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**BEFORE THE  
MINNESOTA SUPREME COURT ADVISORY COMMITTEE  
ON RULES OF CRIMINAL PROCEDURE**

**ST. PAUL, MN**

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**PROPOSED AMENDMENTS TO THE MINNESOTA  
RULES 4.01, 4.02(D)–(E) OF THE GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS  
REGARDING AUDIO VISUAL COVERAGE OF CRIMINAL PROCEEDINGS**

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**COMMENTS OF THE  
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA)**

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**MICKEY H. OSTERREICHER, GENERAL COUNSEL  
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**



**120 HOOPER STREET  
ATHENS, GA 30602  
716.983.7800  
[LAWYER@NPPA.ORG](mailto:LAWYER@NPPA.ORG)**

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**August 26, 2022**

**Minnesota Supreme Court Advisory Committee  
On Rules of Criminal Procedure**

Proposed Amendments to the Minnesota  
Rules 4.01, 4.02(d)–(e) of the General Rules of Practice for the District Courts  
Regarding Audio Visual Coverage of Criminal Proceedings

**Comments of the  
National Press Photographers Association (NPPA)**

August 26, 2022

On behalf of the NPPA, I thank the committee for the opportunity to submit our comments on Proposed Amendments to the Minnesota Rules Regarding Audio Visual Coverage of Criminal Proceedings in Minnesota. While there are other areas of concern to visual journalists, being able to properly cover, report on, broadcast, photograph and record such judicial proceedings in Minnesota and throughout the country is of paramount importance to our members and even more importantly to an informed citizenry.

**Introduction**

Founded in 1946, the National Press Photographers Association (NPPA) is a 501(c)(6) non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution in all news media. NPPA encourages visual journalists to reflect high standards of quality and ethics in their professional performance, in their business practices and in their comportment. NPPA vigorously promotes and defends freedom of expression and of the press in all forms. Its members include still and television photographers, editors, students and representatives of businesses serving the visual journalism industry. As the *Voice of Visual Journalists*, the NPPA advocates for the First Amendment rights of journalists and an informed public, especially as it relates to visual journalism.

By way of background, I am an award-winning visual journalist with over forty years' experience in print and broadcast. My work has appeared in such publications as the New York Times, Time, Newsweek and USA Today as well as on ABC World News Tonight, Nightline, Good Morning America, NBC Nightly News and ESPN.

During that career I have covered scores of legal proceedings in New York and throughout the country such as the Attica trials and the murder trial of O.J. Simpson. I have also testified twice before Congress regarding these issues. First in 2013 before the U.S. House of Representatives Committee on The Judiciary, Subcommittee on Courts, Intellectual Property and the Internet, "Hearing on H.R. 917, The Sunshine In The Courtroom Act Of 2013."<sup>1</sup> And again in 2017 before the same subcommittee during a hearing on "Judicial Transparency and Ethics."<sup>2</sup>

As both staff photographers and independent visual journalists, members of the National Press Photographers Association (NPPA) have also covered, reported on, photographed and recorded, as well as broadcast judicial proceedings in Minnesota and throughout the world.

## **Background**

More than forty years ago, Florida welcomed cameras into its courtrooms. In the ensuing decades, dozens of states followed. But not Minnesota, which remains one of the only jurisdictions that bans audio-visual coverage in trial courts.

Minnesota's court system should no longer be held back by a woefully anachronistic ban on audio-visual coverage enacted 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

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<sup>1</sup> Testimony of Mickey H. Osterreicher at: <https://nppa.org/sites/default/files/HR%20917%20Osterreicher%20Testimony%2012-03-14.pdf>

<sup>2</sup> Testimony of Mickey H. Osterreicher at: <https://republicans-judiciary.house.gov/wp-content/uploads/2017/02/Osterreicher-Testimony.pdf>

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.”

