REPORT OF THE COMMITTEE ON CAMERAS IN THE COURTS OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR

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REPORT OF THE SUBCOMMITTEE ON CAMERAS IN THE COURTS OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR

Introduction

We have been charged by Division IV with the task of recommending whether cameras should be permitted to be present during Superior Court and the Court of Appeals proceedings. [1] This committee is unanimous in its recommendation that cameras be permitted in the Court of Appeals. A majority of the committee also believes that cameras should be permitted in Superior Court subject to the restrictions and limitations set forth in the body of our report.

The issue is unquestionably timely. Forty-two of the fifty states have adopted permanent or experimental rules permitting some type of photographic access to their courts. [2] The Judicial Conference of the United States is now considering a proposal to permit electronic coverage of federal court proceedings. [3] And, most importantly, the Supreme Court has

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[1] Although our report specifically discusses only the Superior Court and the District of Columbia Court of Appeals, we believe our analysis and conclusions would be equally applicable to the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit.

[2] Radio-Television News Directors Association, News Media Coverage of Judicial Proceedings With Cameras and Microphones: A Survey of the States (as of February 29, 1984), at B-1 (hereinafter cited as "RTNDA").

[3] In March 1983, twenty-eight journalistic organizations filed a petition with the Judicial Conference and in January 1984 representatives of those organizations met with the Judicial (Cont'd)

held that televised trials do not constitute a per se violation of the due process clause of the Fourteenth Amendment. 4/

Traditionally, the ban against electronic access to the courts was contained within Canon 3A(7) of the ethical standards of the ABA's Code of Judicial Conduct. In 1973, Canon 3A(7) was adopted in the District of Columbia and current court rules reflect its flat ban on televised coverage. 5/ But the American Bar Association has since amended Canon 3A(7) in a dramatic fashion. That provision now permits the "broadcasting, televising, recording and photographing of judicial proceedings" in a manner "that will be unobstrusive, will not distract the trial participants and will not otherwise interfere with the administration of justice."

With the constitutional and ethical considerations now resolved, the question is directly presented whether, as a matter of policy, additional media access to the courtrooms of the District of Columbia is desirable. 6/ That issue can now be

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Conference to discuss their proposal.

4/ There is no reason to believe that the due process clause of the Fifth Amendment, which governs the governmental actions of the District of Columbia, demands any different result. See e.g., Bolling v. Sharpe, 347 U.S. 497 (1954).

5/ See Rule 53(b), Superior Court Rules of Criminal Procedure; Rule 203(b), Superior Court Rules of Civil Procedure.

6/ In the main, our report will discuss electronic access to court proceedings in terms of television. It is our intention that radio be permitted in courtrooms on the same basis as television. Although it is possible to suggest some distinction between radio and television on the ground that television is more likely to disrupt court proceedings, we are aware of no state that has made such a distinction and we believe that, given current technological advances discussed below, any distinction among electronic media is not substantial enough to justify (Cont'd)

considered with the help of an impressive volume of evidence from the state courts. We have relied heavily on reports and other data from states that have considered the question of television in the courts. Of particular interest have been the reports written in states such as Arizona, California, Massachusetts and Wisconsin that have evaluated experimental programs put into operation before the adoption of permanent rules. Those reports, which survey and evaluate responses of trial participants to the presence of cameras, offer a first-hand look at the way cameras effect -- or do not effect -- courts on a day-to-day basis.

In considering the question of cameras in the courts, we began our deliberations by agreeing on three basic principles. (1) First, we have determined that no change should be implemented that carries with it a substantial risk of affecting the truth-finding process of our judicial system. Any diminution of the ability of courts to reach accurate determinations of fact or to apply the law impartially threatens both the due process rights of individual litigants and the equally important public interest in maintaining a fair system of justice.

(2) Second, we believe that, so long as our first principle is met, it is desirable to increase the flow of information concerning the activities of the courts. As Chief Justice Burger has written, open trials enhance "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise

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treatment of television as different from radio. Nor have we distinguished between still cameras and the electronic media.

Co. v. Superior Court, No. 82-556, slip. op. at 6 (Jan. 18, 1984). The free flow of information about judicial proceedings permits "the public to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government." Globe Newspaper Co. v. Superior Court, 102 S.Ct. 2613, 2620 (1982). Moreover, we believe there can be no question that television transmits information that is not available solely from the printed media. This is true both because the electronic media undoubtedly reaches persons who do not regularly read newspapers and magazines and because television conveys detail that is not captured by the printed report of a trial. Thus, the access of the broadcast media to courts, although not of constitutional significance, see Nixon v. Warner Communications, Inc., 435 U.S. 589, 608-10 (1978); United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983), will further the public interest.

At the same time, we recognize the broadcast coverage carries with it a risk of conveying to the public a distorted impression of what a trial is like through the selection of video images and audial records transmitted. An essential feature of our trial system is that the jury hear all the evidence, presented by both sides, before making its decision. Broadcast coverage, at least on commercial television, cannot in most cases replicate or convey this experience; the brief time allotted to reporting on trials precludes all but small portions of testimony from being reproduced. While similar selectivity is present in print media trial coverage, the same immediacy that makes

television coverage vidid may have a stronger effect than print media in creating impressions that are not an accurate reflection of what occurs in the entire trial. Thus, in balancing the public benefit from increased information to be derived from permitting broadcast coverage of trials against any possible risk of impairing fact-finding, we believe it is important to recognize that there may be limitations on the educational value of broadcast coverage of trial proceedings.

We do not believe, however, that it would be appropriate for the bar or bench to condition access by cameras to the courts by assessing how well journalists do their jobs. Our third basic premise is that access should not be based on the bar's or the judiciary's evaluation of the quality of television coverage. The essential task of a journalist is to select the information that he or she considers to be newsworthy. As the Supreme Court has explained, "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 124 (1973); see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

The Report that follows is based on these principles. A finding that broadcasting necessarily has a substantial risk of impairing the decisional process would demand a continued ban on coverage. Where the risk is insubstantial, however, we have balanced the likely informational value of permitting coverage against possible but not substantial risks of affecting the performance of participants or outcome of trials. As the Report

makes clear, we have concluded that in such circumstances the informational value outweighs any such residual risks of coverage.

