trial -- which concerns the single greatest act of terrorism ever to take place on American soil -- is of enormous national importance."*
>
> *-- (Jeffrey Toobin, Why America Should See This Trial, TV Guide, November 9, 1996)*

VI. A CHECK ON, AND SUPPLEMENT TO, TRADITIONAL REPORTING ABOUT THE LEGAL SYSTEM:

Americans get information about their legal system in two ways: through traditional news reporting and through fictionalized versions of American justice seen on television, in novels, and in the cinema. This is true of all areas of public and governmental activity, but the legal system is different; for the inherent drama of legal conflicts has made it much more typically and indelibly the fare of fiction than is true of other branches of government.

A. AN ANTIDOTE TO FICTIONAL JUSTICE:

"I think it's great that the public is getting to see the real world of courtrooms -- a far cry from P. Mason and L.A. Law."

-- (Federal Judge, Eastern District of Pennsylvania)

And in fictionalized versions of justice -- those that suit our tastes and those that don't -- our legal system is simplified, glorified, demonized or just plain distorted, leaving all Americans with unrealistic expectations, unjustified cynicism, or both.

We watch Perry Mason and expect trials always to be crisp, truth-seeking affairs in which right always prevails and the wrongdoer will always break under cross examination. We watch a police show on television and we come to believe that only technicalities, not real constitutional protections, save those who are arrested.

Thus, Professor David Harris wrote in the *Arizona Law Review* in 1993 (in the only academic study done thus far on the effect of televised trials on the public perception of justice):

> "While the portrayal of police in conventional television has often been sympathetic, it has conditioned viewers to expect much more of law enforcement, prosecutors, and courts than they can realistically deliver .... Regardless of the fact that forensic science solves very few cases, jurors expect such evidence, or an explanation for its absence, in every case. Jurors become so conditioned by the 'law' and 'police work' on television that the actual evidence becomes secondary. As an officer interviewed in another study said, jurors expect the impossible: 'The public gets the impression that you can take fingerprints off water.'
>
> "Whatever one thinks of the portrayal of criminal justice on conventional television, no one would dispute that Court TV at least does a better job of showing viewers what a trial really is. No slick actors here; rather, we see real attorneys make their way through thickets of complex issues. Even the very good attorneys do not emerge as hot, exciting performers. Rather, we see that slow, careful, patient work

represents the lawyer's stock in trade. Painstaking precision, backed by conscientious preparation, wins cases. Flash and excitement seldom show up on Court TV."

B. A SUPPLEMENT TO TRADITIONAL JOURNALISM:

One need not be critical of traditional television and print reporting about the legal system (and certainly we at Court TV are not, since we are also involved in publishing ten legal newspapers and magazines) to appreciate how the camera in the courtroom can supplement and enhance more traditional reporting.

As Professor Harris wrote in the *Arizona Law Review*:

> "Even the most accurate part of conventional television, news broadcasts, can offer only an incomplete version of any important trial. The whole event will be summarized in two minutes by a reporter with little or no knowledge of the legal process. Thus the person interested in a case depends on a highly derivative filtered source of information.
>
> "By contrast, those who see Court TV can make up their own minds about the case and the evidence. Court TV's virtually uncut live coverage of trial testimony allows anyone to see the trial as if present. The viewer sees an almost unmediated version of the proceedings, rather than interpretations of the event."

The camera takes away the traditional reporters' monopoly on the information about what actually happened in the trial. The reporter is still there to report on the significant developments and to attempt to explain and assess them, but he or she is no longer the only one among his or her editors or readers who has seen the event.

Camera coverage also allows other legal journalists and commentators to add analysis to their coverage. This commentary has, on occasion, angered members of the legal community. Likening it to sports commentary, these critics argue that it demeans the legal system and the lawyers. For those of us at Court TV involved in our sister publication, *The American Lawyer* magazine, this reaction is reminiscent of the criticism we received when we began publishing columns by veteran Supreme Court journalist Lyle Denniston, in which Denniston critiqued lawyers' performances in oral argument before the high court. However uncomfortable people become when their work is watched and commented on by others, this is one of the prime purposes of good journalism.

The camera also provides an important check in those rare cases where the press becomes so used to the stories and system that it covers that it becomes more tolerant than the public would be of how that system is working. This was

classically true in the Simpson criminal case, where court reporters -- long used to delays in California trials -- were initially far more tolerant than the rest of the world, who then got to watch such a trial.

Thus, Professor John Langbein of Yale Law School, who believes that the system is far too tangled in a procedural morass, told CBS news, referring to the Simpson criminal case, "[t]hose cameras are an absolute godsend because the public has been educated to think that criminal trials are what they saw on Perry Mason and it ain't true. What it's showing people is the way the system really works."

VII. DEBUNKING CLICHÉS, REAFFIRMING VALUES:

The camera in the court punctures myth and reaffirms the reality of the legal system. For example:

• Redeeming the Goal of Deterrence.

In the past many criminal defense lawyers have opposed cameras in criminal trials because the televising of a trial would further punish the defendant by embarrassing him if he were convicted. This is an understandable position for defense lawyers to take for their clients, but it is contrary to one of the basic purposes of any criminal law system: deterrence. Historically, one of the prime ways of achieving deterrence was the specter of embarrassment in the community resulting from being caught committing a crime.

• Distinguishing the "technicalities" from the constitutional safeguards.

The Simpson criminal case, as is true of other televised cases before it, reminded Americans about, and reaffirmed for them, the presumption of innocence and burden of proof that attach to every criminal case. As the *Arizona Law Review* article referred to above, noted, "Court TV offers citizens the chance to actually see their system of justice at work, along with expert analysis and commentary. . . For example, it is one thing to be aware of the presumption of innocence; it is quite another to watch the system do the best that human institutions can to be fair to an individual accused of the most horrible acts possible."

At the same time the Simpson case focused debate on whether the criminal justice process can become too bogged down in procedural issues when the defense has the resources to press all of these issues. And it ignited anew a debate over whether the solution is to give every defendant these resources or remove some of those procedural hurdles.

• There has always been a tendency among the public and even in some of the media to confuse fame with quality when it comes to lawyers.

At the beginning of the Simpson criminal trial all of the lawyers involved were famous. Now, however, not all of them are considered to be stellar lawyers. That's because people have watched them work, rather than simply see them on the courthouse steps and in newspaper headlines.

VIII. CAMERAS AND DEFENDANTS:

In 1981, the United States Supreme Court ruled in *Chandler* v. *State of Florida* that the presence of a camera televising a trial does not inherently deprive a criminal defendant of a fair trial.

Nonetheless, as mentioned above, many in the defense bar have historically opposed cameras in courts. Many defense lawyers have now changed their view, for two reasons:

a. Defense lawyers increasingly believe that the presence of a camera strengthens the integrity of the process, insuring that their clients' rights are protected by judges and prosecutors alike.

This is why many observers now believe that camera coverage could be an especially important dynamic in preserving the rights of defendants who lack the resources to mount a vigorous defense or who may feel that there are inequities in the system.

Thus, the Texas NAACP supported cameras in the courtroom "to ensure fairness and equity in our criminal justice system, which after all, is accountable to the general public. The public scrutiny that cameras afford is extremely helpful in keeping trials fair to all parties and ensuring that minorities are treated with courtesy and adherence to the rules. We are concerned about any perpetuation of stereotypes, but we are proud to recognize that existing entities such as Court TV have done a good job in avoiding this problem."

b. Defense lawyers in high profile cases, and their clients, say the camera will help restore the reputations of those who are acquitted because the public will see what the jury saw when it made its decision. Similarly, and particularly in high profile cases, many defense lawyers want jurors to know that if they render a decision to acquit that seems at odds with the initial pretrial publicity, they will return from jury service to friends and co-workers in the community who will have seen the evidence in what might otherwise be an unpopular decision.

Thus, just one year after Court TV was launched, the network received an award from the Criminal Justice Section of the New York State Bar Association for its "Outstanding Contribution in the Field of Public Information."

IX. CAMERAS AND VICTIMS:

While we believe that the interests of the general public as a whole are served by allowing the televising of court proceedings, there are few groups more directly affected than those who have been victims of crimes and their families. Victims and their families, who have learned to be wary of the general media have come to see the courtroom camera as a welcome exception -- and often a form of protection. The courtroom camera not only gets the story right, it allows them to have a record of the proceedings and, to tell their stories to a much broader audience than the few individuals who are present in the courtroom.

Thus, one family which lost family members in a multiple-homicide wrote, "[Court TV's coverage] was a tribute not only to them but to the court system in general...Thank you too for letting us know when it was broadcast so we could tell other family members who could not attend the hearing...You have helped make an overwhelming time in my life with the loss of my son and beautiful daughter-in-law a little easier and I just wanted you to know how much I appreciate it. I think that by your presence in court, the [local] stations and press showed us an additional courtesy in the questions they asked."

And the Committee for Justice for Little Freddie Vela in Detroit wrote that "Court TV has given the Hispanic Community long overdue justice!"

These deeply felt responses by victims who have experienced cameras in courts have lead prominent victims' rights groups, like the Doris Tate Crime Victims Bureau to support camera access to courtrooms.

Similarly, groups concerned with domestic violence and spousal abuse, such as the Family Violence Prevention Fund, have argued that the much needed exposure live trial coverage brings to issues involving victims of domestic violence has helped change attitudes and even laws around the country.

Some crimes are so sensational that their trials will receive massive media attention even without the courtroom camera. But in those cases the interests of the victims in accurate reporting is often the strongest. That is why in the recent high-profile trial of Richard Allen Davis for the murder of young Polly Klaas, the victim's father fought to have a camera televise the trial and why the families involved in the civil suit against O.J. Simpson argued for the presence of a camera in that trial as well.

Recently, this issue arose when survivors and families of the victims in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City were adamant that they -- and the world -- be permitted to watch the court proceedings.

As a May 5, 1995 *USA Today* editorial put it:

> "By keeping cameras out [of the Oklahoma bombing trial] federal courts make it more difficult for society to learn from and come to terms with this tragedy. And should the accused be let go, a public deprived of televised access may find it hard to understand why."

In late April, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. One provision, which allows victims of crime to watch criminal trial proceedings in cases where the venue is moved out of state and more than 350 miles from original location, requires the closed-circuit television coverage of the federal trial in the Oklahoma City bombing case.

The impetus for this legislation came directly from victims and their families and representatives who had asked Court TV to televise the trial, not realizing that this was not possible under rule 53 of the Federal Rules of Criminal Procedure. Nonetheless, working together with the Oklahoma delegation to the United States Congress as well as the chairmen of the House and Senate Judiciary Committees, victims and Court TV helped create an exception to the 50-year-old Rule 53. While the result was not entirely satisfactory to many of those in Oklahoma City who will not be deemed "victims" and therefore will be excluded from watching the trial, this exception does represent a step forward in acknowledging that the television camera is the best medium to accurately convey court proceedings and that its presence serves victims -- and others -- without diminishing the fairness of the proceedings.

X. COURTROOM CAMERA COVERAGE AS "CLASSIC" JOURNALISM:

A debate about courtroom camera coverage tends to make electronic journalists defensive. For they often have to justify what they do in terms of negatives: it is not merely entertainment; it doesn't endanger the rights of defendants; it doesn't impede the process.

In fact, there is a simple, positive statement that can also be made about courtroom camera coverage: when done well it is journalism at its best -- journalism that defines the core purpose of journalism and the First Amendment.

For television coverage of trials tells the whole, real, true story about a complicated, often misunderstood and under-reported subject. It allows the participants in a democracy to judge for themselves how well the government institution that makes the most fundamental decision that any government makes -- liberty or prison -- is working.

And this is true even with regard to the most "sensational" trials. We can see for ourselves whether William Kennedy Smith and his lawyers corrupted the system or fooled the jury. Or, we can see whether O.J. Simpson was railroaded in a way that we could not see, for example, whether Mike Tyson (whose rape trial in Indiana could not be televised) received a fair trial.

Court TV began in 1991 at a time when it would be hard to argue that the public understood its legal system well or that journalism was doing a complete job of showing it to those who are ruled by it. This, after all, is the most misunderstood branch of government -- the branch where who wins and who loses has heretofore dominated most of the news coverage, with little attention given to the process of deciding who wins and who loses.

In the wake of the Simpson criminal case some may have been made uncomfortable by this new and unforgiving eye of journalism. The temptation may be to criticize the messenger rather than focus on the message (that, at least in this case, the system may need some changing.) Journalists have often faced that kind of reaction, especially when their medium or their method was new. But rarely have they had to face it against the backdrop of laws and rules that could restrict their coverage.

XI. COURTROOM CAMERA COVERAGE AS A BUILDER OF CONFIDENCE IN THE LEGAL SYSTEM:

> *"It is essential that justice is seen to be done, and television lets the citizenry see our justice system in action. Television viewers have demonstrated great interest, and their interest should be encouraged. The televising of court proceedings is the best thing that ever happened to our profession, because it inspires confidence in our judicial processes."*
>
> -- (U.S. Court of Appeals Judge Roger Miner, *New York State Bar Journal*, February 1995)
>
> *"As a journalist and former prosecutor, I have had the opportunity to watch a lot of criminal trials in my life. And the Simpson trial -- to understate the case -- was not typical. Most judges run excellent courtrooms. The public would be impressed to see them and rightly so. The best way to correct the impressions of our system left by the Simpson case is to show the American people how real courtrooms are run."*
>
> -- (Jeffrey Toobin, *Why America Should See This Trial, TV Guide*, November 9, 1996)

On the surface, it seems inconsistent to celebrate coverage of the Simpson criminal case as classic journalism that shows flaws in the system and acts as a catalyst to change the system, and then to argue also that camera coverage builds confidence in the legal system. It would, indeed, be inconsistent were it not for one overriding factor: the dramatic ways in which the Simpson criminal case is the exception that proves the more general rule.

The Simpson criminal case may be an anomaly all its own. Or it may be emblematic of problems with trial procedure in California. Or it may be emblematic of an imbalance in the system between the protections afforded defendants based on their economic resources. But it is not typical of the system in general.

Nor has reaction to its telecast been typical. Public opinion polls report that people generally have less confidence in the legal system after watching the Simpson criminal case. But previous research and polling suggest even more strongly that, as a rule, when people watch trials they come away with more confidence in the system.

Thus, in 1994 the independent Times Mirror Center For The People And The Press conducted a study that found that by a margin of 49 percent to 28 percent Court TV viewers said "they have a better impression of the fairness of the judicial system as a result" of watching Court TV.

This result has been repeatedly reflected in the comments of Court TV viewers and in the reactions reported by judges and lawyers who have participated in trials televised on Court TV.

XII. CAMERA COVERAGE AND EDUCATION:

> "There is something prodigiously healthy in leaving civic chambers open to public scrutiny. The calm deliberation of the legal process, the television disclosure of human values and motivations, of imputability -- at the bar of justice and reason -- all this would, I submit, be an antidote for the portrayed aggression and delinquency in so much of our television melodrama. Such programming, indeed, might well serve to brace civic morality."
>
> -- (*America*, January 16, 1965)

Courtroom television coverage has generated dramatic improvements in how Americans are helped to understand that branch of government that determines liberty and organizes our social and business affairs. Videotapes of actual trials are now used regularly to train law students, paralegals and lawyers. Special tapes have been made by Court TV of especially important cases -- for example, a Philadelphia appellate argument on affirmative action, free speech/civil rights case in New York, a landmark desegregation case in Hartford, the Nuremberg Trial -- and distributed for free to civil rights leaders and educators.

Through the "Cable In The Classroom" program, students from grade school to college across the United States now regularly receive tapes of actual courtroom proceedings, for free, and discuss them in classroom presentations led by teachers who receive supporting materials from Court TV.

Court TV has also created and distributed, for free, an interactive CD ROM based on the Rodney King trial that allows students to review and organize the actual trial tapes and transcripts and present their own opening and closing arguments to other students. This trailblazing interactive learning tool, created in cooperation with the leaders of the interactive learning laboratory at New York's Dalton School, has been used in classes ranging from middle school at Dalton to Evidence at Harvard Law School. Other law schools -- among them Stanford, Notre Dame, Syracuse and Case Western -- regularly acquire courtroom footage as a resource for their libraries and classrooms.

Also on Court TV, six hours a week are devoted to special continuing legal education programs for lawyers; and on weekday evenings primetime shows use trial footage as a departure to explain the legal process to lay audiences. For example, *Miller's Law*, with Harvard Law Professor Arthur Miller, explains and analyzes a significant legal issue presented by a current trial and *Trial Story* features one-hour documentaries.

In 1996, Court TV launched a programming block aimed at teens which airs on Saturday and Sunday mornings. The critically acclaimed programming,

consisting of three shows, explores the justice system from a young viewer's point of view and allows teenagers to participate in the programs. The block includes an issue-oriented talk show, a show re-capping and analyzing real trials, and a magazine show which takes viewers behind the scenes of our justice system. The goal behind the programming was to take serious adult material about crime and law and order and our justice system -- the exact material that is often exploited on other places on the TV dial -- and make it understandable and intriguing to teenagers while teaching important lessons.

Reed Hundt, Commissioner of the FCC, recently stressed in a speech the importance of reaching the young viewers: "When I see, for example, what the Court TV network has done to create a terrific show that educates teenagers about our legal system, I say, 'wouldn't it be great if every network used its existing capacity to put together a show that would help our kids become better citizens.'"

Howard Rosenberg, television critic for the *Los Angeles Times*, wrote that "all three programs try mightily to educate and spark enthusiasm about the law through a youth prism. It's a noble effort and, based on this early sampling, a highly promising one." Walter Goodman, critic for the *New York Times*, wrote, "As for a verdict about the idea, given the cartoon assault on youngsters at these hours on other channels, it doesn't take the Supreme Court to rule that it warrants a fair trial."

A. TEACHERS' SURVEY:

It should be no surprise, then, that an independent survey of educators across the country completed in 1994 found that teachers consider Court TV a highly valuable curriculum tool for educating students about the workings of the American justice system. Among key findings:

- 90 percent of respondents who indicated they had viewed Court TV said the network is important because it provides students the opportunity to see the U.S. judicial system in action;

- 80 percent of those who watched Court TV said the network helps students understand many aspects of the law;

- 85 percent of respondents who viewed the network said they believe Court TV presents current issues of social interest such as free speech, crime, and violence in a constructive manner;

- 87 percent of Court TV viewing teachers said that the network's trial programming focuses on resolving social disputes in a civilized and fair manner, as compared to many television

programs which show violence and violent outcomes in public and individual disputes;

- Of all the teachers surveyed, 77 percent are in favor of Court TV being available for educational instruction. And 75 percent of the respondents would recommend that their students watch Court TV on their own. (Malarkey Taylor Associates Survey, 1994.)

B. COMMENTS ON EDUCATIONAL VALUE OF CAMERAS:

Across the country, judges and other community leaders have expressed equal appreciation for the educational value of televised trials:

> "I am a firm believer of 'cameras in the courtrooms' as applied under the law. It is a wonderful educational tool and a marvelous way to show 'the entire picture' to the public which is in dire need of a 'true picture' of what actually transpires in our courtrooms."
>
> -- *(Judge, Circuit Court, Palm Beach County, FL)*

> "The few opportunities I had to watch the evening recaps and listen to the callers' questions convinced me your audience was intelligent, paying close attention and learning about the system. I am proud about contributing to the public's understanding about the system."
>
> -- *(Judge, Denver District Court, CO)*

> "Indeed, the benefits of televising trials far outweigh any burdens - even in the much-criticized O.J. Simpson case. People learn from trials. As aberrant as the Simpson case is, it has become a civics class on the rights against search and seizure, the role of judges and the duties of jurors ... The Simpson case is bringing to light differences in how blacks and whites view the legal system .... Compare those public conversations to what's emanated from federal courthouses in New York during the trials for the World Trade Center bombing. A sad silence .... Now, the Oklahoma City bombing may get similar treatment. By keeping cameras out, federal courts make it more difficult for society to learn from and come to terms with this tragedy. And should the accused be let go, a public deprived of televised access may find it hard to understand why."
>
> -- (*USA Today* editorial, *May 5, 1995*)

> "The courts are public institutions, and the televising of proceedings is a powerful educational tool. People learn a tremendous amount about the

judicial process by watching trials and appeals on television. Think of what is being learned about our legal system -- both for better and for worse -- by the televising of the O.J. Simpson trial."

-- (*Washington Post* editorial, *April 8, 1995*)

"The rules in Texas are working well as regards cameras in court, and there is no record of their disrupting proceedings, violating defendants' rights or otherwise creating havoc. So why mess with it? ... The O.J. Simpson trial has demonstrated, often painfully, both the positive and negative aspects of cameras in court. The illuminations of the indecorous attorneys have been deplorable, and some of that egregious excess may be blamed on the unblinking camera. But the camera also makes the larger public privy to the entire display and not just subject to after-court sound bites orchestrated by the various lawyers involved."

-- (*Austin American-Statesman* editorial, *April 4, 1995*)

"Fifteen of the 28 states addressed the educational benefits associated with allowing cameras in the courtroom, and all of these states determined that camera coverage contributed in one way or another to public understanding of the judicial system."

-- (*Electronic Media Coverage of Federal Civil Proceedings, Federal Judicial Center* evaluation, *1994*)

"Many of the small sample of Court TV viewers interviewed said they have a better understanding of the legal system and think the courts are fairer as a result of watching trials on TV. Specifically, 66 percent said their viewing gave them a greater understanding of the way the American court system works."

-- (*Times Mirror Center for The People & The Press, 1994*)

"The Simpson case may be the first wave of a new future of high-profile trials. It does not mean the system has broken down. It just means that it has been demystified, that more ordinary people are getting a chance to watch it at work, close up, warts and all. Americans may not always be comfortable with it, but they can learn from it."

-- (*Chicago Tribune, June 13, 1995*)

"Televised coverage is an accepted part of society, and it is the primary means by which people learn about the world. The nation's founders intended trials to be public. Television offers the best way for people to see for themselves what occurs in the courts, unfiltered by secondary sources such as news reports and commentary.

To blame the camera for the frustrations of the Simpson trial, and to call for an absolute ban on televising court proceedings, is to kill the messenger for the content of the message. Enhancing public understanding of the courts demands that televised coverage of court proceedings, with proper safeguards, should be standard operating procedure."

-- *(American Judicature, September-October, 1995, Volume 79, Number 2)*

XIII. THE LAW AND CAMERAS:

> "The constitutional mandate that trials be public is an essential component of our judicial system. In an era where newly-constructed courtrooms are often tiny, television provides a minimally intrusive means of providing public access."
>
> -- (*Committee for Modern Courts, Statement on Television in the Courts, Fall 1996*)
>
> "[T]he right of the public and the press to attend and observe criminal trials, as recognized in *Richmond Newspapers*, cannot plausibly be limited to the few who are fortunate enough to fit physically into whatever courtroom space is made available. [Therefore,] wholesale exclusion of the larger public - both contemporary and historic - that is unable to witness the proceedings, without the aid of a TV camera, cannot stand in the absence of a compelling justification in the particular case."
>
> -- (Laurence Tribe, *American Constitutional Law 964*, 1988)

We often hear that there is "no constitutional right to cameras in the courts." Right now, that is the state of Supreme Court jurisprudence. But there is no constitutional bar either. In fact, the courts have opened the way to cameras in the courtroom, and the issue of whether there is a constitutional right, given the non-obtrusive nature of modern video technology, is not at all settled.

Indeed, United States District Judge Robert Sweet, in his decision to permit televised oral arguments in a federal trial, recently noted that camera coverage may be constitutionally protected: "In addition to the particulars of the present application as set forth above, the concerns, rights, and privileges of the parties...and the public must be assessed, *including the possible constitutional impropriety* of excluding cameras from civil court proceedings, an issue neither raised nor briefed by the parties." (emphasis added)

There are three Supreme Court cases that bear directly on the issue of cameras in courts:

A. RICHMOND NEWSPAPERS v. VIRGINIA, 448 US 555 (1980):

In *Richmond Newspapers* v. *Virginia* the Supreme Court held that the Sixth Amendment right to a public trial is not a right afforded only to defendants -- that the constitutional right to a public trial also belongs to the public. "Without the freedom to attend such trials, which people have exercised for centuries, important

aspects of freedom of speech and of the press would be eviscerated," the court ruled. "The First Amendment can be read as protecting the right of everyone to attend trials."

However, not everyone can actually attend trials. In a world in which community interest is now often defined on a regional, national or even worldwide basis, trials that are the major focus of regional, national or world community attention often take place in courtrooms that have one or two dozen seats for spectators and that are far away from most members of that "community." Which is a far different reality than a century ago when "community" was a much smaller place and when courtrooms had cavernous audience galleries to accommodate those who wanted to come see a trial that had become the talk of the town.

Chief Justice Burger, who wrote the opinion, wrote that openness "has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th Century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."

In the *Richmond* opinion, Burger quoted the journals of the Continental Congress as extolling the necessity of a trial "in open court....before as many of the people as chuse to attend."

B. BILLIE SOL ESTES v. STATE OF TEXAS, 381 US 532 (1965):

On the other hand, The *Richmond* case talks about "attending trials," not seeing them on television. Which brings us to the second major courtroom camera case: *Billie Sol Estes* v. *Texas*. This is the case that is most often cited -- and accurately so -- for the proposition that there is no constitutional right of camera access.

In the *Estes* case the Supreme Court, indeed, ruled that camera coverage was not a constitutional right and overturned the criminal conviction of Billie Sol Estes because the publicity attendant to his trial, including the presence of cameras, had deprived Estes of due process.

However, in that case the Supreme Court focused on the physical attributes of camera coverage -- the lights, the wires, the noise, the chaos. Indeed, the circus.

In his plurality opinion in that case Justice Clark said, "When advances in the [television] arts permit reporting ... by television without [its] present hazards, we will have another case."

Obviously, there are none of those hazards today. The camera is small, silent, usually wireless and often mounted on the wall with no more intrusion than a standard security camera. So, perhaps we may soon have another case.

C. CHANDLER v. STATE OF FLORIDA, 449 US 560 (1981):

In 1981, the Supreme Court clarified its position on cameras when it ruled in *Chandler* v. *Florida* that the presence of a camera in and of itself (without any attendant circus atmosphere of lights, tangled wiring, reporters and photographers bustling through the courtroom) did not deprive a defendant of a fair trial.

So, the state of the constitutional law on cameras is as follows: The Supreme Court has frowned on cameras but primarily because of the circus that once attended a camera set-up in court (*Estes*); the Court has ruled that public trials (but not camera-covered trials) are a public, First Amendment right (*Richmond Newspapers*); and the Court has ruled that cameras alone do not deprive the defendant of a fair trial (*Chandler*).

Against that backdrop, 48 states have now passed laws allowing some kind of camera coverage. All of those laws afford the presiding judge discretion, however, to rule on individual cases. Some states require the judge to allow cameras unless there is some tangible reason why they should not be allowed, while others simply give the judge (or in some cases the participants) broad discretion to keep cameras out. In short, while cameras have increasingly been allowed, they do not yet enjoy in the law the same right of access that reporters and their notepads do.

D. A NEW CASE?

Thus, the question now becomes whether the technological advances referred to by Justice Clark in the *Estes* case as opening the way for camera coverage as a matter of right aren't now here. For if they are and if, therefore, the physical set-up of the camera isn't destructive to the trial, then all of the arguments about the effect of cameras on making a trial more public would not be relevant; for the *Richmond* case and the Sixth Amendment require public trials, which means that if a camera simply makes a trial more public it should be welcomed, not barred so that "as many of the people as choose to attend" can do so electronically.

To take a specific example, there were typically seven or eight seats at the Simpson criminal trial open to the public. In a trial that generated so much community interest in such a large national community can that be what the founding fathers meant about a "public trial" when an unobtrusive technological means is now available to make it so much more public? And if the lone, silent camera on the wall is now no more obtrusive than a few dozen reporters scribbling away on their pads,

can there be a justification for keeping the camera out? It cannot be that the justification is that participants will act differently (even though the empirical evidence is that they don't) knowing that the trial is so much more public -- because the founding fathers always wanted public trials.