Although some opponents of audio-visual coverage of judicial proceedings still insist on conjecturing that such coverage may interfere with the right to a fair trial or cause some other irreparable harm, empirical and anecdotal studies of such objections have proven those concerns are chimerical. As former Chief Justice of the Florida Supreme Court observed:

As a member of the Supreme Court, I feel a deep sense of pride in and gratitude for the 1979 case *In re Petition of Post-Newsweek Stations, Florida, Inc.* I know those feelings are shared by our entire court system. My appreciation of the wisdom and courage displayed by my predecessors on this Supreme Court is deepened every time I see a headline from another state about the struggle over a ban on cameras in their courtrooms and when I read about the fear in those states about how judges, lawyers, witnesses, victims, and jurors would be affected by cameras.

Like Florida, many states now allow cameras in the courtrooms. But that certainly wasn't the case 30 years ago. When the Florida Supreme Court acted, it was breaking new ground. At the same time, its unanimous decision was calm, thoughtful, and honored our state's legacy of open government:

“We are persuaded that on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage. The prime motivating consideration promoting our conclusion is this state's commitment to open government.”<sup>3</sup>

Another example can be seen in New York, where more than forty-years ago, the state legislature, under Section 218 of NY Judiciary Law, amended NY Civil Rights Law § 52 permitted audio-visual coverage of trial court proceedings over ten years (1987 -1997) during four (4) “experimental” periods.

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<sup>3</sup> See: Chief Justice Peggy A. Quince, “Cameras in the courtroom: Looking back over 30 years,” Florida Bar News, April 1, 2009, available at: <https://www.floridabar.org/the-florida-bar-news/cameras-in-the-courtroom-looking-back-over-30-years-2/>

Rather than rehash the reports submitted at the end of each “experiment,” only information from the fourth and last one is included here.

On January 31, 1995, the day the “third experiment” was due to sunset, then New York Governor George E. Pataki signed a bill that extended audio-visual coverage of courtroom proceedings until June 30, 1997. The Senate stated that as a result of better technology and an increase in “gavel to gavel” coverage, “New Yorkers have a better understanding of legal principles and the court process.”<sup>4</sup> However, the Senate found that “the extent of compliance with the statute by trial judges and the effect of audio-visual coverage on their conduct has not been addressed. In order to discourage violations of the statute in the future, this bill continues the experiment without giving it permanence.”<sup>5</sup>

The 1995 bill created a fourth advisory commission<sup>6</sup> which was asked to review the effectiveness of the experiment by evaluating: whether a public benefit accrued; whether any abuses occurred; whether, and to what extent, the conduct of participants in court proceedings changes when audio-visual coverage is present; the degree of statutory compliance by judges and the media; and the effect of audio-visual coverage on the conduct of trial judges both inside and outside the courtroom.<sup>7</sup>

In preparing its report, the Feerick Commission: designed and conducted a written survey to assess the experience of New York judges with cameras in the courtroom; contacted the Marist Institute for Public Opinion, which conducted a public opinion survey in New York on the issue of cameras in the courtroom; wrote to the presidents and executive directors of 150 bar associations in New York

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<sup>4</sup> See NYS Bill & Veto Jackets: L. 1995, ch. 8 at 6

<sup>5</sup> *Id.*

<sup>6</sup> The commission was chaired by Fordham Law School Dean John Feerick and consisted of several attorneys practicing civil law, one criminal defense attorney, one prosecutor, one former judge of the New York Court of Appeals and several academics. For two months in 1996 the Feerick Commission held four public hearings throughout the state. Over fifty witnesses, including representatives of the print and electronic media, civil and criminal trial lawyers who had participated in televised trials, judges, crime victim advocates, law enforcement officials, media scholars and jurors testified at the hearings. Also see: Jay C. Carlisle “An Open Courtroom: Should Cameras Be Permitted in New York State Courts?” *Pace Law Review* Volume 18 Issue 2 Spring 1998 Article 2.