I. Summary and Conclusions

With this analysis in mind, we have examined the effect of television on courtroom proceedings. (1) First, we have considered the impact of modern technology on the environment generally. (2) Second, we have considered the effect of television on five groups of persons: (i) judges, (ii) attorneys (iii) witnesses, (iv) jurors and (v) parties. (3) Third, we have considered the effect of television on two specific types of court proceedings: (i) pre-trial proceedings in cases that will require a jury trial and (ii) trials of matters that, like divorce or child-custody disputes, concern details of an intimate and personal nature. (4) Fourth, we have considered whether television coverage should be permitted on an experimental or permanent basis.

Our conclusions are relatively straightforward. Advances in the technology of broadcasting now permit television cameras to operate in courtrooms without the attendant disruption that would by itself influence the trial proceedings. We have found no substantial evidence that judges or attorneys will be affected by participation in televised proceedings. Accordingly, we have concluded that appellate and trial court proceedings may be televised without concern on this score.

By contrast, we have found substantial evidence that laypersons who appear as witnesses or serve as jurors may be affected if the proceedings in which they participate are televised. We have concluded, therefore, that each witness should be permitted to bar the televising of his or her testimony and that jurors should never be televised. In general, we have concluded that trials should be available to be televised so long as these criteria are met. 7/ However, we recommend that trial judges retain full discretion upon request of any party to preclude broadcast coverage of any proceeding for good cause.

We have determined that special rules should govern access by the electronic media to pre-trial proceedings in cases in which a jury trial will be held in order to insure that pre-trial publicity does not affect the ability of the parties to choose an impartial and unbiased jury. For different reasons, we also believe that cameras should not be present during trials of certain matters that may be unduly embarassing to the parties involved. In such instances we believe that the privacy rights of the parties outweigh the public interest in access by the electronic media.

Finally, we conclude that the television access to courts in the District of Columbia should not be made permanent at this time. Rather, we propose the promulgation of rules based

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7/ Bench conferences held during trials and consultations between litigants and their attorneys should not, however, be broadcast.

on our recommendations for a one-year period to be followed by evaluation of the experimental coverage.

We propose that such standards be adopted through the normal notice-and-comment rule making procedure employed for the adoption of local court rules. This procedure will permit the Bar and the public to comment on specific rules that, we hope, endorse the substance of the conclusions we make herein.

II. The Effect of Modern Technology on Trials

When the Supreme Court reversed the conviction of Billy Sol Estes because his state trial in Texas had been open to television reporters and newspaper photographers, see Estes v. Texas, 381 U.S. 533 (1965), the presence of cameras in the courtroom had had two generalized, undesirable effects on the trial. First, the technology of the time required bright lights for television cameras that were distracting to the trial participants. Second, the presence of an unlimited number of cameramen in the courtroom created considerable distraction as they moved about.

Almost twenty years after Estes, however, both difficulties have been resolved in states that permit television coverage. Television and still cameras are now capable of working without significant modifications to the courtroom's lighting systems, sound equipment can be "patched" into pre-existing courtroom sound systems, court rules can require that only the quietest still cameras be used in court, a required pooling procedure may be employed to limit courtroom access to

one television camera and one still camera, and movement by media personnel in the courtroom can be strictly limited. See e.g., In re California Rules of Court, 6 Med. L. Rptr. 1252, 1253-54 (1980); [8/] In re Petition of Post-Newsweek Stations, 5 Med. L. Rptr. 1039, 1047-48 (Fla. 1979); In re Canon 35, 6 Med. L. Rptr., 1543, 1543-44 (Mont. 1980); Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom ("Wisconsin Report"), 57-59 (Wis. 1979). The success of these procedures has been obvious. For example, 93% of the jurors and witnesses surveyed in Arizona reported that they were not distracted by the presence of media equipment. See Raker, Cameras and Recorders in Arizona's Trial Courts, ("Arizona Report") 20 (1983).

Indeed one state judge familiar with the presence of television cameras at trial has stated that increased media access actually decreases courtroom distractions. Edward D. Cowart served as Chief Judge of the Eleventh Judicial Circuit in Florida from February 1979 through March 1981 and presided over trials open to television that included the trial of Theodore Bundy, who was accused of the murder of female college students. Judge Cowart explained that

> The coverage of highly publicized trials by television in the courtroom actually makes the highly publicized trial more manageable and takes considerable pressure from the participants including the trial judge.

[8/] The California rules since have been amended in respects not relevant to this issue. See RTNDA A-8 to A-9.

> This unanticipated result of television access is true because the many reporters and other journalists who would otherwise crowd the courtroom and its environs prefer to watch most segments of the trial from remote television monitors where they are able to follow the proceedings and, at the same time, phone their editors, smoke, eat food and otherwise conduct themselves free of the discipline of the courtroom. For instance, in the Bundy trial, although it was fully covered by the nation's media, most journalists covering the trial operated from a press room several floors away from the courtroom. I never had problems with the press or the audience in that case and I believe that the use of television actually reduced the tensions of trial.

Affidivit of Edward D. Cowart, submitted in United States v. Hastings, No. 81-596-Cr-ETG (S.D. Fla. Nov. 20, 1982). Similarly, the operation of an annex from which reporters could view proceedings on television monitors assisted the trial judge presiding in the murder trial of Claus von Bulow in maintaining order in the courtroom. See Weisberger, Cameras in the Courtroom: The Rhode Island Experience, 17 Suffolk University L. Rev. 299 (1983); see also Final Statistical Report Cameras in the Courtroom in Nevada, ("Nevada Report"), Table 1 (1981). Accordingly, the purely technical objections to the presence of television in the courtroom are no longer sufficient to support a continued prohibition of cameras in the courtroom.

