Perspective

An Open Courtroom: Should Cameras Be Permitted in New York State Courts?

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On June 30, 1997, the State of New York became one of the nation's few states which does not permit audio-visual coverage of court proceedings. There are several potent arguments in the determination of whether cameras should be permitted in courtroom proceedings. This article will briefly summarize the history of the use of cameras in New York State courts, and then, set out the arguments for and against their use in the state's judicial system. The article is prompted by the book entitled "An Open Courtroom: Cameras in New York Courts" which was published in 1997 by the New York State Committee to Review Audio-Visual Coverage of Court Proceedings.[1]

I. Historical Overview

In 1952, the New York State Legislature enacted § 52 of the Civil Rights Law which prohibited audio-visual coverage of all pubic proceedings, including court proceedings, "in which the testimony of witnesses by subpoena or other compulsory process

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1. NEW YORK STATE COMMITTEE TO REVIEW AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, AN OPEN COURTROOM: CAMERAS IN NEW YORK COURTS (Fordam University Press 1997).

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is or may be taken . . . ."[2] The statute was supported by Governor Thomas E. Dewey, a former prosecutor, and a majority of the state's legislators who believed that the new legislation would prevent the detrimental effects camera coverage would have on the participants in court proceedings. The Legislature believed that the use of cameras would gradually erode New York State's fundamental conception of justice. The Legislature's primary concern was that in criminal trials, prosecutors, defense attorneys, witnesses, the jury and the judge would act differently when under the continual eye of a camera. Further, they believed that these effects would distort the trial process in such a way as to deprive defendants of their right to a fair trial.

In 1982, media advocates and a small group of progressive lawyers and judges sought to have cameras allowed in New York courtrooms. Their efforts were unsuccessful; but in 1987 the legislature, although sensitive to the concerns of those who opposed the use of cameras, enacted § 218 of the Judiciary Law[3] which provided for temporary use of cameras in the courts. The temporary legislation was prompted by the desire to enhance public familiarity with the workings of the judicial system, and it was decided that the prohibition of audio-visual coverage of court proceedings should be modified for an experimental period. The term experiment referred to a loosening, on a temporary basis, of the strictures of § 52 of the Civil Rights Law which prohibits use of cameras in the courts.

II. The Experimental Period: 1987-1997

Section 218 of the Judiciary Law gave trial judges broad discretion to allow camera coverage of civil and criminal court proceedings upon the timely and proper application by news media. These requests had to be made in writing and submitted "not less than seven days before the commencement of the judicial proceeding."[4] In circumstances where the applicant could not reasonably apply seven or more days before the pro-

2. N.Y. C.R.L. § 52 (McKinney 1992).

3. *See* NEW YORK STATE COMMITTEE TO REVIEW AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, AN OPEN COURTROOM: CAMERAS IN NEW YORK COURTS 94 app. C at 125-31.

4. *Id.* at 126.

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ceeding began, the presiding trial judge had the authority to shorten the time period.

A trial judge's decision to grant or deny the media's request for audio-visual coverage had to be in writing and was required to contain both a list of any restrictions imposed by the judge on camera coverage and a warning to all parties that any violation of the order was punishable by contempt.

Section 218 identified five factors which trial judges were required to consider prior to ruling on an application for camera coverage. First, the type of case involved. Second, whether the coverage would cause harm to any participant in the case or otherwise interfere with the fair administration of justice, the advancement of a fair trial or the rights of the parties. Third, whether any order directing the exclusion of witnesses from the courtroom prior to their testimony could be rendered substantially ineffective by allowing audio-visual coverage that could be viewed by such witnesses to the detriment of any party. Fourth, whether such coverage interfered with a law enforcement activity. And lastly, whether the coverage involved lewd or scandalous matters. However, the use of judicial discretion was not limited to the initial decision to permit camera coverage. The judge also had discretion to decide, at any time during the proceedings, to remove cameras from the courtroom or to bar coverage of any witness or exhibit. Thus, the statutes inclusion of broad judicial discretion was thought by many legislators to limit the type of abuses that Governor Dewey and other supporters had originally sought to avoid in enacting the original civil rights legislation banning cameras from the courts.

