National Press Photographers Association

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Via Email

November 13, 2015

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver St., 11th Floor
New York, NY 10004

Re: Proposed Amendment of 22 NYCRR Parts 29 and 131: Electronic Recording and Audio-Visual Coverage of Court Proceedings

Dear Mr. McConnell,

The National Press Photographers Association ("NPPA") respectfully submits these comments on behalf of the organizations listed below in response to the proposed amendments referenced above.

In keeping with our longstanding support of audio-visual and still photographic coverage of judicial proceedings to the greatest extent allowed by law, we strongly endorse the comments of the Communications & Media Law Committee of the Association of the Bar of New York City as well as the position of the New York State Bar Association[1] regarding the Office of Court Administration ("OCA") proposals to revise and update the Unified Court System ("UCS") rules. In particular, we support the proposed revisions to the definition of audio-visual coverage and other proposed clarifications excluding still photography from the definition of audio-visual coverage.

We whole-heartedly agree with the proposed goals of "(i) consistently maintaining the distinction between audio-visual coverage and still photography throughout the rules and using consistent terminology to avoid confusion; (ii) emphasizing that there should be a presumption in favor of permitting both audio-visual and still photographic coverage to the extent consistent with Section 52 of the Civil Rights Law, with ultimate decisions left to the presiding judges; and (iii) eliminating certain restrictions on coverage created or continued by the proposed revisions that go beyond the requirements of Section 52."[2]

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[1] *See*: New York State Bar Association, Special Committee on Cameras in the Courtroom, Final Report to House of Delegates, March 31, 2001 http://tinyurl.com/nt8owg5

[2] Letter of Charles S. Sims, Chair, Communications & Media Law Committee of the Association of the Bar of New York City

In 2013, New York State Chief Judge Jonathan Lippman announced "a legislative proposal to expand camera coverage of courtroom proceedings" in his State of the Judiciary address. Under his proposal, "all court proceedings — including the testimony of witnesses at hearings and trial — will be open to cameras at the discretion of the judge presiding over the case."[3]

We urge the OCA to exercise its authority to ensure that New York's court system, which has been a beacon of progressive policies for the nation, does not fall further behind than it already has under some of the anachronistic rules promulgated at a time when televisions used vacuum tubes and at best could receive 12 channels, broadcast in black & white for a few hours a day.

As Justice Oliver Wendell Holmes once stated, "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[4]

Beginning in 1987 and continuing through 1997, the New York State legislature passed a series of legislative enactments permitting audio-visual coverage of New York trials on an experimental basis. During this period, four studies by distinguished experts were conducted to judge the effect of such coverage on the rights of defendants to a fair trial, as well as the educational value to the general public from such coverage. The studies were extremely thorough, taking into account thousands of evaluations submitted by trial judges and attorneys throughout the state, complaints from members of bar associations, studies and experiences from other jurisdictions, multiple public hearings at which nearly 100 witnesses testified, and written submissions from other interested parties.[5]

The studies specifically refuted virtually all of the arguments that have been raised against permitting audio-visual coverage of court proceedings. For example, in response to the argument that the "bright lights, large cameras and other noisy equipment" intrude upon the court proceedings and create an "atmosphere unsuited to calm deliberation and impartial decision making,"[6] the studies instead found that improvements in technology had "rendered cameras no more, and possibly less, conspicuous than the newspaper reporter with pencil and notebook and the courtroom artist with crayon and sketch pad."[7]

Responding to criticisms that electronic media coverage would sensationalize court proceedings, subsequent studies found that while "it is simply not true that the media have sought to cover only 'sensational' proceedings . . . , [c]overage of those cases reveals the reality

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[3] *See*: New York State Unified Court System, *State of the Judiciary 2013*, Jonathan Lippman Chief Judge of The State of New York, March 5, 2013 at 19. http://tinyurl.com/nzwjoto
[4] Vol. 3 OLIVER W. HOLMES, *The Path of the Law, in* Collected works of Justice Holmes 391, 399
[5] *See*: Hon. Burton Roberts et al., Report of the Committee on Audio-Visual Coverage of Court Proceedings at 20–21(1994).
[6] Act of June 15, 1987, ch. 113, § 1, 1987 N.Y. Laws 231 (McKinney).
[7] *See*: Roberts Report, *supra* note 5, at vii.