Put differently, it would seem that all of the current controversy about the Simpson criminal case should -- when juxtaposed against the public trial requirement of the *Richmond Newspapers* case and the technological advances that make the physical presence of the camera no more (and arguably less) an event than the presence of lots of reporters -- be matters of debate about taste, not about rules and restrictions.

As the *Houston Post* declared in an April 7, 1995 editorial, "The public has a right to know what happens in the courtrooms. Through newspapers, they have long known. But recorders and television cameras serve as more modern eyes and ears for the public. The laws and judicial rules and procedures should accommodate these technologies to enhance the public's right to know."

The *Atlanta Journal and Constitution* put it this way on September 21, 1994: "When the forefathers drafted the First Amendment, assuring a watchdog media, and the Sixth Amendment, guaranteeing the criminal defendants a 'public' jury trial, they knew what they were doing. While they didn't envision television, they meant those guarantees to be kept consistent with the times."

Or as United States Court of Appeals Judge Roger Miner explained in an article in the *New York State Bar Journal* in February 1995, "Today, of course, except in sensational trials, the courtrooms are empty. But there is a way to fill up those courtrooms and to secure the desirable attendance of the citizenry. That way is television."

In short, as Justice Clark foretold, we may now "have another case." Restricted camera access as a matter of taste should be a thing of the past. Imagine the reaction if a legislature or judge could restrict other media based on assessments of the prospective tastefulness or benefits of coverage.

Camera access should be a right to be withheld only when the judge finds that the camera -- not publicity, but the camera -- will unduly affect a witness or impede a trial. And certainly this right should apply to coverage of appellate arguments, including those in the Supreme Court, where there are no witnesses or jurors to be intimidated by cameras and where the issues are rarely the "sensational" ones that the camera-taste critics decry.

In arguing that the Fifth Circuit Court of Appeals should permit cameras on a case-by-case basis (the Fifth Circuit ultimately decided not to allow

cameras), Daniel Popeo and Glenn Lammi of The Washington Legal Foundation wrote the following:

> *"When reviewing laws, most judges normally are hostile to irrational blanket bans and favor rules that allow case-by-case decision making. Applying similar reasoning, the 5th Circuit judges should realize that not every court case is or need be like the Simpson case. Also, any arguments this infamous trial created against cameras don't apply in the context of televising appellate hearings.*
>
> *Appellate arguments are the most rational, deliberate and tempered of all judicial proceedings. Appeals lack witnesses who could be made "self-conscious" by cameras; there are no jurors who somehow might be affected by the presence of cameras. Instead, attorneys, in the service of their clients, urge judges to adopt their view of the law; judges, whose decisions affect all future cases, test the limits of the attorneys' proffered rule, like modern philosophers.*
>
> *'What transpires in the courtroom,' the Supreme Court said long ago, 'is public property.' The only way to maintain a balanced and reasoned judiciary is to expose court activities to everyday citizens. A healthy democracy requires an educated, well-informed public. Judges in a position to do so, like those in the 5th Circuit, can contribute to that needed education by allowing cameras in their courtrooms."*

And, as United States Circuit Judge Miner wrote:

> *"Let's get cameras into the Supreme Court! Is there any possible reason you can think of not to televise Supreme Court arguments? Is there any possibility of prejudice to anyone? And wouldn't televising those arguments provide the greatest civic lessons the nation could have? There are some indications that the Court considers that televised sessions would be an affront to its dignity. I think that is ridiculous."*
>
> *-- (Roger J. Miner, Eye on Justice, New York State Bar Journal, February 1995)*

XIV. SO, WHY IS THERE STILL A CONTROVERSY ABOUT CAMERAS IN COURTS?:

> *"The obsession with this particular television trial should not lead to a rejection of televised trials..."*
>
> -- *New York Times* editorial, *June 11, 1995*

> *"Likewise, Congress needs to rethink the Federal law that bans cameras in all Federal criminal cases. There is no excuse for denying Americans who rely heavily on the electronic media for information the chance to follow firsthand proceedings like the Oklahoma City bombing trial.*
>
> -- *New York Times* editorial, *March 9, 1996*

If all of the empirical evidence about the balance of harmful effects versus the benefits of camera coverage is so clear, and if the policy arguments and legal arguments are so good, how come courtroom camera coverage is still so controversial, with so many sincere, highly regarded people in opposition?

One simple answer is the Simpson criminal case. The general revulsion with the media frenzy surrounding that case has motivated people to want to do "something." And the only thing that really can be done under current law is to remove the camera in the courtroom -- which is not responsible for any of the abuses that people are upset about, and which, it could be argued, is actually an antidote to those abuses.

Similarly, the Simpson criminal case was clearly an exception in many quarters to most prior experience, in which camera coverage has inspired enhanced confidence in the legal system. Thus, many of those who want to protect the system -- for good reason, because it is generally a system well worth protecting -- are now disenchanted with cameras. Put differently, there are many who have been made uncomfortable by the undeniably true story told by the camera in the Simpson criminal case.

Most important, the broad viewership of the Simpson criminal trial and the attendant publicity may itself be one reason the camera in the courtroom has come under fire. For many people, who have not previously paid much attention to courtroom cameras, the Simpson trial has made the issue of cameras in the courts a "new" issue, rather than the decades old issue (with accompanying reams of empirical studies) that it actually is.

Looked at as a new issue and against only the backdrop of the distasteful Simpson criminal case, camera coverage has gotten swept up in the overall backlash from this trial.

And many people instinctively are leery of something that seems so new, especially when it presumes to intrude upon an old system that in their perception has generally worked well.

This problem of "newness" has always been a hurdle for cameras in courts. It is probably true that a majority of judges who have not had cameras in their courtrooms oppose cameras. But it is definitely true that an overwhelming majority of judges who have presided over televised trials -- including, to our knowledge, every single judge who has presided over a trial televised by Court TV -- favors camera coverage with appropriate safeguards.

Thus, according to news reports at the time, when the Judicial Conference voted to allow the 1991-94 experiment with civil trials to lapse, all but two or three of the judges who voted had never had a camera in their courtrooms. Those who had experience with cameras voted for continued camera coverage and those federal judges not on the Conference who had participated in the experiment were overwhelmingly in favor of continuation of coverage. Similarly, in the 1996 survey undertaken by California's Judicial Council Task Force, while 70% of judges overall expressed fears that cameras would impair fair trials, judges who had actually experienced cameras were virtually unanimous (96%) in their agreement that cameras do not impair fair trials.

The purpose of this paper, therefore, has been to provide perspective on a debate that seems new but is not.

And to convey the clearest message possible that journalism using cameras in the courtroom is journalism that is effective, that tells the truth, that can -- and among most journalists, does -- have a high purpose, and that now deserves the same protection as any other journalism from those who would want their own taste to become rules that apply to what everyone reports and what everyone gets to see.

Cameras in the courtroom provide many benefits. They offer the public the chance to see the legal system at work and to judge with their own eyes whether it has performed as it should. They can heighten public understanding of the system, counter rumor and speculation, and provide important insurance against abuses of defendants' and victims' rights. They are, in short, the modern realization of the founding fathers' vision that trials be held "before as many of the people as chuse to attend."

EXHIBIT 20

Cameras in the courtroom: a case study

A study of broadcast coverage of four criminal cases in Florida suggests that cameras in the courtroom do not disrupt the judicial process or distort the proceedings.

by S.L. Alexander

In September 1990, the U.S. Judicial Conference approved implementation of experimental camera coverage of the federal civil courts at both the circuit and trial court levels. U.S. Supreme Court Chief Justice William Rehnquist has said he is "by no means averse" to the experiment,[1] which might eventually lead to cameras in the high Court. In 1990, the U.S. Court of Military Appeals also allowed live camera coverage of oral arguments for the first time[2]—and 45 states currently allow some form of camera coverage (still, radio or TV) in state courts (see page 310).

Traditional objections to courtroom cameras have revolved around their presumed impact on the process of the trial. Legal scholars such as Tongue and Lintotte[3] express typical concerns: they suggest cameras violate privacy of witnesses and jurors, warp understanding of courtroom procedures, and are an added burden on the trial judge and court administration. And the Supreme Court decision in *Estes v Texas* (1965),[4] which overturned a conviction on due process grounds, was long regarded by many as a *de facto per se* ban on courtroom cameras.

However, Kuriyama and Zimmerman[5] are among those who suggest a camera ban, if based on distinguishing between print and electronic media, is unconstitutional. Goldman and Larson, Gardner, Dyer and Hauserman, Frank, and Killian[6] also argue for camera coverage with narrow exceptions.

Various states have surveyed members of the bench and bar who participated in courtroom camera experiments, with findings generally favorable toward cameras.[7] The decision in Florida's 1979 *Post-Newsweek* case[8] included a response to major objections to courtroom cameras: for instance, physical disruption was no longer an issue due to technological innovations, possible psychological impact on trial participants had never been shown, and privacy rights of participants were not a viable concern. And on grounds of federalism, the landmark high Court case *Chandler v. Florida*[9] supported the right of states to experiment with courtroom cameras.

Social scientific research has been conducted in experimental settings to test apparent effects of courtroom cameras. For instance, Netteburg[10] conducted a

Support for this research included a contribution from the William C. Steel Media Access Fund of the Miami office of Steel, Hector & Davis.

1. Quoted by Gross, *Panel Urges Test Use of Cameras for Civil Cases in Federal Courts*, N.Y. Times, August 24, 1990, at B9.

2. *Courtroom Doors Begin to Open for TV, Radio*, Broadcasting, September 3, 1990, at 25-26.

3. *The Case Against Television in the Courtroom*, 16 Williamette L. Rev. 777 (1980).

4. 381 U.S. 532 (1965). *See also*, Schwartz, Estes v. Texas: *Television in the Courtroom*, The Unpublished Opinions of the Warren Court 191-226 (New York: Oxford University Press, 1985). (As originally written, opinion would have permitted cameras but rejected First Amendment basis for access.)

5. Kuriyama, *The 'Right of Information Triangle': A First Amendment Basis for Televising Judicial Proceedings*, 4 U. Hawaii L. Rev. 85 (1982); Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 64 Duke L. J. 641 (1980).

6. Goldman and Larsen, *News Cameras in the Courtroom during* State v. Solorzano: *End to the Estes Mandate?*, Sw Nev L. Rev. 2001 (1978); Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475 (1985); Dyer and Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 Geo. L. J. 1633 (1987); Frank, *Cameras in the Courtroom: A First Amendment Right of Access*, 9 Comm. L. J. 749 (1987); Killian, *Propriety of Restrictive Guidelines for Cameras in the Court*, 9 Com. & The L. 27 (1987).

7. Available from the National Center for State Courts, Williamsburg, VA. *See, e.g.*, Advisory Commission on Cameras in the Courtroom, *Final Statistical Report: Cameras in the Courtroom in Nevada* (1981); Franza, *Report of the Florida Conference of Circuit Judges in re Petition of Post-Newsweek Stations, Florida* (1978); Minnesota Advisory Commission on Cameras in the Courtroom, *Report on Cameras in the Courtroom to the Supreme Court* (1982); Office of the State Courts Administrator, *A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts* (1978); Raker, *Cameras and Recorders in Arizona's Trial Courts* (1983); Short & Associates, *Evaluation of California's Experiment With Extended Media Coverage of Courts* (1981); Superior Court Judges's Association Committee on Courts & Community, *Cameras in the Courtroom: A Two-Year Review of the State of Washington* (1978).

8. In re Petition of Post-Newsweek Stations, Florida, Inc. for Change in Code of Judicial Conduct, 370 So. 2d 764 (1979).

9. 449 U.S. 560 (1981).

10. *Does research support the* Estes *ban on cameras in the courtroom?*, 63 Judicature 466 (1980).

telephone survey regarding a newsworthy trial and concluded his data contradicted the proposition that television could destroy an accused's case. Kassin[11] showed "mock jurors" a videotape of a civil trial either in the presence or absence of a camera and concluded the impact of cameras would be minimal, could be mitigated with pretrial warnings, and generally would have no effect on the outcome of a trial. A handful of others[12] have conducted experimental studies, best summarized by Susanna Barber's seminal study.[13]

But now that news cameras are allowed in courtooms, it is time to examine their actual role in news media coverage of the judicial process rather than theoretical effects on participants and public. A first such study, which included juror exit polls, was completed by the author as a doctoral dissertation at the University of Florida in 1990.[14] Although methods of social science research require conclusions be limited to the specific conditions of the study, future research should validate its findings: traditional speculation as to possible disruption to the judicial process by courtroom cameras appears to be unwarranted.

The study

The Florida study focused on the process of broadcast coverage of four criminal trials in Florida's Eighth Judicial Circuit (eight counties in north central Florida), specifically all four trials for defendants charged with first-degree murder which appeared on the 1989 criminal docket and were held in the Alachua County Courthouse.

The study asked four questions:

1. How closely do broadcast journalists follow state guidelines for behavior in courtrooms during criminal trials?
2. What impact do the guidelines have on coverage?
3. Do broadcast journalists following the guidelines present undistorted coverage of criminal trial proceedings?
4. Do broadcast journalists following the guidelines observably disrupt the judicial process at the trial court level?

The primary method used was "participant observation"—*i.e.*, the researcher sat in the courtroom watching the proceedings, from jury selection through verdict and, in the three cases resulting in convictions, sentencing. Interviews with trial participants—including judges and attorneys—as well as with news media personnel, were conducted before, during, and after the trials.

The guidelines in Florida are the most liberal of those in any state allowing camera coverage.

The study also included a "content analysis," analyzing the trial coverage presented by the four local broadcast stations (the ABC and PBS TV affiliates, a commercial AM-FM radio station [CBS] and an FM radio station [NPR]) as well as the trial stories published in the local daily newspaper. The study concluded with juror exit polls regarding the perceived impact of the media on the trial process. The questionnaires were handed out by the presiding judges to the jurors prior to their dismissing the jurors: this method was selected to best assure juror anonymity.

Before the trials actually began, the researcher interviewed 15 representatives of the Eighth Judicial Circuit, including judges, court personnel, attorneys, and news policymakers. Interviewees were asked to describe their experience with courtroom cameras during the decade since experiments with cameras had begun as well as to respond to specific guidelines adopted for courtroom cameras in Florida courts.

These "Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings," developed as part of the aforementioned *Post-Newsweek* case and included in the Florida Rules as Code of Judicial Conduct 3A(7),[15] cover seven areas, which may be briefly summarized as follows:

1. *Equipment and Personnel:* Only one video camera and operator is allowed in a trial court; only two in an appellate proceeding; only one still cameraman utilizing no more than two cameras in any court; only one audio operator using existing microphones or previously court-approved equipment is allowed; any "pooling" arrangements are the responsibility of the media, with any disagreements resulting in exclusion of all.
2. *Sound and Light Criteria:* Only "non-distracting" equipment allowed; no artificial lighting; advance approval from the presiding judge required for all equipment used.
3. *Location of Equipment and Personnel:* Location of equipment determined by the chief judge in each jurisdiction.
4. *Movement During Proceedings:* Equipment operators must remain in a fixed position until a break in proceedings.
5. *Courtroom Light Sources:* Advance modifications may be made with judicial approval at non-public expense.
6. *Conference of Counsel:* No pickup or broadcast of attorney-client, co-counsel, or counsel-judge conferences.
7. *Impermissible Use of Media Material:* None of media work-product admissible as evidence in any proceedings.

The guidelines in Florida are among the most liberal of those in states allowing any form of camera coverage: for instance, several states forbid coverage of jurors or participants who object. However, the guidelines for the federal experimental program on camera coverage in civil courts are generally similar to the Florida guidelines, with the major additional restriction a ban on coverage of jurors.[16]

Regarding the appropriateness of the Florida guidelines, the general consensus among those interviewed in the

11. *TV Cameras, Public Self-Consciousness, and Mock Juror Performance*, 20 J. Exp. Soc. Psych. 336 (1984).

12. *See, e.g.*, Paddon, "Television Coverage of Criminal Trials with Cameras and Microphones: A Laboratory Experiment of Audience Effects," PhD dissertation, U. Tenn. (1985).

13. News Cameras in the Courtroom: A Free Press-Fair Trial Debate (Norwood, NJ: Ablex Pub., 1987).

14. Alexander, " 'Mischievous Potentialities': A Case Study of Courtroom Camera Guidelines, Eighth Judicial Circuit, Florida, 1989." PhD dissertation, U. Fla. (1990).

15. 370 So. 2d at 781.

16. Judicial Conference Committee on Cameras in the Courtroom, Guidelines for the Pilot Program on Photographing, Recording, and Broadcasting in the Courtroom, Agenda E-22 Appendix C (1990). (Federal guidelines for experimental coverage also grant great latitude to presiding judges to refuse, limit or halt coverage—as well as to require camera operators to wear "appropriate business attire.")

JAMES L. SHAFFER/PHOTOEDIT

Eighth Judicial Circuit was favorable toward cameras in principle. Some concern was expressed with the limited amount of time broadcasters spent presenting trial coverage, particularly the few seconds broadcasting coverage of events which may have taken eight hours in real time.

No one described any problem with equipment and personnel restrictions of the guidelines. However, there was concern expressed by some attorneys with the "clicking" sound of newspaper cameras which results when a photographer fails to use a "blimp" (a device designed to muffle camera sounds). And the broadcasters were concerned with the difficulty of picking up audio in the courtrooms, none of which in Florida's Eighth Judicial Circuit is permanently wired to allow broadcasters to take advantage of the latest technology.

In general, all agreed with the appropriateness of restrictions on location and movement of media personnel in the courtroom and the prohibitions against coverage of bench conferences. Finally, although the media representatives agreed with the rule on inadmissibility of press coverage as evidence, some of the court personnel would prefer the judge retain flexibility on this issue.

During the 12-month observation period (January-December 1989), four first-degree murder cases appeared on the docket. In *Florida v. Simmons*, a two-day trial, the youthful defendant was charged with first-degree murder and burglary in the beating death of an acquaintance; three other teenagers were involved in the case, with one subsequently pleading guilty to second-degree murder, one to burglary, and one never charged in the case. Simmons was found guilty of both charges, and his sentence included life imprisonment with a minimum of 25 years.

In *Florida v. C. Harris & P. Harris*, a five-day trial, one brother charged with the stabbing death of an acquaintance was granted a directed verdict of acquittal midtrial, while the second brother charged with the death was acquitted by the jury after two hours of deliberation. In *Florida v. Spikes*, a two-day trial, the defendant was convicted of first-degree murder (life imprisonment) and first-degree arson (30 years) in the death of his 77-year-old grandfather, who died two weeks after receiving severe burns when his house burned. And in *Florida v. Stanley*, a four-day trial, the defendant was convicted of second-degree murder after the shooting death of a co-worker and was sentenced to 15 years.

Analysis

Based on the information gathered from the interviews, the participant observation, and the content analysis, all four questions were analyzed. There were a total of 19 television stories on the four trials (average length: 1:20), 122 radio stories (average length: roughly :40), and 21 stories in the local daily newspaper. Television news reports included video footage taken in the courtroom at all four trials, although none of the pieces included courtroom audio. None of the radio reports included audio footage taken in the courtroom. Newspaper reports included photographs taken in the courtroom at all four trials. Broadcasters presented reports which included "sound bites," interviews made in the courtroom corridors, of all four trials: the reports generally balanced prosecution and defense, although one of the prosecutors in *Simmons* and the defense counsel in *Spikes* both refused to speak to broadcasters until after the verdicts.

Regarding the first question, which asked how closely broadcast journalists follow state guidelines for behavior in courtrooms during criminal trials, the evidence suggests the broadcast journalists follow the guidelines very closely. In fact, the only exceptions to following the guidelines were when, twice, the newspaper photographer failed to use equipment which prevents "distracting sound" and when, once, one TV station's news personnel—with express permission of

TV cameras in the state courts: current status (February 20, 1991)

Compiled by The Information Service of the National Center for State Courts

All states that permit television, radio, and photographic coverage of courtroom proceedings, whether on a permanent or an experimental basis, have adopted rules or guidelines governing such coverage. The consent of the presiding judge is required in almost all states, and the judge has discretion to control the coverage during the proceedings. Many states require advance written application for permission.

Coverage is prohibited in nearly all states with respect to cases involving juveniles, and most states prohibit coverage of victims of sex crimes, domestic relations cases, and trials involving trade secrets. Voir dire coverage is generally prohibited. Coverage of jurors is either prohibited or is restricted to prevent visual identification of jurors. Some states prohibit coverage of witnesses who appear under subpoena, and many states deny coverage of victims or witnesses who object. All states ban coverage of conferences in court.

The guidelines generally include provisions with regard to media equipment, lights, number of media personnel, types of cameras, position of equipment operators, and movement in the courtroom.

States with permanent rules

	Effective date: Experimental	Effective date: Permanent	Level	Court division
Alaska	5/21/79	1/15/80	Trial & appellate	Civil & criminal
Alabama*	[illegible]	2/1/79	Trial & appellate	Civil & criminal
Arizona	[illegible]	7/1/83	Trial & appellate	Civil & criminal
Arkansas*	7/1/81	5/5/82	Trial & appellate	Civil & criminal
California*	2/1/81	7/1/84	Trial & appellate	Civil & criminal
Colorado*	[illegible]	2/21/82	Trial & appellate	Civil & criminal
Connecticut	1982	10/1/84	Trial & appellate	Civil & criminal
Florida*	7/5/77	8/1/79	Trial & appellate	Civil & criminal
Georgia	[illegible]	5/12/77	Trial & appellate	Civil & criminal
Hawaii	1/1/84	10/1/87	Trial & appellate	Civil & criminal
Idaho*	10/4/78	5/27/79	Supreme court in Boise	
Idaho	10/9/78	10/1/80	Supreme court on circuit	
Illinois	1/1/84	1/22/85	Appellate	
Iowa	1/1/80	7/1/82	Trial & appellate	Civil & criminal
Kansas	4/14/81	9/1/88	Trial & appellate	
Kentucky		7/1/81	Trial & appellate	Civil & criminal
Louisiana***	7/13/78	3/30/85	Appellate	
Maine	4/2/84	3/13/84	Supreme court	
Maryland	4/1/81	7/1/82	Appellate	
Maryland*	1/1/81	7/1/84	Trial	Civil & criminal
Massachusetts	4/1/80	1/1/83	Appellate	
Massachusetts	6/1/80	7/1/83	Trial	Civil & criminal
Michigan	2/1/88	1/13/89	Trial & appellate	Civil & criminal
Minnesota*	1/27/78	4/20/83	Appellate	
Montana	4/1/79	4/16/80	Trial & appellate	Civil & criminal
Nebraska	10/1/82	10/1/83	Supreme court	
Nevada	4/1/80	4/20/84	Trial & appellate	Civil & criminal
New Hampshire		1/1/78	Trial & appellate	Civil & criminal
New Jersey	6/1/79	10/8/80	Appellate	
New Jersey	6/1/79	6/9/81	Trial	Civil & criminal
New Mexico	7/1/80	4/1/83	Dist. & appellate	Civil & criminal
New York[1]		1/1/81	Appellate	
North Carolina	10/16/82	7/25/90	Trial & appellate	Civil & criminal
North Dakota*	2/1/79	7/1/80	Supreme court	
Ohio***	6/1/79	7/1/82	Trial & appellate	Civil & criminal
Oklahoma***	1/1/79	9/22/82	Trial & appellate	Civil & criminal*
Texas**		1/1/90	Trial	Civil only
Tennessee***		2/27/79	Trial & appellate	Civil & criminal*
Vermont	7/1/84	8/1/88	Supreme court	
Washington***		9/20/76	Trial & appellate	Civil & criminal
West Virginia	1/1/79	5/28/81	Trial & appellate	Civil & criminal
Wisconsin	4/1/78	7/1/79	Trial & appellate	Civil & criminal
Wyoming	6/14/81	9/3/82	Supreme court	

* Consent of accused required in criminal trials.
** Consent of parties and witnesses required.
*** No coverage of individuals who object.
**** Subject to approval of the individual court.
1. See experimental basis table, also.

States with experimental rules

	Effective date	Period	Level	Division
Delaware	6/1/89	Extended indefinitely	Supreme court	Civil & criminal
Idaho[1]	1/4/82	Extended indefinitely	Court of appeals	Civil & criminal
Maine	7/1/91	Two years	Trial	Civil & criminal
Minnesota***	4/16/83	Unofficially extended	Trial	Civil & criminal
New Jersey[1]	1/3/84	Indefinite	Municipal courts	Civil & criminal
New York	12/1/87	Extended to 5/31/91	Trial courts	Civil & criminal
Oregon	6/1/83	Indefinite	Appellate	Civil & criminal
Pennsylvania**	10/1/79	Extended indefinitely	Trial, non-jury	Civil, superior court
Rhode Island	10/1/81	Extended indefinitely	Trial & appellate	Civil & criminal
Utah[2]	1/1/88	Completed, awaiting decision	Supreme court	Civil & criminal
Vermont	1/2/89	Two years	Trial courts	Civil & criminal
Virginia	7/1/87	Extended to 8/30/91	Trial & appellate	Civil & criminal

1. See states with permanent rules, also.
2. Still photography only in trial courts.
* Consent of accused required in criminal trials.
** Consent of parties and witness required.
*** No coverage of individuals who object.

Summary of state rules

States with permanent rules*	
Approved for trial and appellate courts	28
Approved for trial courts only	1
Approved for appellate courts only	10
States with experimental rules*	
Approved for trial and appellate courts	2
Approved for trial courts only	6
Approved for appellate courts only	1
Total states allowing cameras in courtroom	45
States where cameras not permitted and no rules pending	5
States considering implementing rules*	0

*Note: Some states fall into more than one category.

States without TV in the courts

States considering	States not permitting TV in the courts
None	Indiana
	Missouri
	Mississippi
	South Carolina
	South Dakota

dge, who later said he regretted used artifical lighting for two days. the case of the newspaper photographer, on the second of the two occasions he disobeyed the guidelines, he had been told his new camera would not require the use of a "blimp" in the courtroom, although it became obvious at the time he must have been the recipient of a slick sales talk. The judge who had ejected the noisy newspaper photographer at the *Simmons* trial was generally supportive of cameras in court, but said he had to stop the photographer because he was distracting: "You assume they are, as professionals, aware of the requirement; it should not be distracting or annoying." The (different) judge who regretted granting the exception to the artifical-lighting ban, and whose only criticism of the guidelines was they might be too restrictive, still maintained that judges must remain flexible in working with the media: "I have never had any breach of faith by the press so far."

The second question regarded the degree of impact the guidelines have: the evidence here suggests the guidelines have a noticeable impact. For instance, in one trial, when one of the television station's cameras did not produce a broadcast quality picture due to the guideline's restriction on artificial light-, the result was the station had no video to show on the news story that night but merely presented a brief "tell" story (voice of the newscaster with graphics in the background). Also, the restriction on microphone placement—the local guidelines limit broadcasters to one microphone placed behind the bar—contributed to the failure of any of he broadcast stations during the observation period to use any "actuality," *i.e.*, ound taped inside the courtroom itself.

The third question asked whether oadcast journalists following the guidelines present undistorted coverage of iminal trial proceedings. The evidence e suggests the broadcasters generally present undistorted coverage, defin- *undistorted coverage* as "a high de- of correspondence between events— erceived by the researcher, described rint journalists and evaluated by trial cipants—with the work product of broadcast journalists covering the criminal trial." For instance, the in *Simmons*, who had seen newspaper and one television station's coverage of the trial, said he was impressed with the accuracy of the coverage.