<sup>7</sup> See *An Open Courtroom: Cameras in New York Courts*, New York State Committee on Audio-Visual Coverage of Court Proceedings (1997) (the “Feerick Report”) at 27.

asking for information about the experience of their members; contacted the New York Law Journal, which agreed, as a public service, to run a prominent notice of the Committee’s interest in receiving public comments; held public hearings, each announced by press release; sought Office of Court Administration (OCA) data regarding media applications for audio-visual coverage; invited television stations around the state to provide samples of their televised courtroom footage; gathered relevant information on the policies of other states and federal courts and reviewed U.S. Supreme Court precedent as well as legal and psycho-social literature in this field; sought information from the deans of all of the law schools in New York State regarding educational use of televised trials; solicited information from eleven jury consultants about their experience with the impact of cameras in the courtroom on jurors and other trial participants; and conferred informally with media scholars, as well as “camera-experienced” attorneys and judges in New York and from other jurisdictions, including other states, and federal courts.

After hearing from “a broad spectrum of points of view from a wide range of persons with experience and expertise,” the Committee concluded that the foremost benefit of audio-visual coverage was “enhanced public scrutiny of the judicial system.”<sup>8</sup> The Committee had “little doubt” that television coverage drew the public’s attention to major societal problems, such as domestic violence and child abuse, and served a cathartic purpose for the families of some homicide victims,<sup>9</sup> concluding that while “[w]eighing the question of public benefits is not a simple matter,” the “benefits that flow from televised coverage of the judicial process are so important that they ought not to be sacrificed by barring cameras from the courtroom across-the-board.”<sup>10</sup> Significantly, the Committee noted that in making this determination, it was guided by the precept that ““what happens in a trial is a public matter”” and should

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<sup>8</sup> Feerick Report at 66.

<sup>9</sup> Id.

<sup>10</sup> Id.

be accessible to as many interested New Yorkers as possible.”<sup>11</sup> The Committee struck a balance in favor of coverage, observing that “[v]ideo and photographs have become important tools in presenting news to the public, many of whom now rely on television as their principal source of information about public affairs.”<sup>12</sup> After reviewing earlier surveys done by prior committees of judges, lawyers and other trial participants, it concluded “that evidence of impact on trial participants was too slight to outweigh the benefits of cameras.”<sup>13</sup> In addition, it found support for its conclusions in the fact that “[t]he majority of states which permit camera coverage of court proceedings have reached similar conclusions.”<sup>14</sup> The Committee ultimately decided that its record “[did] not show that the fears regarding the impact of cameras on trial participants have been realized in New York during the experimental period,” and, therefore, concluded that “any impact cameras may have on trial participants does not justify an across-the-board ban of cameras in courtrooms.”<sup>15</sup>

The Committee recommended that the fourth experimental law be made permanent; that “defendant consent should be a prerequisite for camera coverage of bail hearings;” that “there should be no separate rule for death penalty cases;” that “judges should be vigilant in addressing the safety and privacy concerns of witnesses in both criminal and civil proceedings;” that “[OCA] should actively monitor camera-covered proceedings, make periodic reports, and, if necessary, recommend changes in Section 218 of the Judiciary Law and the implementing rule;” and that “[OCA] should develop an enhanced judicial training program to familiarize all judges with the applicable statutory and administrative provisions and safeguards.”<sup>16</sup>

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<sup>11</sup> Id. (citing testimony of Syracuse University Professor Jay Wright, executive director, New York State Fair Trial/Free Press Conference).

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id. at 77-81.

New York's legislature declined to make Judiciary Law § 218 permanent. As New York's own Court of Appeals noted in *Courtroom Television Network LLC v. The State of New York*, 4 N.Y.3d 808 (2005):

After each experiment, lasting approximately two to three years, the Legislature reviewed the findings and reports on audiovisual equipment in the courtroom, all of which recommended cameras in the courtroom, and, after each review, rejected the recommendation. On June 30, 1997, the Legislature and Governor allowed Judiciary Law § 218 to sunset. Thus, the ban on televised trials contained in Civil Rights Law § 52 resumed as of July 1, 1997, a ban which continues to the present. Despite the technological improvements to audiovisual equipment, which renders its presence in courtrooms less obtrusive, the Legislature has not seen fit since 1997 to amend section 52 or reenact section 218.