of the courtroom as distinctly as does the coverage of other cases."[8] The studies also suggested that the behavior of trial participants may well be more likely to "improve rather than worsen in the presence of cameras."[9] In short, concerns expressed by some critics that coverage might lead courtroom actors to change their behavior, either by grandstanding or politicizing their comments, are not supported by the experience of the New York courts. Nor is the charge that the presence of cameras in courtrooms will intimidate witnesses and jurors. The data studied in the Feerick Report, for instance, noted that:

(i) "[M]any judges believe that witnesses' testimony is unchanged in the presence of cameras."[10]

(ii) "[W]itness intimidation is neither borne out by the record in New York nor sufficiently strong to warrant barring cameras from the courtroom across-the-board. Such witness concerns are adequately addressed, in our view, by all of the current safeguards in Section 218 and in the implementing rules."[11]

(iii) Claims that jurors will watch and be influenced by televised coverage of their case or that jurors will be reluctant to reach an unpopular decision given their knowledge that the public is watching are unsupported. In any event, judges are "capable of taking these factors into account when they consider whether to grant or deny an application for camera coverage in a particular case."[12]

(iv) "[M]ost judges felt that compared to similar cases covered only by the print media, lawyers made about the same number of motions, objections and arguments in camera-covered cases and presented about the same amount of evidence and witnesses."[13]

(v) "[W]e have no basis from our review to conclude that lawyers in camera-covered cases in New York State have failed to serve their clients and the public responsibly. The evidence from the record before this Committee is that they have met their professional obligations."[14]

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[8] *See*: John D. Feerick et al., Report of the Committee to Review Audio-Visual Coverage of Court Proceedings, *reprinted in* An Open Courtroom: Cameras in New York Courts 70, 89 (Fordham Univ. Press 1997) [hereinafter "Feerick Report"].
[9] *Id.* at 80.
[10] *Id.* at 77.
[11] *Id.* at 78.
[12] *Id.* at 76–77.
[13] *Id.* at 79.
[14] *Id.*

(vi) "There was ample testimony and public comment that cameras raised some judges' performance and had a positive impact on judicial demeanor."[15]

(vii) "In the end, we are left with a record heavily weighted with opinions which suggest that judicial conduct may improve rather than worsen in the presence of cameras. There is no basis in this record to conclude that judges will not faithfully discharge their responsibilities if courtrooms are open to cameras. The evidence before this Committee is that they have met their obligations with a high degree of competence."[16]

The Feerick Report went on to find that audio-visual coverage "respects the public value of openness, the public nature of a trial, and the constitutional principle of a fair trial,"[17] and that any negative consequences could be adequately addressed by appropriate statutory restrictions. Notably, all four of the studies concerning the effect of cameras on New York courts concluded that audio-visual coverage of courtroom proceedings should be permanently implemented.[18]

Although some opponents of media coverage of courtroom proceedings continue their relentless conjecture that such reporting may interfere with the right to a fair trial or cause some other irreparable harm, empirical studies of such objections and the over 40 years of experience with such coverage in almost all other states have proved those concerns to be chimerical at best.

There is no substantive rational or legal argument for precluding cameras from the courtroom. Their presence in the courtroom and the images that they convey provide a compelling public service without infringing upon the constitutional or statutory rights of any affected persons or institutions. Respect for the dignity, decorum and safety of the courthouse is not only maintained but enriched by allowing such coverage. Any proposed rules should continue to provide judges with the judicial discretion necessary to permit such access while safeguarding those rights and principles.