III. The Effect of Cameras on Participants

As we explain below, our review of the evidence concerning the effect of television on trial participants has proved to be the critical step in determining whether judicial proceedings should be televised. We have reached one conclusion,

however, that we believe should be considered apart from the more difficult questions concerning the presence of broadcast media at trials. We believe that appellate court proceedings, in which only judges and attorneys participate, should be open to broadcast coverage. There is no substantial evidence that television affects the trained professional and, moreover, we believe that additional media access to our appellate court will better permit the public to comprehend the important role played by judges on the Court of Appeals. Moreover, the educational uses in law schools and in continuing-legal-education courses of videotaped oral arguments are self-evident.

A. Judges. We have found no substantial evidence that the presence of cameras in the courtroom affects the performance of judges. Although judges may notice the presence of cameras at first, the evidence we have reviewed supports the conclusion that their actions are not adversely altered by the presence of cameras. One state court judge has explained that "[m]ovement of spectators in and out of the courtroom is far more noticeable, subconsciously than was the presence of the TV camera and its operator." Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom ("Louisiana Pilot Project"), 4 (1979)(Humphries,J.). See Evaluation of California's Experiment With Extended Media Coverage of Courts ("California's Experiment"), 221 (1981); Pryor, Strawn, Buchanan & Meeske, The Florida Experiment: An Analysis of On-the-Scene Responses To Cameras in the Courtroom ("Florida Experiment"), 7,

13 Tables 1 & 2; Final Report of the Hawaii State Bar Association Committee on "Cameras in the Courtroom," ("Hawaii Report") 7, 12.

One specific fear that has been raised is that judges may "play" to the cameras in order to attain wider public attention. In this regard, it is relevant to note that judges in the District of Columbia, although they do not have life tenure, are appointed for relatively long terms and are not elected. Insofar as there is any merit to the criticism noted above, these factors render it less credible in the District of Columbia.

B. Attorneys. Lawyers, like judges, are professionals who should be able to adapt to a change in courtroom procedures without any adverse effect on their actions. The evidence we have reviewed supports the view that attorneys are not adversely affected because they are televised although, like judges, they may well notice the presence of cameras at first. See California's Experiment at 221; Hawaii Report at 7, 12; Louisiana Pilot Project at 2, 4;

Again as with judges, the suggestion has been made that attorneys will "play" to the camera. See Brief of the American College of Trial Lawyers, 21 filed in Chandler v. Florida, No. 79-1260. Despite some evidence to the contrary, see In re Canon 3A(7), 9 Med. L. Rptr. 1778, 1782 (Minn. 1983) (Yetka J., dissenting), the overwhelming bulk of the evidence does not support that fear as a serious concern. Thus, based on our own experience and the empirical evidence we have reviewed, we do not think that the risk here is sufficiently substantial to justify a ban on television coverage of attorneys.

C. Witnesses. The effect of television on witnesses may be the most critical, and sharply debated, issue addressed in this report. Based upon our review of studies conducted across the country, we believe that televised proceedings may have two effects on witnesses. First, witnesses may be uncooperative if they fear that their cooperation will lead to their televised testimony. Second, the presence of cameras in the courtroom during a witness's testimony may make that witness less comfortable and forthcoming and may, therefore, influence the testimony that is received. See Final Statistical Report Cameras in the Courtroom in Nevada, ("Nevada Report"), Table 6 (1981); Lancaster, One Murder, Two Trials -- One With Cameras, One Without ("One Murder, Two Trials"), 29 (1982); see also In re Photographic Coverage, 8 Med. L. Rptr. 1556, 1559 (Maine 1982).

Frankly, the information gathered on this issue is mixed. A considerable amount of data indicates that television will not affect the testimony of witnesses. See California's Experiment at 221; Arizona Report at 26; In re Petition of Post-Newsweek Stations, 5 Med. L. Rptr. at 1048. Nonetheless, there is evidence suggesting the opposite conclusion. A questionnaire distributed after a murder trial in Massachusetts in which about 80 witnesses testified revealed that 23.8% of the witnesses believed that the presence of television had an "intimidating" effect on them. See Report of the Advisory Committee To Oversee the Experimental Use of Cameras and Recording Equipment in Courtrooms, ("Massachusetts Report") Attachments 4-5 (1982). See

also Buchanan, Pryor, Meeske & Strawn, Trial Lawyers' Attitudes Towards Cameras in the Courtroom: The Florida Experiment, 5.

Despite the divergent data on the effect of television on witnesses per se, it is generally agreed that certain witnesses, such as victims of violent crimes, police informants, and defense witnesses who are reluctant to "get involved" with the criminal process, will be adversely affected if their testimony is televised. Even the Supreme Court of Florida, which has been among the most liberal in permitting television coverage, has recognized the existence of "occasional instances of significant adverse impact on some catagories of witnesses." In re Petition of Post-Newsweek Stations, 5 Med. L. Rptr. at 1050. In our view, there can be no more compelling reason to preclude cameras in the courtroom than the risk that witnesses may be unavailable or that testimony may change because of television coverage.

As a practical matter, therefore, the question is not whether all witness testimony should be televised -- we know of no state that has adopted such a rule -- but is, rather, what sort of restrictions should be placed upon television access to testimony. In general, states have adopted one of two different methods of eliminating adverse effects of television on witnesses. First, some states permit each witness to bar his or her testimony from being broadcast. See In re Canon 3A(7), 5 Med. L. Rptr. 2494, 2494 (Alaska 1979); In re Canon 3A(7), 8 Med. L. Rptr. 1361, 1361 (Ark. 1982); In re Canon 3A(7), 9 Med. L. Rptr. 1778, 1779 (Minn. 1983); In re Canon 3A(7), 7 Med. L. Rptr.

