SUMMARY OF COMMENTS BY THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE ON THE SUPERIOR COURT MEDIA COMMITTEE'S PRELIMINARY DRAFT RULE REGARDING AUDIO-VISUAL COVERAGE OF JUDICIAL PROCEEDINGS

The Committee applauds the Superior Court Media Committee's proposal to allow audio-visual coverage on an experimental basis of D.C. Superior Court proceedings. The Committee endorses the proposed rule subject to certain comments, most of which are listed below. One dissenting opinion and two separate statements were filed.

The Committee observed that, with respect to criminal trials, the proposed rule will have to be approved by the D.C. Court of Appeals as such coverage currently is banned by the Federal Rules of Criminal Procedure. The Committee believes that the provision precluding appeals of judicial orders denying coverage requests is beyond the power of the Board of Judges and should be deleted; that the pilot program should not automatically terminate and instead should continue until the Court decides on whether to implement a permanent coverage program; that a pretrial conference on coverage should only be required if a party requests such a conference; that the court should pre-approve visual obscuring techniques to be certain they are effective; and that any Order permitting coverage and setting forth restrictions thereon should be published in the case court jacket to ensure notice to all interested members of the media.

Finally, consistent with the belief that audio-visual coverage enhances public awareness of and respect for its judiciary, the Committee believes that, in ruling on coverage requests, the court should be guided by a presumption in favor of such coverage.

SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR

COMMENTS ON THE PRELIMINARY DRAFT RULE REGARDING AUDIO-VISUAL COVERAGE OF JUDICIAL PROCEEDINGS

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Ad Hoc Committee on Cameras in the Courtroom

July 23, 1993

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COMMENTS OF THE AD HOC MEDIA COMMITTEE ON THE PRELIMINARY DRAFT RULE REGARDING AUDIO-VISUAL COVERAGE OF JUDICIAL PROCEEDINGS

INTRODUCTION

On June 4, 1993, the District of Columbia Superior Court published a notice soliciting comments on a Preliminary Draft Rule regarding Audio-Visual Coverage of Judicial Proceedings (the "Draft Rule") in the Superior Court. Members of the Section on Courts, Lawyers and the Administration of Justice (the "Section"), together with other members of the D.C. Bar, joined the Section's Ad Hoc Committee on Cameras in the Courtroom (the "Committee") for purposes of reviewing the Draft Rule, assessing the divergent concerns of clients, witnesses, lawyers and media in covering courtroom proceedings, and preparing comments on the Draft Rule. These comments are the product of the Committee's deliberations on and review of the Draft Rule.

In preparing these comments, members of the Committee met with representatives of the broadcast and print media to obtain information concerning coverage of judicial proceedings in neighboring jurisdictions and other states. On July 1, 1993, the Radio-Television News Directors Association arranged for a demonstration to the Ad Hoc Committee of the currently available technology and methods typically used for covering courtroom proceedings.

Through the demonstration, the Committee was able to observe how broadcast and still photography equipment would be set up and operated in a courtroom setting.[1] In addition, members of the Committee exchanged views with representatives of the media relating to concerns about courtroom coverage that have been raised by members of the Bar and the Superior Court.

As a whole, the Committee applauds the proposal to allow audio-visual coverage on an experimental basis of D.C. Superior Court proceedings. A majority of the Committee endorses the broad outlines of the Draft Rule, subject to the reservations and comments noted below. It should be noted that in 1984, a predecessor Committee on Cameras in the Courts of the D.C. Bar Section on Courts, Lawyers and the Administration of Justice (then known as "Division IV" of the D.C. Bar) (the "1984 Committee") proposed a one-year experimental program allowing audio-visual coverage of the D.C. Superior Court as well as the D.C. Court of Appeals. This recommendation was never implemented by the D.C. courts, even though at that time, forty-two out of the fifty states had adopted permanent or experimental rules

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1 A mock courtroom maintained by the law firm of Jenner & Block was made available to the Committee for purposes of this demonstration. A list of media representatives who participated in this demonstration is attached to these comments as Appendix No. 1.

permitting some form of photographic access in their courts. As of 1993, that number has now grown to 47 states.

With the national expansion of state court audio-visual coverage experiments and rules and with the advent of the federal pilot program of audio-visual coverage, the Section reconstituted its Ad Hoc Committee on Cameras in the Courtroom to study the question again. Certain members of the Committee met informally with Superior Court representatives and, ultimately, certain Section members were invited to serve on the Superior Court's Media Committee, which promulgated the preliminary draft Rule currently under consideration.

The First Amendment to the Constitution protects the right of both the public and the members of the press to have access to otherwise open court proceedings. Richmond Newspapers, Inc. v. Virginia 448 U.S. 555 (1980). Such access is consistent with the history of open trials and the role of the public "to enhance the integrity and quality of what takes place." Id. at 561. However, courts may place "time, place, and manner restrictions" on the exercise of this constitutional right of access, if the restrictions are reasonable and promote "significant governmental interests" and do not "unwarrantly abridge . . . the opportunities for the communication of thought." United States v. Hastings, 695 F.2d 1278, 1282 (11th Cir. 1983); See Westmoreland v.

Columbia Broadcasting Sys., 752 F.2d 16, 24-25 (2d Cir. 1984) (Winter, J., concurring), 105 S. Ct. 3478 (1985). Courts have thus far declined to extend the constitutional right of access to include the right of the broadcast media to electronically record, broadcast, or photograph trials. See Chandler v. Florida, 449 U.S. 560; 569-70 (1981); Conway v. United States, 552 F.2d 187, 188-89 (6th Cir. 1988). See also United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986); United States v. Kerley, 753 F.2d 617, 620 (7th Cir. 1985).

The Committee believes that, in this camera experiment, the Superior Court must be vigilant to the needs of protecting criminal defendants' rights to due process under the Sixth Amendment. It is well-settled that audio-visual coverage is not a per se violation of a defendant's due process rights. Chandler v. Florida, 449 U.S. 560, 570-74 (1981). Nevertheless, the Committee endorses the concept embodied in the Draft Rule of providing presiding judicial officers with broad discretion to restrict such coverage when the Court concludes such coverage will impinge on a defendant's due process rights, expose certain categories of witnesses to undo embarrassment or danger, or otherwise compromise the fairness of the proceeding. In considering the various factors that would warrant such restrictions, however, the Committee believes that in each case the Court

should be guided by a presumption in favor of coverage. This presumption is consistent with the principles underlying this experiment -- i.e., that audio visual coverage will make a public trial truly public, that it will inform and educate the public as to the working of their judicial system, and such increased public awareness will engender respect for the courts and the rule of law, thereby enhancing the Court's ability to perform its function with the support of the public it serves. As Chief Justice Burger has written:

> The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise Company v. The Superior Court, 464 U.S. 501, 508 (1984) (citation omitted) (reversing denial of access to public and press to observe jury selection).