But a look back to New York's history also demonstrates the benefits of televised court proceedings. In *People v Boss*, where four NYPD officers were acquitted for the 1999 murder of Amadou Diallo, the trial venue was moved to Albany but could still be viewed in New York City thanks to it being broadcast by Court TV. A New York Times editorial stated, the "decision to permit cameras in the courtroom allowed the public to understand the legal complexities of the officers' claims of self-defense." That see-it-for-yourself capability is even more important today in an age of Twitter, Facebook and text messaging. But most tellingly, during the ten-year period when audio-visual coverage of courtroom proceeding in New York state was allowed, not one case was appealed on the grounds that a defendant's Sixth Amendment right to a fair trial was violated because of such coverage.

### **Analysis and Recommendations**

Ironically, Minnesota is perhaps the best example of such successful and critical coverage of a criminal proceeding. The trial judge in the case of former police officer Derek Chauvin for the murder of George Floyd boldly allowed audio-visual coverage despite Minnesota's ban. Hennepin County Judge Peter A. Cahill ordered cameras into the courtroom citing, among other things, limited courtroom space caused by pandemic restrictions. Despite prosecutor's objections that it would derail the trial, the

proceedings were not disrupted, and no witnesses refused to testify for fear of being on TV. As U.S. Senator Charles Grassley, a perennial proponent of cameras in the courtroom wrote in an op-ed about the trial, “Cameras in the Hennepin County courtroom didn’t tilt the scales of justice, disrupt court proceedings or infringe on due process of the accused. If anything, the live feed delivered unfiltered assurance to the American people. It showed our system of justice at work and affirmed the independence of the judiciary as an impartial arbiter of the rule of law.”<sup>17</sup>

This is not merely an issue of transparency. It is also about fairness. Many Minnesotans do not enjoy the opportunity to attend Court in person, for reasons of work, health, childcare responsibilities, or lack of transportation. For certain trials, the number of interested observers can far exceed the capacity of the courtroom. There are not enough overflow courtrooms in America to accommodate the estimated 18.4 million Americans who watched the Derek Chauvin trial on television.

The rules committee, which advised against expanding video access, expressed great concern that the media would only provide snippets of sensational news, but not inform the public about substantive issues during a trial. A livestreamed public record of the entire trial -- as provided after the Chauvin and Potter trials – should assuage any of those concerns. Additionally, where previously TV stations were only able to broadcast short news stories of about one minute – thirty seconds in length which included ten or fifteen second soundbites from a courtroom proceeding, they are now also able to broadcast the entire trial on their websites. Denying video access to the courtrooms on this basis is the same as a public official saying they will not give an interview or allow a recording of a press conference because the news station or newspaper will use as snippet soundbite or a one sentence quote.

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<sup>17</sup> See: USA Today Opinion, “Sen. Chuck Grassley: Cameras added transparency to Derek Chauvin trial — now add them to all courtrooms,” May 2, 2021, available at: <https://www.usatoday.com/story/opinion/2021/05/02/cameras-derek-chauvin-trial-helped-transparency-column/4855919001/>

It is also a huge paradox that in this electronic age video recordings often exist of the crime itself, which the public gets to see, but no such type of audio-visual coverage is permitted of the courtroom proceeding related to that crime.

In the wake of the Amber Heard/Johnny Depp trial, many have expressed the concern about livestreamed trials becoming a spectacle, but those people conflate commentary with coverage much as they did during the O.J. Simpson murder trial. Audio-visual coverage of courtroom proceedings is just the “messenger” which should not be “shot” because of the non-stop panels of experts endlessly discussing a trial.

Additionally, after a two and one-half year, pandemic, which for health and safety reasons required the use of livestreaming and virtual civil and some criminal hearings throughout Minnesota, the judicial system has not collapsed and unsurprisingly this summer, the Minnesota Supreme court expanded its remote hearing process<sup>18</sup> in recognition of a “greatly expand[ed] access to justice.”