2336, 2337 (Ohio 1981); In re Canon 3A(7), 4 Med. L. Rptr. 2501, 2502 (Tenn. 1979) Second, other states, like Florida, permit a trial judge to bar coverage of a witness's testimony upon the witness's request, but do not require the trial judge to follow the witness's wishes. See In re California Rules of Court, 6 Med. L. Rptr. at 1253; In re Canon 3A(7), 8 Med. L. Rptr. 1355, 1360 (Conn. 1982).

For several reasons, we favor the former approach for non-party witnesses. First, an absolute rule will enable attorneys to assure reluctant witnesses before trial that they can decide whether their testimony will be televised. 9/ The Florida approach leaves the issue uncertain until the testimony is scheduled to begin. The ability to assure a reluctant witness may be important to a governmental prosecutor who attempts to secure coooperation from a complaining witness in a rape prosecution or a defense attorney who seeks cooperation from witnesses reluctant to testify. Second, the absolute rule, because it does not require participation by the court, is less burdensome to the judicial process and, in particular, will lead to fewer disruptions of the trial. Third, the inevitable effect of the Florida rule is to make each witness a potential litigant. Indeed, a witness who feels strongly that he or she may be harmed by the broadcast of testimony may be forced to retain an attorney to represent his or her interests. This is an

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9/ As explained above, see n.5 supra, testimony not accessible to television cameras will also be unavailable to still cameras and the audio portion of such testimony may not be broadcast either on television or radio.

intolerable burden to place on a person whose sole function is to provide evidence and who is not directly interested in the outcome of the trial. 10/

We do not favor a witness veto rule, however, for party witnesses. Unlike nonparty witnesses, they will be present for trial despite any reluctance to be televised. Moreover, unlike nonparty witnesses, they have already retained counsel and are fully involved in the litigation process. For such witnesses, we would permit a trial judge to bar televising of the witnesses' testimony -- but would not require the judge to honor such a request. This would treat the request of a party to bar his or her testimony in the same manner as a party's request to close the proceedings in their entirety. See Part III(E) infra. 11/

D. Jurors. We have found significant evidence to support the belief that jurors may be affected by television coverage if the jurors themselves are photographed. See One Murder, Two Trials at 28; Arizona Report at 44-45; Florida Experiment at 15; Wisconsin Report at 26, 60; but see In re Petition of Post-Newsweek Stations, 5 Med. L. Rptr. at 1042-43;

10/ The question has been raised whether this rule is equally applicable where corporations are a party and important corporate officials are "non-party" witnesses who may invoke an absolute veto. As a practical matter, we are uncertain how to formulate a definition of a corporate "party" that would address this concern. Accordingly, our report would permit any non-party witness, even a corporate official closely aligned with a corporate party, to invoke the witness veto.

11/ Vicki C. Jackson believes that during the experimental period a party witness should have the same ability to veto his or her testimony as a non-party witness. This approach has been adopted by a number of jurisdictions that have a witness rule. See e.g. In re Canon 3(A)(7), 6 Med. L. Rptr. 2279 (Ark. 1980).

Hawaii Report at Appendix C; Louisiana Pilot Project at 1-3; Wisconsin Report at 60. By contrast, where juror anonymity was better protected, there is less reason to believe that jurors will be distracted by the presence of television cameras. For example, the Rhode Island experimental rules prohibited any juror from being photographed in a manner that would permit that juror to be individually identified. Interviews with the jurors who served in the Claus von Bulow trial revealed that "[a]ll of those interviewed seemed to be in substantial agreement that the presence of television cameras and radio broadcasting in the courtroom had no measurable incremental effect upon the excitement, tension, and electric atmosphere already generated by the trial itself and by the presence of large numbers of representatives of the printed press." Weisberger, supra at 302. See California's Experiment at 221, 225-27, 231.

The prospect that jurors may be disturbed by television broadcasts of their own images has been addressed in different ways. Some states have limited, but not completely prohibited, cameras from photographing jurors. See In re California Rules of Court, 6 Med. L. Rptr. at 1253; In re Canon 3(A)(7), 5 Med. L. Rptr. 2609, 2611 (Nev. 1980). At least one state, however, has adopted a rule permitting trials to be broadcast but prohibiting jurors from being photographed. See In re Canon 3(a)(7), 6 Med. L. Rptr. 2278, 2279 (Ark. 1980). We favor the more stringent Arkansas approach. Such a rule strikes the proper balance because it guarantees that jurors will not be adversely affected

by exposure given to their identities. We conclude, therefore, that no juror should be televised.

The fact that trials are televised will require courts to exercise vigilance in order to assure that jurors are not affected by press coverage. Jurors should be informed that they will not be televised. Instructions should be given, similar to those already in use, that inform the jurors that they are not to watch television or listen to the radio or look at newspaper photographs concerning the trial. We believe that if such instructions are given, the broadcasting of trials will not prejudice the impartial deliberations of the jury.

E. Parties. Some jurisdictions have adopted a requirement that all parties consent to the broadcast of their trials before cameras may be admitted. A realistic appraisal of the effect of the party-consent requirement suggests that it will lead to the broadcast of very few trials. An Hawaiian bar committee concluded that "as a practical matter, parties . . . generally will exercise the veto power conferred by Hawaii's canon to prevent videotaping of civil and criminal trials, even for educational purposes." Hawaii Report at 19. And the abolition by the state of California of its party-consent requirement resulted in a "sharp increase" in the number of criminal trials that were broadcast. California's Experiment at 219.

We do not believe that the adoption of a party-consent requirement is justified. A party consent will be invoked in one

of two circumstances. First, a party will bar cameras because he believes that the mere presence of cameras will impair his ability to a fair trial. But this issue was litigated in Chandler v. Florida and the Supreme Court expressly held that broadcasting was not inherently prejudicial to a criminal defendant. Where the right of a criminal defendant to a fair trial is not affected, we see no reason to permit a criminal defendant to block the flow of information provided by televised coverage.