During consideration of the Draft Rule, the Committee was mindful of the need to protect the constitutional rights of parties to a fair trial as guaranteed by the Bill of Rights. The Committee was also

sensitive to the need to protect the safety of parties, witnesses, police officers, jurors and counsel involved in judicial proceedings. However, whether audio-visual coverage will jeopardize any of these important interests and in what circumstances are matters of debate. Some believe that allowing virtually any electronic or photographic coverage of trial proceedings will prejudice the rights of litigants, especially defendants in criminal cases. At least one member of the Committee who expressed this viewpoint pointed out that the District of Columbia courts are a unique judicial forum because parties in this jurisdiction may not secure a change of venue. A majority of the Committee, however, does believe that the Draft Rule, with the changes the Committee proposes, contains adequate safeguards to protect the rights of litigants to a fair trial.

The Committee has considered with care the views expressed by David Reiser in his dissenting statement. He makes many thoughtful points, and the other members of the Committee do not deny that his arguments have some force. Indeed, most of us share his distaste for the increasingly sensationalistic nature of television news coverage. But most people today <u>do</u> get their news from the electronic media, and we think the increased coverage of judicial proceedings that cameras in the courtroom will bring will

serve the public interest. A majority of the Committee believes that the opposition to any audio-visual coverage of Superior Court proceedings, although well-intentioned, is misguided for several reasons.

First, our dissenting colleague objects to allowing any audio-visual coverage of court proceedings by the media in part because the media will engage in selective coverage of such proceedings (the "snippet theory"). Selective coverage, however, is already a reality of all print coverage of judicial proceedings and therefore, in the Committee majority's view, this is an insufficient basis on which to preclude entirely other forms of media coverage of court proceedings. After much deliberation and careful examination, the New York State courts concluded that this was not a reason to bar audio-visual coverage. As the report of their media committee concluded: "The content of news reports, like it or not will remain essentially the same with or without cameras in the court." State of New York Unified Court System, Report of the Chief Administrator to the New York State Legislature, the Governor, and Chief Justice on the Effect of Audio-Visual Coverage on the Conduct of Judicial Proceedings, at 139 (March 1991) (N.Y. Report). (emphasis in original) We believe that the same holds true if coverage is permitted of Superior Court proceedings.

We also believe that the government should not be in the business of deciding how the media should cover the public's business except where compelling reasons so require, and we perceive no compelling reasons to preclude audio-visual coverage of court proceedings. Jury selection may take a little longer in a small fraction of the hundreds of cases tried in Superior Court every year, and perhaps there will be a mistrial or a reversal once in a blue moon when a juror inadvertently sees a telecast of a portion of a trial from which the jury was excluded (although we do not understand why this risk will be any greater than it is now, when the media routinely report on such events), but we think those are small and acceptable risks to run in return for the considerable public benefit that we believe will accrue from electronic coverage of trials.

Furthermore, the broadcast media may be the only media that actually permits complete, gavel-to-gavel coverage of judicial proceedings. "Court TV", affiliated with the American Lawyer magazine, has begun to broadcast on cable television complete or nearly complete coverage of a number of major trials throughout the U.S. Although representatives of the local broadcast media have advised the Committee that they are unlikely to broadcast full trials in the near future, the explosion of cable offerings (including technological advances that may permit as many as

500 channels in the future) and operations such as "Court TV" hold the promise in the future of gavel-to-gavel coverage of some court proceedings in this jurisdiction.

Second, the dissent has suggested that the Superior Court should not adopt a pilot program of audio-visual coverage merely because "everyone else is doing it." The Committee does not believe that the Superior Court Media Committee was motivated by a "herd mentality" to propose the preliminary Draft Rule authorizing limited, audio-visual coverage on an experimental basis, nor does the Committee urge the Court to adopt the Draft Rule for this reason. We do not endorse the proposed experiment because "everybody is doing it," but because we think it is the right thing to do, as our predecessors on the Courts, Lawyers and Administration of Justice Section Steering Committee believed when they proposed a similar experiment nearly a decade ago.

Moreover, there have been significant changes since the early to mid-1980s when the Superior Court declined to act on the recommendations of the 1984 Report of the D.C. Bar committee which urged experimental audio-visual coverage of judicial proceedings in the Superior Court. One of those significant changes is that most jurisdictions that have experimented with audio-visual coverage (including the Commonwealth of Virginia) have concluded, based on the

positive results of those experiments, that broadcast coverage, subject to appropriate safeguards, does not interfere with or impede the justice system or the ability of parties to secure a fair trial. Another is the increasing reliance placed by most Americans on television for news. One should recognize this reality by opening up the judicial system to audio-visual coverage. Third, a number of states have even gone so far as to allow videotapes of judicial proceedings to serve as the official or experimental records of court proceedings. News Media Coverage of Judicial Proceedings With Cameras and Microphones: A Survey of the States (as of Jan. 1, 1993), at 3-4 Radio-Television News Directors Association (1993). Based on these developments, the Committee believes that the overall experience with audio-visual coverage in other jurisdictions has been positive and demonstrates that allowing experimental coverage in the Superior Court will not interfere with judicial proceedings or prevent litigants from obtaining a fair trial.

Finally, the dissent suggests that the Draft Rule should not be adopted because the media is not interested in "better" coverage, only more "dramatic" coverage. Our dissenting colleagues reflect the suspicions of the media shared by many in this country. Although the Committee agrees wholeheartedly that there should be improvements in

the quality of television news and television's portrayal of court proceedings generally, this is not a reason to preclude all broadcast coverage of court proceedings, any more than it is a reason to exclude the supermarket tabloids from covering such proceedings. The Committee continues to believe that the public will be best served by court proceedings that are open to members of the public and all forms of the press. Indeed, a majority believes that, with appropriate safeguards in the Draft Rule, audio-visual coverage should enhance the public's knowledge of judicial proceedings while not interfering with the fundamental rights of litigants to due process and a fair trial.

Accordingly, subject to the following comments, the Committee supports the Draft Rule and recommends that it be implemented on an experimental basis.

(a) Authorization and Length of Experimental Coverage. The Committee endorses the recommendation that the Board of Judges of the D.C. Superior Court authorize an experimental program of audio-visual coverage of Superior Court proceedings.

The Draft Rule would permit coverage of criminal, as well as civil proceedings. The Superior Court must conduct its business according to the Federal Rules of Civil and Criminal Procedure unless modified with the approval of the D.C. Court of Appeals. Because Federal Rule of Criminal

Procedure 53 forbids coverage of criminal proceedings, any rule change allowing coverage of criminal trials must be approved by the D.C. Court of Appeals before it can go into effect with regard to criminal trials. D.C. Code Ann. §11-946.[2] Before implementation of the pilot program, therefore, the D.C. Court of Appeals must approve the temporary suspension or rescission of Rule 53.