Table 1 Juror response

	Simmons	Harris	Spikes	Stanley	Totals
General feeling courtroom cameras:					
Bad idea, interferes with judicial process	1	0	0	0	1
Some advantages, some drawbacks	1	5	2	3	11
Good idea, helps public understand process	4	2	0	3	9
During trial: how aware of cameras?					
Hardly noticed reporters or equipment	0	2	0	6	8
Sometimes distracted by presence	4	5	2	0	11
Very aware, wish they weren't there	2	0	0	0	2
After trial:					
Read newspaper coverage? Yes:	6	7	2	6	21
Hear about radio/TV coverage? Yes:	1	1	1	2	5
How accurate do you feel coverage was?					
Poor, noticed serious differences	1	1	0	0.5	2.5
Fairly accurate, minor inaccuracies	4	5	1	2	12
Good, noticed no inaccuracies	1	1	1	3.5	6.5
Respondents	6/12	7/12	2/6	6/12	21/42
Total respondents	.50	.58	.33	.50	.50
Percentage respondents					
Total percentage respondents					

There were a few exceptions. For instance, in *Simmons*, a defense attorney questioned a television reporter's interpretation of testimony regarding an admittedly ambiguous factor (which weapon had been the actual death weapon; the researcher's notes agreed with the facts as presented by the reporter). However, this attorney also described some attorneys: "The first thing they do is look for inaccuracies. They can be minor, but the lawyers will make a big deal of it."

A complaint was voiced by several attorneys and one judge that the brevity of coverage, seen as more a problem of broadcasters, particularly radio, than of print journalists, may lead to a "distortion" in the mind of the audience member who may not fully understand the ramifications of specific events. The judge who complained of broadcast brevity presided over the Harris trial, where he allowed an exception to the lighting ban for two days of the trial, although he did not watch television coverage of *Harris*. He found the newspaper coverage "pretty accurate" and said the radio stories he heard were accurate but "so brief as to possibly be misleading." However, none of the criticism by the presiding judges or the attorneys involved in the cases studied was directly related to the issue of courtroom cameras.

Finally, the last question asked whether broadcast journalists following the guidelines observably disrupt the judicial process at the trial court level. The evidence suggests the broadcasters did not. The attorneys complained during one trial that the newspaper's advance story contributed to a prolonged *voir dire*. However, despite specific questioning on this crucial issue—due to traditional objections to courtroom cameras as well as to apprehensions expressed by some of the court personnel in the preliminary survey—none of the trial participants mentioned any specific instance of disruption caused by cameras, nor did the researcher's observations or the content analyses suggest any such disruption.

The results of the juror polls, shown in Table 1 (50 per cent response rate), appeared to uphold the results of the interviews as well as the researcher's observations and the content analysis. First, regarding the Simmons trial, the only negative comments mentioned the noisiness of the newspaper camera without a "blimp" as well as a nonspecific suggestion from one juror, who had read newspaper coverage after the trial but had not heard or seen any broadcast coverage, that the reports included serious differences from his perception of the proceedings. Positive comments included the suggestion the coverage was very accurate.

Regarding *Harris*, a lengthy negative comment criticized the journalists (mistakenly) assumed to be responsible for causing a distraction by frequently entering and leaving the courtroom; the same juror noted the distraction caused by the (judge-approved) use of artificial lighting the first and second days of the trial. Positive comments included the suggestion that a first-time juror was helped by television coverage she had seen in the past.

Regarding *Spikes*, the only negative comment described the camera's causing uneasiness on the part of one juror who was also distracted by the defendant's apparent annoyance at the newspaper photographer. Likewise, only one comment was offered regarding *Stanley*: the juror suggested public television should cover trials in order to avoid possible commercial sensationalism.

As far as the multiple-choice questions, describing general feeling toward courtroom cameras, awareness of courtroom cameras during the trial participated in, and accuracy of coverage of that trial, an average of 35 per cent of the respondents selected answers most favorable to the press, 58 per cent selected answers neutral toward the press, and 7 per cent selected answers unfavorable to the press. (See Table 2).

Conclusions/recommendations

The purpose of this study was to take a first step in observation of the actual behavior of broadcast journalists in a courtroom. Based on the data gathered, the Florida guidelines, which might serve as a model for other states as well as for possible coverage of federal courts, seem to be appropriate and should continue to be strictly adhered to.

The only major area of concern regarded the poor audio quality available to the broadcaster limited to a single microphone in a traditional courtroom. Due to this restriction, rather than "actuality," the broadcasters often interviewed attorneys in courtroom corridors during recesses; thus, instead of the observations of a trained impartial observer, the observations of a source trained to take an advocate's position were presented to the public. In the interest of improved coverage, and to safeguard against potential distortion, media representatives might work with courtroom personnel to wire permanently at least one courtroom in any given jurisdiction to accommodate electronic equipment, as has been done with great success in other jurisdictions such as Miami-Dade County.[17]

Broadcasters should make every effort to increase the length of coverage of courtroom stories.

Data collected directly regarding the issue of undistorted coverage lead to the conclusion that rather than fact errors, the major cause of perceived distortion was due to a general feeling, particularly among some members of the bar, that journalists misinterpret some of what they see, although this perception was generally unsupported during the study.

Other court officers expressed concern with the brevity of most broadcast coverage and the inability of the representative broadcast journalist to spend a sufficient amount of time in the courtroom to fully comprehend the proceedings: this appeared a bona fide criticism. For instance, as mentioned above, of 19 television stories in the case study, the average length of the actual presentation on the news was roughly 1:20; of 122 radio stories, the average length of the presentation on the news was approximately :40. None of the broadcast reporters remained in the courtroom throughout an entire trial.

Thus, this researcher recommends that broadcasters recognize the potential dangers of incomplete coverage and make every effort to increase the length of coverage of courtroom stories. Local stations might also attempt more "beat" coverage, allowing reporters either to remain in a courtroom throughout an entire trial or at least to become more familiar with courtroom procedures and able to grasp more quickly the essentials of an individual trial.

The final area of concern was possible disruption to the judicial process caused by courtroom cameras. The data indicate that rather than specific problems arising from the use of cameras, major concerns are those of traditional fair trial/free press, such as the potential for prejudicial publicity concomitant with pretrial coverage.

This observer did note instances where the journalists might have misunderstood the nuances of the proceedings: for instance, reporters routinely left the courtroom when the judge was reading jury instructions, disregarding the possible import of charges which might be included in or excluded from the instructions. Thus, one recommendation of this observer regards the need for journalism schools to institute curriculum revisions regarding teaching methods of courtroom coverage.

The fact remains that the broadcast journalists in the study accurately presented coverage from a layman's viewpoint, unaware of the advocates' various procedural accomplishments in having motions sustained or denied or other such subtleties in the attorneys' handling of the case. It may be this approach which contributes to criticism of journalists by members of the legal profession.

Therefore, along with the recommendation that journalists receive more education about courtroom proceedings, this researcher also suggests that members of the legal community might benefit from more education regarding the work of journalists. Particularly relevant would be discussion of the goal of the journalist to serve as an impartial "gatekeeper," the pressure of constant deadlines, and the tradition of the Fairness Doctrine, which, although currently suspended, was in effect for nearly 40 years and has led some

Table 2 Juror response, percentages

Multiple-choice answers	Simmons	Harris	Spikes	Stanley	Average percentages
Favorable to press	28%	24%	17%	69%	35%
Neutral to press	50	71	83	28	58
Unfavorable to press	22	5	0	3	7

17. *See, e.g.*, Pollock, *Issues in Sensational or Widely Publicized Cases, 11th Jud. Cir. Florida* (1990). Available from Mort Lucoff, Administrative Office of the Courts, Miami.

ers of the public to expect (incor-y) each individual broadcast news port to balance equally opposing viewpoints.

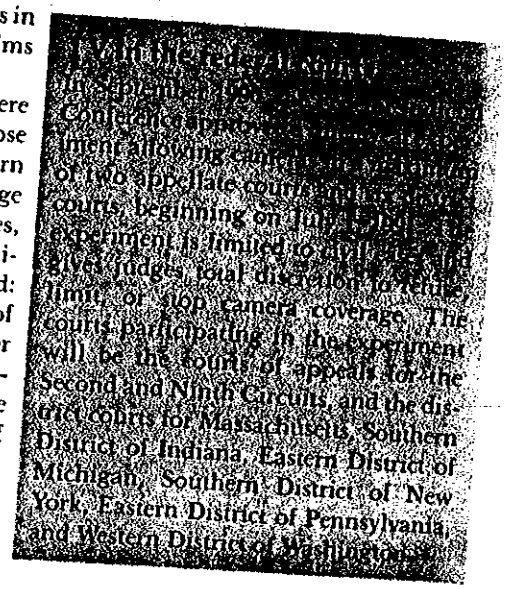
In fall 1989, when William Lozano, an Hispanic Miami policeman, was tried for manslaughter in the shooting deaths of an unarmed black motorcylist and his passenger, community leaders specifically requested a local public television affiliate provide nightly gavel-to-gavel coverage of the trial. The community hoped to avoid outbreaks of racial violence similar to those which had occurred during two earlier trials in cases involving the killings of black civilians by white Miami policemen. The leader of the Miami Community Relations Board, which requested the television coverage of *Lozano*, explained, "A basic philosophy we have is that when people are informed, they are able to assess judicial proceedings and develop a respect for the judicial process."[18]

The instant case study is limited—it includes only a handful of trials in a single jurisdiction—and would have to be replicated in other jurisdictions, for other types of cases, and at other levels in the judicial process, before any claims might be made for its validity.

And many important questions were not addressed by the study, such as those raised in *Estes v. Texas* which concern the possible impact of camera coverage on trial participants other than judges, attorneys, and jurors. Broad philosophical questions might also be discussed: for instance, does camera coverage of criminal trials—when less than 10 per cent of arrests actually end up at trial—add to a misconception on the part of the public regarding the actual process of judicial administration today?

But the empirical study does support the theoretical evidence presented by the handful of earlier experimental studies cited above that the mere presence of cameras does not lead to a disruption of the judicial process. Broadcast journalists who follow state guidelines present coverage which, upon close examination by presiding judges, participating attorneys and jurors, is perceived as undistorted.

Thus, the instant study is one more contribution to the evidence suggesting courtroom cameras may have been merely a scapegoat—unjustly stigmatized as the major cause of the disruptions to the judicial process in the most sensational case of its time more than 50 years ago, the "Lindbergh baby case,"[19] and for merely speculative "mischievous potentialities" to due process described in overturning the *Estes* conviction 25 years ago. In future, as in *Lozano*, courtroom cameras may again be invited to enter the courtroom in order to dramatize the fairness inherent in the unique process of judicial administration under the U.S. Constitution. □



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18. Rabbi Solomon Schiff, quoted by Klein, *Miami Station Airs Trial to Defuse Racial Tensions*, ELECTRONIC MEDIA, December 4, 1989, at 2.

19. N.J. v Hauptmann, 115 N.J.L. 412, 180 A. 809 cert. denied, 296 U.S. 649 (1935). For revisionist interpretation of role of cameras in *Hauptmann*, *see, e.g.*, Kielbowicz, *The story behind the adoption of the ban on courtroom cameras*, 63 JUDICATURE 14 (1979).

EXHIBIT 21

Cameras in the Courtroom: Real Cases, Real Judges, Real Justice?

A proposal for an Honors Project to be submitted for graduation
in December 2006.

To the Honors Department
Indiana University South Bend
In partial fulfillment of the requirements
for an Honors degree
by

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Introduction

We exist in an electronically advanced society that broadcasts nearly every incident of our lives. Beginning in the 1950's, television brought media and entertainment up to a new echelon.[1] This unprecedented level of media saturation has transformed and shaped our lives. In realizing the potential influence of the media on the public, Justice Learned Hand stated, "The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country."[2] Television serves as a medium that can exploit images and manipulate public opinion. In fact, most people today choose to obtain news and other information via television.[3] According to reports, "television is the number one source of news across the nation."[4] Thus, televised information reaches a much higher number of people than any other venue.

Besides news programs, television also attracts many viewers through court reality shows. Even though law-related programs are not new to television, "in the last decade, networks have added the 'reality programming' of real trials to their repertoire...[, and a]s demonstrated by ratings, the most popular reality 'legal' fare is the syndicated television courtroom."[5] Reality television shows like *The People's Court*, *Divorce Court*, and *Judge Judy* all deal with real people involved in civil litigations and provide viewers with "instant

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[1] Gary Hengstler, *Bridging the Great Divide: A Symposium on the State of Legal Journalism: Pressing Engagements: Courting Better Relationships Between Judges and Journalists*, 56 Syracuse Law Rev. 419, 420 (2006).

[2] Id.

[3] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Col. L. Review 1546, 1553 (1985).

[4] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 490 (1985).

[5] Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry*, The American Business Law Association, Inc. American Business Law Journal, 1 (2001).

gratifications of yelling and winning."[6] These cases, however, typically deal with trivial issues that primarily consist of "unpaid debts."[7] Despite the marginality of these cases, the show requires the approval of both parties in order to televise the trial; and many people obviously consent. The litigants on these shows reveal a great deal of information about their personal lives, thus making the cases entertaining for viewers. Additionally, one critic argues, "In the main, courts adjudicate highly personal disputes involving intimate details amassed from the personal lives of people and comprising nothing of interest to the general public beyond that of prurient voyeurism."[8] Viewers find the judges' lectures and the litigants' embarrassment entertaining as well as informational.[9] Both of these qualities contribute to the high ratings of reality court television shows[10] and the incentive to televise more serious cases.

Witnessing other people's quandaries, as portrayed on court television, appeals to the public's appetite for sensationalism.[11] For example, "[i]n Florida, trials of varying degrees of seriousness including murder, are regularly televised and are considered to be more entertaining than most fictional courtroom dramas. All this is done in the interest of 'public education.'"[12] However, these depictions titillate the audience more than they inform.[13] Obviously, the

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[6] Alexander Wohl, *And the Verdict Is...*, 11 The American Prospect 1, 2 (2000).

[7] Id.

[8] Christo Lassiter, *TV or Not TV. That Is the Question*, 86 The Journal of Criminal Law and Criminology 928, 934-35 (1996).

[9] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1408 (1981).

[10] Chris Pursell, *Court Strips Gain Viewers*, 21Electronic Media 1, 1 (2002).

[11] Subject matter that is manipulated to excite and please obscene tastes.

[12] Neil Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*, Viking Penguin Inc. 94, 94 (1985).

[13] Charles E. Ares, *Chandler v. Florida: Television, Criminal Trials, and Due Process*, 1981 The Supreme Court Review 157, 163 (1981).

boundary of what people consider entertainment is tastelessly transforming. According to one critic, "[t]he problem is not that television presents us with entertaining subject matter but that all subject matter is presented as entertaining..."[14] Even serious crimes that involve murders and rapes are sensationalized to captivate audiences.

The public's insatiable appetite for sensationalism, as depicted by the media, encourages more camera coverage of live trials. From the sensationalism of trials arises a gripping debate regarding the constitutionality of cameras in the courtrooms. Justice Felix Frankfurter, recognizing the complex relationship between the media and the courts, stated, "Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication."[15] Now, with the advent of television, this task becomes even more complicated because television is more intrusive than the press. The televising of trials creates tension between the First Amendment[16] rights of the media to report on the justice system and the Sixth Amendment[17] right to a fair trial by an impartial jury. Proponents of

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[14] Neil Postman, Amusing Ourselves to Death: Public Discourse in the Age of Show Business, Viking Penguin Inc, 87 (1985).

[15] Id. at 546. (Opinion denying certiorari in *Baltimore Radio Show v. Maryland*, 193 Md. 300, 67 A. 2d 497 (1949), 338 U.S. 912 (1950).

[16] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
United States Constitution, Amendment I.
http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti

[17] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." United States Constitution, Amendment VI.
http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti

cameras in the courtroom argue that the broadcasting of trials offers the public an array of benefits.[18] These include affording citizens who can not attend trials owing to courts' limited seating capacity the opportunity to witness trial proceedings,[19] heightening the public's knowledge and understanding of our justice system[20] as well as societal issues,[21] and assisting as an additional check on the judicial branch.[22] On the other hand, opponents of cameras in the courtroom contend: that freedom of the press to attend a public trial does not sanction bringing cameras into our courtrooms;[23] that editing and distorting information in trial proceedings misinforms the public;[24] and that the press can retain an oversight of the judiciary without the use of cameras.[25] Moreover, opponents stress that cameras are a nonessential element that negatively impacts the trial participants and the proceedings as a whole.[26]

Notwithstanding both arguments, televising court proceedings at the trial level has the potential to affect adversely the conduct of judges, attorneys, jurors, and witnesses, thereby

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[18] Gilbert Geis and Robert E. L. Talley, *Cameras in the Courtroom*, 47 The Journal of Criminal Law, Criminology, and Police Science 546, 552 (1957).

[19] The Third Branch, *Judicial Conference Opposes Bill to Bring Cameras Into Courts*, Newsletter of the Federal Courts, 2 (2005). http://www.uscourts.gov/ttb/sept00ttb/cameras.html

[20] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1408 (1981).

[21] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 492 (1985).

[22] Id. at 492.

[23] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Col. L. Review 1546, 1560 (1985).

[24] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 503 (1985).

[25] Id. at 492.

[26] Gilbert Geis and Robert E. L. Talley, *Cameras in the Courtroom*, 47 The Journal of Criminal Law, Criminology, and Police Science 546, 553 (1957).

endangering a defendant's right to a fair and impartial trial as guaranteed by the U.S. Constitution. A court's primary concern must therefore center on protecting a defendant's right to due process rather than informing or educating the public. At the same time, cameras can have a place in the courtroom provided that the circulation of trial videotapes transpires no sooner than two years after rendering a verdict to allow time for the heightened media to dissipate; that cameras never film juries; and that both parties consent to the camera coverage. Such conditions would satisfy the desire for more transparency in our justice system, while providing some safeguards against the sensationalistic tactics that the media often employs to draw attention and entertain an audience.

1st Amendment and Protective Orders

Journalists, even those who employ sensationalistic tactics, receive protection under the First Amendment. This Amendment provides that "Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[27] Besides laying down a privilege for the press, the broad language in the First Amendment allows for expansive interpretation and therefore much latitude in favor of the mass media. In response, judges attempt to compensate for prejudicial publicity and to protect a defendant's right to a fair trial by issuing protective orders.[28] Such orders include voir dire (examining or questioning prospective jurors to determine their suitability), continuance (postponing procedures until a later date), sequestering of juries (isolating jurors from outside contact), change of venue (transferring a trial to a different

[27] U.S. CONST.amend. I.

[28] Gary Hengstler, *Bridging the Great Divide: A Symposium on the State of Legal Journalism: Pressing Engagements: Courting Better Relationships Between Judges and Journalists*, 56 Syracuse Law Rev. 419, 430 (2006).

location), and gag orders (a court order prohibiting reporting). Judges issue protective orders to prevent media saturation on juries and unfair trials.[29] These remedies, however, are problematic. For instance, courts cannot suppress the media from reporting information that it legally obtains. For example, the *Nebraska Press Association v. Stuart* case involved a man accused of multiple murders in a small town that attracted extensive media interest.[30] To protect the accused's right to a fair trial, the judge issued a pretrial order restricting the press from reporting certain materials that would prejudice a prospective jury.[31] The U.S. Supreme Court ruled that the gag order violated the press's First Amendment rights because of its speculative nature and because it had failed to consider alternative measures to ensure fairness.[32] This decision prohibited a judge from issuing a pretrial gag order to prevent a biased jury. The case established the constitutional difficulties behind gag orders, especially ones aimed at the media. At the same time, it also established that the courts cannot prohibit the media from publicizing legally obtained records.

Like *Nebraska Press,* Martha Stewart's case[33] depicts a judge's failed attempt to utilize a protective order. Stewart was accused of "conspiracy, obstruction, lying to investigators and securities fraud in connection with the sale of her stock in ImClone, a biotech company, and public comments she made regarding the federal investigation into that sale."[34] In this case, the U.S. district judge closed the jury selection process, but the U.S. Second Court of Appeals dismissed this order, asserting that "openness acts to protect, rather than to threaten, the right to a

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[29] Id.

[30] 427 U.S. 539 (1976).

[31] Id.

[32] *Nebraska Press Association v. Stuart,* 423 U.S. 1319 (1975).

[33] 433 F.3d 273.

[34] Rochelle Steinhaus, *Jury to Decide Whether Martha Stewart Defrauded Shareholders in Her Company,* Court TV. http://www.courttv.com/trials/stewart/background.html

fair trial."[35] The media's argument of keeping courts open to public scrutiny prevailed. This case supports the notion that such protective measures taken by judges unjustifiably hinder a reporter's access to information and that media reports are essential to our democracy. Proponents of cameras in courts also argue that such orders are detrimental because these orders create "rumors and speculations instead of factual information [since] the people with the facts aren't allowed to talk."[36] Therefore, closing a trial and precluding pertinent facts from reaching the public can lead them to believe or conjure up half-truths and draw erroneous conclusions.[37]

Media Distortions and Editing

Regardless of access, however, the public can still draw inappropriate conclusions. According to Senator Charles Grassley, cameras in the courtroom would solve the problem of limited seating, thus providing access to anyone wanting to attend.[38] However, because the media habitually distorts actual trial proceedings through editing, Justice Antonin Scalia remarked that "[f]or every one person who sees it... gavel to gavel so that they can really understand what the court is about...[,] 10,000 will see 15-second takeouts on network news which I guarantee you will be uncharacteristic of what the court does."[39] Most viewers will see only clips of a trial, which is not sufficient to draw proper conclusions. They usually see unrepresentative snippets and "[i]t was precisely this fear that led the U.S. Judicial Conference to

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[35] Gary Hengstler, *Bridging the Great Divide: A Symposium on the State of Legal Journalism: Pressing Engagements: Courting Better Relationships Between Judges and Journalists*, 56 Syracuse Law Rev. 419, 431 (2006).

[36] Id. at 8.

[37] Id. at 8.

[38] The Third Branch, *Judicial Conference Opposes Bill to Bring Cameras Into Courts*, Newsletter of the Federal Courts, 2 (2005). http://www.uscourts.gov/ttb/sept00ttb/cameras.html

[39] Amanda Buck, *Not Ready for Prime Time*, 30 News Media & the Law 20, 21 (2006). (Justice Scalia's comment to the National Archives, as reported by NBC in April 2005).

end the three-year experiment of cameras in six federal state courts."[40] Moreover, broadcasting all trials in their entirety will probably not attract many viewers.[41] Snippets and sensationalization of information in trials may attract viewers[42] but these representations hardly educate viewers.

Misrepresentation of facts in a case challenges another argument the media proposes: that televising trials educates the public. One study reports that, on average, the typical American watches over six hours of television a day whereas only 23 percent choose to purchase morning newspapers.[43] Generally, most Americans receive greater access to news and other information through television than newspapers. The study supports the notion that public knowledge could increase with the broadcasting of trials. Conversely, another survey that asked Americans general justice-related questions discovered that "37 percent of those surveyed believed that a person accused of a crime is guilty until proven innocent; 72 percent thought that the Supreme Court can review and reverse any state court decision; and 30 percent believed that a district attorney's job is to defend an accused criminal who cannot afford a lawyer."[44] These answers show that the public needs educating about the workings of our legal system. Additionally, further research "has found that the public knows little about crime or the criminal justice system including crime-related statistics such as crime rates, recidivism rates, and average sentences.

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[40] Paul Mason, *Court on Camera: Electronic Broadcast Coverage of the Legal Proceedings,* USFCA, 3 "n.d." http://www.usfca.edu/pj/camera-mason.htm.

[41] Richard P. Matsch, *Television in the Courtroom: Mightier than the Pen?* 97 Mich. L. Review 2037, 2039 (1999). [Richard Matsch is a Chief Judge for the United States District Court for the District of Colorado].

[42] Richard P. Matsch, *Television in the Courtroom: Mightier than the Pen?* 97 Mich. L. Review 2037, 2039 (1999).

[43] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1408 (1981).

[44] Id.

Members of the public have little familiarity with specific laws or with their legal rights."[45] Despite the increasing role of television in our daily lives, these statistics reveal a widespread false perception regarding the function of our justice system, which will likely not recover with continued editing or other media distortions.

Opponents further argue that blatant distortions such as "abbreviated and one-sided presentation[s]"[46] of the judicial system compromise any educational purpose. In its Judicial Conference Report, the Ad Hoc Committee on Cameras in the Courtroom affirmed that "media coverage of state court proceedings has not resulted in increased public understanding of the courts."[47] Because the general public may not adequately distinguish between false realities or the "spins" that the media chooses to project, even if the broadcasting of trial proceedings reaches a larger number of the public, this will not necessarily contribute to the public's education or overall benefit. Furthermore, because selected cases commonly involve high-profile or unusual cases, they portray a less-than-typical case. For instance, O.J. Simpson's dream-team defense became acquainted "in the technical literature, visited laboratory sites, interviewed (and sometimes collaborated with) informants, and analyzed documentary records such as protocols, photographs, autoradiographs and videotapes."[48] O.J. Simpson's funds allowed him to retain eminent attorneys as well as to hire expert witnesses, whom most ordinary defendants never have the opportunity to employ owing to a lack of funds. In addition, nearly

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[45] Julian Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 Crime and Justice 99, 99 (1992).

[46] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 491 (1985).

[47] Id.

[48] Michael Lynch, *Social Studies of Science*, 28 Special Issue on Contested Identities: Science, Law and Forensic Practice 829, 830 (1998).
http://links.jstor.org/sici?sici=03063127%28199810%2F12%2928%3A5%2F6%3C829%3ATDPOUT%3E2.0.CO%3B2-H

"80 percent of criminal defendants require court-appointed counsel because they are indigent... [and deficient funding leads to] , insufficient legal and support staff... [that] can affect the quality of services."[49] A large percentage of defendants obviously cannot afford prestigious representation that will provide a similar defense to that of Simpson's "dream-team." Nevertheless, atypical cases receiving the most attention can create an erroneous impression of courts and society at large that may cause people to misguidedly form impressions based on the cases they view on television.

The O.J. Simpson Spectacle

Broadcasters choose to publicize trials that will allow them to fuse news and entertainment to indulge audience demand, even though the cases they choose do not represent typical criminal defendants or trials. The public's voyeuristic desire to witness other people's perils combined with the high ratings of Court TV's RED (Real. Exciting. Dramatic.) shows[50] has propelled a slew of camera coverage in our courtrooms. Dirk C. Gibson, an associate professor of Communications and Journalism, maintains that "cases involving celebrities or their significant others, and/or especially gruesome cases, will attract considerable attention."[51] High-profile cases turn into more significant stories than other broadcasts or government dealings primarily because these cases attract a diverse audience.[52] The 1995 O.J. Simpson trial, involving a black sports legend who had allegedly murdered two white people, generated high

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[49] Marian Williams, *Comparison of Sentencing Outcomes for Defendants With Public Defenders Versus Retained Counsel in a Florida Circuit Court,* Justice System Journal 1, 1 (2002). http://findarticles.com/p/articles/mi_qa4043/is_200201/ai_n9057629

[50] Jon Lafayette, *Court TV Locks Up Prime Demo,* 25 Television Week 1, 1-2 (2006).

[51] Dirk Gibson, *Litigation Pubic Relations: Fundamental Assumptions,* Public Relations Quarterly, 19 (Spring 1998).

[52] Charles S. Clark, *Courts and the Media,* 4 CQ RESEARCHER ONLINE 817 (1994). http://library.cqpress.com/cqresearcher/cqresrre1994092300

ratings accompanied by controversial issues concerning race, class, gender, sex, violence, and celebrities.[53] These issues polarized the nation and led to questions concerning the reliability of our legal and judicial institutions. Indeed, the live white Bronco pursuit captivated audiences across the nation while "main networks televised key segments and had daily summaries and frequent news specials... dominat[ing] the evening news programming and talk programs."[54] The case generated such interest owing to its inclusion of an array of controversial issues, particularly race, surpassing all other issues of importance at the time. For instance, according to the *Tyndall Report*, "the nightly news programs on ABC, CBS, and NBC devoted 1,392 minutes to covering the Simpson trial... [, coverage that] exceeded the combined attention to the war in Bosnia and the Oklahoma bombings."[55] The ability to attract and maintain such a vast audience signifies the capacity and influence of broadcast media on its audiences and trial participants.