Second, a criminal defendant may exercise his veto because he has articulable grounds to believe that the presence of cameras will impact unfavorably on his ability to gain a fair trial. In such circumstances, we do not believe that a trial should be televised. But rather than permitting a party to exercise unfettered discretion to prohibit television, we believe that the trial judge, either sua sponte or on motion of a party, should have the discretion to bar coverage whenever he or she concludes that cameras will affect the trial in an identifiable and unfavorable manner.

Because there is no constitutional right to broadcast trials, see text at 4 supra, the trial judge may bar cameras on grounds that would not satisfy the constitutional requirements for closure of trial proceedings to the press. Moreover, because the presence of television is a collateral question that should not delay or interfere with the trial proceedings, no interlocutory appeal should be permitted of a trial judge's decision to bar coverage. See In re Canon 3(A)(7), 9 Med. L.

Rptr. 1778, 1779 (Minn. 1983); In re Canon 3A(7), 5 Med. L. Rptr. 2609, 2611 (Nev. 1980). We do believe, however, that where coverage is permitted over a party's objection, the objecting party should be allowed to seek apellate review of that issue before the trial begins.

The soundness of the position advocated herein cannot be separated from the remainder of the proposals we make. The requirement of party consent may be sensible in jurisdictions that allow jurors to be televised or do not permit witnesses to veto broadcast coverage of their testimony or do not bar coverage of certain proceedings likely to implicate privacy interests. But, given the other limitations that we have proposed on television access to trials, we do not believe that a party-consent requirement is necessary.

IV. The Effect of Cameras on Particular Proceedings

A. Pre-trial Proceedings. Particular difficulties may arise when pre-trial proceedings are televised before a jury trial. Although the effects of broadcasting can be avoided during the trial by an instruction from the judge to the jurors, that is not possible before the jury is selected. Thus, we believe that in some cases extensive publicity of pre-trial proceedings may jeopardize the ability of the parties to select an impartial jury. Such a situation may arise, for example, in a criminal case if a defendant testifies at a pre-trial suppression hearing. A broadcast of that testimony may allow potential jurors to make assessments and hear the assessments of others

concerning the defendant's demeanor and, consequently, his or her credibility. A juror who is exposed to such information may have formed a view of the defendant's honesty before the trial begins. See Massachusetts Report at 8 (suggesting that "probable cause hearings, hearings on motions to supress evidence, motions to dismiss charges and voir dire hearings" are not generally suitable for coverage).

This difficulty is subsumed, of course, within the general problem of pre-trial publicity. We do not believe that any absolute rule need be adopted concerning such situations. Rather, pre-trial suppression hearings and other pre-trial proceedings should presumptively be closed to broadcast coverage whenever one of the parties makes such a request, if there is a significant risk that the broadcast will adversely affect the ability of the parties to secure an impartial jury.

B. Trials Likely To Invade Litigants' Privacy Rights. States permitting cameras in the courtrooms have recognized that certain proceedings, most notably those that concern family matters, may involve issues of such personal sensitivity that the public interest in the receipt of televised information is outweighed by the individual interest in the maintenance of privacy. For example, the experimental rules adopted to govern coverage of trial proceedings in Connecticut bar coverage of family-relations litigation, cases involving trade secrets and cases involving sexual offenses. In re Canon 3A(7), 8 Med. L. Rptr. 1357, 1358 (Conn. 1982); see also Hawaii Report at 22; In re Canon 3A(7), 9 Med. L. Rptr. 1778, 1779 (Minn. 1983); In re

Media Coverage, 7 Med. L. Rptr. 1484, 1485 (R.I. 1981). We concur in that judgment. In particular, we believe no television coverage should be permitted of civil commitment, juvenile delinquency, neglect, adoption and other domestic relations proceedings, and that requests to exclude broadcast coverage of cases involving trade secrets and sexual offenses should be liberally granted.

V. The Adoption of Experimental Rules

As we noted at the outset, a number of states that have allowed some form of electronic media coverage have provided for an experimental stage to determine whether, and on what basis, permanent access should be permitted. We believe that a one-year experimental period would be equally appropriate in the District of Columbia. The information we have studied supports the conclusions that we have reached. But the "hands on" experience that would be gained during an experimental period would, in our view, be extremely helpful to a final evaluation of these questions.

In this regard, we believe that the Superior Court should appoint an Advisory Committee to monitor and evaluate the experiment. In particular, the Advisory Committee should collect information from trial participants during the experimental period with a view towards determining whether broadcast coverage of the type we recommend carries with it any substantial risk in the District of Columbia of prejudicing the ability of litigants to enjoy fair trials. As we said at the beginning of this

report, that question is at the center of the policy issue we have faced. We expect that evaluations conducted at the close of an experimental period will permit it to be resolved definitively.

Respectfully submitted,

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April 27, 1984

SEPARATE STATEMENT OF VICKI C. JACKSON

I join the Committee's recommendations with respect to both trial and appellate coverage. I write separately to emphasize the importance of the one-year experimental period.

During this time, all trial participants of televised proceedings should be polled to determine whether such coverage is affecting the essential fact-finding and decisional process.*/ While I think that the precautions recommended by the Committee -- prohibiting broadcast coverage of jurors, and permitting witnesses to veto coverage of their testimony or appearance -- are probably sufficient to avoid undue effect, it is possible that, after experimentation, a different conclusion will be reached.

Some witnesses, for example, may not believe attorneys assurances that they will not be covered; some witnesses may feel extraneous pressures to agree to be broadcast, when in fact, it makes them uncomfortable and may adversely affect, or simply change their demeanor. In view of the empirical evidence that, at least in some jurisdictions, a sizable minority of witnesses reported discomfort at being broadcast,

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*/ The Advisory Committee may also wish to consider efforts to determine the educational value to the public of such televised coverage of judicial proceedings, by soliciting comments, polling, or other techniques.