The Ad Hoc Committee notes, however, that there no longer is an ABA judicial ethical canon or other model rule prohibiting or discouraging experiments or permanent rules permitting audio-visual coverage of proceedings. The history and evolution of such restrictive canons coincides with the evolution of audio-visual technology from its clumsy, cumbersome beginnings to its current advanced,

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2 This provision of the D.C. Code provides, in pertinent part:

> The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes rules or adopts rules which modify those rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court . . .

D.C. Ann. §11-946.

Fed. R. Crim. P. 53 prohibits the "taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom . . ." There is no comparable prohibition in the Federal Rules of Civil Procedure.

unobtrusive state. The highly sensationalized trial of Bruno Hauptmann, who was tried for the kidnapping of the Lindbergh baby, served as a catalyst for the adoption of Canon 35 of the Cannons of Judicial Ethics. 62 A.B.A. Rep. 1134-35 (1937); see State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, cert. denied, 296 U.S. 649 (1935). Canon 35 provided, in pertinent part, that "[t]he taking of photographs . . . and the [radio] broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

In 1952, with the emergence of television, Canon 35 was amended to include a ban on television broadcasts. 77 A.B.A. Rep. 110, 257-59 (1952). In 1972, Canon 35 was recodified as Canon 3 A(7) when the ABA replaced the Canons of Judicial Ethics with the Code of Judicial Conduct. 97 A.B.A. Rep. 556, 558 (1972). Later, in 1982, Canon 3 A(7) was revised once more, this time allowing electronic coverage, under certain circumstances, at the judge's discretion. 107 A.B.A. Rep. 649-52, 725-35 (1982). Finally, in 1990, Canon 3 A(7) was deleted altogether because the ABA determined that the subject matter dealt with a matter of court administration, not judicial ethics, and was more appropriately regulated by separate court

rules. See Report of the ABA Standing Committee on Ethics and Professional Responsibility Concerning the Proposed Model Code of Judicial Conduct, page 25, 1990.

Initially, most states adopted the original Canon 35 and the later Canon 3 A(7) and a similar provision was codified in 1946 in the Federal Rules of Criminal Procedure as Rule 53. As technology improved, however, states began experimenting with audio-visual coverage of judicial proceedings and, accordingly, modified or rescinded their rules to reflect the new acceptance of this form of news coverage. See National Center for State Courts, Television Coverage in State Courts: An Update, 7 St. Ct. J.1, 13-14 (1983); see also News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States (as of January 1, 1993), at 2-3, Radio-Television News Directors Association (1993).

The Draft Rule proposes a twenty-four month period for the pilot program of coverage of Superior Court proceedings. The Draft Rule also requires that in the event it is adopted, the Chief Judge of the Superior Court shall appoint a Media Committee which shall submit recommendations concerning "the efficacy of audio-visual coverage of judicial proceedings" and whether such coverage should be continued after termination of the experimental program. A majority of the Committee recommends that the experimental

program should be allowed to continue after the initial twenty-four month period until such time as the Superior Court has determined whether or not to allow audio-visual coverage of judicial proceedings on a permanent basis. The Committee believes that it is in the interests of the Superior Court, the public and the media to allow the experimental program to continue on a temporary basis until the Superior Court evaluates the experience with the pilot program and acts on the recommendations of its Media Committee. The Committee also notes that other jurisdictions that have implemented programs allowing audio-visual coverage of judicial proceedings, e.g., New York, have extended their experimental programs in the past until a permanent program could be adopted and implemented.

A minority of the Committee opposes such an open-ended experimental program. This minority believes that a twenty-four month period is a sufficient time to allow the D.C. Superior Court to collect and evaluate information from the experimental program.

(b) Definitions. The Committee recommends that the court clarify the definition of "[v]isually obscured" in Section (b)(11) of the Draft Rule. It is the Committee's understanding that there are a variety of techniques currently used in the broadcast industry for visually obscuring the faces of witnesses and other participants in

court proceedings. The Committee believes, however, that the Superior Court should pre-approve the methods that will be acceptable for visually obscuring participants' faces so that participants' faces are actually obscured effectively and consistently. During the demonstration provided by the media to this Committee, the Committee was advised that there are two principal methods for visually obscuring a witness' face: the so-called Blue Dot method and the "scrambler" technique. According to representatives of the media, the "scrambler" technique is more effective, albeit somewhat more expensive. Accordingly, the Committee recommends that the "scrambler" technique be the required method of visually obscuring faces in the courtroom, unless equal or more effective techniques are or become available.

The Committee does not favor the use of closed-captioning, as suggested by a dissenting member. In the majority's view, closed-captioning does not convey the flavor of a witness's testimony as well as face- or voice-obscured coverage. Additionally, many television sets are not equipped to receive closed-caption broadcasts.

The Committee notes that the Draft Rule also allows a nonparty witness to request not only that his or her face be "visually obscured," but that the witness' voice also (or alternatively) be "audibly obscured." The term "audibly obscure[d]" (Draft Rule (d)(2)), is not defined. Again, the

Committee recommends that this term be defined, the means of obscuring a participant's voice be pre-approved by the Superior Court, and that such standards be applied uniformly to all participants who have this right under the Rule.

(c) **Requests for coverage of proceedings.**

(1) As currently drafted, this provision of the Draft Rule requires the media to give the Superior Court at least seven days notice before the commencement of the judicial proceedings it wishes to broadcast, televise or photograph. Certain members of the Committee expressed concern that seven days is unreasonably and impracticably short notice for both the Court and litigants. These members of the Committee noted that attorneys should be provided additional time in which to adjust their trial preparation and/or advise their clients and witnesses of the possibility that there may be audio-visual coverage of proceedings. Accordingly, these members recommend that the media be required to file a request for coverage within 45 days after a complaint is filed in a civil case or an arrest/arraignment occurs in a criminal matter. It is the Committee's understanding, however, that especially with regard to civil cases, the media often does not become aware of matters it wishes to cover until a later date. Nevertheless, the Committee suggests that the media be encouraged to notify the Superior Court even sooner than

this seven-day deadline. A majority of members of the Committee recommended that if representatives of the media become aware of their interest in a judicial proceeding at an earlier date, they should not be permitted to wait until a mere seven days before a hearing to advise the Superior Court and the parties of their request for coverage.

The Draft Rule also provides in Section (c)(1) that, upon a showing of good cause, a presiding judicial officer may permit representatives of the media to file and serve upon the parties a request to allow coverage within seven days of the commencement of the proceeding. The Committee recommends that the Draft Rule state specifically that good cause is presumed if the hearing or trial was scheduled on less than seven days prior notice.