Therefore, we recommend that this body should presumptively permit visual and audio recording in all criminal proceedings in Minnesota trial and appellate courts, subject to rebuttal and require, at minimum, a showing of good cause by the party opposing visual and audio recording before such recording is prohibited.

It is hoped that the judiciary will acknowledge the reality that Minnesota’s courts have already adopted audio-visual coverage – if only out of necessity. Over the past two years, the COVID-19 epidemic forced Minnesota’s courts to get creative in ensuring public access, turning to Zoom and other forms of live broadcast. For the first time in decades, Minnesotans were able to observe trials from the safety and comfort of their own homes.

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<sup>18</sup> See: oneCourtMN Hearings Initiative Policy at [https://mncourts.gov/mncourtsgov/media/Judicial\\_Council\\_Library/Policies/500/525.pdf](https://mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/525.pdf)

## **Conclusion**

The Internet and livestreaming have enabled gavel-to-gavel audio-visual coverage of courtroom proceedings because of its intrinsic capacity to permit unlimited content rather than be bound by the time constraints of traditional broadcast and cable programming, which was one of the major objections thirty years ago when the fear was that news stations would only be able to broadcast “snippets” of any trial. Additionally, newspaper websites have made it possible for the print media to also provide audio-visual coverage where they previously were relegated to 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 benefits of allowing such coverage are numerous and significant: it will bring transparency to the judicial system, provide increased accountability from litigants, judges, and the press and educate citizens about the judicial process. Audio-visual coverage will allow the public to ensure that proceedings are conducted fairly, and, by extension, that government systems are working correctly. NPPA expects that 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.

“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 57 years ago by U.S. Supreme Court Justice John Harlan in *Estes v. Texas*, 381 U.S. 532 (1965) (first case to consider cameras in the courtroom) are now beyond self-evident. Modern technology has transcended the difficulties that led to bans on such coverage. There are no more whirling, noisy cameras. There are no more glaring lights. Nor does a thundering herd of

technicians have to go in and out of the courtroom to set up and tear down their gear. Modern equipment is inaudible, requires no additional lighting and can be operated by a limited number of trained professionals. The courtroom trial has been a fixture of justice and fairness throughout our state's history. That tradition will be enhanced by permanently permitting audio-visual coverage in Minnesota courtrooms.

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 enhanced by having cameras in the courtroom. A revision of the rules will provide judges with all the judicial discretion necessary to oversee such coverage while safeguarding those rights and principles. Permitting cameras in the courtroom enhances public understanding of and confidence in, the judicial system without interfering with the fair administration of justice.

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."

Minnesota's judiciary must be mindful of its power not to erect its own prejudices into law. Society can ill afford to let the arbitrary and speculative objections of those antagonistic to the press to infringe upon the public's right to observe proceedings in our courts – effectively lens-capping the very means by which modern society receives news and information.

Therefore, in order to ensure fairness in our justice system and make Minnesota a leader in the fair trial – free press arena, we urge the judiciary to amend the rules permitting audio-visual coverage of criminal proceedings in Minnesota.

As with so many other government bodies which have “studied” audio-visual coverage of courtroom proceedings, the Minnesota Supreme Court’s Advisory Committee on the Criminal Rules recommendation regarding cameras in courts are arbitrary and speculative at best and at worst advocate taking a giant leap backward in procedural justice and judicial legitimacy. The proposed limitations on audio-visual access do not outweigh the strong societal interest in public access to the courts. Such electronic coverage of Minnesota court proceedings will bring transparency to the system, provide increased accountability from litigants, judges and the press and educate citizens about the judicial process. It will help assure the public that judicial proceedings are conducted fairly and that government systems are working correctly.

Finally, we offer the service and vast expertise of our members should the Committee wish any additional input and advice regarding audio-visual coverage of judicial proceedings in Minnesota.

Respectfully submitted,

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

By

*Mickey H. Osterreicher*

Mickey H. Osterreicher  
General Counsel  
129 Hooper Street  
Athens, GA 30602  
(716) 983-7800  
[lawyer@nppa.org](mailto:lawyer@nppa.org)