(and the possibility that other witnesses as well were affected, though they did not report or perceive it), close attention should be paid to whether the absolute veto rule is effective in preventing impairment of the fact-finding process.

At the end of the experimental period, moreover, it is possible, in my view, that the Advisory Committee that we recommend be established will determine that certain additional restrictions beyond those recommended here -- specifically, a party consent rule -- should be favorably considered. Certainly, given modern advances in the technology of broadcasting that permit television coverage to be implemented in an unobtrusive way that does not disrupt the courtroom, I do not think that the independent interests of the court would generally be sufficient to bar broadcasting if all the parties to a litigation are willing to agree to such coverage.

DISSENT TO
REPORT OF THE SUBCOMMITTEE ON
CAMERAS IN THE COURTS OF DIVISION IV
OF THE DISTRICT OF COLUMBIA BAR

Barbara Bergman */
April 26, 1984

*/ The views expressed in this dissent are the personal views of the writer and do not represent any official position of the Public Defender Service where she is employed.

Although the Supreme Court has held that the presence of cameras in a courtroom over the defendant's objection is not a per se constitutional violation, 1/ there are still substantial policy questions about whether electronic media should be given access to courtrooms in the District of Columbia. Because those issues are not adequately addressed in the majority report, I must respectfully dissent from its recommendation that cameras be permitted to record local judicial proceedings. 2/

I. General Comments

The majority report bases its recommendations on the following principles:

(1) No change should be implemented which carries with it a substantial risk of affecting the truth-finding function of our judicial system;

(2) As long as the first principle can be achieved,

(a) we should increase the flow of information concerning the activities of the courts; and

(b) The manner in which television reporters will cover trials is not a legitimate concern of this committee.

I agree with the first principle, but I disagree with the majority report's conclusion that that principal can be achieved

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1/ Chandler v. Florida, 449 U.S. 560 (1981).

2/ I dissent only from the majority report's recommendation concerning electronic media coverage of trial courts. I do not disagree with the recommendation that the electronic media have access to appellate court proceedings assuming that the experimental period recommended by the majority would apply to appellate court proceedings as well.

if electronic media is given access to the courts. Because I am concerned that there will be substantial prejudice to litigants created by permitting such access, I must dissent.

Freedom of the press is an important right, but the primary function of the judicial system is to give each litigant a fair trial. 3/ At the same time the Sixth Amendment guarantee of a public trial is a right which belongs to the accused, not to the public in general or the media in particular. See Estes v. Texas, 381 U.S. 532, 538-39 (1965); Nixon v. Warner Communications Line, 435 U.S. 589, 610 (1977). 4/ District trials are already open to the public and there is no reason to believe that permitting access to electronic media would enhance "the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system" as described by Chief Justice Burger in Press Enterprise Co. v. Superior Court No. 82-556, slip op. at 6 (Jan. 18, 1984) (Majority Report at

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3/ The public is usually most interested in criminal cases. Therefore those are the proceedings which are most likely to be televised. Thus, that is where the greatest potential for prejudice is likely to arise. For that reason, much of the ensuing discussion will be in terms of the impact upon defendants and criminal trials.

4/ Historically the right to allow a public trial arose from a traditional distrust of secret trials and was designed to impose restraints on the possible abuse of judicial power. See Estes v. Texas, supra, 381 U.S. at 538-539. As a result, the Sixth Amendment does not require "that the trial -- or any part of it -- be broadcast live or on tape to the public. The 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." Nixon v. Warner Communications, Inc., supra, 435 U.S. at 610.

3. 5/

Because anyone who wants to watch a trial already has access to the courtrooms of the District of Columbia and the printed media routinely reports cases of public interest, all that is being considered here is a different type of coverage. The basic question which must be answered is what purpose would be achieved by permitting electronic media coverage of trials.

The majority report advances one primary "public benefit" which is the promotion of a better understanding of the courts and how they work by the public generally. (No benefit to the court system itself is claimed.) Unfortunately, there is no evidence that the public will be better informed after electronic media coverage is provided. In fact, there are substantial reasons to believe that the public will be given a sensationalized version of trials if electronic media is given access to the courts.

Most sponsors of electronic media have an underlying commercial interest. As a result, they have limited time available and, in all likelihood, will broadcast only brief segments of proceedings which they alone will select and edit. The public will be exposed in most cases to only the most "notorious" episodes of courtroom drama. It will rarely, if ever, see a

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5/ Press-Enterprise concerned a murder trial in which the voir dire was closed to the public and the press. Chief Justice Burger's comments were directed toward allowing the public, generally to be present during the voir dire. His comments were not directed toward electronic media coverage. It is also interesting to note that despite Chief Justice Burger's support for open court proceedings, the Supreme Court itself has found no need to open its proceedings to the electronic media.

trial from gavel to gavel. The result will be a distorted perspective of how our courts actually function.

The Chandler case considered by the Supreme Court in 1981 exemplifies the type of editing which can be expected. Although Chandler was a lengthy criminal trial, only two segments lasting a total of two minutes and fifty-five seconds -- the direct examination of the prosecutor's star witness and a portion of the government's closing argument -- were televised to the public. None of the defense's cross-examination or closing were shown. Given the constraints of commercial television, that is probably fairly typical of the treatment most trials will receive in the media. That is hardly a balanced or comprehensive view of what happens in the courts.

Moreover, watching a small part of a witness's actual testimony is intrinsically different than listening to a reporter describe what he observed at trial. The public still maintains a healthy skepticism for what it reads, but we tend to believe what we see for ourselves. Watching and listening to someone and observing their demeanor for ourselves carries with it a much greater impression of accuracy which because of the limited time available may well not be an accurate view of what really happened throughout the course of the entire trial.

The manner in which trials are likely to be broadcast, therefore, should be of major concern to this committee. This is not to say that the committee should seek to dictate what must be broadcast, but that the committee should evaluate, given the editing which likely will occur, whether the electronic

media should be given access to the trial courts at all. The manner in which court proceedings will be broadcast and the tremendous potential for distortion as well as the possible prejudical impact on jurors and participants therefore must be considered when evaluating the pros and cons of camera access.