Additionally, § 218 of the Judiciary Law contained numerous safeguards for defendants in criminal proceedings, parties in civil proceedings, witnesses and jurors. For instance, the factor which prohibited audio-visual coverage of lewd or scandalous matters was designed as a safeguard to protect family members of a victim or a party. Finally, § 218 contained detailed restrictions on the number of cameras and camera operating personnel who could be present in the courtroom. The determination by the trial judge regarding camera coverage was subject to limited judicial review by the administrative judge.

Significantly, § 218 contained no provision requiring the consent of any party to a civil or criminal proceeding to permit

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camera coverage. The drafters of the legislation believed it would be unfair to allow any one person to veto the judicial discretion exercised by the trial judge. To further assure that § 218 would be fairly applied, the Chief Administrative Judge of New York promulgated rules implementing the state's cameras in the court statute. These rules had two purposes: first, to comport with the legislative findings that an enhanced understanding of the judicial system was important in maintaining a high level of public confidence in the judiciary, and second, to underscore the legislative concern that cameras in the court be compatible with the fair administration of justice.

The Legislature created a mechanism under § 218 for evaluating the experiment by requiring the Governor, the Chief Judge of New York, the Majority Leader of the Senate, the Minority Leader of the Senate and the Speaker of the Assembly to appoint a total of twelve citizens of New York State to serve on a special commission to "review audio-visual coverage of court proceedings."[5] Four times during the past ten years these special commissions (committees) have studied camera coverage and recommended to the leaders of the State that the experiment become permanent. On three occasions the Legislature declined to permanently enact § 218 but recommended that it be continued as experimental legislation. In January 1995, the Legislature approved the fourth phase of the cameras in the courtroom experiment and appointed another commission to conduct an additional review. 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.

III. The Feerick Commission

The Feerick Commission was asked by the Legislature to evaluate the efficacy of the experimental camera program and to assess whether (1) any public benefits accrued from the experimental program; (2) any abuses occurred during the program; (3) audio-visual coverage in court proceedings changed the conduct of participants; (4) there was any change in the de-

5. *Id.* at 130.

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gree of compliance by trial judges and the media with the requirements of § 218 of the Judiciary Law; and, (5) audio-visual coverage effected the conduct of trial judges, both inside and outside the courtroom.

From October 29, 1996 through December 17, 1996, the Feerick Commission held four public hearings. Two hearings were held in New York City, one in Albany and one in Rochester. Another shorter public hearing was held in New York City on February 27, 1997. 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.

The Feerick Commission designed and conducted two surveys. First, a detailed judicial survey was sent to 1,108 state payroll judges asking them to evaluate the use of cameras in the courtroom. About 351 judges (31.7% of those surveyed) responded to Part I of the survey which was designed to elicit their views on the benefits and detriments of cameras in the courtroom under § 218 of the Judiciary Law. Of these, 226 judges (64.4%) also responded to Part II of the survey, which was addressed only to judges who had received one or more applications to permit camera coverage in their courtroom.[6] Second, the Feerick commission contacted the Marist Institute for Public Opinion which agreed to survey public opinion in New York on the issue of cameras in the courtroom.[7] Six hundred sixteen registered voters were interviewed in proportion to the voter registration in each county in New York State. Further, the Feerick commission wrote to the presidents and executive directors of 150 bar associations in New York, asking for information about the experience of their members with respect to each of the issues the Legislature had directed the Commission to study. Additionally, in an attempt to reach more lawyers, the Commission contacted the New York Law Journal, which agreed, as a public service, to place a prominent notice of the Commission's interest in receiving public comment in several editions of the Journal. Dean Feerick also convinced a group of

6. The statistical analysis of the survey was performed by Professor Edmund H. Mantell of the Pace University's Lubin School of Business.

7. The interviews were administered by telephone.

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Fordham students and volunteer lawyers to conduct a study to review the laws of all fifty states.[8]

The Feerick Commission submitted its report to the Legislature, Governor Pataki and Chief Judge Kaye in April 1997. The twelve member Commission, with one dissent, recommended that: (1) cameras should be permitted in New York State Courts on a permanent basis with all of the safeguards of the then current law for parties, prospective witnesses, jurors, crime victims, and other trial participants; (2) defendant consent would be a prerequisite for camera coverage of bail hearings; (3) there should be no separate rule for death penalty cases; (4) judges should be vigilant in addressing the safety and privacy concerns of witnesses in both criminal and civil proceedings; and, (5) the Office of Court Administration should actively monitor camera-covered proceedings, make periodic reports, and, if necessary, recommend changes to § 218 of the Judiciary Law and the Implementing Rules.