The increasing popularity of reality court shows reveals that television has become an aperture to our world, shaping our perceptions and beliefs. For example, some Simpson trial spectators immersed themselves into the trial on a cruise ship dedicated to the O.J. "ordeal."[56] Additionally, one juror actually posed for *Playboy* magazine.[57] Even prosecutor Marcia Clark altered her appearance for the cameras. At the same time, Judge Lance Ito delayed the trial to converse with the celebrities who attended.[58] Judge Ito obviously took pleasure in the media attention and explicitly supported the presence of cameras in the courtroom claiming:

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[53] Marjorie Cohn and David Dow, Cameras in the Courtroom, 57 (2002).

[54] Douglas Kellner, *Media Spectacle*, Routledge, 97 (2003).

[55] Id. at 100.

[56] Id.

[57] Id.

[58] Id. at 105.

> The problem with not having a camera is that one must trust the evaluation and analysis of a reporter who is telling you what occurred in the courtroom, and anytime you allow somebody to report an event, you have to take into consideration the filtering effect of that person's own biases. Whereas if you have a camera in the courtroom, there is no filtering. What you see is what's there.[59]

However, broadcasters habitually edit and depict snippets.[60] Moreover, commentators are free to interpret the scenes and arguments from their perspective and to depict only certain scenes. The Simpson case exemplifies the media frenzy that enthralled trial participants, as much as audiences, while turning trial participants like Kato Kaelin into instant celebrities. Cameras in the courtroom and media prejudice undoubtedly affected the actions of trial participants as well as caused the public to question the entire justice system.

The Simpson spectacle essentially transformed the news into an entertainment reality show. Reporters merely described minute-by-minute scenes rather than investigating and reporting the facts of the case.[61] According to Douglas Kellner, author of *Media Spectacle*, "[t]he media circus and lack of investigative reporting by the mainstream perhaps signifies the end of an era of investigative journalism and its replacement by journalism that is dependent more on pictures and leaks than in-depth 'behind the scenes' inquiry."[62] Replacing investigative reporting with entertainment harms the public who watches to obtain information. If the public wants to follow the case for educational purposes, as a way to learn the workings of our legal

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[59] Id. at 105.

[60] Richard P. Matsch, *Television in the Courtroom: Mightier than the Pen?* 97 Mich. L. Review 2037, 2039 (1999).

[61] Douglas Kellner, *Media Spectacle,* Routledge, 101 (2003).

[62] Id. at 101.

system, it would receive incomplete information and coverage from media sectors that focuses on entertainment rather than journalism or the truth.[63] In response to the Simpson trial, "[n]ews media lawyers, jurists, and other experts, some of who favored cameras before, were cited as blaming cameras for turning 'the search for justice into a spectator sport,' for intimidating some and emboldening other participants, and for the interminable length of the trial."[64] The problems that camera coverage presents begin with pretrial coverage, continue with coverage during a trial, and persist in the aftermath of a trial.

6th Amendment and Access

By presenting atypical cases that captivate people, the media's presentations extend beyond mere reporting. These extensions, according to the late Justice Potter Stewart, "create a fourth institution outside Government to serve as an additional check on the three official branches."[65] Several supporters of cameras in the courtroom contend that public trust toward our judicial process requires transparency. Indeed, the Court has recognized that "a right to gather news, of some dimensions, must exist."[66] The press, however, can provide such oversight on the judicial process without the use of cameras. According to Marjorie Cohn and David Dow, authors of *Cameras in the Courtroom: Television and the Pursuit of Justice*, the First Amendment guarantee to public access "may be curbed only where there is a compelling interest

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[63] Charles E. Ares, *Chandler v. Florida: Television, Criminal Trials, and Due Process*, 1981 The Supreme Court Review 157, 163 (1981).

[64] George Gerbner, *Cameras on Trial: The O.J. Show Turns the Tide*, 39 Journal of Broadcasting and Electronic Media 562, 564 (1995).

[65] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 492 (1985).

[66] *Branzburg v. Hayes*, 408 U.S. 665 (1972).

at stake. When a fair trial is jeopardized, that is a compelling state interest."[67] The primary responsibility of courts is to ensure every citizen of a fair trial and "[t]he Judicial Conference believes that the use of cameras in the courtroom could seriously jeopardize that right."[68] Thus, if cameras negatively impact the role of any trial participant or proceedings, then the media's role has extended beyond reporting by compromising a defendant's right to a fair trial.

Cameras in the courtroom do reach beyond merely reporting trial proceedings; they actually affect the trial proceedings. Proper court procedures require affording the accused his or her fundamental right to a fair and impartial trial, and "[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process."[69] The right to a public trial, which "rests within the heritage of English common law,"[70] arose to protect an accused from secret trial proceedings and to discourage misconduct. Specifically, the Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, *the accused shall enjoy the right to a speedy and public trial*, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

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[67] Marjorie Cohn and David Dow, Cameras in the Courtroom, 38 (2002).

[68] U.S.Courts. *Judicial Conference Opposes Bill to Bring Cameras Into Courts*, "n.d." http://www.uscourts.gov/ttb/sept00ttb/cameras.html

[69] Daniel H. Erskine, *An Analysis of the Legality of Television Cameras Broadcasting Juror Deliberations in a Criminal Case,* 39 Akron L. Rev. 701, 709 (2006).

[70] Id. at 3.

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[71] [Emphasis added]

Clearly, the language above indicates that the right to a public trial belongs to the accused. In this way, a right to a public trial remains conditional[72] and, more importantly safeguards the accused as the Court recognized in *Gannett Co. v. DePasquale.*[73] In *Gannett,* the defendant, who faced criminal charges for murder and robbery, requested a closed hearing.[74] The judge granted the closure order, and the U.S. Supreme Court upheld the decision affirming that "[t]he right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered."[75] This guarantee afforded to the defendant protects his or her rights to a fair trial rather than ensuring a pubic right to view televised trials. Unlike in *Nebraska Press Association v. Stuart*, the Court in *Gannett*[76] held that sometimes closing pretrial hearings does not violate any constitutional amendments.

Even though courts typically hold civil and criminal trials open to the public and the press, that right has constraints. Even though earlier cases showed that protective orders have not always been upheld, other cases represent holdings that can restrict access. For example, the Court in *Globe Newspapers Co. v. Superior Court* held that "[t]he right of access to criminal trials is not absolute, but the circumstances under which the press and public can be barred are

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[71] U.S. CONST.amend. VI.

[72] *Estes v. Texas*, 381 U.S. 532 (1965).
"Headnote: [6] While maximum freedom must be allowed the press in carrying out its important function in a democratic society of informing the public, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process."

[73] 443 U.S. 368 (1979).

[74] Id.

[75] Id.

[76] *Gannett Co. v. DePasquale,* 443 U.S. 368, 388 n.19 (1979).

limited. The State must show that denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest."[77] In determining to limit access under such restricted conditions, a judge must base his or her decision on a case-by-case basis to ensure fairness. One example of such discretion appears in *Richmond Newspapers, Inc. v. Virginia (1980),* in which the Court held that "[j]ust as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public."[78] Courts have typically ruled against blanket exclusions or complete trial closures for every case, thus allowing the presiding judge to determine whether or not, and to what extent, to limit access.

Nonuniform guidelines, however, leave the tension between First and Sixth Amendments unresolved.[79] Still, even in deciding on a case-by-case basis, protecting a defendant's right to a fair trial must take priority during trial proceedings.[80] Recognizing this factor, Judge George Bundy Smith affirmed that, "[t]he primary governmental interest, both State and Federal, is guaranteeing that the defendant receives a fair trial... The governmental interests of a defendant to have a fair trial and for the trial court to maintain the integrity of the courtroom outweigh any absolute First Amendment or [A]rticle I, [S]ection 8 right of the press or the public to have access to trials."[81] On balance, protecting a defendant's right to a fair trial outweighs not only a

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[77] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 at 606-607 (1981).

[78] *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1979).

[79] See Appendix, Fig. 1.

[80] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Col. L. Review 1546, 1560 (1985).

[81] John Caher, *In Loss for Court TV, N.Y. Judges Continue Ban on Cameras in Courts,* New York Law Journal, 2 (2005). http://www.law.com/jsp/article.jsp?id=1118912719346

right of access to broadcast a trial, but also any other educational or transparency benefits that cameras may produce in access to that of the press because "[t]he primary purpose of a criminal trial is to provide the defendant with an impartial forum in which the truth will emerge, not to educate or entertain the public."[82] Protecting a defendant's right to a fair trial must outweigh not only a right of access to broadcast a trial, but also any other purported educational or transparency benefits that cameras may produce.

Effects of Cameras on Trial Participants

Experience shows that cameras affect the trial participants. For instance, a judge may alter his or her method of questioning in order not to appear biased or offensive to the spectators. In *Estes*, Justice Clark avowed that, "Judges are human beings also and are subject to the same psychological reactions as laymen... [and this is] particularly bad where the judge is elected... [and t]he telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand -- the fair trial of the accused."[83] Lawyers and judges with certain political aspirations can exploit televised trials. Justice Scalia explains that "common law judges are supposed to be in the background... They are not supposed to be in the rough and tumble of politics because the court is different."[84] Cameras in the courtroom would bring judges to the spotlight, which could affect the role of many elected judges, an outcome that can again jeopardize a fair trial. On this subject, Justice David Souter has made the most riveting remark of all, commenting that "I can tell you the day you see a camera come into our [The U.S. Supreme Courts] courtroom, it's going to roll over my

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[82] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 494 (1985).

[83] *Estes v. Texas*, 14 L. Ed. 2d 543 at 548 (1965).

[84] Amanda Buck, *Not Ready for Prime Time*, 30 News Media & the Law 20, 22 (2006).

dead body."[85] In recognizing the dangers associated with permitting cameras in the courtrooms, Justice Souter, like other Justices,[86] takes a strong stance against sanctioning them. Playing to the cameras, on a conscious or unconscious level, can become a factor in the fairness of a trial and such risk should be avoided to ensure the accused a fair trial. According to Judge Ito, attorneys are also vulnerable to psychological reactions in the presence of cameras. For example, he states that [w]hen I listen to counsel argue in this courtroom, I see the nervousness in their [sic] eyes, especially with counsel that I'm familiar with... [and] that [sic] I've known for 20 years who I can tell are nervous and I can tell their performance is affected by this [the camera's] eye here."[87] In this instance, Judge Ito actually witnessed the camera's presence intimidating attorneys, which consequently affected their performance, most likely to their clients' detriment.

Publicity generated by cameras in the courtroom during the course of a trial also proves detrimental to the accused. In *Sheppard v. Maxwell*,[88] the defendant was charged with the murder of his wife. The jurors, witnesses, and counsel were photographed as they entered the court and the media broadcasted evidence that was not presented at the trial.[89] The immense publicity prejudiced the jury during the trial, leading to grounds for reversal. *Sheppard* exemplifies that the duty of ensuring a defendant's right to a fair trial rests with judges. As mentioned earlier, protective orders primarily and justifiably serve this purpose even if they

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[85] Id. at 21.

[86] Id. at 21.

[87] Marjorie Cohn and David Dow, Cameras in the Courtroom, 8 (2002).

[88] *Sheppard v. Maxwell*, 384 U.S. 333 (1965).

[89] Id.

hinder some informational access from the media. At the same time, the trial judge's failure to protect Sheppard also demonstrates the need for uniform rules to guide the proceedings.

Still, some critics argue that cameras could bring forth witnesses who could either corroborate or discredit testimony. For instance, some witnesses may refrain from testifying from fear that their testimony may subject them to public scrutiny and repercussion.[90] If a witness acted inappropriately, the witness may not testify to avoid public retribution or exposure by the cameras. On the other hand, other witnesses may testify for their fifteen minutes of fame. At the Simpson trial "[m]any expressed concern... that some witnesses stepped forward for their moment of televised fame."[91] For example, Francine Florio-Bunten, who was part of the jury for over four months, maintains that Brian (Kato) Kaelin "seemed almost too enthralled with the whole thing."[92] Kato Kaelin became widely known and recognized after his testimony in the Simpson trial. Thus, the credibility of witnesses who comes forth only after a trial is televised remains questionable. At the same time, cameras can also unsettle witnesses, making them less willing to come forth or even testify at all in court.[93] This scenario jeopardizes a defendant's right to a fair trial since the U.S. Supreme Court has recognized that the accused has a "constitutionally guaranteed access to evidence"[94] and that cameras in the courtroom "can inhibit witnesses and thereby impair the ability of the defendant to obtain evidence."[95] Precluding a

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[90] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Col. L. Review 1546, 1554 (1985).

[91] Marjorie Cohn and David Dow, Cameras in the Courtroom, 8 (2002).

[92] Id.

[93] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Col. L. Review 1546, 1554 (1985).

[94] *United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982).

[95] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Col. L. Review 1546, 1552 (1985).

defendant from presenting evidence in his or her defense by discouraging witness testimony violates their access to evidence and consequently a right to a fair trial. Clearly, both scenarios present problems that jeopardize one's right to a fair trial. To avoid most of these dilemmas, camera coverage of a witness's testimony should require the consent of witness. Additionally, the conditional release of videotaped trials at least two years after a rendered verdict would give aspiring Kato Kaelins a less appealing path and would also lessen sensationalization by the media.

In 1965, *Estes v. Texas* was the first case to deal with the constitutionality of cameras in the courtroom.[96] During this case, Billy Sol Estes, a financier, was convicted of swindling by the District Court for the Seventh Judicial District, and despite the defendant's objections, his trial was televised and broadcast.[97] The trial judge granted the press permission to bring cameras into the courtroom, which led to yet another unmanageable court. Altogether present were twelve cameramen, cable wires spread across the floor, and microphones on the judge's bench and jury box, all of which caused substantial disruptions.[98] After a continuance, the press was restricted to a booth constructed and painted to blend in with courtroom structure at the back of the court.[99] In spite this effort to control the disorderly press, the defendant claimed that televising and broadcasting his trial violated his right to due process under the Fourteenth Amendment and to a fair trial as guaranteed by the Sixth Amendment.[100] Finding a violation of the appellant's right to

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[96] Charles E. Ares, *Chandler v. Florida: Television, Criminal Trials, and Due Process*, The Supreme Court Review 157, 167 (1981).

[97] *Estes v. Texas*, 14 L. Ed. 2d 543, 1 (1965).

[98] Id. at 6.

[99] Id. at 7.

[100] Id.

due process, the Supreme Court of the United States overturned the *Estes* conviction.[101] In a 5-4 decision, the Court held that the presence of cameras in the petitioner's pretrial hearing violated his due process rights.[102] Writing the opinion of the Court, Justice Clark, quoting the opinion of Justice Holmes in *Patterson v. Colorado*,[103] observed, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[104] Camera coverage during the pretrial hearing may have saturated the jury with evidence or information not provided during the trial proceedings and caused bias. Still, *Estes* was principally overturned because of the obtrusiveness of cameras.

The physical distractions originally noted by the Court in *Estes* no longer present an issue. Technological advances make camera equipment unnoticeable to most people. In fact, supporters of cameras in the courtroom argue that owing to technological advances, "[t]elevision equipment manufacturers are now capable of producing compact, noiseless color cameras that can operate without the necessity of any additional room lighting... [and] sound equipment no longer consists of intrusive microphones and transmitters."[105] Therefore, the physical distractions now reflect a moot point.

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[101] Id.

[102] Id.

[103] 205 U.S. 454, 462 (1907).

[104] *Estes v. Texas*, 14 L. Ed. 2d 543,12 (1965).

[105] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1404-05 (1981).

The camera's presence, however, extends beyond physical distractions. Cameras in the courtroom may also have psychological effects[106] on trial participants who would, as one might expect, feel the anxiety of realizing that millions of people, including friends and family, are likely monitoring and scrutinizing all their actions. During the *McVeigh* trial, Judge Match explained the necessity to move the trial existed because "the entire state had become a unified community, sharing the emotional trauma of those who had become directly victimized."[107] The social pressure of facing a highly charged public after a verdict creates an external pressure with which jurors must contend. Pretrial coverage heightens such emotions and prejudice. Consequently, the psychological effect of the cameras' presence impacts a jury's impartiality, especially if in fear of a hostile reaction to an unpopular verdict.

Right to Privacy

Generally, privacy means the right to be let alone. Even though, "[t]he word *privacy* appears not once in the Constitution," most people consider privacy an integral component of everyday life.[108] In *Griswold v. Connecticut*,[109] a state law criminalized the use of contraceptives as well as medical professionals advising others of their use. The U.S. Supreme Court held that the right to privacy, even though not explicitly mentioned in the Constitution, it exists under "penumbras" or "zones," which state "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and

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[106] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Col. L. Review 1546, 1552 (1985).

[107] Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 Law and Human Behavior 73, 73 (2002).

[108] Alpheus Mason and Donald Stephenson, *American Constitutional Law: Introductory Essays and Selected Cases*, Prentice Hall, 592 (2002).

[109] 381 U.S. 479 (1965).

substance... [and these v]arious guarantees create zones of privacy."[110] Justice Goldberg, in his concurring opinion considered the Ninth Amendment protects the right to privacy. Regardless of its basis, the Court concluded that a right to privacy exists and is an essential right for due process.

The Lindbergh baby kidnapping illustrates the significant privacy concerns of trial participants. In 1932, the 21-month old son of United States icon Charles Lindbergh was kidnapped from his nursery at home. A ransom note left behind demanded $50,000 for the baby's return. Despite the Lindberghs' cooperation, the child was not returned alive. Because of Lindberg's celebrity status and the appalling conduct of the kidnapper, the case attracted a great deal of publicity. But, the heightened publicity created at least some positive components; it prompted public involvement. For instance, the great deal of publicity impelled the infuriated mobster, Al Capone, to offer a $10,000 reward. In addition, during the trial several witnesses came forth to place the accuser near the crime scene. This case also prompted legislation for firm anti-kidnapping laws.[111]

Still, the heightened publicity surrounding the Lindbergh kidnapping exposes the tribulations that sensational media creates. After the trial judge granted the media permission to film the proceedings, the courtroom resulted in a "circus atmosphere [that] reduced the dignity of the proceedings."[112] For example, [n]oise from spectators frequently interfered with the proceedings [and c]ounsel for both sides carried on a regular campaign of press conferences."[113]

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[110] *Griswold v. Connecticut*, 381 U.S. 479 (1965). (See *Poe* v. *Ullman*, 367 U.S. 497, 516-522 (dissenting opinion)).

[111] Xreferplus, *Lindbergh Baby Kidnapping*, World of Criminal Justice, Thompson Gale, 1. http://www.xreferplus.com/entrypp.jsp?xrefid=4827898&secid=.-

[112] Id.

[113] Charles E. Ares, *Chandler v. Florida: Television, Criminal Trials, and Due Process*, The Supreme Court Review 157, 161 (1981).

In this case, the judge subsequently lost control of the proceedings after permitting cameras in the courtroom. The courtroom's capacity of 260 was exceeded by 150 people and during jury deliberations, a swarm of people outside the building intoned, "kill Hauptmann! Kill the German!"[114] In the end, the court convicted Hauptman, but he vehemently maintained his innocence. In spite of the strong evidence against the accused, the media spectacle and presumption of guilt certainly jeopardized to a high degree his chances at a fair trial. The media also exposed the family to a great deal of unwanted publicity and invasion of privacy to the point that the Lindbergs "developed a hatred for the press" that eventually led them to leave the country.[115]

The American Bar Association responded to the shoddy trial by formulating Canon 35 of the Code of Judicial Conduct. It states:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room... are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.[116]

Canon 35 also granted judges the discretion to authorize cameras in their courtrooms.[117] In 1937, Canon 35 prohibited all photo coverage, in 1952, the canon was reformed "to prohibit television coverage, and in 1972 [it] was adopted in its present form as Canon 3A (7) of the ABA

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[114] Marjorie Cohn and David Dow, Cameras in the Courtroom, 15 (2002).

[115] Xreferplus, *Hauptmann, Bruno Richard*, World of Criminal Justice, Thompson Gale, 1. http://www.xreferplus.com/entrypp.jsp?xrefid=4827753&secid=.-

[116] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 Col. L. Review 1546, 1546 (1985).

[117] William. B. Spann, *Cameras in the Courtroom-for Better or for Worse*, 64 American Bar Association Journal, 797 (1978).

Code of Judicial Conduct."[118] At this time, judges have the discretion to permit or deny the access of cameras in the courtrooms.[119]

Permitting cameras in the courtroom, however, re-victimizes victims and their families. In *Cox Broadcasting Corp. v. Cohn*,[120] a reporter broadcast a rape victim's name obtained from public court records. The Court in this case held that "[t]he prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record, and the conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press."[121] Forbidding the broadcasting of public records encroaches on the First and Fourteenth Amendments. Similarly, videotapes containing sensitive information from a trial would be difficult to sensor from broadcasting. At the same time, in the same opinion, the Court noted:

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records; if there are privacy interests to be protected in judicial proceedings, the states must respond by means [that] avoid public documentation or other exposure of private information, but once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned

[118] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1394 (1981).

[119] Id. at 1395.

[120] 420 U.S. 469 (1975).

[121] *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1974).

for publishing it, and reliance must rest on those who decide what to publish or broadcast.[122]

The Court's holding that information contained on the public record allows the media to broadcast it illustrates the need to close a trial or seal records as a means of protecting victims and other trial participants from needless humiliation and distress. Regardless of the verdict, the media's slants and influence detrimentally impact the accused's reputation. To reduce prejudicial and embarrassing publicity superior court Judge Alfred Delucchi denied access to cameras in the Scott Peterson trial, recognizing that besides creating difficulty in empanelling an impartial jury and affecting the role of trial participants, cameras would also subject both families and the victim to unwanted exposure.[123] Unless the parties consent to camera access, the publicity that the media exposes the defendant, families, and victims to places them in difficult and often embarrassing situation.

Avoiding embarrassing situations or unnecessary pressures on witnesses, especially victims, outweighs the public's interest in obtaining information via electronic broadcasting. Undertaking this approach, the Court in *Commonwealth v. Hobbs*,[124] held that "[t]he right to an open trial is an important and time-honored right, basic to our system of justice, but it is not absolute… [and] judges may exclude spectators from the courtroom when necessary to protect witnesses, shelter confidential information, or maintain order."[125] Closing trials functions beyond protecting an individual's right to a fair trial by also guarding the privacy of that person

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[122] Id.

[123] Harriet Ryan, *No Cameras, New Peterson Judge Says*, Court TV. http://www.courttv.com/trials/peterson/020204_ctv.html (accessed September 6, 2006).

[124] 385 Mass. 863 (1982).

[125] *Commonwealth v. Hobbs*, 385 Mass. 863 (1982).

relating to sensitive information. Furthermore, not excluding cameras may hinder victims of such crimes from reporting them.[126] Parties may also choose to settle out of court to avoid injurious publicity. Chief Judge Edward R. Becker contends that "in civil cases cameras can intimidate civil defendants who, regardless of the merits of their case, might prefer to settle rather than risk damaging accusations in a televised trial."[127] The use of cameras could in this way "become a potent negotiating tactic in pretrial settlement negotiations."[128] Publicizing personal information could deter filings of cases or even induce out of court settlements. Ultimately, this negatively impacts the courts' purpose, which aims to distribute justice.

Safety Issues

The media's ability to choose and edit cases to sway public opinion toward a particular view holds a power that requires some restraint.[129] For instance, "[t]elevision's symbolic courtroom trial, be it fictionalized or dramatized, 'reinforces, shapes, and directs' 'the public's view of lawyers, courts, and society."[130] The media's impact on public perception encourages American's to "see things as black or white."[131] The O.J. Simpson trial, for example, left many people at odds, primarily divided along racial lines, over its verdict. Similarly, the Rodney King

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[126] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 501 (1985).

[127] U.S.Courts. *Judicial Conference Opposes Bill to Bring Cameras Into Courts*, "n.d." http://www.uscourts.gov/ttb/sept00ttb/cameras.html

[128] Diarmuid O'Scannlain (testimony), *Hearing on: "Cameras in the Courtroom,"* 109th Congress, November 9, 2005, 52.

[129] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 495 (1985). "Interests in privacy, fairness, judicial efficiency and even public education necessitate that strict limitations be imposed on those broadcasters permitted to televise."

[130] Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry*, The American Business Law Association, Inc. American Business Law Journal, 3 (2001).

[131] Id.

verdict in 1992 produced volatile reactions. Both trials contained racial concerns and controversial issues that appealed to and at the same time divided people across the nation. In the trial's aftermath, the courtroom drama in the Rodney King case continued on the streets in the form of riots. These riots demonstrated that heightened publicity could entice people to take the law into their own hands after an unpopular verdict leaves them feeling denied of proper justice. Such reactions endanger the safety of citizens, trial participants, and reliance in our legal system. In the event of broadcasting a highly controversial trial, "[t]he idea is that the case might be tried in the court of public opinion as well before a jury."[132] In a highly publicized trial, the accused must also contend with the court of public opinion regardless of the verdict in court. James E. Lukaszewski[133] adds that "Unfortunately, while the conventional wisdom says 'you're innocent until proven guilty,' the reality of prosecution by both the government and media is exactly the opposite."[134] A presumption of guilt, either before or after a trial, can irreparably damage one's reputation and ability to resume a normal lifestyle.

Both of the aforementioned cases effectively illustrate the media's influence on trial proceedings and participants. The aftermath of these trials illustrates the dangers behind live broadcasting of trials. Moreover, in the words of chief Justice Warren Burger, "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[135] Judges contend that

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[132] Dirk Gibson, *Litigation Pubic Relations: Fundamental Assumptions,* Public Relations Quarterly, 19 (Spring 1998).

[133] Author of "The Other Prosecutors," Public Relations Quarterly, 23-9 (Spring 1997).

[134] Dirk Gibson, *Litigation Pubic Relations: Fundamental Assumptions,* Public Relations Quarterly, 19 (Spring 1998).

[135] Gary Hengstler, *Bridging the Great Divide: A Symposium on the State of Legal Journalism: Pressing Engagements: Courting Better Relationships Between Judges and Journalists,* 56 Syracuse Law Rev. 419, 428 (2006).

journalists who violate ethical rules receive no reprimands because "ethical rules for journalists are only aspirational and therefore, unenforceable."[136] To a large extent, the press can publish information pertaining to trial cases unchecked. Self-regulation by the media therefore remains capricious, which leaves the integrity and dignity of a trial to rest utterly in the hands of judges.

Judges must also contend with the rise of hostility against them that the media exacerbates.[137] Publicity, especially via televised trials, heightens security concerns for judges, who will, as a result, lose anonymity as well as for "all witnesses, jurors, and United States Marshalls Service personnel [that] may be put at risk because they would no longer have a low public profile."[138] For instance, Justices Ruth Bader Ginsberg and Sandra Day O'Connor reportedly received death threats even without the broadcasting of Supreme Court cases.[139] Televised trials would certainly increase the recognition of judges and, consequently, violence against judges who make unpopular decisions or opinions. According to Justice Clarence Thomas, "the loss of anonymity would raise security concerns... [For instance, t]hey couldn't walk around – as they do pretty much routinely now – by themselves."[140] A judge should not be placed in a position in which she or he reluctantly reaches a particular verdict out of fear of repercussions.

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[136] Id.