Despite all of the studies relied upon by the majority, I am not convinced that we can determine the actual impact of the presence of the electronic media upon the participants in our court proceedings. 6/ How can we measure whether the presence of media cameras will influence jurors' votes? 7/ As Justice Clark has noted:

> Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to nieghbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the

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6/ Most of these studies rely upon the subjective responses of the participants in televised trials. Because the statistics are not based upon controlled objective evaluation, their validity is questionable. See e.g., Report of Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom ("Louisiana Pilot Project") (1979) (Humphries, J.); Evaluation of California's Experiment with Extended Media Coverage of the Courts ("California Experiment") (1981); Pryor, Straun, Buchanan & Meeske The Florida Experiment: An Analysis of On-The-Scene Responses to Cameras in the Courtroom ("Florida Experiment").

7/ This subtle impact may well affect the reactions of judges and attorneys as well when court proceedings are televised. How can we measure whether a judge would rule the same way or impose the same sentence if he or she were not concerned about offending the viewing public? How can we determine whether some defense counsel are less zealous in their advocacy if they are defending unpopular clients?

state and the accused. . . .' 8/

(Emphasis added) Estes v. Texas, supra, 381 U.S. at 545.

In addition, can we really rely upon all jurors to be forthright about their exposure to broadcasts about the trial or pretrial proceedings? Although juror exposure is a problem even without electronic media broadcasting, it is more likely to be exacerbated when the evening news shows "instant replays" of brief portions of that day's testimony. Moreover, seeing edited portions of "live" testimony may well tremendously affect their impressions of that witness's overall testimony. The problem is that there will be virtually no effective way to guarantee that this does not happen unless every jury in a televised case is sequestered. That procedure is rarely used in the Superior Court and would add substantially to the cost of conducting such trials.

Prejudicial publicity in the District of Columbia also creates problems unique to this jurisdiction. The District is a relatively small, urban geographic area which, because of its political status, has no provisions for change of venue for those cases in which there has been prejudicial publicity. As a result, if a judge permits the broadcasting of pretrial proceedings, for example, the jury pool is more likely to be irrevocably tainted.

All these factors lead me to conclude that no significant

8/ Even if the jurors themselves are not televised, the impact will be much the same because their family and friends will know they served on that jury.

advantage would be gained by giving the electronic media access to our courts and the problems created would substantially outweigh any benefit from the "increased flow of information."

II. Specific Comments

Assuming for the purposes of this discussion, however, that a decision is made to give electronic media access to District courts, then the specific recommendations made by the majority report must be closely scrutinized.

The majority report recommends that any witness be permitted to refuse to be televised. That rule would not extend to testimony by parties in the litigation -- e.g., a defendant in a criminal case; a plaintiff in a Dalkon shield products liability suit. At a minimum, there is no justification in applying a different rule to litigants. Surely, they should, at least, have the same rights as other witnesses. A criminal defendant, for example, (who is theoretically presumed innocent until proven guilty) has no way to prevent his prosecution. He certainly is not in court by choice. He may well have a privacy interest in not becoming the evening's television entertainment. 9/ Even if acquitted, he may well find himself convicted by the public by standards less rigorous than those required by the criminal justice system because of the impressions created by the television coverage. Moreover, given the nature of the coverage, they are more likely to be easily recognized and

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9/ Another example would be plaintiffs in malpractice or products liability cases who have to testify about intimate matters which they do not want shown on local television.

easily recognized and subject to harrassment. 10/

Given the potential prejudice and the lack of any significant benefits to the courts, I would strongly recommend that if court proceedings are to be televised, the consent of both parties should be required. The majority report notes that in jurisdictions which require party consent, most criminal defendants refuse to give their consent. For this reason and because the Supreme Court has held that camera access is not per se prejudicial, the majority urges the rejection of a party consent rule in criminal cases. However, I believe that criminal defendants' views concerning the potential practical prejudice to them of camera coverage of their trials should be respected not denigrated particularly since the Sixth Amendment right to a public trial was designed for their protection not for the public's or the media's convenience.

The majority would permit electronic media coverage unless the trial judge concluded that the presence of cameras would have a "discernible impact upon the trial in excess of the impact upon the trial of the publicity that would occur even if cameras were not permitted." How a court could ever make such a prediction goes unexplained. In reality, such predictions would be impossible. Moreover, that standard is similar to the one used in Florida. In that state, the media usually prevail when fighting motions to exclude cameras from the courts because

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10/ In addition, if a defendant is given a new trial after a successful appeal, it may well be difficult to empanel an impartial jury if there has been broadcast coverage of the first trial.

"[i]t is quite a difficult test to meet, in most cases." "Where the Camera Blinks," The National Law Journal, January 30, 1984. Why the burden should be on the parties to the litigation to justify exclusion rather than upon the media to justify access is unclear. Given the existing presumption in the District that the electronic media access is undesirable, why not leave the burden on the electronic media to demonstrate that their special type of coverage would produce benefits unattainable through printed media coverage?

Overall, the potential for harm created by broadcast coverage of courtroom proceedings in the District far outweighs any claimed benefit derived from simply adding one more form of media coverage. For that reason, electronic media should not be given access to trial court proceedings.

Respectfully submitted,

Barbara Bergman

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May 29, 1984

SEPARATE STATEMENT OF ARTHUR SPITZER */

I join with the Division IV Steering Committee in endorsing its subcommittee's recommendation that proceedings in the District of Columbia courts generally be opened to media coverage by television and still cameras and radio microphones. But I cannot endorse most of the subcommittee's proposed restrictions on such coverage.