Permitting still photography and audio visual coverage of courtroom proceedings enhances public understanding of, and confidence in, the judicial system without interfering with the fair administration of justice. The watchful eye of the public will demand increased accountability from all courtroom participants. Claims of sensationalistic or inaccurate reporting will be readily verifiable by a public able to view the underlying proceedings for itself. That see-

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[15] *Id.*
[16] *Id.* at 80.
[17] *Id.* at xxi.
[18] Despite the recommendation of all four studies to permit audio-visual coverage of trial proceedings, the State legislature failed to permanently adopt Section 218 of the Judiciary Law, which served as the statutory underpinning of the four New York experiments. The dispute centered chiefly around a proffered amendment to Section 218 — one not proposed by the studies — to permit any witness, including parties, to veto all coverage of their own testimony.

it-for-yourself capability is even more important today in an age of Twitter, Facebook and text messaging.[19]

The Internet has further enabled gavel-to-gavel audio-visual coverage of courtroom proceedings because of its inherent capacity to permit unlimited streaming of the trial rather than be bound by the time constraints of traditional broadcast and cable media. Additionally, newspaper websites have made it possible for the print media to also provide audio-visual coverage where they previously were relegated to only publishing still images and written words. Websites carrying news and information have the capacity to convey and archive video of full trial proceedings. A growing trend by many communities to have all-news cable television stations that focus around the clock on local events also would permit extended coverage of trials – not just short news clips with sound bites.

"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." Those words written 50 years ago by U.S. Supreme Court Justice John Harlan in *Estes v. Texas* (first case in 1965 considering cameras in the courtroom) are now self-evident. Modern technology has transcended the difficulties that led to bans on such coverage. The courtroom trial has been a fixture of justice and fairness throughout our state's history. That tradition will only be enhanced by permitting still photography along with audio-visual coverage in New York State courtrooms.

Justice Potter Stewart, dissenting in *Estes* wrote, "The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." Society can ill afford to let the arbitrary and speculative objections of some antagonistic to press coverage infringe upon the public's right to observe proceedings in our courts by lens-capping the very means by which modern society receives the news.

Those opposing the proposed changes miss the point. The tired arguments that camera coverage will: prejudice a defendant's fair trial rights, their right of privacy, the prosecution's ability to have witnesses comply with subpoenas, as well as the detrimental effect cameras will have on lawyers, judges, and other participants are just that – threadbare and unsubstantiated. But the more crucial point is not how cameras affect either side in a litigation. It is whether cameras will increase the public's confidence in our justice system. Nothing is more fundamental to our democratic system of governance than the right of the people to know how their government is functioning on their behalf. That, we submit, is a higher value which should drive the debate here; and is the central point about which the Bar Association, the Unified Court System and, indeed, the legislature should be concerned.

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[19] Perhaps the best example of the advantages of cameras-in-the-courts came in the Florida sexual assault trial of William Kennedy Smith. Had the trial not been televised, the public surely would have believed that his acquittal was due to Kennedy money and influence. Because it was televised, the public understood that he was acquitted for a different reason: it was clear the prosecution had not proved its case.

We are confident that our state's judicial system will benefit from increased still photography and audio visual coverage. It is not the sensational surprises of *Law and Order* or (for earlier generations) of *LA Law* or *Perry Mason*; it is a plodding, unspectacular but thorough process by responsible, well-meaning lawyers and jurists which should give the public confidence. But if the public can't see this for themselves, it is not surprising that they lack trust in the system. In *Richmond Newspapers*, Chief Justice Burger observed that "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."[20] Only if they can see it first-hand, which these ever evolving new technologies now allow at virtually no cost, will the public gain – as they should – added confidence in our legal system. And that, ultimately, is the most important value we can provide.

We respectfully submit these comments in support of the proposed revisions in order to further ensure fairness in our justice system and restore New York as the national leader for the public's right of access to court proceedings. It is also our hope that the success of these progressive rules will spur needed and timely legislative change as well. We urge the OCA to institute its proposed revisions without delay, along with the additional changes set forth in the comments submitted by the Communications & Media Law Committee of the Association of the Bar of New York City.

Thank you for your attention and consideration in this matter.

Very truly yours,

Mickey H. Osterreicher

Mickey H. Osterreicher
General Counsel

On behalf of:

Associated Press Media Editors
Associated Press Photo Managers
The Deadline Club/New York City Chapter of the Society of Professional Journalists
Media Law Resource Center
New York News Publishers Association
New York Press Photographers Association
New York State Broadcasters Association, Inc.
The NewsGuild of New York Local 31003, CWA
North Jersey Media Group
Online News Association
Radio Television Digital News Association
Reporters Committee for Freedom of the Press
Scripps Media, Inc., d/b/a WKBW-TV
Society of Professional Journalists

[20] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 (1980).