[137] The Third Branch, *Court Security Bill Passes House With Cameras in Courtroom Provision,* 37 First Session Legislation Waits for 2006, 3 (2005). http://www.uscourts.gov/ttb/dec05ttb/legislationwaits/index2.html

[138] Diarmuid O'Scannlain (testimony), *Hearing on: "Cameras in the Courtroom,"* 109th Congress, November 9, 2005, 53 (2005).

[139] Amanda Buck, *Not Ready for Prime Time,* 30 News Media & the Law 20, 20 (2006). (Ginsburg statement in a speech given in South Africa in February 2006).

[140] Id. at 20.

Besides compromising safety, cameras in the courtroom can undermine the justice system. A research report conducted by Richard Fox, a professor of political science, indicates that the Simpson trial on its own reveals that "75 percent of people surveyed 'had less confidence' in the justice system after the trial."[141] This report indicates that televised trials can compromise trust in the judicial process. Televising trials can also change a judge's method of questioning so she or he does not appear arrogant to the public. Judges, however, must often play devil's advocate, a role that presents them unfavorably. Thus, judges can appear condescending even though their line of questioning aims to scrutinize the arguments presented before them. The average layperson may misunderstand this process and develop animosity toward the judges or the legal system altogether.

Federalism

All of the states now permit cameras in the courtrooms at some level.[142] United States Circuit Court Judge Diarmuid O'Scannlain maintains that "It is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the courtroom."[143] Although a constitutional right to a public trial and free press exists, states differ in their admission of cameras in courtrooms because that right does not automatically sanction access to cameras in

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[141] Gayle Mertz, *Debating Culture and the Courtroom—Past and Present*, ABA Division for Public Education, 3 "n.d." http://www.abanet.org/publiced/youth/sia/culture/tv.html

[142] See Appendix. (Figure 2).

[143] Diarmuid O'Scannlain (testimony), *Hearing on: "Cameras in the Courtroom,"* 109th Congress, November 9, 2005, 47. "Although it is somewhat difficult to obtain current information, it appears that approximately 31 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as allowing coverage only in certain courts, prohibiting coverage of certain types of proceedings or of certain witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Thirteen states do not allow coverage of criminal trials. In nine states, cameras are allowed only in appellate courts. The District of Columbia prohibits cameras altogether. Utah allows only still photography at civil trials. In fact, only 19 states provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation."

courts. The media has no more superior a right of access than that of any other citizen. Still, numerous courts throughout the Unites States consent to the televising of trials "either by statute or by local court rules."[144] Despite the perils that cameras in the courtroom tend to create, they have encroached on the justice system. For instance, in 1975, after some media prompting, the Supreme Court of Florida began an experimental program that allowed the televising of civil and criminal trials as long as all the trial participants agreed. In 1977, because parties continually opposed the idea, the Florida Supreme Court launched a new experimental program that excluded the consent requirement.[145] Under canons of federalism,[146] states can serve as laboratories in experimenting with the use of cameras in the courtroom. In *Chandler v. Florida*, the Court "ruled that states should be allowed to experiment and develop their own court rules with regard to EMC [Electronic Media Coverage] ... [and most] states now permit electronic media coverage of appellate or trial proceedings on a permanent or experimental basis."[147] Experimentation has led to all of the states permitting cameras in the courtroom at some level and this access often affords states with even greater protections than the First Amendment.

In *Chandler*, the defendants, eminent Miami Beach police officers convicted of breaking and entering into a restaurant, which drew much publicity. The defendants' trial was televised in spite of their objections and they appealed the conviction by contesting the constitutionality of

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[144] Rodney A. Smolla, *The People's Right to Know: Transparency in Government Institutions*, Democracy Papers, 6. http://usinfo.state.gov/products/pubs/democracy/dmpaper10.htm

[145] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1395 (1981).

[146] Alpheus Mason and Donald Stephenson, *American Constitutional Law: Introductory Essays and Selected Cases*, Prentice Hall, 146 (2002). ["A distinguishing characteristic of American government is federalism—a dual system in which governmental powers are constitutionally distributed between central (national) and local (state) authorities"].

[147] Eugene Borgida; Kenneth G. DeBono; Lee A. Buckman, *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 14 Law and Human Behavior 489, 490 (1990).

experimenting with cameras in the courtroom.[148] The trial judge in this case denied a motion to sequester the jury, but did instruct it to watch only coverage of national news.[149] During the trial, "[o]nly two minutes and fifty-five seconds of the trial were actually broadcast, all pertaining to the prosecution's side of the case"[150] Broadcasting only one side of the facts can create bias. Such bias is usually detrimental to the accused "because news director run stories only if they are convinced of the guilt or civil liability of a defendant."[151] In spite of the potential media influence, the United States Supreme Court in *Chandler* ultimately upheld the convictions. Regarding the appellant's argument that publicity of the proceedings prejudiced the accused's right to a fair trial, the Chief Justice in *Chandler* noted:

> An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter . . . . The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly.[152]

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[148] *Chandler v. Florida*, 101 S. Ct. 802, 806 (1981).

[149] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1397 (1981).

[150] Id.

[151] Dirk Gibson, *Litigation Pubic Relations: Fundamental Assumptions,* Public Relations Quarterly, 19 (Spring 1998).

[152] Id. at 1400.

The Court in *Chandler* concluded that the appeal contained no empirical evidence of an infringement on due process. The Court also shifted the burden of proof to the defendant, stating that each petitioner would need to prove prejudice.

The *Chandler* decision offers a contrast to the position taken by the *Estes* court. The Court in *Estes* disagreed with the need to prove actual prejudice, stating:

> The prejudice of television may be so subtle that it escapes the ordinary methods of proof, but it would gradually erode our fundamental conception of trial. A defendant may be unable to prove that he was actually prejudiced by a televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was substantial evidence to support his conviction aside from the confession.[153]

Even though camera coverage leaves no revealing signs of prejudice, this does not negate its effects. Proving prejudice presents a daunting task, and this difficulty was recognized in *U.S. v. McVeigh* by judge Matsch. He contended that prejudice exists not only in bias, but also in the deliberative process that may impair a juror's analysis with facts not introduced by evidence in court.[154] Chief Justice Warren's opinion in *Estes* further emphasizes "that displaying particular defendants on television was in itself a denial of due process because the media's selective coverage of cases would subject some defendants to trials under prejudicial conditions [that] others would not experience."[155] For example, Section 1 of the Fourteenth Amendment grants persons with a right to equal protection of the laws in providing that:

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[153] *Estes v. Texas*, 14 L. Ed. 2d 543 (1965).

[154] *U.S. v. Mcveigh*, 918 F. Supp. 1467, (1996) at 1472.

[155] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1402 (1981).

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[156]

A cornerstone of the protection of civil rights, the equal protection clause pertains to equal application of the laws to people in similar situations. Broadcasting that singles out and negatively impacts only some defendants under similar circumstances in a discriminatory manner violate equal rights.

At this point, states create their own rules regarding camera coverage in courtrooms and this perpetuates prejudice.[157] Substantive state guidelines differ in the following areas:

> (1) the effect of an objection from a litigant or witness on the decision whether to televise the trial or the objector's testimony; (2) whether the jury should be televised; (3) whether certain types of trials should be off-limits to broadcasters; (4) procedural rules including whether there should be review of the pretrial decision allowing or excluding cameras; and (5) the extent to which broadcasters should be subject to an obligation of balanced reporting.[158]

Even with experimentation, states ought to abide by some uniform guidelines that protect one's right to a fair trial and paramountly serve the interests of justice. As Justice Warren recognized, selective coverage does prejudice defendants in similar circumstances. However, requiring consent to camera coverage by both parties could drastically reduce the number of videotaped

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[156] U.S. CONST.amend. XIV.

[157] See Appendix (Figure 1).

[158] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 495 (1985).

trials[159] and, at the same time, remove the media's ability to selectively report on certain cases. Supporting a federalist point of view[160] regarding Florida's experimentation with cameras in the courtroom, the U.S. Supreme Court held "'[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"[161] However, state experimentation with cameras can prove to be injurious in courts because the prospect exists that at some point compelling evidence can confirm the adverse impact of cameras on trials, which would potentially open the floodgates to a series of appeals. A federal district judge who acknowledged this risk explained, "[I]f the Florida Supreme Court has guessed wrong, an entire year's worth of state court convictions—no matter how heinous the crime—may be subject to reversal."[162] But, given the fact that at this point there exists no definitive confirmation in connection with the psychological effects that cameras pose on trial participants[163], a more responsible retort by the Court would have put off allowing cameras in courts at least until more

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[159] Joy D. Fulton, *Fourteenth Amendment. Cameras in the Courtroom: Supreme Court Gives the Go-Ahead*, 72 The Journal of Criminal Law and Criminology 1393, 1395 (1981). "The Supreme Court of Florida adopted an experimental program which would have allowed the televising of one civil and one criminal trial, subject to the consent of all parties...[and] it proved that parties would not agree to broadcast coverage."

[160] Alpheus Mason and Donald Stephenson, *American Constitutional Law: Introductory Essays and Selected Cases*, Prentice Hall, 146 (2002). ["A distinguishing characteristic of American government is federalism—a dual system in which governmental powers are constitutionally distributed between central (national) and local (state) authorities"].

[161] Id. at 1402.

[162] Id. at 1396.

[163] Eugene Borgida; Kenneth G. DeBono; Lee A. Buckman, *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 14 Law and Human Behavior 489, 489 (1990). "The empirical evidence on these and other psychological effects has been generally inconclusive and methodologically suspect... virtually all research commissioned by states considering the implementation of EMC [Electronic Media Coverage] has involved nonrepresentative surveys and anecdotal evidence... With the possible exception of one project, none of the studies conducted to evaluate EMC 'experiments' employed an experimental design with appropriate control groups."

adequate data could be analyzed on either side. Concerning an Indiana pilot program, Justice Dickson remarked:

> If television coverage can safely be done in our trial courtrooms, without harm to the effective ascertainment of truth, the reliability and fairness of trials, the quest for justice, and the provision of correct information to the public, such safety should be first conclusively demonstrated by a thorough and reliable scientific study in jurisdictions in which trial court television is presently permitted, without putting Indiana citizens at risk.[164]

Until unwavering scientific studies can prove definitively that camera coverage poses no adverse affects on trial participants or proceedings, courts should proceed with more caution. Courts must take steps to minimize the risks and prejudices associated with televising trials by reducing the number of cases involved in such experimentations. Even in *Chandler,* the U.S. Supreme Court acknowledged that even though television can "adversely affect the conduct of the participants and the fairness of the trial, [it] yet leave[s] no evidence of how the conduct or the trial's fairness was affected."[165] The *Chandler* case indeed reveals the potentially uncertain consequences of the camera's presence in the courtroom. These unproven outcomes, financial risks and the potential harm cameras can do demonstrates that the use of cameras is not efficient in the long run.

Compounding the inefficiency, permitting and monitoring cameras in the courtroom requires additional time and expense. For example, in case of a retrial, the effects of live

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[164] Ron Browning, *Lights, Camera, Action; Indiana to Test Cameras in Courts As Feds Continue to Debate the Issue,* The Indiana Lawyer (2006). http://web.lexisnexis.com/universe/document?_m=6379f5850a2e47baffbfde57b9408a6b&_docnum=1&wchp=dGLbVlb-zSkVA&_md5=f54a3d89806e883aa992b0b5c253c43b

[165] *Chandler et al. v. Florida*, 66 L Ed. 2d 740, 101 S. Ct at 811 (1981).

broadcasting would negatively "influenc[e] public opinion against the defendant[,] thereby tainting potential jurors by exposure to inculpatory evidence inadmissible at trial."[166] In case of a retrial, a judge would have to resort to a change of venue, a continuance, or prolonged voir dire proceedings, all of which increase time and the costs of trial proceedings. Furthermore, a public opinion survey taken by the defense between "Menendez I and Menendez II revealed about 80 percent of all potential jurors in Los Angeles thought the brothers were guilty of first degree murder."[167] This survey shows that broadcasts by prejudiced media will likely bias potential juries. Empanelling an impartial jury after abundant media saturation on the public would be difficult.[168] For instance, "trial consultant Lois Heaney.... expressed concern that the jury pool for the [Menendez] retrial may have been tainted by its exposure to television coverage of the first proceeding."[169] Allowing cameras in the courtroom can taint other potential jurors and in the process increase costs and expand judicial time while attempting to empanel an impartial jury.

Recommendations

Requiring the consent of both parties would reduce potential court costs. In *United States v. Kerley,* [170] the United States Court of Appeals for the Seventh Circuit denied Kerley permission to videotape his trial. The court held that Rule 53 expressly states that "[t]he taking of photographs in the court room during the progress of judicial proceedings or radio

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[166] Daniel H. Erskine, *An Analysis of the Legality of Television Cameras Broadcasting Juror Deliberations in a Criminal Case,* 39 Akron L. Rev. 701, 713 (2006).

[167] Marjorie Cohn and David Dow, Cameras in the Courtroom, 38 (2002).

[168] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 491 (1985).

[169] Marjorie Cohn and David Dow, Cameras in the Courtroom, 38 (2002).

[170] 753 F.2d 617(1985).

broadcasting of judicial proceedings from the court room *shall not* be permitted by the court."[171] According to the court, Rule 53 did not violate Kerley's First, Fifth, or Sixth Amendment rights because the rule served the interests of justice. While the states permit experimentation with cameras in the courtroom, federal courts completely prohibit camera coverage. Nevertheless, just as it is not in the best interest for defendants to represent themselves, it is also not in a defendant's best interest to consent to camera coverage during a trial because "research on the content of media stories indicates that, at least for criminal cases, they [stories] are generally slanted in a direction that favors the prosecution."[172] However, just as courts allow defendants to represent themselves, even though it is rarely in their best interest, courts should also consider permitting a defendant's request for cameras in the courtroom.

Allowing cameras in the courtroom upon the defendant's request seems to follow *Gannett's* interpretation of the right to a public trial being construed to benefit the defendant. For instance, in *Gannett,* the defendant's Sixth Amendment guarantee was established to be "a personal right of the defendant, which he may in some circumstances waive in conjunction with the prosecution and the court."[173] Nonetheless, the consent of both the defendant and the victims ought to be required when deciding to authorize cameras in the courtroom. To protect a defendant's rights, "seven states still require the defendant's consent as an absolute precondition for televising a criminal trial."[174] Most parties will not consent to media coverage as indicated by early experimentation in the Florida courts. Besides the Kerley case, O.J. Simpson and his

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[171] Id.

[172] Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 Law and Human Behavior 73, 83 (2002).

[173] FindLaw, *Public Trial*, 1 (1994). http://caselaw.lp.findlaw.com/data/constitution/amendment06/03.html

[174] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 495 (1985).

defense team serve as another example in which a defendant welcomed cameras in court even though many statements later revealed that Simpson's attorneys regretted this decision. According to the *D.C. Report*, "A realistic appraisal of the effect of the party-consent requirement suggests that it will lead to the broadcast of very few trials."[175] Thus, the consent requirement of both parties limits the number of videotaped cases and also removes the media's power to handpick cases to televise, thereby greatly reducing the possibility of sensationalism.

Under narrowly tailored conditions, televised trials can provide educational benefits without compromising the interests of justice. Narrowly tailored conditions should include the consent of both parties, not filming the juries in order to avoid exposing them to harassment or external pressures and a flat rule against filming objecting witnesses.[176] A Federal Judicial Center study reported, "46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to appear in court."[177] Courts should not intensify witness's apprehensions to testify by permitting camera coverage of their testimony. Still, in consideration of *Estes* and *Chandler*, the Supreme Court has held "that the Constitution neither prohibit[s] nor mandate[s] televised coverage of trial proceedings where there [are] safeguards in place to ensure the court [can] honor the defendant's right to a fair trial and there [is] no showing of specific prejudice."[178] But, with the proper measures in place, a trial can offer constructive benefits while eluding many dangers that live broadcasting of trials presents. More important, to

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[175] Id. at 496.

[176] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 497 (1985).

[177] U.S.Courts. *Judicial Conference Opposes Bill to Bring Cameras Into Courts*, "n.d." http://www.uscourts.gov/ttb/sept00ttb/cameras.html

[178] Christo Lassiter, *TV or Not TV..That Is the Question*, 86 The Journal of Criminal Law and Criminology 928, 942 (1996).

curtail media prejudice, the circulation of videotaped trials should not commence until at least two years after a rendered verdict. This would reduce the sensationalization of trials that arises from live broadcasting surrounding particular cases. Courts that choose to experiment with camera coverage should employ such assurances and determine the qualifications on a case-by-case basis because "[t]radition and experience caution us in considering any changes, and those who seek to amplify the force of public opinion by adding an electronic audience bear a heavy burden of proof. They must show that the search for justice will not be transformed into just another spectacle for mass amusement."[179] Since empirical evidence in support for cameras in the courtroom does not yet exist, in order to avoid the cameras potential negative impacts on trial proceedings and trial participants, the courts should forestall sanctioning cameras in courts.

Conclusion

In light of the negative potentialities of camera coverage, balanced against the purported benefits produced by cameras in the courtroom, the interests of justice in protecting a defendant's right to a fair trial must prevail. Peter Konefal, stresses that "By elevating the primary purpose of the courts (fairly determining the guilt of the accused), above secondary concerns whether they are to provide education to the public, or entertainment for the masses – become superfluous and involve dangerous compromises."[180] Moreover, the thrust of this debate does not center on the judges' comfort level with the cameras' presence or the fear of public scrutiny.[181] Instead, the debate for opponents principally arises over providing defendants with a

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[179] Richard P. Matsch, *Television in the Courtroom: Mightier than the Pen?* 97 Mich. L. Review 2037, 2041 (1999).

[180] Peter Konefal, *Debates on the Constitutional Validity of Cameras in the Court, the Role of the Commercial Media and the Epistemological Relevance of Television*, Media and Constitutional Law, 1 (2004). http://percipere.typepad.com/media/media_and_constitutional_law/index.html

[181] Diarmuid O'Scannlain (testimony), *Hearing on: "Cameras in the Courtroom,"* 109th Congress, November 9, 2005, 63.

right to a fair trial as guaranteed by the U.S. Constitution. The issues considered here involve: Does a ban on cameras in the courtroom violate the First Amendment? Does the exclusion of cameras hinder the right to a public trial as guaranteed by the Sixth Amendment? Does banning cameras from the courtroom hamper public knowledge?

First, a ban on cameras in the courtroom does not violate the First Amendment. Excluding cameras differs from excluding the press. The First Amendment protects freedom of press; the right to access, however, is not absolute. For instance, to ensure a fair trial, judges may issue protective orders such as voir dire, continuances, changes of venue, sequestering of jury, and gag orders. Excluding cameras differs from excluding the press because no constitutional right to bring cameras into courts exists. The First Amendment does not safeguard printing and broadcasting equally; hence, freedom of the press does not include a right to bring cameras into court.

Second, the exclusion of cameras does not hinder the right to a public trial as guaranteed by the Sixth Amendment. The right to a public trial was created for the benefit of the defendant, not the public. A court has the authority to close a trial to the public as a precautionary measure to ensure a fair trial and orderly proceedings. Additionally, limited seating in the courtroom presents a noteworthy argument. However, without the sensationalization caused by the media's selectiveness and depictions of certain trials, the public's interest in most cases would diminish. Sensational media tends to generate an increased public interest and involvement. The problem with making television viewers part of the jury, however, is that viewers, owing to biased media exposure and evidence presented in the media but not permissible in court, makes the public partial. This, consequently, damages a defendant's reputation and ability to integrate back into society after a trial, even if found innocent in a court of law.

Third, banning cameras from the courtroom does not hamper public knowledge. Selective reporting, biased interpreting, and editorializing all present a distorted version of the legal system. In this case, the ability to draw and involve a large crowd does not actually translate to educational benefits for the public. Besides, people wanting to gain knowledge, rather than to be entertained with live broadcasts, have access to trial transcripts, newspapers, and television reports.[182]

On the other hand, even more significant considerations regarding the implementation of cameras in courts, include: Does camera coverage in courtrooms affect trial participants? Does the presence of cameras affect trial proceedings? Does camera coverage create selectiveness, thus depriving a defendant of equal protection under the Fourteenth Amendment?

First, camera coverage in courtrooms can really affect trial participants. The studies mentioned earlier indicate negative effects on trial participants at some level and any level of impact that affects one's right to a fair trial is unacceptable. According to Judge O'Scannlain, "our mission is to administer the highest possible quality of justice to each and every litigant. We cannot tolerate even a little bit of unfairness (based on media coverage), notwithstanding that society as a whole might in some way benefit, for that would be inconsistent with our mission."[183] Witnesses become intimidated and may be less forthcoming or truthful; jurors can feel the external pressures arising from a society that expects a particular verdict from the jury; judges and attorneys may play to the camera to advance their own agendas; safety issues of judges, juries, witnesses or other participants heightens with camera coverage; and parties may

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[182] Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475, 503 (1985).

[183] Diarmuid O'Scannlain (testimony), *Hearing on: "Cameras in the Courtroom,"* 109th Congress, November 9, 2005, 48.

settle out of court or not even bring forth charges in order to avoid the broadcasting of embarrassing details.

Second, the presence of cameras surely affects trial proceedings. Applications for coverage, coupled with monitoring, and exposure that prejudices juries and cause extensive voir dires, changes of venue, and continuances all delay the trial proceedings. In addition, these delays increase the duration of the trial and consequently raise the costs associated with accommodating these orders.

Third, camera coverage creates selectiveness, thus depriving a defendant of equal protection under the Fourteenth Amendment. Handpicked cases expose some defendants to prejudice unlike other defendants in similar situations. Camera coverage at the trial level adversely impacts the performance of judges, attorneys, jurors, and witnesses and in doing so endangers the accused's right to a fair trial.

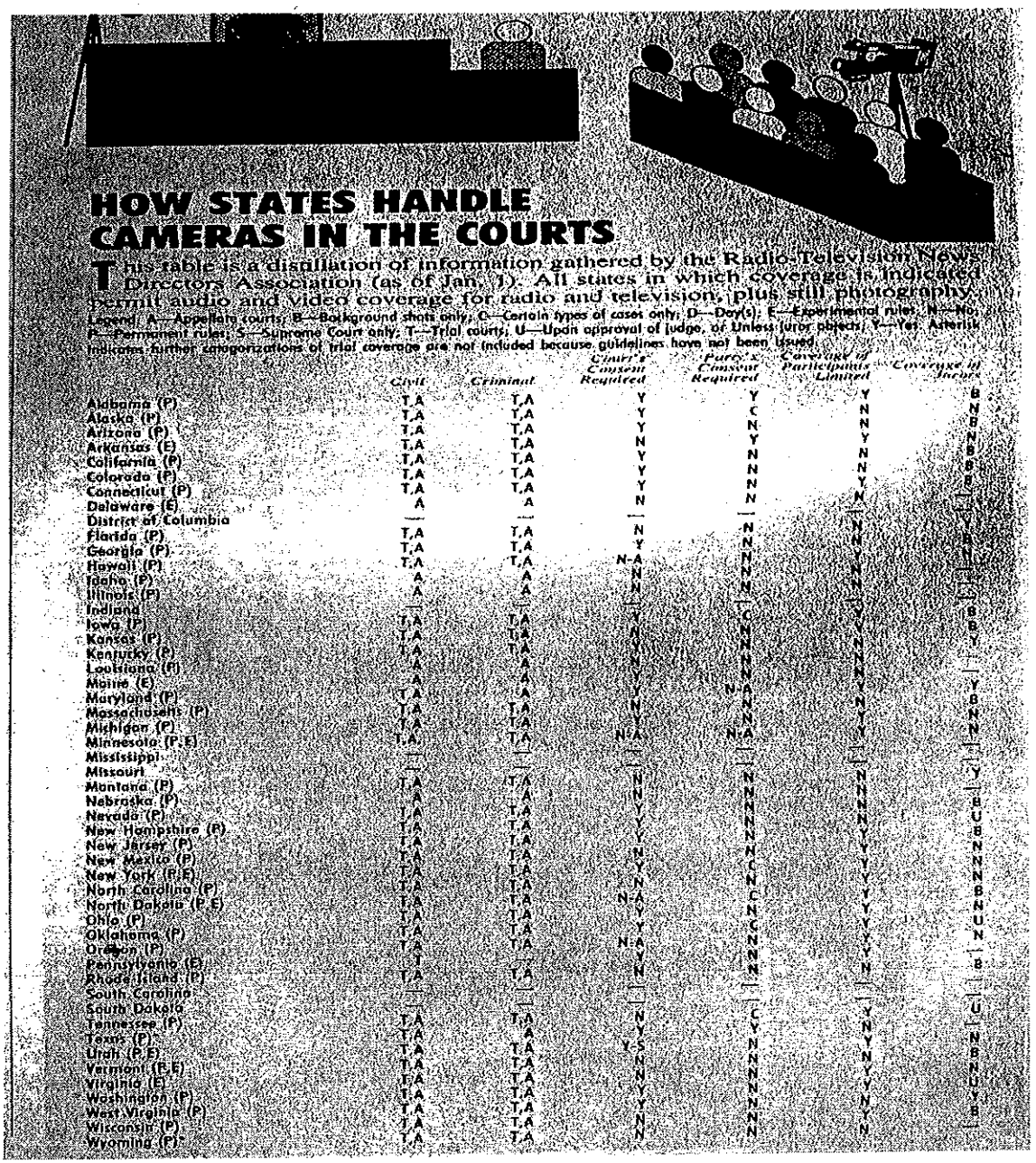
Because we function in an electronic age where most Americans obtain news and other information primarily from television, we have become desensitized to its influence. In *Estes,* Justice Harlan recognized this predicament and stated, "The day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."[184] Because televising trials erodes deference for the judicial process and in the process sensationalizes trials, courts must construe regulations according to the interests of justice in every case. While *Judge Judy* offers an entertaining television program depicting trivial courtroom dramas, trial courts deal with more serious matters. Despite the triviality of cases in *Judge Judy*, both parties must consent to appear on camera, unlike the experimentation of cameras in trial courts. Ultimately,

[184] Marjorie Cohn; David Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice*, McFarland and Co., Inc., 3 (1998).

many trials hold a defendant's freedom and other assets at risk of being taken. Under these circumstances, ensuring a fair and impartial trial must supersede any benefits produced by camera coverage of trials. The issue at stake affects everyone either presently or potentially in the future because everyone is vulnerable to becoming either a defendant or a victim.

APPENDIX

Fig. 1



HOW STATES HANDLE CAMERAS IN THE COURTS

This table is a distillation of information gathered by the Radio-Television News Directors Association (as of Jan. 1). All states in which coverage is indicated permit audio and video coverage for radio and television, plus still photography.

Legend: A—Appellate courts; B—Background shots only; C—Certain types of cases only; D—Day(s); E—Experimental rules; N—No; P—Permanent rules; S—Supreme Court only; T—Trial courts; U—Upon approval of judge, or Unless juror objects; Y—Yes. Asterisk indicates further categorizations of trial coverage are not included because guidelines have not been issued.