My disagreement with the subcommittee's recommendations grows out of my disagreement with the basic principle on which the subcommittee relied: that "no change should be implemented that carries with it a substantial risk of affecting the truth-finding process of our judicial system." Report at 3. The problem with this principle is that it leaves no room for any balance to be struck between the public interest in the purity of the truth-finding process, on the one hand, and the public interest in media coverage of public judicial proceedings, on the other. When those interests conflict, as they often do, the subcommittee's "principle" always allocates 100% weight to the

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*/ The views expressed in this statement are the personal views of the writer. They are not necessarily (but in fact they are generally) the views of the American Civil Liberties Union of the National Capital Area (ACLU/NCA), of which he is the Legal Director. The views of the ACLU/NCA have been submitted to the Superior Court in its Petition to Amend Court Rules to Permit Photographic and Broadcast Coverage of Public Proceedings in Superior Court, filed May 20, 1982, to which the reader is respectfully referred.

purity of the truth-finding process, and zero weight to media coverage. If this "principle" were applied to the print media, newspaper reporters would be excluded from many judicial proceedings that they now routinely attend.

Nevertheless, the subcommittee's principle will not prevent media coverage from interfering with the truth-finding process. Existing news coverage already has some such effects. All that the subcommittee's approach accomplishes is to freeze the existing irrational distinction between courtroom coverage by the print media -- which is allowed despite its effects -- and coverage by the electronic media -- which is to be barred because it has the same effects.

This distinction is just an historical accident. If television had existed in 1789, then the right to have cameras in the courts would now be an accepted part of the First Amendment. Indeed, because I see no relevant distinction in principle between the different modes of media, I believe that all media have equal constitutional rights to be present in the courtroom.[1/] The principle I would apply is that any particular form of media

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1/ Of course I recognize that the Supreme Court has opined that there is no constitutional right to have cameras in a courtroom. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978). But the only case there cited in support for this proposition was Estes v. Texas, 381 U.S. 532 (1965), which was limited to its facts by Chandler v. Florida, 449 U.S. 560 (1981). In my view this position cannot be squared with First Amendment principles. I believe that the First Amendment right of camera access to public judicial proceedings will ultimately be recognized. In the meantime, however, my argument in the text does not depend on the existence of such a constitutional right.

coverage may be restricted only if its damaging effects on the truth-finding process are shown to be both more serious than, and different from, the effects of traditional courtroom media coverage.[2/]

In particular, then, I believe the subcommittee's report provides no adequate justification for (1) allowing a non-party witness to veto all coverage of himself or herself; (2) banning all photography of jurors; (3) permitting a trial judge to bar electronic coverage of a criminal trial if he or she believes that such coverage "will affect the trial in an identifiable and unfavorable manner"; (4) closing pre-trial proceedings if there is a "risk" that coverage will make it harder to secure an impartial jury; (5) completely banning coverage of civil commitment, juvenile and family matters and liberally granting requests to ban coverage of cases involving trade secrets and sexual offenses.

Traditional press coverage can and does lead to all of the evils on which the subcommittee's proposed restrictions are premised. No law or court rule prevents the Washington Post from

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2/ The subcommittee's failure to distinguish among the electronic media where there are relevant differences is therefore also objectionable. The subcommittee points to no evidence or even speculation that radio broadcasting of any public judicial proceeding will lead to any untoward effects greater than or different from coverage by the print media. Most courtrooms are equipped with microphones at the bench, the lectern, and the witness stand. In many cases a second microphone leads to a court reporter's tape recorder. It is not suggested that lawyers or witnesses find such microphones fearsome or distracting. Except in very unusual circumstances, then, I would think that there could be no objection to another wire leading to a radio station's tape recorder.

printing jurors' names and home addresses on the front page, or from giving such considerable publicity to a pre-trial hearing that the seating of an impartial jury may become more difficult. And a trial judge could surely find that massive press coverage of trials such as those of the Abscam or Watergate defendants, or of John Hinckley, "will affect the trial in an identifiable and unfavorable manner." But if these kinds of problems do not rise to the compelling level necessary to restrict traditional press coverage -- and no one suggests that they do -- then I do not see why they should be allowed to restrict coverage by the electronic media.

I agree with the subcommittee that the protection of personal privacy in certain kinds of cases, and the protection of trade secrets and other secret information, can be compelling interests outweighing the public's right to an open trial. But the only adequate response to this concern is to close such proceedings (or portions thereof) <u>altogether</u> -- to the public and to the print press, as well as to cameras. This is the current and appropriate practice in many such cases.

In many ways, the subcommittee's report evinces an attitude, shared by many judges and lawyers, that public attendance at judicial proceedings is fine as long as it is limited to a few retired people in the back of the courtroom, but that widespread community awareness of the details of judicial proceedings is a problem to be avoided. This is not the model of open trials that existed when our judicial system was founded. Courthouses were centers of community life; an important trial would draw

considerable public attendance. A small community would be well aware of who was on the jury, and of the identities of the non-party witnesses and the details of their testimony. Such awareness was not seen as an infectious germ in a preferably sterile "truth-finding process"; rather, it was seen as a healthy check on the witnesses' and jurors' honesty. See 1 Journals of the Continental Congress 107 (quoted in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 568-69 (1980)); 3 Blackstone *372-73. And a public trial was said to bring the case to the attention of key witnesses unknown to the parties. Richmond Newspapers at 570 n. 8.

These and other desirable attributes of public trials are generally absent today, at least in large metropolitan areas. All too often, the public has no idea of what its courts do or how they do it. The televising of trials would help to return the public to its historic role as a participant of sorts in the judicial process. And greater public exposure to the realities of courtroom life might spur public support for needed court reforms. Public awareness of judicial proceedings is not a hazard to be avoided, but a vital part of our commitment to a democratic system of government.

For these reasons, I dissent from the subcommittee's proposed limitations on electronic media coverage of courtroom proceedings. The District of Columbia Courts should adopt rules that are not based on the groundless presumption that camera coverage is inherently more objectionable than print or sketch-pad coverage.