The Committee also believes in order to protect the rights of parties and counsel that the Superior Court should require representatives of the media filing requests for coverage with the presiding judicial officer to serve copies of such requests simultaneously on counsel for the parties, or on the parties themselves, in the event parties are not represented by counsel.

(2) Judicial Discretion to Grant or Deny Requests:

(a) Coverage Orders. The Committee discussed at length whether to recommend any changes to the provision of the Draft Rule, (c)(2), which states that media coverage

shall be "at the discretion of the presiding judicial officer." On its face, this provision of the Draft Rule appears to vest unfettered discretion in the presiding officer over whether to grant or deny a request for coverage. On the other hand, another provision of the Draft Rule, (c)(3), specifically provides that the presiding judicial officer "shall consider" several factors including, among others, (a) the type of case, (b) whether coverage will harm any participant or otherwise interfere with the fair administration of justice, and (c) the wishes of the parties and witnesses, in determining whether to grant or deny a request for coverage.

The Committee appreciates that particularly during the implementation of an experimental system of audio-visual coverage of judicial proceedings, individual judges and hearing commissioners must be afforded some discretion in granting or denying requests for coverage. The Committee is also mindful that a presiding judge is granted discretion in controlling the behavior of counsel, parties and observers of judicial proceedings in his or her courtroom. Nevertheless, during the operation of the experimental program, the Committee endorses the requirement in Section (C)(2) that a presiding judicial officer be required to make a ruling on the record when granting or denying requests for coverage. It is the sense of the Committee

that, if the presiding officer makes such a ruling applying the factors set forth in (c)(3) of the Draft Rule, there is much less likelihood that arbitrary determinations will be made granting or denying requests. In addition, a requirement of written rulings on coverage requests will afford the Superior Court, the Bar and the public with a better basis for evaluation of the Court's pilot program of coverage.

(b) Appealability of Coverage Orders.

Section (c)(2) of the Draft Rule provides that orders granting or denying requests for coverage shall "not constitute an appealable order . . . nor an order subject to review by extraordinary writ." The Committee agrees this provision should be deleted. The Committee believes it is beyond the power of the Board of Judges of the Superior Court to limit the jurisdiction of the District of Columbia Court of Appeals. Indeed, even the District of Columbia Council is forbidden to modify Title 11 of the D.C. Code, which contains the provisions conferring jurisdiction on the District of Columbia courts. D.C. Code § 1-233(a)(4).

Appellate jurisdiction over the Superior Court is governed by D.C. Code § 11-721. This statute confers jurisdiction over all final orders in criminal cases (except those in which a fine of less than $50 is imposed for a misdemeanor offense) and in civil cases (except Small Claims

proceedings). There are well-established standards used to determine whether a pretrial order is sufficiently collateral to be deemed a "final" order for purposes of appellate jurisdiction under D.C. Code § 11-721. See e.g., In re Estate of Tran van Chuong, No. 89-PR-1511 (March 2, 1993)(en banc)(holding that order disqualifying counsel in civil case is not appealable collateral order). While there is no authority in this jurisdiction directly relating to television coverage of court proceedings, the D.C. Court of Appeals has exercised jurisdiction over an interlocutory appeal of an order closing a pretrial detention hearing. United States v. Edwards, 430 A.2d 1321, 1343-46 (D.C. 1981)(en banc)(reversing trial court closure order on cross-appeal by the prosecution), see also id. at 1347-1350 (Nebeker, J., dissenting)(discussing jurisdiction). The Court has also considered an interlocutory appeal by a juvenile of a trial court order permitting a reporter to attend a juvenile trial. In re J.D.C., 594 A.2d 70 (D.C. 1991) (reversing trial court order permitting coverage).

Whether a coverage order is subject to review by an extraordinary writ will depend upon whether the trial court order is a clear abuse of its discretion or exceeds its jurisdiction. See, e.g., Yeager v. Greene, 502 A.2d 980 (D.C. 1985); see also D.C. Court of Appeals Rules 21, 22.

(3) Factors to be Considered in Granting or Denying Requests for Coverage.

The proposed rule provides that in determining whether to grant a coverage request, judicial officers "shall consider at least" certain specific, enumerated factors. Members of the Committee agree with the approach taken in this section of the proposed rule, which is consistent with that taken by many of the jurisdictions that have allowed coverage. The Committee believes that this approach provides appropriate guidance to the presiding judicial officers in the exercise of their discretion, and assures that considerations of fairness to the parties and witnesses and the advancement of a fair trial be weighed in the coverage determination.

(4) Requests for Audio-Visual Coverage During Trial.

The Draft Rule provides that requests for audio-visual coverage during a trial "shall not be granted" unless either (a) counsel for all parties agree or (b) the request is limited to coverage only of a jury verdict or sentencing. Draft Rule (c)(4). The majority of the Committee agrees that requests for coverage midway in a trial could be very disruptive to the parties, counsel and the court. Therefore, a majority of the Committee supports the way the Draft Rule deals with this issue.

Certain members of the Committee, however, are concerned that by permitting audio-visual coverage to start during a trial or other proceeding only upon the consent of all counsel, counsel and the parties in effect are being provided with a veto over coverage of a public proceeding. These Committee members note that, by contrast, parties are not allowed to veto coverage requests made in advance of trial or other proceedings. Ultimately, these members of the Committee believe that allowing parties a veto in the ordinary case is contrary to the constitutional guarantee that trials should generally be open to the public and to coverage by the media for the benefit of the public.

(d) Supervision of Audio-Visual Coverage; Mandatory Pretrial Conference; Judicial Discretion.

(1) Supervision of Audio-Visual Coverage. The Ad Hoc Committee generally is supportive of the concept of broad and active judicial supervision of audio-visual coverage of Superior Court proceedings. In discussing the supervision provisions (Sections (d)(1) and (d)(4)), however, the Committee was concerned about the breadth of judicial discretion in modifying or vacating prior orders relating to audio-visual coverage of the proceedings. The Committee believes that comments to the proposed rule should make it plain that, once the Superior Court permits audio-visual coverage of its proceedings, it cannot edit, revise or otherwise restrain the broadcasting or dissemination of

lawfully covered events, even though it may prohibit future coverage of such proceedings.[3] Such rule commentary will avoid any misconstruction of the proposed rule as a judicial endorsement of unbridled prior restraint of protected speech.[4]

(2) Mandatory Pretrial Conference on Coverage.