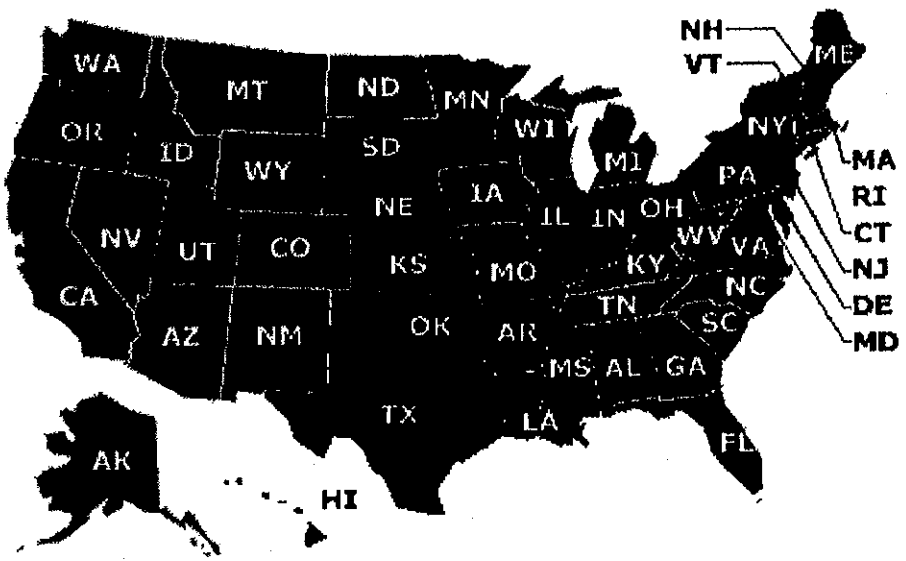
	Civil	Criminal	Court's Consent Required	Party's Consent Required	Coverage of Participants Limited	Coverage of Jurors
Alabama (P)	T,A	T,A	Y	Y	Y	B
Alaska (P)	T,A	T,A	Y	C	N	N
Arizona (P)	T,A	T,A	Y	N	N	B
Arkansas (E)	T,A	T,A	N	Y	Y	N
California (P)	T,A	T,A	Y	N	N	B
Colorado (P)	T,A	T,A	Y	N	N	B
Connecticut (P)	T,A	T,A	Y	N	Y	B
Delaware (E)	A	A	N	N	N	—
District of Columbia	—	—	—	—	—	—
Florida (P)	T,A	T,A	N	N	N	Y
Georgia (P)	T,A	T,A	Y	N	N	B
Hawaii (P)	T,A	T,A	N-A	N	Y	N
Idaho (P)	A	A	N	N	N	—
Illinois (P)	A	A	N	N	N	—
Indiana	—	—	—	—	—	—
Iowa (P)	T,A	T,A	Y	C	Y	B
Kansas (P)	T,A	T,A	N	N	Y	B
Kentucky (P)	T,A	T,A	Y	N	N	Y
Louisiana (P)	A	A	N	N	N	—
Maine (E)	A	A	Y	N	N	—
Maryland (P)	T,A	A	Y	N-A	Y	Y
Massachusetts (P)	T,A	T,A	N	N	N	B
Michigan (P)	T,A	T,A	Y	N	Y	N
Minnesota (P,E)	T,A	T,A	N-A	N-A	Y	N
Mississippi	—	—	—	—	—	—
Missouri	—	—	—	—	—	—
Montana (P)	T,A	T,A	N	N	N	Y
Nebraska (P)	A	A	N	N	N	—
Nevada (P)	T,A	T,A	Y	N	N	B
New Hampshire (P)	T,A	T,A	Y	N	N	U
New Jersey (P)	T,A	T,A	Y	N	Y	B
New Mexico (P)	T,A	T,A	N	N	Y	N
New York (P,E)	T,A	T,A	Y	C	Y	N
North Carolina (P)	T,A	T,A	N	N	Y	N
North Dakota (P,E)	T,A	T,A	N-A	C	Y	B
Ohio (P)	T,A	T,A	Y	N	Y	N
Oklahoma (P)	T,A	T,A	Y	C	Y	U
Oregon (P)	T,A	T,A	N-A	N	Y	N
Pennsylvania (E)	T	—	Y	N	N	—
Rhode Island (P)	T,A	T,A	N	N	—	B
South Carolina	—	—	—	—	—	—
South Dakota	—	—	—	—	—	—
Tennessee (P)	T,A	T,A	N	C	Y	U
Texas (P)	T,A	A	Y	Y	N	—
Utah (P,E)	T,A	T,A	Y-S	N	Y	N
Vermont (P,E)	T,A	T,A	N	N	N	B
Virginia (E)	T,A	T,A	N	N	Y	N
Washington (P)	T,A	T,A	Y	N	Y	U
West Virginia (P)	T,A	T,A	Y	N	N	Y
Wisconsin (P)	T,A	T,A	N	N	Y	B
Wyoming (P)*	T,A	T,A	N	N	N	—

Fig. 1 Radio-Television News Directors Association, *How States Handle Cameras in the Courts,* Broadcasting, v. 120, No. 22, (1991), p. 32.

Fig. 2

FREEDOM OF INFORMATION

CAMERAS IN THE COURT: A STATE-BY-STATE GUIDE



The District of Columbia is the only jurisdiction that prohibits trial and appellate coverage entirely.

Legend:

TIER I: States that allow the most coverage

TIER II: States with restrictions prohibiting coverage of important types of cases, or prohibiting coverage of all or large categories of witnesses who object to coverage of their testimony

TIER III: States that allow appellate coverage only, or that have such restricting trial coverage rules essentially preventing coverage.

Fig. 2 Cameras in the Court: A State-By-State Guide, from The Association of Electronic Journalists, Freedom of Information. http://www.rtndf.org/foi/scc.shtml#. Last updated: 10:57 AM 7/27/2005, courtesy of Matthew Gibson for Kathleen Kirby.

EXHIBIT 22

Evaluation of Empirical Research on the Effects of Cameras in the Courtroom

Jason Zenor[1]

There is an absence of empirical research on the effects of cameras in the courtroom.[2] The few studies that have been conducted have validity and reliability issues. Nonetheless, many proponents of cameras in the courtroom have cited these studies as proof that there is no effect from the presence of cameras in the courtroom. However, of the forty reported studies, most have been inconclusive, contradictory or insufficient.[3] Conversely, opponents of cameras in the courtroom have cited only normative reasons based on speculation of effects.[4] If the policy on cameras in the courtroom is to change, it should be based on valid research and findings. Furthermore, the policy should be drafted in a manner that insures that the information disseminated informs the public and protects a party's right to a fair trial.

State Studies

Most of the studies, concerning the effects of cameras in the courtroom, have been done by state governments. These studies have concluded that cameras have little effect in the

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[1] Mr.. Zenor is currently a Juris Doctorate/Masters of Public Administration Candidate at the University of South Dakota. He has a Master's Degree in Media Research from the Newhouse School of Communication at Syracuse University. Prior to coming to South Dakota, Mr. Zenor worked in higher education, teaching courses in Mass Communication, including Media Theory and Research. Mr. Zenor has conducted research in Media Effects and has presented at several academic conferences and has been published in the *Journal of Human Subjectivity.*

[2] *See* Henry F. Fredella and Brandon Burke. *From the Legal Literature.* 43 No. 5 Crim. Law Bulleting 8, (Sept-Oct 2007); *See* Ralph E. Roberts. *An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings.* 51 SMU L. Rev. 621 (April 1998).

[3] *Id.*

[4] *See* Joshua Sarner, Comment, *Justice, Take Two: The Continuing Debate Over Cameras in the Courtroom,* 10 Seton Hall Const. L.J. 1053, 1060-67 (2000).

courtroom.[5] However, these studies have been non-representative, anecdotal and often drawn out over a long period of time, bringing into question the validity and reliability of the studies.

Most of the state research has been non-representative[6] and anecdotal in evidence.[7] For example, the post-trial survey of the Florida courts in 1978 did not consider the amount of time between the trial and the date of the survey.[8] Additionally, two-thirds of the participants who were asked to participate, refused to do so.[9]

The most reliable state research was conducted by California in 1980.[10] The research was multi-method, collecting survey and interview data from 16 trials with conventional media (CMC-newspaper journalists) and 19 trials with electronic media coverage (EMC-television cameras). Participants (judge, jurors, witnesses, and attorneys) in the trials with EMC reported no effect on communication, decorum or attentiveness.[11] However, the trials selected were not at random. Cameras were allowed in a courtroom only if the judge allowed it. Thus, the 19 EMC trials were presided by judges who had self-chosen to have cameras in the courtroom, therefore they were

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[5] One should note here that the states that have conducted studies already had cameras in the courtroom and had trials completely litigated with television cameras present.

[6] California had 56 respondents; Virginia had 57 respondents; Nevada had 31 respondents.

[7] *See* New York State's Defender's Association Public Defense Back-Up Center. *The intrusion of cameras in New York's Criminal Courts*. A report to the State of New York's Cameras in the Courtroom Experiment., Albany N.Y.(1989); Hawaii State Bar Association .*Final Report on "cameras in the courtroom."* Hawaii Bar Journal, 7(1), 4-39; (1982); Order of the Supreme Judicial Court of Massachusetts. (1982). ; Advisory Committee Report on Camera in the Courtroom, Arkansas Supreme Court Committee on Broadcasting and Photographing of Judicial Proceedings, *Letter/report to Chief Justice Adkisson, Supreme Court of Arkansas*, (1982); Supreme Court of Wisconsin. *Report to the Supreme Court Committee to Monitor and evaluate the use of audio and visual equipment in the courtroom*, Madison, WI. (1979); Humprhies, G.E. *Report o the Pilot Project of the presence of cameras and electronic equipment in the courtroom*. Ninth Judicial District Court, State of Louisiana (1978).

[8] *See* Eugene Borgida, et al. *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions,* 14 Law & Hum. Behav. 489, 491 (1990).

[9] *Id.*

[10] *See* Borgida, supra note 5, at 491.

already comfortable with them and supported their use.[12]

In April of 1991, the Criminal Justice Section of New York Bar Association presented a results of surveys conducted by participant self-reporting. Their survey revealed that because of the presence of cameras in the courtroom:

39% of witnesses felt more tense.
38% of attorneys reported that witness testimony was affected.
37% of attorneys were more self-conscious.
28% of witnesses were reluctant to testify
28% of jurors thought the proceeding was of more importance.
23% of attorneys found the cameras distracting.
21% of witnesses reported being distracted.
10% of attorneys believed the witnesses appeared nervous.[13]

In all of the state studies the information was gathered through self-reporting by witnesses. Self-reporting is not a reliable method for measuring effects. Participants who truly believe that they were compromised by the presence of television cameras, may be disinclined to report it.[14] Additionally, the Hawthorne Effect predicts that once people know they are being researched they will change their behavior to correspond with what they believe is expected of them.[15] The most effective method for measuring effects is an experiment with a control group. However, understandably, courts have been unwilling to submit juries and trials to social science experimentation. Such experiments have been relegated to the unrealistic setting of university campuses. However, undergraduates do not reflect most real-life jurors and campus simulation does not reflect most courthouse

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[11] *See* Earnest Short. *Evaluation of California's experiment with extended media coverage of the courts.* Sacramento., CA (1981).
[12] *See* Eugene Borgida et al. *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions.* 14 Law & Hum. Behav. 489, 491 (1990).
[13] *See* Chris Lassiter. *TV or Not TV-That is the Question.* Journal of Criminal Law and Criminology, Vol. 86, Issue 3 (Spring 1996).
[14] *Id.*
[15] *See* Richard Gillespie, *Manufacturing Knowledge: A History of the Hawthorne Experiments.* Cambridge: Cambridge University Press (1991).

settings.[16]

University Studies

A 1977 study by Hoyt had undergraduates recall information while their answers were being televised. Hoyt found that students who answered before a camera had better recall than those who had their answers recorded by either a camera behind a two-way mirror or in the absence of a camera.[17] A 1984 study, by Kassin, had subjects, acting as jurors, watch a trial (on film) and then they were asked to recall the facts. The group that had to recall in front of a camera was less accurate than those who recalled sans the presence of a camera. In 1990, the University of Minnesota conducted an experiment with simulated courtrooms. One courtroom had electronic media coverage, another had conventional media coverage and one courtroom had no coverage (control group). The University of Minnesota study found that the witnesses and jurors that were before electronic media, reported being more nervous and appeared more nervous, however, their recall and accuracy were not effected.[18] Nevertheless, opponents of cameras in the courtroom have argued that witnesses that seem nervous in the presence of cameras may appear unreliable to the jury.[19] However, once again, much of this commentary is mere speculation, not based on empirical evidence.

The social sciences, like all research , try to remain on the cutting edge. Since

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[16] *See* John Burshke, *Free Press v. Fair: Examining Publicity Role in Trial Outcomes*. Laurence Erlbaum Associates, New York (2004).

[17] *See* Hoyt, J. *Courtroom Coverage: the effects of being televised.* Journal of Broadcasting, 21, 487-495 (1977).

[18] *See* Eugene Borgida et al. *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*. 14 Law & Hum. Behav. 489 (1990).

[19] *See* Joshua Sarner, Comment, *Justice, Take Two: The Continuing Debate Over Cameras in the Courtroom*, 10 Seton Hall Const. L.J. 1053, 1060-67 (2000).

these reports have been published, the assumption is that researchers already know the answer and EMC has no effect. But a concern with these studies is that they were published 20-30 years ago and no research has been done since. New research is needed with experimentation in settings that are as real as possible.

One constant in the social science research has been findings that people with high public self-consciousness (PSC-nervousness in public) are more affected by the presence of cameras.[20] The concern for a court is what percentage of people have high PSC and more importantly what percentage of jurors and witnesses will have high PSC. However, the research cited above was conducted before the modern social phenomena of traffic light cameras, cell phone cameras and YouTube. Today, it may be true that people, especially millennials,[21] are desensitized to any effects of being in front of a camera. If this is true, all prior research would be unreliable, and would make any future experimental research to measure effects moot. People may already be changed.

Educating the Public

There is an appetite for television programming that portrays the American judicial system.[22] From *Court TV* to *Judge Judy*, from *Boston Legal* to *Law & Order*, television programming that shows courtroom drama is a lucrative venture for broadcasters. 24/7 news stations receive high ratings when there is a high-profile trial being litigated.[23]

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[20] *See* Alan Punches. *The Cognitive Effects of Camera Presence on the Recall of Testimony in a Simulated Courtroom Setting.* Alan Punches, Ph.D. Dissertation, Colorado State University (1991).

[21] This would beg the question, is the average jury, specifically in S.D., made up of technologically savvy people in their twenties. If not, the theory may be different.

[22] *See* Henry F. Fredella and Brandon Burke. *From the Legal Literature.* 43 No. 5 Crim. Law Bulleting 8, (Sept-Oct 2007).

[23] *See* Jeffrey S. Johnson. *The Entertainment Value of a Trial: How Media Access to the Courtroom is Changing the American Judicial Process.* 10 Vill. Sports & Ent. L.J. 131, 133 (2003).

Research shows that the more people watch television, the more they believe that it reflects reality.[24] Consequently, a significant amount of what the public knows about courtrooms and the judicial system comes from their exposure through dramatized television.[25]

One of the arguments. made by proponents of cameras in the courtroom, is that the information will be used to educate the public. However, there is no empirical research to justify the claim.[26] In fact many studies have shown that media use of footage from trial only serves to further dramatize and over-simplify the judicial system.[27] If cameras are to be allowed in the courtroom and there is to be a benefit to the public, then there needs to be increased communication between judges and the media.[28] Judges can shape the discourse so that the information being disseminated is informative, explanatory and accurate. One suggestion is to have courts with a single open circuit camera or live webcams that will broadcast to all citizens, including the media.[29]

Conclusion

Though many cases have been cited supporting the theory that the presence of cameras in the courtroom has no effect, there is little empirical evidence to support it and the

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[24] *See* George Gerbner and Larry Gross. *Living with Television: The Violence Profile.* Journal of Communication, Vol. 26 (1972).

[25] *See* V. Hans and J. Dee. *Media Coverage of the Law.* American Behavioral Scientist 35(2) 136-140 (1991).

[26] *See* Ralph E. Roberts. *An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings.* 51 SMU L. Rev. 621, 634 (April 1998).

[27] *See* C. Vinson and J. Ertter. *Entertainment or Television? How Do Media Cover the Courts.* Harvard International Journal of Press-Politics Vol 7, Issue 4, p. 80-97 (Fall 2002).

[28] *See* Laura Maryniak. *Coverage of Murder Trials by Missouri Newspapers.* Ph.D. Dissertation, University of Missouri (2006).

[29] *See* Paul Mason "*Reflections of International Law in Popular Culture: Justice seen to be done? Electronic Broadcast Coverage of the International Criminal Tribunal of the Former Yugoslavia.* 95 American Society of International Law Proceedings 210 (2001).

research that has been offered is suspect in terms of validity and reliability. Conversely, there is little evidence supporting any effect caused by cameras in the courtroom. Ultimately, policy conclusions based upon outdated and flawed research would not be prudent. More experimental research should be conducted in a setting best representing the courtroom experience with subjects representing a real jury pool. Finally, the courts are in a position to control the information and make sure that it is used to best inform the public and to strengthen the judicial system while protecting a party's right to a fair trial.

EXHIBIT 23

Sheppard v. Maxwell,
U.S.Ohio 1966.

Supreme Court of the United States
Samuel H. SHEPPARD, Petitioner,
v.
E. L. MAXWELL, Warden.
No. 490.

Argued Feb. 28, 1966.
Decided June 6, 1966.

Habeas corpus proceeding by state prisoner seeking release from custody. The United States District Court for the Southern District of Ohio, 231 F.Supp. 37, held conviction void, and an appeal was taken. The Court of Appeals, Sixth Circuit, 346 F.2d 707, reversed, and certiorari was granted. The United States Supreme Court, Mr. Justice Clark, held that failure of state trial judge in murder prosecution to protect defendant from inherenty prejudicial publicity which saturated community and to control disruptive influences in courtroom deprived defendant of fair trial consistent with due process.

Reversed and remanded with instructions.

Mr. Justice Black dissented.

West Headnotes

[1] Constitutional Law 92 ⚷2070

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90(1))
Unqualified prohibitions laid down by framers of Constitution were intended to give liberty of press broadest scope that could be countenanced in orderly society.

[2] Constitutional Law 92 ⚷2093

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)1 In General
92k2092 Publicity Regarding Proceedings
92k2093 k. In General. Most Cited Cases
(Formerly 92k90.1(3))

Constitutional Law 92 ⚷2112

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2111 Publicity Regarding Proceedings
92k2112 k. In General. Most Cited Cases
(Formerly 92k90.1(3))
Freedom of discussion should be given widest range compatible with essential requirement of fair and orderly administration of justice, but it must not be allowed to divert trial from very purpose of court system to adjudicate controversies, both criminal and civil, in calmness and solemnity of courtroom according to legal procedure.

[3] Criminal Law 110 ⚷857(1)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k857 Deliberations in General
110k857(1) k. In General. Most Cited Cases
Jury's verdict must be based on evidence received in open court and not from outside sources.

[4] Habeas Corpus 197 ⚷706

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197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)2 Evidence
197k705 Burden of Proof
197k706 k. Particular Issues and Problems. Most Cited Cases
(Formerly 197k85.2(1))
Burden of showing essential unfairness in criminal trial as demonstrable reality need not be undertaken when television has exposed community repeatedly and in depth to spectacle of accused personally confessing in detail to crimes with which he is later to be charged.

[5] Criminal Law 110 ⚷633.11

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.11 k. Management of Courtroom in General. Most Cited Cases
(Formerly 110k633(1))

Criminal Law 110 ⚷633.32

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases
(Formerly 110k633(1))
Extensive newspaper, radio and television coverage of criminal trial, together with physical arrangements in courtroom itself for news media, deprived defendant of judicial serenity and calm to which he was entitled.

[6] Criminal Law 110 ⚷633.32

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases
(Formerly 110k633(1))
Court has power to control publicity concerning criminal trial.

[7] Courts 106 ⚷72

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k72 k. Courthouses and Courtrooms. Most Cited Cases
Courtroom and courthouse premises are subject to control of court.

[8] Criminal Law 110 ⚷635

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 k. Publicity of Proceedings. Most Cited Cases
Presence of press at judicial proceedings must be limited when it is apparent that accused might otherwise be prejudiced or disadvantaged.

[9] Constitutional Law 92 ⚷4754

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)7 Jury
92k4754 k. Fair and Impartial Jury. Most Cited Cases
(Formerly 92k267)
Due process requires that accused receive trial by impartial jury freefrom outside influences. U.S.C.A.Const. Amend. 14.

[10] Criminal Law 110 ⚷633.32

110 Criminal Law

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110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases
(Formerly 110k633(1))

Criminal Law 110 ⚷1134.45

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.45 k. Conduct of Trial in General. Most Cited Cases
(Formerly 110k1134(3))
Given pervasiveness of modern communications and difficulty of effacing prejudicial publicity from minds of jurors, trial courts must take strong measures to ensure that balance is never weighed against accused, and appellate tribunals have duty to make independent evaluation of circumstances.

[11] Criminal Law 110 ⚷126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In General. Most Cited Cases

Criminal Law 110 ⚷591

110 Criminal Law
110XIX Continuance
110k588 Grounds for Continuance
110k591 k. Local Prejudice. Most Cited Cases
Where there is reasonable likelihood that prejudicial news prior to trial will prevent fair trial, judge should continue case until threat abates or transfer it to another county not so permeated with publi- city.

[12] Criminal Law 110 ⚷918(1)

110 Criminal Law
110XXI Motions for New Trial
110k918 Errors and Irregularities in Conduct of Trial
110k918(1) k. In General. Most Cited Cases
If publicity during proceedings threatens fairness of trial, new trial should be ordered.

[13] Criminal Law 110 ⚷633.32

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases
(Formerly 110k633(1))
Courts must take steps by rules and regulations that will protect their processes from prejudicial outside interferences, and neither prosecutors, defense counsel, accused, witnesses, court staff nor enforcement officers coming under jurisdiction of court should be permitted to frustrate its function.

[14] Attorney and Client 45 ⚷37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases
(Formerly 110k633(1))

Criminal Law 110 ⚷1985

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)1 In General
110k1985 k. Miscellaneous Particular Issues. Most Cited Cases

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(Formerly 110k633(1))

Criminal Law 110 ⚷2050

110 Criminal Law
110XXXI Counsel
110XXXI(E) Duties and Obligations of Defense Attorneys
110k2050 k. In General. Most Cited Cases
(Formerly 110k633(1))
Collaboration between counsel and press as to information affecting fairness of criminal trial is not only subject to regulation but is highly censurable and worthy of disciplinary measures.

[15] Constitutional Law 92 ⚷4605

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4603 Public Trial
92k4605 k. Publicity. Most Cited Cases
(Formerly 92k268(7))

Criminal Law 110 ⚷633.10

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.10 k. Requisites of Fair Trial. Most Cited Cases
(Formerly 110k633(1), 92k268(7))

Criminal Law 110 ⚷633.32

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases
(Formerly 110k633(1), 92k268(7))

Habeas Corpus 197 ⚷499

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k499 k. Conduct and Deliberations of Jury. Most Cited Cases
(Formerly 197k25.1(4))
Failure of state trial judge in murder prosecution to protect defendant from inherently prejudicial publicity which saturated community and to control disruptive influences in courtroom deprived defendant of fair trial consistent with due process and necessitated reversal of denial of defendant's habeas corpus petition. U.S.C.A.Const. Amend. 14.

****1508 *334** F. Lee Bailey, Boston, Mass., for petitioner.
***335** Bernard A. Berkman, Cleveland, Ohio, for American Civil Liberties Union, and others, as amici curiae.
William B. Saxbe, Columbus, Ohio, and John T. Corrigan, Cleveland, Ohio, for respondent.
Mr. Justice CLARK delivered the opinion of the Court.
This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution.[FN1] The United States District Court held that he was not afforded a fair trial and granted the writ subject to the State's right to put Sheppard to trial again, 231 F.Supp. 37 (D.C.S.D.Ohio 1964). The Court of Appeals for the Sixth Circuit reversed by a divided vote, 346 F.2d 707 (1965). We granted certiorari, 382 U.S. 916, 86 S.Ct. 289, 15 L.Ed.2d 231 (1965). We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment.

FN1. Sheppard was convicted in 1954 in

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the Court of Common Pleas of Cuyahoga County, Ohio. His conviction was affirmed by the Court of Appeals for Cuyahoga County, State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (1955), and the Ohio Supreme Court, 165 Ohio St. 293, 135 N.E.2d 340 (1956). We denied certiorari on the original application for review. 352 U.S. 910, 77 S.Ct. 118, 1 L.Ed.2d 119 (1956).

I.

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lakeshore***336** home ****1509** in Bay Village, Ohio, a suburb of Cleveland. On the day of the tragedy, July 4, 1954, Sheppard pieced together for several local officials the following story: He and his wife had entertained neighborhood friends, the Aherns, on the previous evening at their home. After dinner they watched television in the living room. Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered was hearing his wife cry out in the early morning hours. He hurried upstairs and in the dim light from the hall saw a 'form' standing next to his wife's bed. As he struggled with the 'form' he was struck on the back of the neck and rendered unconscious. On regaining his senses he found himself on the floor next to his wife's bed. He rose, looked at her, took her pulse and 'felt that she was gone.' He then went to his son's room and found him unmolested. Hearing a noise he hurried downstairs. He saw a 'form' running out the door and pursued it to the lake shore. He grappled with it on the beach and again lost consciousness. Upon his recovery he was lying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and 'determined or thought that she was gone.'[FN2]He then went downstairs and called a neighbor, Mayor Houk of Bay Village. The Mayor and his wife came over at once, found Sheppard slumped in an easy chair downstairs and asked, 'What happened?' Sheppard replied: 'I don't know but somebody ought to try to do something for Marilyn.'Mrs. Houk immediately went up to the bedroom. The Mayor told Sheppard, 'Get hold of yourself. Can you tell me what happened?'***337** Sheppard then related the above-outlined events. After Mrs. Houk discovered the body, the Mayor called the local police, Dr. Richard Sheppard, petitioner's brother, and the Aherns. The local police were the first to arrive. They in turn notified the Coroner and Cleveland police. Richard Sheppard then arrived, determined that Marilyn was dead, examined his brother's injuries, and removed him to the nearby clinic operated by the Sheppard family.[FN3] When the Coroner, the Cleveland police and other officials arrived, the house and surrounding area were thoroughly searched, the rooms of the house were photographed, and many persons, including the Houks and the Aherns, were interrogated. The Sheppard home and premises were taken into 'protective custody' and remained so until after the trial.[FN4]

FN2. The several witnesses to whom Sheppard narrated his experiences differ in their description of various details. Sheppard claimed the vagueness of his perception was caused by his sudden awakening, the dimness of the light, and his loss of consciousness.

FN3. Sheppard was suffering from severe pain in his neck, a swollen eye, and shock.

FN4. But newspaper photographers and reporters were permitted access to Sheppard's home from time to time and took pictures throughout the premises.

From the outset officials focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported-and it is undenied-to have told his men, 'Well, it is evident the doctor did this, so let's go get the confession out of him.'He proceeded to interrogate and examine Sheppard while the latter

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was under sedation in his hospital room. On the same occasion, the Coroner was given the clothes Sheppard wore at the time of the tragedy together with the personal items in them. Later that afternoon Chief Eaton and two Cleveland police officers interrogated Sheppard at some length, confronting him with evidence and demanding explanations. Asked by Officer Shotke to take a lie detector test, Sheppard said he would if it were reliable. Shotke replied that it was 'infallible' and 'you might as well tell us ***338** all about it now.'At the end of the ****1510** interrogation Shotke told Sheppard: 'I think you killed your wife.'Still later in the same afternoon a physician sent by the Coroner was permitted to make a detailed examination of Sheppard. Until the Coroner's inquest on July 22, at which time he was subpoenaed, Sheppard made himself available for frequent and extended questioning without the presence of an attorney.

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon-later the chief prosecutor of Sheppard-sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. Under the headline 'Testify Now In Death, Bay Doctor Is Ordered,' one story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. The officers questioned him for several hours. On July 9, Sheppard, at the request of the Coroner, re-enacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner. The home was locked so that Sheppard was obliged to wait outside until the Coroner arrived. Sheppard's performance was reported in detail by the news media along with photographs. The newspapers also played up Sheppard's refusal to take a lie detector test and 'the protective ring' thrown up by his family. Front-page newspaper headlines announced on the same day that 'Doctor Balks At Lie Test; Retells Story.'A column opposite that story contained an 'exclusive' interview with Sheppard headlined: "Loved My Wife, She Loved Mr,' Sheppard Tells ***339** News Reporter.' The next day, another headline story disclosed that Sheppard had 'again late yesterday refused to take a lie detector test' and quoted an Assistant County Attorney as saying that 'at the end of a nin-hour questioning of Dr. Sheppard, I felt he was now ruling (a test) out completely.'But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with 'truth serum.'FN5

FN5. At the same time, the newspapers reported that other possible suspects had been 'cleared' by lie detector tests. One of these persons was quoted as saying that he could not understand why an innocent man would refuse to take such a test.