The Draft Rule requires that a conference be held in each

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3 See Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (statute forbidding newspapers from publishing names of juvenile offenders without prior approval by court violates first amendment); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (newspaper could not be enjoined from publishing name or photograph of minor offender after reporters gained information from attending a juvenile proceeding); see also State ex rel. Miami Herald Pub. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1977) (holding that "there is no special perquisite of the judiciary which enables it to suppress, edit or censor events which transpire in proceedings before it, and those who see and hear what transpired may report it with impunity . . ."); KFMB-TV Channel 8 v. Municipal Court, 271 Cal. Rpter. 109, 112 (Cal. App. 4 Dist. 1990) (striking down trial judge's order prohibiting the media from broadcasting witness statements without the court's approval; finding that the court rule giving the judge discretion to prohibit audio-visual coverage of proceedings did not authorize the court to "become the editor of a television station's news broadcasts of a previously recorded judicial proceeding").

4 See Nebraska Press Assn. v. Stuart, 427 U.S. 839, 561 (1975); New York Times v. United States, 403 U.S. 713 (1971); Levine v. U.S. Distr. Court for the C. District of Cal., 764 F.2d 590 (9th Cir. 1985); Columbia Broadcasting Systems, Inc. v. U.S. Dist. Ct. for C.D. of California, 729 F.2d 1174 (9th Cir. 1984). One court has held that if a media organization violates the court's rules restricting coverage and, without prior authorization, records proceedings, then the court may confiscate or otherwise restrain the dissemination of the recorded images (e.g., audio or video tape, photograph). See Marin Indep. Journal v. Municipal Court, 16 Cal. Rptr 2d 550, 554 (Cal. App. 1 Dist. 1993)

case in which audio-visual coverage of a proceeding has been approved. While the Committee agrees that issues such as the audio-visual coverage of witnesses, concerns of prospective witnesses and limitations on coverage need to be aired and addressed, the Committee almost unanimously agreed that a mandatory conference is not necessary for these purposes. Instead, the Committee recommends that the conference regarding coverage be discretionary, not mandatory, unless requested by counsel for a party or unless the Court believes such a conference is prudent. Committee members also believe that this conference, when it is held, should be held concurrently with other scheduled pretrial hearings such as the Rule 16 pretrial conference in civil cases in order to minimize any burden or cost to the Court and the litigants.

Furthermore, several members of the Committee felt that it would be difficult to advise each nonparty witness as to his or her rights prior to the commencement of a trial. Especially in criminal actions, members of the Committee expressed a concern that requiring an attorney to advise the Superior Court prior to the day of trial as to specific witnesses might give undue notice of trial strategy to opposing counsel, discourage witnesses from appearing, and put counsel in an untenable position where they are advising witnesses who might have interests that diverge

from those of their clients. For these reasons, the Committee recommends that the language in (d)(2) be amended to read as follows:

> At the request of counsel or at the direction of the Court, a conference shall be held in a case in which audio-visual coverage of a proceeding has been approved. If such a conference is held, or if not, on the day of trial prior to voir dire, the presiding judicial officer shall review with counsel and the news media who will participate in the audio-visual coverage any restrictions or limitations which shall be imposed. Counsel for each party in a proceeding shall, prior to this conference or meeting, insofar as possible, notify each nonparty witness that the proceeding may be covered and that he or she has the right to request that his or her image, voice, or both image and voice be obscured during such witness's testimony. The counsel shall convey to the court any concerns of prospective witnesses with respect to audio-visual coverage, and any request by a witness that his or her image, voice, or both, be obscured during the witness's testimony.

(3) **Jury Notification.** Members of the Committee agree that prospective jurors, during voir dire, should be notified that the trial is going to be covered by audio-visual means, explain how audio-visual coverage will operate, and permit prospective jurors to advise the Superior Court of any concerns that they may have. The Committee also believes that the jury should also be informed that the jury itself will not be covered during the course of the audio-visual coverage of the proceeding.

Specifically, the Committee recommends the Draft Rule be revised to read as follows:

> During the voir dire of the jury panel in any trial proceeding the presiding judicial officer shall advise the jury panel that the proceeding will be subject to audio-visual coverage, explain the meaning of audio-visual coverage, notify the jury that there will be no coverage of the jury during the trial, except as allowed in (f)(4), and permit prospective jurors to advise the court of any concerns they have with respect to such coverage.

(4) Modification or Rescission of Coverage Orders.

The Committee incorporates by reference its comments to Section (d)(1) of the Draft Rule found above.

(e) Restrictions relating to equipment and personnel; sound and light criteria:

(1) (B) Equipment and personnel.

The Draft Rule allows no more than one photographer to operate one still camera in a proceeding. Members of the Committee expressed their concern over the use of still cameras. First, they were concerned about allowing the media to use cameras which had an audible shutter click, or other mechanisms which would draw attention to the camera and disrupt the proceedings. Second, they were concerned that the photographer would have the ability to move, or stand, or have other ambulatory powers which would also disturb proceedings. The Committee notes that these issues are generally addressed in Section (e)(2)-(3), but,

recommends that specific criteria regarding these two issues be addressed in the Draft Rule or that the Clerk of the Court pre-approve acceptable cameras.

Based on the Committee's observation of certain still photography equipment demonstrated by the media on July 1, 1993, the Committee recommends that still camera operators not be permitted to move about the courtroom from their designated area during a judicial proceeding.

The Committee recommends the Draft Rule be expanded to allow the Court, and counsel and litigants in particular proceedings to obtain tapes of audio-visual coverage of proceedings at no charge (other than for the tapes themselves). The Committee believes that each grant of a request for coverage by the media should be expressly conditioned on the media's agreement to make available a "feed" to the Court, counsel and litigants, at their request, so that they can make tapes of any audio-visual coverage of the proceedings. The Committee proposes that the following language be added as (e)(1)(G):

> (G) Upon the request of the court, or counsel or parties to litigation for which a request for audio-visual coverage has been granted, the media or media pool covering the proceeding shall make available access to the audio-visual "feed" of such coverage at no charge in order to permit the Court, counsel or litigants to make tapes of such audio-visual coverage.

(2) Sound and light criteria:

(A) <u>Approved AV Equipment</u>. The Committee agrees with the proposal that the Clerk of the Court promulgate a list of acceptable equipment models, and further suggests that the Clerk of the Court pre-approve the technology available to streamline the process.

(f) Restrictions on audio-visual coverage:

Generally, the Committee agrees that the restrictions set forth in section (f) of the Draft Rule are appropriate for purposes of this experimental program. However, the Committee had difficulty with subsections (5) and (6). Subsections (5) and (6) address coverage of police or other law enforcement officers, and potentially paid informants, who acted in an undercover capacity in connection with the instant court proceedings, or who are routinely or currently engaged in a covert or undercover capacity. The Draft Rule allows such individuals to veto coverage of their testimony. The Draft Rule allows such individuals to veto coverage of their testimony.

While sensitive to the importance of preserving the integrity of on-going or future investigations and the safety of individuals, the Committee believes that such individuals should not be able to veto all audio-visual coverage of their testimony. Rather, we believe that such witnesses, like others, will generally be adequately

protected by obscuring their appearance and/or voice. However, the Committee would modify the rule to give presiding judicial officers the authority to prohibit audio-visual coverage of such witnesses altogether if he or she concludes that less drastic measures will not protect their safety or the integrity of on-going and future investigations.

The Committee also was concerned about the possibility of compromising a potential investigation by requiring such individuals, pursuant to subsection (f)(6), to notify the Superior Court of its applicability. A second concern was that (f)(5) and (f)(6) were unclear when read together. As a result of the Committee's discussions and review of the preliminary Draft Rule, the Committee uniformly believes that subsections (f)(5) and (f)(6) should be clarified. The Committee suggests that both provisions could be clarified by modifying the present language in subsection (6), and collapsing the two subparts in one provision. Accordingly, the Committee suggests modifying the language in subsection (6) to read as follows:

> Audio-visual coverage may be denied or restricted with respect to a witness who, as a police or other law enforcement officer or as a paid or unpaid government informant, acted in a covert or undercover capacity in connection with the instant court proceeding or is routinely or currently engaged in a covert or undercover capacity, or where the coverage might affect an ongoing or future investigation, without the prior

written consent of such witness. It shall be the responsibility of the counsel for the government to raise this issue with the presiding judicial officer at the bench or in chambers, as soon as the counsel for the government is made aware of the potential problem.

Another issue which was discussed by the Committee was the coverage of the presiding judicial officer, courtroom officials, and counsel. Because the concern was raised by several members of the Committee as to those individuals' safety if coverage of them were permitted in certain cases, the Committee suggests that the Superior Court include a provision in this section giving the presiding judicial officer discretion to order the visual images of counsel, the presiding judicial officer and courtroom officials be obscured when required to meet safety concerns.

(g) **Media Committee**.

During both the implementation and term of the project, it will be important to maintain an oversight body concerned with making the experiment a success and able to take needed steps to have problems resolved. It would appear that continuation of the Media Committee organized by the Superior Court would provide the best means of assuring that this role is performed effectively. The Committee suggests further, however, that the membership of the Media Committee be augmented to include at least one, and

preferably two, representatives of the media, optimally coming from the print and broadcast sectors. These representatives will in no way be able to dominate or obstruct the Media Committee and their presence will serve the useful purpose of providing a direct means of ready communication of issues.

Day-to-day direction of the project should be exercised by appropriately-designated public information staff in the office of the Executive Officer of the District of Columbia Courts. This office is charged with general responsibility within the courts for public information functions and is generally regarded as the proper place for this assignment to be located.

Dissenting Views of David A. Reiser

I disagree with the Steering Committee's endorsement of a rule permitting television coverage of Superior Court trials. In my judgment, the proponents of such coverage have been distracted by technology and slogans from the realities of what televising trial proceedings will mean to the public and to the participants in trials. There is no good reason to conduct an "experiment" here in the District of Columbia; a national pilot program is underway in the federal courts. It is due to be completed on June 30, 1994. If the object is genuinely to examine how television coverage benefits the public and affects the court, then there is no reason not to wait until the federal program has been completed. If, on the other hand, the object is to get the media's foot in the courthouse door, there is every reason to examine closely and with realism, the reasons offered for changing the rules.

The proponents of television coverage of court proceedings have not pointed to any evidence that it "will help to educate the public," see supra at 3. Indeed, they acknowledge that allowing television cameras inside the courtroom will make little, if any, difference in the quality of the information communicated to the public, and they defend broadcasters against criticisms of inaccuracy and sensationalism by arguing that the same problems exist

today. Supra, at 4. The absence of persuasive evidence of the benefits of television coverage is damning, given the large number of "experiments" that have been conducted. Courts have authorized continued television coverage of trials, despite the absence of benefit to the public, perhaps because of the media's skill at promoting its own cause. See In re Permitting Media Coverage, 539 A.2d 976 (R.I. 1988).

The risks, on the other hand, are clear. In New York, there were a number of reported violations of coverage restrictions. Matthew T. Crosson, Report of the Chief Administrator to the New York State Legislature, the Governor, and the Chief Judge on the Effect of Audio-Visual Coverage on the Conduct of Judicial Proceedings, Appendix 1 (March 1991). See also State v. Hudson, 475 S.E.2d 732 (N.C. 1992) (defendant failed to show specific prejudice from media violations of court orders regarding coverage including recording of bench conferences). In Tampa, a trial had to be moved recently because jurors were recognized on television despite obscuring technology. "Trial in Tampa on Torching Is Ordered Moved," Washington Post, June 17, 1993 A7. In another Florida case, a conviction was overturned because the trial court failed to conduct a hearing on the effect of television coverage on the defendant's competency to stand trial. State v. Green,

395 So.2d 532 (Fl. 1981). In several cases, attorneys have complained about the distracting effects of still camera coverage. State v. Hanna, 378 S.E. 2d 640 (W.Va. 1989); Jent v. State, 408 So.2d 1024 (Fl. 1982) (a sensationalized capital murder case in which both defendants were exonerated several years later). These haphazard examples demonstrate that there are real problems to be weighed against the ephemeral benefits of letting cameras into our courtrooms.

I have listened closely to the arguments offered for allowing television coverage of trials. What I hear said, predominantly, is: (1) everybody is doing it, and it is time to get modern; and (2) it will increase public "access" to the courts. What I do not hear spoken, but what I believe is an important motivating force, is the commercial media's apparently insatiable appetite for infotainment. If coverage is allowed, snippets from Superior Court trials can be added to the range of realistic crime and punishment offerings, from "Cops" to "America's Most Wanted," to the "Amy Fisher Story." I do not believe any of these reasons justify the risks television coverage pose to the decorum and fairness of trial proceedings, and I believe it is the obligation of the proponents of a new rule to mount persuasive arguments for taking what all appear to concede to be risks with individual privacy and dignity, and with the integrity of verdicts. If it allows television

cameras inside its courtrooms, the Superior Court will become entangled with the media; the Court will bear responsibility for the images broadcast to the public, even though it will lack any meaningful authority to control what is presented. For the reasons summarized below, I urge the Court to disapprove the proposed rule.

1. "Everybody else is doing it," is no better reason to allow television coverage than it was to wear bell bottoms or platform shoes. There is no question the media can exert powerful political and economic force throughout the country. The fact that other courts have yielded is not a good reason, by itself, for our court to do so. Moreover, it ignores important and unique facts about the District of Columbia. This is the only jurisdiction from which no change of venue, to my knowledge, is possible. No court outside the District of Columbia has jurisdiction to try offenses committed in the District. Changes of venue impose substantial burdens on criminal defendants who would prefer to be tried by a jury drawn from their own community. But this most common remedy for overwhelming pretrial publicity is not even available here.