On the 20th, the 'editorial artillery' opened fire with a front-page charge that somebody is 'getting away with murder.' The editorial attributed the ineptness of the investigation to 'friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected * * *.' The following day, July 21, another page-one editorial was headed: 'Why No Inquest? Do It Now, Dr. Gerber.'The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was

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brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. ***340** When Sheppard's chief counsel attempted to place ****1511** some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes.[FN6] At the end of the hearing the Coroner announced that he 'could' order Sheppard held for the grand jury, but did not do so.

FN6. The newspapers had heavily emphasized Sheppard's illicit affair with Susan Hayes, and the fact that he had initially lied about it.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence.[FN7] During the inquest on July 26, a headline in large type stated: 'Kerr (Captain of the Cleveland Police) Urges Sheppard's Arrest.'In the story, Detective McArthur 'disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section,' a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extramarital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that ***341** Sheppard had any illicit relationships besides the one with Susan Hayes.

FN7. A number of articles calculated to evoke sympathy for Sheppard were printed, such as the letters Sheppard wrote to his son while in jail. These stories often appeared together with news coverage which was unfavorable to him.

On July 28, an editorial entitled 'Why Don't Police Quiz Top Suspect' demanded that Sheppard be taken to police headquarters. It described him in the following language:

'Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases * * *.'

A front-page editorial on July 30 asked: 'Why Isn't Sam Sheppard in Jail?'It was later titled 'Quit Stalling-Bring Him In.' After calling Sheppard 'the most unusual murder suspect ever seen around these parts' the article said that '(e)xcept for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling * * *.' It asserted that he was 'surrounded by an iron curtain of protection (and) concealment.'

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned-having been denied a temporary delay to secure the presence of counsel-and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: 'DR. SAM: 'I Wish There Was Something I Could Get Off My Chest-but There Isn't.'' Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: "I Will Do Everything In My Power to Help Solve This Terrible ***342** Murder.'-Dr. Sam Sheppard.' Headlines announced, inter alia, that: 'Doctor****1512** Evidence is Ready for Jury,'

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'Corrigan Tactics Stall Quizzing.' 'Sheppard 'Gay Set' Is Revealed By Houk,' 'Blood Is Found In Garage,' 'New Murder Evidence Is Found, Police Claim,''Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him.'On August 18, an article appeared under the headline 'Dr. Sam Writes His Own Story.'And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: 'I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?'We do not detail the coverage further. There are five volumes filled with similar clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954. The record includes no excerpts from newscasts on radio and television but since space was reserved in the courtroom for these media we assume that their coverage was equally large.

II.

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors. The selection of the jury began on October 18, 1954.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside ***343** the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its vardict.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were ***344** photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and ****1513** extensively photographed for the newspapers and television. A rule of court prohibited picture-taking in the courtroom during the actual sessions of the court, but no restraints were put on

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photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch.

All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard. Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.

The daily record of the proceedings was made available to the newspapers and the testimony of each witness was printed verbatim in the local editions, along with objections of counsel, and rulings by the judge. Pictures of Sheppard, the judge, counsel, pertinent witnesses, and the jury often accompanied the daily newspaper***345** and television accounts. At times the newspapers published photographs of exhibits introduced at the trial, and the rooms of Sheppard's house were featured along with relevant testimony.

The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at voir dire to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the jurors' homes, but we must assume that most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the Sheppard home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered-while the jurors were at lunch and sequestered by two bailiffs-the jury was separated into two groups to pose for photographs which appeared in the newspapers.

III.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an ***346** effort to use the resulting statistics to show the necessity for change of venue. The article said the survey 'smacks of mass jury tampering,' called on defense counsel to drop it, and stated that the bar association should do something about it. It characterized the poll as 'non-judicial, non-legal, and nonsense.' The article ****1514** was called to the attention of the court but no action was taken.

2. On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal

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lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that 'WHK doesn't have much coverage,' and that '(a)fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can.'

3. While the jury was being selected, a two-inch headline asked: 'But Who Will Speak for Marilyn?'The frontpage story spoke of the 'perfect face' of the accused.'Study that face as long as you want. Never will you get from it a hint of what might be the answer * * *.' The two brothers of the accused were described as 'Prosperous, poised. His two sisters-in law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan.'The author then noted Marilyn Sheppard was 'still off stage,' and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author-through quotes from Detective Chief James McArthur-assured readers that the prosecution's exhibits would speak for ***347** Marilyn. 'Her story,' McArthur stated, 'will come into this courtroom through our witnesses.'The article ends:

'Then you realize how what and who is missing from the perfect setting will be supplied.

'How in the Big Case justice will be done.

'Justice to Sam Sheppard.

'And to Marilyn Sheppard.'

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss' confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continuance based on the same ground, saying:

'Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody. * * * We are not going to harass the jury every morning. * * * It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury * * *.'

348** 6. On November 24, a story appeared under an eight-column headline: 'Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin To Testify.'It related that Marilyn had recently told friends that Sheppard was a 'Dr. Jekyll and Mr. Hyde' character. No such testimony was ever produced at the trial. The story went on to announce: 'The prosecution*1515** has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper-countering the defense claim that the defendant is a gently physician with an even disposition.'Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the

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broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: 'Would that have any effect upon your judgment?'Both replied, 'No.' This was accepted by the judge as sufficient; he merely asked the jury to 'pay no attention whatever to that type of scavenging. * * * Let's confine ourselves to this courtroom, if you please.'In answer to the motion for mistrial, the judge said:

'Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there were no trial here. The trial has nothing to do with it in the Court's mind, as far as its outrage is concerned, but-

***349** 'Mr. CORRIGAN: I don't know what effect it had on the mind of any of these jurors, and I can't find out unless inquiry is made.

'The COURT: How would you ever, in any jury, avoid that kind of a thing?'

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: "Bare-faced Liar,' Kerr Says of Sam.' Captain Kerr never appeared as a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. Although the telephones had been removed from the jurors' rooms, the jurors were permitted to use the phones in the bailiffs' rooms. The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors' end of the conversation. The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

IV.

[1] The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' ***350**In re Oliver, 333 U.S. 257, 268, 68 S.Ct. 499, 92 L.Ed. 682 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news ****1516** media for '(w)hat transpires in the court room is public property.'Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press * * * the broadest scope that could be countenanced in an orderly society.'Bridges v. State of California, 314 U.S. 252, 265, 62 S.Ct. 190, 195, 86 L.Ed. 192 (1941). And where there was 'no threat or menace to the integrity of the trial,'Craig v. Harney, supra, 331 U.S. at 377, 67 S.Ct. at 1255, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

[2][3] But the Court has also pointed out that '(l)egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.'Bridges v. State of California, supra, 314 U.S. at 271, 62 S.Ct. at 197. And the Court has insisted that no one be punished for a

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crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.'Chambers v. State of Florida, 309 U.S. 227, 236-237, 60 S.Ct. 472, 477, 84 L.Ed. 716 (1940).'.freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.'Pennekamp v. State of Florida, 328 U.S. 331, 347, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system * * * to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the ***351** courtroom according to legal procedures.'Cox v. State of Louisiana, 379 U.S. 559, 583,85 S.Ct. 466, 471, 13 L.Ed.2d 487 (1965) (Black, J., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.'At 313, 79 S.Ct. at 1173. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.'At 312, 79 S.Ct. at 1173. Likewise, in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

'With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion * * *.' At 728, 81 S.Ct., at 1645.

[4] The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in Patterson v. State of Colorado ex rel. Attorney General, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907):

'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'

Moreover, 'the burden of showing essential unfairness * * * as a demonstrable reality,'***352**Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942), need not be undertaken when television has exposed the community 'repeatedly and in depth to the spectacle of (the accused) personally confessing in detail to the crimes with which he was later to be charged.'****1517**Rideau v. State of Louisiana, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963). In Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that,
'even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association * * *.' At 473, 85 S.Ct., at 550.

Only last Term in Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'At 542-543, 85 S.Ct. at 1632.

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And we cited with approval the language of Mr. Justice Black for the Court in In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), that 'our system of law has always endeavored to prevent even the probability of unfairness.'

V.

It is clear that the totality of circumstances in this case also warrants such an approach. Unlike Estes, Sheppard was not granted a change of venue to a locale away from ***353** where the publicity originated; nor was his jury sequestered. The Estes jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge's 'admonitions' at the beginning of the trial are representative:

'I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned. You will feel very much better as the trial proceeds * * *. I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content * * *.'

At intervals during the trial, the judge simply repeated his 'suggestions' and 'requests' that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. See Estes v. State of Texas, supra, 381 U.S., at 545-546, 85 S.Ct., at 1634. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the ***354** Cleveland newspapers and broadcasting stations to Sheppard's prosecution.[FN8] Sheppard ****1518** stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.[FN9]

FN8. Many more reporters and photographers attended the Sheppard trial. And it attracted several nationally famous commentators as well.

FN9. At the commencement of trial, defense counsel made motions for continuance and change of venue. The judge postponed ruling on these motions until he determined whether an impartial jury could be impaneled. Voir dire examination showed that with one exception all members selected for jury service had read something about the case in the newspapers. Since, however, all of the jurors stated that they would not be influenced by what they had read or seen, the judge overruled both of the motions. Without regard to whether the judge's actions in this re-

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spect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in Delaney v. United States, 199 F.2d 107, 115 (C.A.1st. Cir. 1952), recognized such a duty under similar circumstances, holding that 'if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.'

[5] While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which ***355** the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that 'judicial serenity and calm to which (he) was entitled.'Estes v. State of Texas, supra, 381 U.S., at 536, 85 S.Ct., at 1629. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

***356** VI.

There can be no question about the nature of the publicity which surrounded ****1519** Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for the Ohio Supreme Court:

'Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. * * * In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life.'165 Ohio St., at 294, 135 N.E.2d, at 342.

Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.[FN10]

FN10. Typical comments on the trial by the press itself include:
'The question of Dr. Sheppard's guilt or innocence still is before the courts. Those who have examined the trial record carefully are divided as to the propriety of the verdict. But almost everyone who watched the performance of the Cleveland press

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> agrees that a fair hearing for the defendant, in that area, would be a modern miracle.'Harrison, 'The press vs. the Courts,' The Saturday Review (Oct. 15, 1955).
>
> 'At this distance, some 100 miles from Cleveland, it looks to us as though the Sheppard murder case was sensationalized to the point at which the press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of fair trials.'Editorial, The Toledo Blade (Dec. 22, 1954).

Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had ***357** hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a 'Jekyll-Hyde'; that he was 'a bare-faced liar' because of his testimony as to police treatment; and finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being 'doctored' to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury. See Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (1963).

VII.

[6] The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he ***358** reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce ****1520** the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.[FN11]

> FN11. In an unsworn statement, which the parties agreed would have the status of a deposition, made 10 years after Sheppard's conviction and six years after Judge Blythin's death, Dorothy Kilgallen asserted that Judge Blythin had told her: 'It's an open and shut case * * * he is guilty as hell.'It is thus urged that Sheppard be released on the ground that the judge's bias infected the entire trial. But we need not reach this argument, since the judge's failure to insulate the proceedings from prejudicial publicity and disruptive influences deprived Sheppard of the chance to receive a fair hearing.

[7][8] The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in Estes, the presence of the press at judicial proceedings must be limited when

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it is apparent that the accused might otherwise be prejudiced or disadvantaged.[FN12] Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

FN12. The judge's awareness of his power in this respect is manifest from his assignment of seats to the press.

***359** Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. See Estes v. State of Texas, supra, 381 U.S., at 547, 85 S.Ct., at 1635.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion.[FN13] That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. The judge made this statement in the presence of the jury:

FN13. The problem here was further complicated by the independent action of the newspapers in reporting 'evidence' and gossip which they uncovered. The press not only inferred that Sheppard was guilty because he 'stalled' the investigation, hid behind his family, and hired a prominent criminal lawyer, but denounced as 'mass jury tampering' his efforts to gather evidence of community prejudice caused by such publications. Sheppard's counterattacks added some fuel but, in these circumstances, cannot preclude him from asserting his right to a fair trial. Putting to one side news stories attributed to police officials, prospective witnesses, the Sheppards, and the lawyers, it is possible that the other publicity 'would itself have had a prejudicial effect.'Cf. Report of the President's Commission on the Assassination of President Kennedy, at 239.

'Now, the Court wants to say a word. That he was told-he has not ****1521** read anything about it at all-but he was informed that Dr. Steve Sheppard, who ***360** has been granted the privilege of remaining in the court room during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the State.

'Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case.

'The Court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the * * * privilege of being in the courtroom, if he wants to avail himself of that method during the progress of the trial.'

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that 'misrepresented entirely the

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testimony' in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner.[FN14] The story that Sheppard had been called ***361** a 'Jekyll-Hyde' personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was 'a 'bombshell witness' on tap' who would testify as to Sheppard's 'fiery temper' could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record. [FN15]

FN14. When two police officers testified at trial that Sheppard refused to take a lie detector test, the judge declined to give a requested instruction that the results of such a test would be inadmissible in any event. He simply told the jury that no person has an obligation 'to take any lie detector test.'

FN15. Such 'premature disclosure and weighing of the evidence' may seriously jeopardize a defendant's right to an impartial jury. '(N)either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against (Sheppard).' Cf. Report of the President's Commission, supra, at 239, 240.

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. See Stroble v. State of California, 343 U.S. 181, 201, 72 S.Ct. 599, 609, 96 L.Ed. 872 (1952) (Frankfurter, J., dissenting). Effective control of these sources-concededly within the court's power-might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take ****1522** any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See State v. Van Duyne, 43 N.J., 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. ***362** Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.[FN16] In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of trial. See p. 1513, supra. In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom-not pieced together from

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extrajudicial statements.

FN16. The Department of Justice, the City of New York, and other governmental agencies have issued such regulations. E.g., 28 CFR s 50.2 (1966). For general information on this topic see periodic publications (e.g., Nos. 71, 124, and 158) by the Freedom of Information Center, School of Journalism, University of Missouri.

[9][10][11][12][13][14] From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing ***363** that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

[15] Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom,****1523** we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

Mr. Justice BLACK dissents.
U.S.Ohio 1966.
Sheppard v. Maxwell
384 U.S. 333, 6 Ohio Misc. 231, 86 S.Ct. 1507, 16 L.Ed.2d 600, 35 O.O.2d 431, 1 Media L. Rep. 1220

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H
State v. DonkersOhio App. 11 Dist.,2007.
Court of Appeals of Ohio,Eleventh District, Portage County.
The STATE of Ohio, Appellee,
v.
DONKERS, Appellant.
Nos. 2003 P 0135, 2003 P 0136.

Decided March 30, 2007.

Background: Defendant was convicted in the Portage County Municipal Court, Nos. R03CRB01333, R03TRD10252 and R03CRB01665, of driving without a valid license, failure to use a child-restraint system, and failure to comply with an order or signal of a police officer by fleeing or eluding. Defendant appealed.

Holdings: The Court of Appeals, Vukovich, J., held that:
(1) defendant was not properly advised of her rights or advised of the substance of charges against her at initial appearance;
(2) statute governing offense of failure to use a child-restraint system applies only when a child is being transported in a motor vehicle that is registered in Ohio;
(3) defendant could not be convicted of first-degree misdemeanor offense of driving without a valid license, absent evidence that her license had been expired for more than six months;
(4) evidence supported conviction for failing to comply with an order or signal of a police officer by fleeing or eluding;
(5) officer was justified in stopping defendant for speeding, even if stop was pretextual;
(6) trial court's conducting of pretrial procedures was improper; and
(7) defendant was not absolved of liability on failure to comply charge based on claim that she was following orders of her alleged husband.

Reversed in part, modified in part, and remanded.

*** The requested pages begin below ***

of Common Pleas of Lake Cty. (1990), 52 Ohio St.3d 104, 108, 556 N.E.2d 1120 See, also, Section 16, Article 1 of the Ohio Constitution"[A]ll courts shall be open"

[37]{¶ 161} All news participants here received prior written approval of the court and were given certain standards of conduct. See Sup.R. 12 Appellant does not point to any objection made to the trial court as to the presence, amount, or location of any of the media representatives present. Had she done so, the trial court could have alleviated any particular concerns. Her failure constitutes waiver. See *State ex rel. Miami Valley Broadcasting Corp. v. Kessler* (1980), 64 Ohio St.2d 165, 168, 18 O.O.3d 383, 413 N.E.2d 1203 (party seeking limitation on coverage has burden to overcome presumption of fair trial).

[38]{¶ 162} Even on appeal, appellant does not set forth any specific **problems** with the **media** other than her blanket statement that a **courtroom** "full of news **cameras**" is prejudicial in itself (or at least as part of cumulative error). This proposition is untenable. See *Miami Valley,* 64 Ohio St.2d at 167, 18 O.O.3d 383, 413 N.E.2d 1203 (news coverage of trials is not per se inconsistent with a fair and impartial trial). Finally, there is no indication on the record of actual interruption, disruption, or influence of the media. See *Neely,* Mahoning App. No. 80CA2, 1981 WL 4743. Thus, this argument is without merit.

SUPPLEMENTAL ASSIGNMENT OF ERROR NUMBER ONE

{¶ 163} The first supplemental assignment of error set forth by appellant pro se alleges:

{¶ 164}"The clear bias of the court in its role as the finder of fact was prejudicial to appellant's right to

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a fair trial."

[39]{¶ 165} Under this assignment, appellant contends that the trial court had a clear disdain for those who seek to uphold their own

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H
In re Extension of Media Coverage for a Further Experimental Period
R.I.,1984.

Supreme Court of Rhode Island.
In re EXTENSION OF MEDIA COVERAGE FOR A FURTHER EXPERIMENTAL PERIOD.
No. 84-148-M.P.

March 24, 1984.

Media advisory committee presented a recommendation that the experiment allowing broadcasting, televising, and photographing of court proceedings should be either extended for a period not less than 18 months or extended indefinitely, subject to published standards and guidelines. The Supreme Court held that the recommendation of the committee to extend media access for a period of 18 months would be followed but that disregard by the media of its obligation to contribute to public understanding and education during such experimental period could result in termination of media access.

Recommendation adopted.

West Headnotes

[1] Constitutional Law 92 ⚷2099

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)1 In General
92k2099 k. Photographing, Recording, or Televising Proceedings. Most Cited Cases
(Formerly 92k90.1(3))
Electronic media have no First Amendment right to photograph or broadcast judicial proceedings. U.S.C.A. Const.Amend. 1.

[2] Trial 388 ⚷20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of Proceedings. Most Cited Cases
Reason for allowing broadcasting and photographing of trial procedures is potential contribution that media can make in area of wider public understanding and acceptance of judicial proceedings and decisions. U.S.C.A. Const.Amend. 1.

[3] Trial 388 ⚷20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of Proceedings. Most Cited Cases
Presence of electronic media with its potential for recording and broadcasting of judicial proceedings is based not upon constitutional imperative but rather is dependent on policy decision made by Supreme Court in exercise of its supervisory authority that such presence leads to wider public understanding and acceptance of judicial proceedings and decisions; this policy decision is obviously subject to review and analysis based upon weighing of benefits as opposed to disadvantages of such media presence. U.S.C.A. Const.Amend. 1.

[4] Trial 388 ⚷20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of Proceedings. Most Cited Cases
Additional burden placed on trial justices by presence of media must be balanced by some benefit in terms of increased public understanding that can only come about through process of education; preservation of tapes of judicial proceedings for use in educational programs, occasional broadcasting of significant portions of judicial proceedings together with informed commentary are illustrations of opportunities media have by which they can contribute to public education and understanding.

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[5] Trial 388 ⚷20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of Proceedings. Most Cited Cases
Recommendation of media advisory committee that experiment allowing broadcasting, televising, and photographing of court procedures be continued for an additional period of 18 months would be followed; however, disregard by media of its obligation to contribute to public understanding and education during such period could result in termination of media access. U.S.C.A. Const.Amend. 1.

***1233** OPINION

PER CURIAM.
This matter again comes before us pursuant to a recommendation of the Media Advisory Committee relating to access by electronic media, including broadcasting, televising, and photographing, to judicial proceedings. On April 22, 1981, we adopted Provisional Order 15, which allowed media access to judicial proceedings on an experimental basis for a period of one year subject to guidelines that were appended to the rule and made a part thereof.

Thereafter, on December 31, 1982, we amended Provisional Order 15 to extend the experimental period of media access from January 17, 1983, through January 16, 1984. In extending this experimental period, we suggested that the **media** had an obligation to further the goal of public education as a justification for the placing of additional burdens upon trial justices in managing **problems** arising out of and adjusting to the presence of **cameras** in the **courtroom**. Our observations bear repeating here.

"Our consideration of the results of the experiment has disclosed that the public educational value of media access has, to this point, been of so limited a value as to be nearly imperceptible. We are of the opinion that the public understanding of the judicial system and its procedures has not been substantially furthered by televising, broadcasting or photographing during the experimental period. We therefore call to the attention of representatives of the media their obligation to further the goal of public education. This goal is the sole justification for the assumption of additional burdens by trial judges and other participants in the trial process in adjusting to and dealing with the presence of broadcasting, television, and still photography in the courtroom during court proceedings." *In re Extension of Media Coverage,* R.I., 454 A.2d 246, 247 (1982).

At the conclusion of this second experimental period, the Media Advisory Committee conducted hearings at which members of the judiciary, members of the bar, and members of the public were given an opportunity to express their views. Testimony of the participants at these hearings has been summarized and presented to this court, along with supplemental letters and statements that were presented to the committee at the hearings or through the mail. In addition, the committee has presented to the court summaries of the responses to questionnaires that were submitted to sixty-two jurors who had participated in criminal cases.

The Media Advisory Committee, after analyzing the testimony given, the results of the questionnaires returned, and related ***1234** materials obtained at the conclusion of the first experimental period, made recommendations to this court, including the following.

"The committee recommends without dissent that media access to judicial proceedings should be either extended for a period not less than eighteen months or extended indefinitely, subject to published standards and guidelines."

In addition to its recommendation to extend media coverage, the committee also suggested that an agency be appointed to continue the monitoring process in the event of extension of coverage. The committee further suggested that the present

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guidelines are adequate and should be continued in effect in the event of extended or indefinite media access.

This court expresses its disappointment at the failure of the television and broadcast media to make more significant efforts to achieve the goals of public education. The only substantial educational effort of which we are aware is the complete recording by channel 10 of an appellate argument before this court with accompanying commentary by a member of the bar. We believe that in the light of the broad potential for education of the public in regard to the judicial process, the efforts of the media in this area to date may only be described as feeble.

[1][2][3] We are constrained to reject suggestions made by representatives of the media and other witnesses at the committee hearings that there is no obligation to educate. We begin with the recognition that the electronic media have no First Amendment right to photograph or broadcast judicial proceedings. *See Chandler v. Florida,* 449 U.S. 560, 569, 101 S.Ct. 802, 807, 66 L.Ed.2d 740, 748 (1981); *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 610, 98 S.Ct. 1306, 1318, 55 L.Ed.2d 570, 587 (1978). Consequently, as suggested by the Supreme Court of Florida in *In re Petition of Post-Newsweek Stations, Florida, Inc.,* 370 So.2d 764 (Fla.1979), the reason for allowing broadcasting and photographing of trial procedures is the potential contribution that the media can make in the area of wider public understanding and acceptance of judicial proceedings and decisions. *Id.* at 780. We suggest that a forty-five-second fragment of a judicial proceeding accompanied by a still or moving image scarcely contributes to such public understanding. Therefore, the presence of the electronic media with its potential for recording and broadcasting of judicial proceedings is based not upon any constitutional imperative but rather is dependent on a policy decision made by this court in the exercise of its supervisory authority. This policy decision is obviously subject to review and analysis based upon the weighing of benefits as opposed to disadvantages of such media presence.

[4][5] We accept the findings of the Media Advisory Committee that no significant disruption or interference with judicial procedures has occurred as the result of the media presence. We recognize, however, from the testimony given before the committee that many trial justices find that the presence of the media adds to their already substantial burdens in the governance of adversary proceedings, already often charged with emotion and tension. Therefore, we reiterate the statement which we previously made that this additional burden must be balanced by some benefit in terms of increased public understanding that can only come about through a process of education. The preservation of tapes of judicial proceedings for use in educational programs, the occasional broadcasting of significant portions of judicial proceedings together with informed commentary are illustrations of opportunities that the media have by which they can contribute to public education and understanding. Disregard by the media of its obligation to contribute to public understanding and education during***1235** a further experimental period may result in the termination of media access.

In response to the committee's recommendation, we hereby authorize the extension of access by the electronic media to judicial proceedings for an additional period of eighteen months, beginning April 1, 1984, and extending through September 30, 1985. By order of even date herewith, we make this extension of media access subject to the guidelines already in force. We shall, however, amend Guideline 15 in order to provide that further monitoring of media access will be carried out by the Advisory Board to the Chief Justice.[FN1] This advisory board consists of the justices of this court, the presiding justice of the Superior Court, the chief judge of the Family Court and the chief judge of the District Court. We are of the opinion that this board will be the body best suited to continue the monitoring process and to make further evaluations of the benefits and disadvantages of media access. The

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advisory board may, from time to time, call upon representatives of the media to advise and inform the board concerning matters of mutual concern to the board and the media relating to the broadcasting and photographing of judicial proceedings.

FN1. The Advisory Board to the Chief Justice is a body authorized by G.L. 1956 (1969 Reenactment) § 8-15-5, as enacted by P.L.1969, ch. 239, § 1.

The court takes this opportunity to thank the Media Advisory Committee and its individual members for the work that they have performed on behalf of this court in analyzing and reporting upon the multiplicity of issues which have been raised incident to experimental programs conducted thus far. Many committee members have served continuously since 1978, and all have participated fully in the process of research and evaluation underlying the extension and regulation of media access to the present time. We commend the committee members for their service.

For the reasons stated, the recommendation of the committee to extend media access for a period of eighteen months is adopted and Provisional Order 15 shall be amended accordingly.

AMENDMENT TO PROVISIONAL ORDER No. 15

AND TO GUIDELINES PROMULGATED IN ACCORDANCE THEREWITH

MEDIA ACCESS TO JUDICIAL PROCEEDINGS

Provisional Order No. 15 adopted by this court April 11, 1981, amended on August 14, 1981, and further amended on December 31, 1982, is hereby further amended to extend the experimental period of media access to judicial proceedings for a period of eighteen (18) months beginning April 1, 1984, and continuing through September 30, 1985.

Provisional Order No. 15 is further amended to include an amendment to the guidelines attached hereto and made a part hereof. All other provisions of the guidelines promulgated by this court on April 22, 1981, and amended December 31, 1982, shall remain in full force and effect during the experimental period.

Entered as an order of this court this 23rd of March, 1984.

/s/ Bevelacqua, C.J.

Bevilacqua, C.J.

/s/ Kelleher, J.

Kelleher, J.

/s/ Weisberger, J.

Weisberger, J.

/s/ Murray, J.

Murray, J.

/s/ Shea, J.

Shea, J.