The District is a small, close knit urban community. Today, it is possible to select juries, even in highly publicized cases, in part because there is relatively little detailed television coverage. With cameras in the

courtroom during trials, retrials, trials of codefendants, or trials of the same person on other charges, would be impossible to conduct fairly. Moreover, the media has made it clear that the goal is to cover pretrial proceedings, as they do in other jurisdictions. The effect of covering bail and suppression hearings would be to flood the potential jury pool with inadmissible information, conveyed in its most potent form. It is no answer to say that these problems already exist; the premise of the argument for television coverage is that television coverage has more impact; if so, it has vastly more potential for prejudice.

Voir dire would have to be expanded enormously in high profile cases if television coverage were allowed. The presence of cameras in the courtroom is likely to have a subtle but important intimidating effect on jurors asked to render a verdict in a high profile case, since the jurors will feel accountable to a public which has been exposed only to a fraction of the evidence at trial. Not only would jurors have to be asked how they would react to such coverage, doubtless with the effect that a certain number of jurors would be lost from each panel, but also jurors would have to be examined about any related television coverage they might have seen. A prospective juror who witnessed a television excerpt from a defendant's first trial is unlikely to be able to serve on a subsequent jury. The

media claims coverage will be without cost, but this ignores, among other things, the real costs to the Court and to citizens, of summoning larger jury panels and conducting more lengthy voir dire.

Much the same point can be made about sequestration. There is no recent practice of sequestering jurors in the Superior Court. The costs, personal and financial, of sequestration would be borne by citizens and by the Court, not by the broadcasters. Yet, at least in some cases, television coverage will create a need for sequestration. It will otherwise be impossible to effectively screen jurors from television coverage. Even instructing them not to watch the news will not be enough, because of the common practice of inserting bulletins into other programs.

The Draft Rule does not give the Court an effective way to prevent the media from broadcasting highly prejudicial footage which occurs while the camera is running. Although there may not be any way to do so without violating the First Amendment, the risk prejudicial information (a supposed threat to a witness emerging in a mid-examination voir dire) will be broadcast is substantial. Indeed, it is a reasonable assumption that even if the opportunity to order the cameras turned off presented itself before a hearing out of the jury's presence, the media would

challenge such an order; the foot in the door will turn with First Amendment alchemy into a right of access. See United States v. Edwards, 430 A.2d 1321, 1343-46 (D.C. 1981)(en banc)(holding there is a right of access to pretrial detention hearing). A properly instructed juror can skip an article that relates to a trial; new stories or bulletins are likely to convey the dramatic information before the juror has warning it is coming, not to mention the risk a family member will pass on the prejudicial information without knowing what has been broadcast did not take place in the presence of the jury.

In my judgment, because change of venue is not an option in the District of Columbia, this jurisdiction is fundamentally different from any other. It is also different because it is governed, in part, by legislators accountable to voters in other parts of the country, but who live, at least part of the time, in the Washington, D.C. metropolitan area. Some consideration should also be given to whether the Court should facilitate the broadcast of images which may inspire Congress to further efforts to impose its will on the District's criminal justice system. A misleading broadcast which discredits a jury verdict -- such as a broadcast juxtaposing dramatic (but ultimately not credible) identification testimony with an acquittal -- is likely to inspire reactions not only among the citizens of

the District of Columbia, but also in a legislature they have no part in electing.

2. "Access" is a red herring. Television stations already have as much access to the courts of the District of Columbia as they need to be able to apprise their viewers of what is happening. At a meeting by the Committee with a representative of the Radio and Television News Directors Association, and other media representatives, they made it clear that they did not envision gavel to gavel, or even lengthy coverage of trials. Rather, as one person put it, they are "looking for that little snippet that makes it interesting." In other words, the purpose of televising trials is to grab dramatic footage to plug into news stories. Let us not pretend, in this day and age, that we can expect televising trials to foster more analytical or thoughtful coverage. Let us not pretend that, if only trials were televised, citizens would have a better understanding of court procedures or the law than they do now. Instead, let us recognize, as the media representatives admitted when the Ad Hoc Media Committee met with them, that this is not about <u>better</u> coverage, but about more dramatic coverage. <u>See e.g.</u>, Kurtz, "Tabloid Sensationalism is Thriving on TV News," <u>Washington Post</u>, July 4, 1993 A1, 20.

Today, news stations broadcast (without saying so) re-enactments by police officers of the discovery of evidence. The broadcasters showed the Ad Hoc Media Committee tapes from court proceedings in Virginia, including one from a trial which appeared to depict the defendant listening to the prosecutor's opening statement, when actually the footage seems to have been taken at a different time. When asked whether the media would be willing to incorporate its code of ethics into the court rule, so that it could be enforced by the Court, the media representative at our meeting answered with an emphatic "no."

The reason the broadcasters wish to televise criminal cases, and expressed virtually no interest in a rule like Maryland's which limits coverage to civil cases, is, to put it bluntly, that they tend to be juicier. Snippets of trials will cater to the loyal fans of "L.A. Law," "Matlock," and shows like "America's Most Wanted." We already have film crews following police officers on searches and arrests. Have these shows contributed to an understanding of the Fourth or Fifth Amendments? No. If anything they have contributed to a simplistic good guys/bad guys portrait, with some viewers rooting for the police, and some for the people they are pursuing. See Batt, "Menace II

the Mind," Washington Post, July 11, 1993 C1.2 (describing reaction of prison inmates to television programs).

I also discovered during our meeting, that the media's idea of "access" is a one way street. The media representatives vowed they would "fight to the death" against any effort to obtain footage of a trial which was not broadcast, even though it happened in a public courtroom under the license of the Court. Apparently, the media views the penumbra of its First Amendment rights to preclude compliance even with a subpoena for an "outtake" recording of an event. For example, if a party wished to play a videotape of a reenactment to the jury in closing, or to provide the tape to the jury for purposes of its deliberations, the media would consider this off-limits, no matter how much it might contribute to the truth-finding process.

3. The media has no constitutional right to televise court proceedings. Accordingly, the issue is how much weight to give the interests of those who must participate in trials. Clearly, the group most at risk are criminal defendants. They are the ones who will suffer the consequences if television coverage leaves indelible images in the minds of too many prospective jurors. But anyone, lawyer, judge, witness, who has a legal obligation to participate in a trial has right to be asked whether that

person wishes to have his or her image exploited for the commercial benefit of a television station, because it is the audio-visual images which are the only issue here; nothing prevents television stations from broadcasting what they wish about trials, or even ordering transcripts. Nobody should have to be a captive performer in a television show, least of all a person whose liberty is at stake.