AMENDED GUIDELINE No. 15

The Advisory Board to the Chief Justice (consisting of the Chief Justice, the Associate Justices of this court, the Presiding Justice of the Superior Court, the Chief ***1236** Judge of the Family Court and the Chief Judge of the District Court) will continue to evaluate the effects of media access to judicial proceedings. To this end the Advisory Board, directly or through its agents retained for this purpose, may submit to trial judges, parties, witnesses, jurors and other participants in trial proceedings questionnaires to be completed, or may cause such individuals to be interviewed as part of the evaluation process. All trial justices, parties, witnesses, jurors and other participants in trial proceedings are expected

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to cooperate fully with the Advisory Board to the Chief Justice, or its agents, in this evaluation process and the furnishing of all relevant information in implementation thereof.

R.I.,1984.
In re Extension of Media Coverage for a Further Experimental Period
472 A.2d 1232, 10 Media L. Rep. 1803

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Carey v. MusladinU.S.,2006.
Supreme Court of the United States
Thomas L. CAREY, Warden, Petitioner,
v.
Mathew MUSLADIN.
No. 05-785.

Argued Oct. 11, 2006.
Decided Dec. 11, 2006.

Background: Following affirmance of his first-degree murder conviction on direct appeal in state court, habeas petitioner sought writ of habeas corpus, contending that spectators' conduct had denied him a fair trial. The United States District Court for the Northern District of California denied relief. The Court of Appeals for the Ninth Circuit, 427 F.3d 653, reversed and remanded. Certiorari was granted.

Holding: The Supreme Court, Justice Thomas, held that state appellate court determination that habeas petitioner was not inherently prejudiced when spectators wore buttons depicting murder victim was not contrary to or unreasonable application of clearly established law.

Vacated and remanded.

Justices Stevens, Kennedy, and Souter filed opinions concurring in the judgment.

*** The requested pages begin below ***

essentially the same as those expressed by Justice SOUTER, with one caveat. In my opinion, there is no merit whatsoever to the suggestion that the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding.
Justice KENNEDY, concurring in the judgment.

Trials must be free from a coercive or intimidating atmosphere. This fundamental principle of due process is well established. It was recognized in *Frank v. Mangum,* 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915), though the Court credited the determination of the state court and granted no relief; and it was the square holding in *Moore v. Dempsey,* 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923), though the Court remanded for factfinding rather than for a new trial. The disruptive presence of the press required **reversal** in *Sheppard v. Maxwell,* 384 U.S. 333, 355, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), where "newsmen took over practically the entire **courtroom**, hounding most of the participants in the trial," and *Estes v. Texas,* 381 U.S. 532, 550, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), where the presence of **cameras** distracted jurors throughout the proceedings.

The rule against a coercive or intimidating atmosphere at trial exists because "we are committed to a government of laws and not of men," under which it is "of the utmost importance that the administration of justice be absolutely fair and orderly," and "the constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding culminating with a trial 'in a courtroom presided over by a judge.'*Cox v. Louisiana,* 379 U.S. 559, 562, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (quoting *Rideau v. Louisiana,* 373 U.S. 723, 727, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)) (finding a statute did not on its face violate First Amendment rights where it prohibited picketing in courthouses). Cf. *Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962)*Turner v. Louisiana,* 379 U.S. 466, 85 S.Ct

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C

Effective: November 1, 2003

Mckinney's Consolidated Laws of New York Annotated Currentness
Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 7-a. Judicial Administration (Refs & Annos)
§ 218. Audio-visual coverage of judicial proceedings

1. Authorization. Notwithstanding the provisions of section fifty-two of the civil rights law and subject to the provisions of this section, the chief judge of the state or his designee may authorize an experimental program in which presiding trial judges, in their discretion, may permit audio-visual coverage of civil and criminal court proceedings, including trials.

2. Definitions. For purposes of this section:

(a) "Administrative judge" shall mean the administrative judge of each judicial district; the administrative judge of Nassau county or of Suffolk county; the administrative judge of the civil court of the city of New York or of the criminal court of the city of New York; or the presiding judge of the court of claims.

(b) "Audio-visual coverage" shall mean the electronic broadcasting or other transmission to the public of radio or television signals from the courtroom, the recording of sound or light in the courtroom for later transmission or reproduction, or the taking of still or motion pictures in the courtroom by the news media.

(c) "News media" shall mean any news reporting or news gathering agency and any employee or agent associated with such agency, including television, radio, radio and television networks, news services, newspapers, magazines, trade papers, in-house publications, professional journals or any other news reporting or news gathering agency, the function of which is to inform the public, or some segment thereof.

(d) "Presiding trial judge" shall mean the justice or judge presiding over proceedings at which audio-visual coverage is authorized pursuant to this section.

(e) "Covert or undercover capacity" shall mean law enforcement activity involving criminal investigation by peace or police officers who usually and customarily wear no uniform, badge, or other official identification in public view.

(f) "Arraignment" shall have the same meaning as such term is defined in subdivision nine of section 1.20 of the criminal procedure law.

(g) "Suppression hearing" shall mean a hearing on a motion made pursuant to the provisions of section 710.20 of the criminal procedure law; a hearing on a motion to determine the admissibility of any prior criminal, vicious or immoral acts of a defendant and any other hearing held to determine the admissibility of evidence.

(h) "Nonparty witness" shall mean any witness in a criminal trial proceeding who is not a party to such proceed-

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ing; except an expert or professional witness, a peace or police officer who acted in the course of his or her duties and was not acting in a covert or undercover capacity in connection with the instant court proceeding, or any government official acting in an official capacity, shall not be deemed to be a "nonparty witness".

(i) "Visually obscured" shall mean that the face of a participant in a criminal trial proceeding shall either not be shown or shall be rendered visually unrecognizable to the viewer of such proceeding by means of special editing by the news media.

3. Requests for coverage of proceedings; administrative review.

(a) Prior to the commencement of the proceedings, any news media interested in providing audio-visual coverage of court proceedings shall file a request with the presiding trial judge, if assigned, or if no assignment has been made, to the judge responsible for making such assignment. Requests for audio-visual coverage shall be made in writing and not less than seven days before the commencement of the judicial proceeding, and shall refer to the individual proceeding with sufficient identification to assist the presiding trial judge in considering the request. Where circumstances are such that an applicant cannot reasonably apply seven or more days before the commencement of the proceeding, the presiding trial judge may shorten the time period for requests.

(b) Permission for news media coverage shall be at the discretion of the presiding trial judge. An order granting or denying a request for audio-visual coverage of a proceeding shall be in writing and shall be included in the record of such proceeding. Such order shall contain any restrictions imposed by the judge on the audio-visual coverage and shall contain a statement advising the parties that any violation of the order is punishable by contempt pursuant to article nineteen of this chapter. Such order for initial access shall be subject only to review by the appropriate administrative judge; there shall be no further judicial review of such order or determination during the pendency of such proceeding before such trial judge. No order allowing audio-visual coverage of a proceeding shall be sealed.

(c) Subject to the provisions of subdivision seven of this section, upon a request for audio-visual coverage of court proceedings, the presiding trial judge shall, at a minimum, take into account the following factors: (i) the type of case involved; (ii) whether such coverage would cause harm to any participant in the case or otherwise interfere with the fair administration of justice, the advancement of a fair trial or the rights of the parties; (iii) whether any order directing the exclusion of witnesses from the courtroom prior to their testimony could be rendered substantially ineffective by allowing audio-visual coverage that could be viewed by such witnesses to the detriment of any party; (iv) whether such coverage would interfere with any law enforcement activity; or (v) involve lewd or scandalous matters.

(d) A request for audio-visual coverage made after the commencement of a trial proceeding in which a jury is sitting shall not be granted unless, (i) counsel for all parties to the proceeding consent to such coverage, or (ii) the request is for coverage of the verdict and/or sentencing in such proceeding.

4. Supervision of audio-visual coverage; mandatory pretrial conference; judicial discretion.

(a) Audio-visual coverage of a court proceeding shall be subject to the supervision of the presiding trial judge. In supervising audio-visual coverage of court proceedings, in particular any which involve lewd or scandalous matters, a presiding trial judge shall, where necessary for the protection of any participant or to preserve the welfare of a minor, prohibit all or any part of the audio-visual coverage of such participant, minor or exhibit.

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(b) A pretrial conference shall be held in each case in which audio-visual coverage of a proceeding has been approved. At such conference the presiding trial judge shall review, with counsel and the news media who will participate in the audio-visual coverage, the restrictions to be imposed. Counsel shall convey to the court any concerns of prospective witnesses with respect to audio-visual coverage.

(c) There shall be no limitation on the exercise of discretion under this subdivision except as provided by law. The presiding trial judge may at any time modify or reverse any prior order or determination.

5. Consent. (a) Audio-visual coverage of judicial proceedings, except for arraignments and suppression hearings, shall not be limited by the objection of counsel, parties, or jurors, except for a finding by the presiding trial judge of good or legal cause.

(b) Audio-visual coverage of arraignments and suppression hearings shall be permitted only with the consent of all parties to the proceeding; provided, however, where a party is not yet represented by counsel consent may not be given unless the party has been advised of his or her right to the aid of counsel pursuant to subdivision four of section 170.10 or 180.10 of the criminal procedure law and the party has affirmatively elected to proceed without counsel at such proceeding.

(c) Counsel to each party in a criminal trial proceeding shall advise each nonparty witness that he or she has the right to request that his or her image be visually obscured during said witness' testimony, and upon such request the presiding trial judge shall order the news media to visually obscure the visual image of the witness in any and all audio-visual coverage of the judicial proceeding.

6. Restrictions relating to equipment and personnel; sound and light criteria. Where audio-visual coverage of court proceedings is authorized pursuant to this section, the following restrictions shall be observed:

(a) Equipment and personnel:

(i) No more than two electronic or motion picture cameras and two camera operators shall be permitted in any proceeding.

(ii) No more than one photographer to operate two still cameras with not more than two lenses for each camera shall be permitted in any proceeding.

(iii) No more than one audio system for broadcast purposes shall be permitted in any proceeding. Audio pickup for all media purposes shall be effectuated through existing audio systems in the court facility. If no technically suitable audio system is available, microphones and related wiring essential for media purposes shall be supplied by those persons providing audio-visual coverage. Any microphones and sound wiring shall be unobtrusive and located in places designated by the presiding trial judge.

(iv) Notwithstanding the provisions of subparagraphs (i), (ii) and (iii) of this paragraph, the presiding trial judge may modify his original order to increase or decrease the amount of equipment that will be permitted into a courtroom on a finding of special circumstances so long as it will not impair the dignity of the court or the judicial process.

(v) Notwithstanding the provisions of subparagraphs (i), (ii) and (iii) of this paragraph, the equipment authorized therein shall not be admitted into a court proceeding unless all persons interested in providing audio-visual coverage of such proceedings shall have entered into pooling arrangements for their respective groups. Furthermore,

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a pool operator for the electronic and motion picture media and a pool operator for the still photography media shall be selected, and procedures for cost sharing and dissemination of audio-visual material established. The court shall not be called upon to mediate or resolve any dispute as to such arrangements. In making pooling arrangements, consideration shall be given to educational users' needs for full coverage of entire proceedings.

(b) Sound and light criteria:

(i) Only electronic and motion picture cameras, audio equipment and still camera equipment which do not produce distracting sound or light shall be employed to cover judicial proceedings. The chief administrator of the courts shall promulgate a list of acceptable equipment models.

(ii) No motorized drives shall be permitted, and no moving lights, flash attachments, or sudden lighting changes shall be permitted during judicial proceedings.

(iii) No light or signal visible or audible to trial participants shall be used on any equipment during audio-visual coverage to indicate whether it is operating.

(iv) It shall be the affirmative duty of any person desiring to use equipment other than that authorized by the chief administrator to demonstrate to the presiding trial judge, adequately in advance of any proceeding, that the equipment sought to be utilized meets acceptable sound and light criteria. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

(v) With the concurrence of the presiding trial judge modifications and additions may be made to light sources existing in the facility, provided such modification or additions are installed and maintained at the expense of the news media who are providing audio-visual coverage and provided they are not distracting or otherwise offensive.

(c) Location of equipment and personnel. Cameras, equipment and personnel shall be positioned in locations designated by the presiding trial judge.

(i) All audio-visual coverage operators shall assume their assigned, fixed position within the designated area and once established in such position, shall act in a manner so as not to call attention to their activities.

(ii) The areas so designated shall provide reasonable access to coverage with the least possible interference with court proceedings. Equipment that is not necessary for audio-visual coverage from inside the courtroom shall be located in an area outside the courtroom.

(d) Movement of equipment during proceedings. Equipment shall not be placed in, moved about or removed from the courtroom, and related personnel shall not move about the courtroom, except prior to commencement or after adjournment of proceedings each day, or during a recess. Camera film and lenses shall be changed only during a recess in proceedings.

7. Restrictions on audio-visual coverage. Notwithstanding the initial approval of a request for audio-visual coverage of any court proceeding, the presiding trial judge shall have discretion throughout the proceeding to revoke such approval or limit such coverage, and may where appropriate exercise such discretion to limit, restrict or prohibit audio or video broadcast or photography of any part of the proceeding in the courtroom, or of the name or features of any participant therein. In any case, audio-visual coverage shall be limited as follows:

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(a) no audio pickup or audio broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding trial judge, shall be permitted without the prior express consent of all participants in the conference;

(b) no conference in chambers shall be subject to audio-visual coverage;

(c) no audio-visual coverage of the selection of the prospective jury during voir dire shall be permitted;

(d) no audio-visual coverage of the jury, or of any juror or alternate juror, while in the jury box, in the courtroom, in the jury deliberation room during recess, or while going to or from the deliberation room at any time shall be permitted; provided, however, that, upon consent of the foreperson of a jury, the presiding trial judge may, in his or her discretion, permit audio coverage of such foreperson delivering a verdict;

(e) no audio-visual coverage shall be permitted of a witness, who as a peace or police officer acted in a covert or undercover capacity in connection with the instant court proceeding, without the prior written consent of such witness;

(f) no audio-visual coverage shall be permitted of a witness, who as a peace or police officer is currently engaged in a covert or undercover capacity, without the prior written consent of such witness;

(g) no audio-visual coverage shall be permitted of the victim in a prosecution for rape, criminal sexual act, sexual abuse or other sex offense under article one hundred thirty or section 255.25 of the penal law; notwithstanding the initial approval of a request for audio-visual coverage of such a proceeding, the presiding trial judge shall have discretion throughout the proceeding to limit any coverage which would identify the victim, except that said victim can request of the presiding trial judge that audio-visual coverage be permitted of his or her testimony, or in the alternative the victim can request that coverage of his or her testimony be permitted but that his or her image shall be visually obscured by the news media, and the presiding trial judge in his or her discretion shall grant the request of the victim for the coverage specified;

(h) no audio-visual coverage of any arraignment or suppression hearing shall be permitted without the prior consent of all parties to the proceeding; provided, however, where a party is not yet represented by counsel consent may not be given unless the party has been advised of his or her right to the aid of counsel pursuant to subdivision four of section 170.10 or 180.10 of the criminal procedure law and the party has affirmatively elected to proceed without counsel at such proceeding;

(i) no judicial proceeding shall be scheduled, delayed, reenacted or continued at the request of, or for the convenience of the news media;

(j) no audio-visual coverage of any participant shall be permitted if the presiding trial judge finds that such coverage is liable to endanger the safety of any person;

(k) no audio-visual coverage of any judicial proceedings which are by law closed to the public, or which may be closed to the public and which have been closed by the presiding trial judge shall be permitted; and

(l) no audio-visual coverage shall be permitted which focuses on or features a family member of a victim or a party in the trial of a criminal case, except while such family member is testifying. Audio-visual coverage operators shall make all reasonable efforts to determine the identity of such persons, so that such coverage shall not occur.

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8. Violations. Any violation of an order or determination issued under this section shall be punishable as a contempt pursuant to article nineteen of this chapter.

9. Review committee. (a) There shall be created a committee to review audio-visual coverage of court proceedings. The committee shall consist of twelve members, three to be appointed by the governor, three to be appointed by the chief judge of the courts, two to be appointed by the majority leader of the senate, two to be appointed by the speaker of the assembly, one to be appointed by the minority leader of the senate and one to be appointed by minority leader of the assembly. The chair of the committee shall be appointed by the chief judge of the courts. At least one member of the committee and no more than two members of the committee shall be a representative of the broadcast media, be employed by the broadcast media, or receive compensation from the broadcast media. At least two members of the committee shall be members of the bar, engaged in the practice of law, and regularly conduct trials and/or appellate arguments; and at least one member of the committee shall by professional training and expertise be qualified to evaluate and analyze research methodology relevant to analyzing the impact and effect of audio-visual coverage of judicial proceedings. No one who has served on an earlier committee established by law to review audio-visual coverage of judicial proceedings in New York state may be appointed to such committee. No member or employee of the executive, legislative, or judicial branches of the state government may be appointed to such committee.

(b) The members of the committee shall serve without compensation for their services as members of the committee, except that each of the nonpublic members of the committee may be allowed the necessary and actual travel, meals and lodging expenses which he or she shall incur in the performance of his or her duties under this section. Any expenses incurred pursuant to this section shall be a charge against the office of court administra- tion.

(c) The committee shall have the power, duty and responsibility to evaluate, analyze, and monitor the provisions of this section. The office of court administration and all participants in proceedings where audio-visual coverage was permitted, including judges, attorneys and jurors, shall cooperate with the committee in connection with the review of the impact of audio-visual coverage on such proceedings. The committee shall request participation and assistance from the New York state bar association and other bar associations. The committee shall issue a report to the legislature, the governor, and the chief judge evaluating the efficacy of the program and whether any public benefits accrue from the program, any abuses that occurred during the program, and the extent to which and in what way the conduct of participants in court proceedings changes when audio-visual coverage is present. The committee shall expressly and specifically analyze and evaluate the degree of compliance by trial judges and the media with the provisions of this section and the effect of audio-visual coverage on the conduct of trial judges both inside and outside the courtroom. Such report shall be submitted to the legislature, the governor and the chief judge by January thirty-first, nineteen hundred ninety-seven.

10. Rules and regulations. The chief administrator shall promulgate appropriate rules and regulations for the implementation of the provisions of this section after affording all interested persons, agencies and institutions an opportunity to review and comment thereon. Such rules and regulations shall include provisions to ensure that audio-visual coverage of trial proceedings shall not interfere with the decorum and dignity of courtrooms and court facilities.

11. Duration. The provisions of this section shall be of no force and effect after June thirtieth, nineteen hundred ninety-seven.

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CREDIT(S)

(Added L.1992, c. 187, § 1; amended L.1992, c. 274, § 1; L.1993, c. 348, § 1; L.1995, c. 8, § 1; L.2003, c. 264, § 65, eff. Nov. 1, 2003.)

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

L.2003, c. 264 legislation

Subd. 7, par. (g). L.2003, c. 264, § 65, substituted "criminal sexual act" for "sodomy".

L.2003, c. 264, § 72, provides:

"This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided, however, that section sixty-eight of this act [amending Executive Law § 631] shall take effect on April 1, 2005 and shall apply to claims for payments made for services rendered on and after such date; and provided further that the provisions of section 218 of the judiciary law, as amended by section sixty-five of this act, shall not be construed to affect the expiration of such section as set forth in subdivision 11 of such section 218, but shall be deemed to amend such expired provisions in the event that such provisions shall be revived."

L.1995, c. 8 legislation

Subd. 9, par. (a). L.1995, c. 8, § 1, eff. Jan. 31, 1995, substituted reference to chief judge for reference to chief administrator in 2 places; substituted provisions requiring 1 or 2 committee members be representatives of, employed by, or paid by broadcast media, for provisions requiring at least 1 committee member be representative of broadcast news media; and added provisions requiring 2 practicing litigators and 1 qualified research analyst on committee, and prohibiting appointment of former committee members and members or employees of state government.

Subd. 9, par. (c). L.1995, c. 8, § 1, eff. Jan. 31, 1995, made request of bar assistance mandatory; substituted provisions regarding report evaluating program's efficacy, public benefits, abuses, and effect on participants, for provisions regarding recommendations as to efficacy of program and desirability of its continuation; required express and specific analysis and evaluation of compliance and effect on judges' conduct; and substituted due date of Jan. 31, 1997 for due date of Nov. 30, 1994.

Subd. 11. L.1995, c. 8, § 1, eff. Jan. 31, 1995, delayed expiration until June 30, 1997 from Jan. 31, 1995.

L.1993, c. 348 legislation

L.1993, c. 348, § 2, eff. July 21, 1993, provides:

"This act [amending this section] shall take effect immediately [July 21, 1993] and shall apply to all proceedings commenced on and after such effective date; provided, however that the amendment to section 218 of the judiciary law made by section one of this act shall not affect the expiration of such section 218 and shall be deemed to expire therewith."

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Derivation

Former § 218, added L.1987, c. 113, § 2; amended L.1989, c. 115, §§ 1 to 8; repealed L.1992, c. 187, § 1.

Former Sections

Section, part of former Article 7-A, added L.1962, c. 684, § 3, which related to co-ordination of auxiliary services, was repealed by L.1978, c. 156, § 6.

NEW YORK CODES, RULES AND REGULATIONS

2005 Main Volume

Audio-visual coverage of judicial proceedings, see 22 NYCRR 131.1 et seq., set out in McKinney's New York Rules of Court Pamphlet [N.Y.Ct.Rules 131.1 et seq.].

Electronic Recording and audio-visual coverage of court proceedings, see 22 NYCRR 29.1 et seq., set out in McKinney's New York Rules of Court Pamphlet [N.Y.Ct.Rules 29.1 et seq.].

Videotape recording of civil depositions--

Court of claims, see 22 NYCRR 206.11, set out in McKinney's New York Rules of Court Pamphlet [N.Y.Ct.Rules 206.11].

Supreme court and county court, see 22 NYCRR 202.15, set out in McKinney's New York Rules of Court Pamphlet [N.Y.Ct.Rules 202.15].

LAW REVIEW AND JOURNAL COMMENTARIES

Audio-Visual Coverage of Trial Proceedings, Memorandum in Support. Michael J. Grygiel, 63 Alb.L.Rev. 1003 (2000).

New Legislation Affecting the Practice of Criminal Law. Barry Kamins, 44 Brook.Barrister 41 (1993).

Open Courtroom: Should Cameras Be Permitted in New York State Courts? Jay C. Carlisle, 18 Pace L.Rev. 297 (1998).

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Courts ⚷ 78.
Criminal Law ⚷ 633(1).
Trial ⚷ 20.
Westlaw Topic Nos. 106, 110, 388.
C.J.S. Courts §§ 7, 124 to 126.
C.J.S. Criminal Law §§ 564, 1134, 1140, 1145 to 1146, 1191.
C.J.S. Trial § 97.

RESEARCH REFERENCES

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2008 Electronic Update

Encyclopedias

NY Jur. 2d, Administrative Law § 88, Conduct of Open Meeting; Right of Public to Use Recording Devices.

NY Jur. 2d, Attorneys at Law § 43, Giving Legal Advice.

NY Jur. 2d, Constitutional Law § 175, Limitations With Respect to Judiciary--Permissible Legislative Action.

NY Jur. 2d, Criminal Law § 2219, Restrictions as to Equipment and Personnel Used.

NY Jur. 2d, Criminal Law § 2220, Restrictions as to Proceedings Covered.

NY Jur. 2d, Criminal Law § 2221, Restrictions as to Persons Covered.

Forms

Carmody-Wait, 2d § 45:5, Audiovisual Coverage of Trials.

Carmody-Wait, 2d § 3:192, Overview of Statutory Provisions.

Carmody-Wait, 2d § 51:35, Conferences as Discretionary.

Carmody-Wait, 2d § 51:44, Actions in Which Audiovisual Coverage Has Been Approved.

Carmody-Wait, 2d § 172:1160, Audio-Visual Coverage.

Carmody-Wait, 2d § 172:2659, Closure of Hearing; Audio-Video Coverage.

NOTES OF DECISIONS

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1. Construction and application

Media company's challenge to constitutionality of statute prohibiting audio-visual coverage and televising of trials was moot, where the criminal trial that the media company wished to cover had been completed, the statute had been enacted 42 years earlier, and the enabling legislation that had circumvented the statute for ten years had not been effective for two years. Clear Channel Communications Inc. v. Rosen (3 Dept. 1999) 263 A.D.2d 663, 692 N.Y.S.2d 812. Constitutional Law ⚷ 46(1)

2. Construction with federal laws

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Court would not permit criminal proceedings to be televised, where defendant stated that he would not attend trial if it were televised and took position that he was being forced to give up his Sixth Amendment right of confrontation by being directed to proceed, regardless of whether application for television coverage had been timely filed. People v. Bellamy, 1995, 167 Misc.2d 265, 639 N.Y.S.2d 649. Criminal Law ⚷ 635

3. Photographs

Magazine would be permitted to take still photographs during proceedings in small claims part arising out of "Airplane Game" pyramid scheme, but would be limited to taking three photographs during course of hearing; nature of proceeding was not such that media coverage would interfere with the administration of justice or operate to prejudice of any party, but possibility of distraction to litigants made three photograph limitation necessary. Howie v. Rayvis, 1988, 139 Misc.2d 38, 526 N.Y.S.2d 727. Trial ⚷ 20

Magazine was entitled to take still courtroom photographs in related small claims action; use of nonintrusive still camera would not negatively affect defendant's privacy and magazine had already published information about defendant's business and residence addresses and had written about defendant at some length. Oles v. Houston, 1988, 138 Misc.2d 1075, 525 N.Y.S.2d 1008. Trial ⚷ 20

4. Divorce proceedings

Applications for audio-visual coverage and for still photography of divorce proceedings were required to be denied; coverage would cause harm to parties' three children, case involved numerous lewd allegations and scandalous assertions, one party opposed coverage, and some witnesses were children. Olesh v. Olesh, 1989, 143 Misc.2d 299, 540 N.Y.S.2d 123. Trial ⚷ 20

5. Timeliness of request for coverage

Where application for television (TV) coverage of defendant's trial was not filed seven or more days prior to commencement of proceedings, and where defendant did not consent to that application, but instead stated that he would not attend trial if cameras were allowed, application was required to be denied. People v. Bellamy, 1995, 167 Misc.2d 265, 639 N.Y.S.2d 649. Criminal Law ⚷ 635

"Commencement of proceedings," for purposes of statute providing that application for television (TV) coverage should be made seven days prior to commencement of judicial proceedings, means selection and swearing of jury, and not opening statements, even if voir dire cannot be shown; seven day rule gives defendant chance to question jury as to their attitude towards cameras, whether they believe presence of cameras somehow makes defendant more important or newsworthy, and whether presence of cameras will otherwise affect their ability to deliberate impartially. People v. Bellamy, 1995, 167 Misc.2d 265, 639 N.Y.S.2d 649. Criminal Law ⚷ 635

6. Objections to coverage

Reversal was not mandated by trial court order permitting audio-visual coverage of defendant's arraignment over his objection, in contravention of statute, when defendant did not seek review by administrative judge and his otherwise wholly conclusory, speculative, and unsubstantiated allegations that jury pool was tainted by coverage did not support vacatur of conviction. People v. Burdo (3 Dept. 1998) 256 A.D.2d 737, 682 N.Y.S.2d 681. Criminal Law ⚷ 1166(3); Criminal Law ⚷ 1166.6

7. Article 78 proceeding for review

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Administrative judge's order upholding trial judge's order denying media entity's permission to utilize cameras and recording devices in courtroom during course of trial in criminal case was made in course of criminal proceeding and was not subject to review in Article 78 proceeding. New York Times Co. v. Bell (1 Dept. 1988) 135 A.D.2d 182, 523 N.Y.S.2d 807. Mandamus ⚷ 61

8. Review

Administrative judge of court lacked authority to review presiding trial judge's determination which barred audio-visual coverage of testimony of witness. People v. Wright, 1988, 138 Misc.2d 906, 525 N.Y.S.2d 789. Judges ⚷ 24

McKinney's Judiciary Law § 218, NY JUD § 218
Current through L.2008, chapters 1 to 117.

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