If an experiment is to be conducted, it should be done only with the consent of all concerned in each case. There is no need for any experiment to be statistically representative, so that a consent requirement will not invalidate the experience learned from any trials which are covered. The Court should not give precedence to commercial interests over constitutional rights.

DISSENTING VIEW OF JAMES H. FALK, JR.

I. Notice Provisions

As currently drafted, Section (c) of the Draft Rule requires the media to give the Superior Court at least seven days notice prior to the commencement of judicial proceedings it wishes to broadcast, televise or photograph.

It is my opinion that seven days notices is unreasonable and impracticable from the perspective of both the Court and the litigants.

As a general proposition, legal proceedings before this Court are initiated upon the happening of a well-defined and public event, i.e., the filing of a civil complaint or the indictment, arrest and/or arraignment of an accused. Without exception, the media routinely learn about or discover these events when they occur. The media then immediately determine whether the particular legal proceeding is one in which they have an interest in covering. As a result, I believe that the media should be required to notify the Court of their interest in a particular proceeding by filing a written notice in the Clerk's Office under the appropriate docket entry within forty-five days from the date a legal proceeding is commenced with the Court.

By establishing this notice requirement, the Court is alerted early in the legal process of media interest in a

particular proceeding so that it can address the dynamics of such interest in an appropriate and timely fashion. Specifically, early notice:

a. affords the litigants with written notice of the media's interest at an early stage;

b. allows the Court to schedule the mandatory conference described in Section (d)(2) of the Draft Rule at an early stage and in conjunction with other required proceedings so as to preserve judicial resources. In this regard, the mandatory conference should be scheduled with and be a part of the Rule 16 pre-trial conference in civil proceedings and the Rule 17.1 pre-trial conference in criminal proceedings;

c. allows the Court (1) to conduct the mandatory conference described in Section (d)(2) of the Draft Rule; (2) to make the six (6) point determination in Section (c)(3) of the Draft Rule; and (3) to delineate and impose whatever coverage restrictions are appropriate, all in a considered and reasoned fashion; and

d. allows the Court ample time to apprise the litigants of any coverage decisions and/or restrictions at an early stage in the proceedings so that the litigants and media can prepare for and adhere to the Court's coverage decisions.

I further believe that a notice mechanism of the type outlined above provides for the orderly and integrated use of the mandatory conference requirement specified in Section (d)(2) of the Draft Rule.

II. Audio/Video Obscuring of Witnesses

As currently drafted, non-party witnesses have the absolute right to request that their voice and/or identity be mechanically obscured while testifying. Rather than requiring the media to use voice alteration techniques (i.e., scrambled voice) and/or video alteration techniques (i.e., a dot matrix imposed over the individuals face), I believe that the Rule should merely require the use of closed-captioning. For example, if a witness elects to have his/her voice or image obscured, the video transmission would simply contain the still picture of an empty courtroom together with closed-captioning of the testimony. By utilizing this technique, obscuring requests are easily addressed and any risk of error with the other techniques is eliminated. Moreover, closed-captioning technology is readily available and in fact will be required on all television sets manufactured on or after 1994. Lastly, this technique provides the most accurate means for communicating information to the viewer.

SEPARATE STATEMENT OF DONNA M. MURASKY

I write separately because I believe that the majority may overestimate the benefits to the public of permitting audio-visual coverage of Superior Court proceedings and that one of the dissents may overstate the dangers of such coverage, especially to criminal defendants. In addition, I have several other concerns that I wish to mention.

There is, and can be, no guarantee that allowing audio-visual coverage of Superior Court proceedings will result in the broadcast of all or even substantial parts of trials or other proceedings in which the public is interested. On the contrary, based on the information the Ad Hoc Committee gathered, it is likely that coverage will result, for the most part, in the publication or broadcast of only very selected material. Furthermore, with the Draft Rule's provisions requiring faces to be obscured and voices to be altered at least in some instances, the potential benefit to the public of allowing audio-visual coverage of Superior Court proceedings becomes even more uncertain. Audio-visual coverage is likely to produce mere "snapshots" of those proceedings, and distorted ones at that.

On the other hand, at the present time, the electronic media are free to report about Superior Court proceedings. This means both that the public is able to learn about our local judicial system through television and radio and that parties to such proceedings may be subject to widespread publicity from those sources. Indeed, some of the most celebrated trials in this city, including the trial of its former mayor, have been accompanied by extensive audio-visual coverage, albeit on the courthouse steps, not in the courtroom itself. In addition, such trials often have been preceded by extensive electronic coverage. The Watergate trials following the televised congressional hearings on the infamous break-in are an example. Other examples of more local interest include the trials of the "8th and H Street gang" and "Little Man James" for murder.

The issue before the Superior Court is, therefore, a rather narrow one -- whether the marginal potential benefits of allowing audio-visual coverage of events inside the courtroom outweigh the marginal potential dangers of doing so. It seems to me that audio-visual coverage of Superior Court proceedings may not in the short run contribute greatly to the public's understanding of our judicial system. Coverage may, however, engender interest in Superior Court proceedings and result in material that enriches the public's understanding. On the other hand, given the District's experience with extensive electronic media coverage of criminal cases, as well as the experiences of numerous state courts which permit coverage, I am not persuaded that the dangers to criminal defendants of proceeding with the experiment are more than speculative.

There are several other concerns that may warrant further inquiry by the Superior Court. The first is the cost to the Court of administering any system of audio-visual coverage of its proceedings. As matters now stand, the Court does not have the resources it needs to discharge its fundamental functions as efficiently as it should and would like. The Court's budget is stretched and its judges are overburdened. Audio-visual coverage of its proceedings will force the Court (and litigants) to expend additional financial and human resources. There is, therefore, a need to simplify the administration of audio-visual coverage of its proceedings.

Second, I am troubled by the Ad Hoc Committee's proposal that the Court should require members of the media to agree to provide "a feed" to the Court and to litigants as a condition of permitting audio-visual coverage of its proceedings. In my mind, the media ought not to be pressed into service to the Court. Their responsibilities run to the public.

Finally, the Draft Rule seems to have an internal conflict. The purpose of allowing audio-visual coverage of our local court system is to provide the public with a convenient and

accurate means of observing its proceedings. This purpose favors coverage that replicates the proceedings (or portions of proceedings) members of the public would see and hear if they attend in person. The proposal to allow faces to be obscured and voices to be altered, however, would have, and is intended to have, just the opposite result. It may be the case that audio-visual coverage, or potential audio-visual coverage, of courtroom proceedings will make witnesses to crime even more reluctant to testify than they are now and will increase the risks to their safety. However, it may also be the case that the cure for genuine safety concerns is not restrictions on audio-visual coverage of courtroom proceedings which the public is free to attend. The idea that audio-visual coverage of a government proceeding open to the public requires distortion is an odd one that invites further inquiry.