The Speaker of the Assembly, Sheldon Silver, strongly opposed the Commission's report and supported the dissenting position.[9] Speaker Silver successfully argued against continuing § 218 of the Judiciary Law on an experimental basis. Governor Pataki opposed the Commission's report but stated he would not oppose another temporary extension of the New York statute allowing cameras in the court on an experimental basis. Chief Judge Kaye strongly supported the Commissions report and urged that the experimental legislation permitting cameras in the court be permanently enacted. The New York State Legislature let the statute expire, and on June 30, 1997, New York became one of the three states in the nation which does not permit camera coverage of courtroom proceedings. Almost one year later, the Legislature has yet to permit the use of cameras in New York courts, even on an experimental basis.

8. California was a state of particular interest due to the audio-visual coverage of the O.J. Simpson trial.

9. The member espousing the dissenting position was appointed to the commission by Speaker Silver.

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IV. Arguments in Favor of and in Opposition to the Legislation

A. *Public Education About the Courts*

Proponents of the legislation argue that cameras in the courtroom demystify the judicial system, allow the public to become better informed about courtroom procedures, and give viewers an appreciation of our judicial system. Furthermore, cameras help funnel information about trials and other judicial proceedings to large numbers of people who are unable to personally attend courtroom proceedings.

During the Feerick Commission's public hearings, the New York State committee on Open Government stated, that "with appropriate safeguards, the law authorizing the use of cameras in the courtroom should be made permanent, because television, as a means of educating the public and promoting understanding of the judicial process, has significant potential value."[10] At another Commission hearing, the late "Judge Harold Rothwax, who presided over the Joel Steinberg trial, testified that cameras opened a window into the whole area of child abuse."[11] Similar arguments were made by representatives from the Victims Services Agency and by surviving family members of homicide and drunk driving victims. They stated that camera coverage "has created a heightened interest in the presentation by victims (or in cases where the victim is deceased, a family member) of an oral victim impact statement at the time of sentencing a convicted defendant."[12] Additionally, the Commission surveyed the deans of New York State law schools, who indicated a general interest in making greater use of videotaped court proceedings in the classroom.

Those who oppose cameras in the courtroom point out that public education is limited by the fact that the overwhelming majority of footage of court proceedings consists of short feature snippets. Since commercial use of snippets is primarily in the criminal area and focuses on entertaining the viewer it does not

10. NEW YORK STATE COMMITTEE TO REVIEW AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, AN OPEN COURTROOM: CAMERAS IN NEW YORK COURTS 29 (Fordam University Press 1997).

11. *Id.*

12. *Id.* at 30.

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serve the purpose of informing or educating the viewer about the state's judicial system. Sixty-one percent of the persons responding to the Marist voter survey supported this notion. Also, the Commission's Office of Court Administration study showed that ninety-four percent of the applications for courtroom coverage were for criminal proceedings featuring terrible crimes.

Even the responses of the twenty-two percent of the Marist voters who watch trials on television indicated that the coverage lacked the public education benefits argued by proponents of the legislation. Forty-three percent of this group candidly responded that camera coverage was more a source of entertainment and forty-three percent felt cameras served more to sensationalize a trial than increase the accuracy of news coverage.

B. *Judicial Accountability and Public Scrutiny of the Judicial System*

Proponents of the legislation argue that government agencies must be open to the fullest public scrutiny. Thus, our courts require more openness because they directly touch the lives of all our people. A sixty-three percent majority of the approximately 350 New York State judges who responded to the Commission's judicial survey agreed that television coverage fosters public scrutiny of judicial proceedings; twenty-five percent agreed that television coverage had a positive effect on the state's criminal justice system. Several homicide victims' relatives appeared before the Commission and argued that public scrutiny of the judicial system is served by cameras in the courtroom. Similar views were stated by a number of journalists who argued that cameras belong in the courtroom because what happens in a trial is a public matter.

Those in opposition to the legislation contend that the public has the right to attend trials and that the intrusion of cameras in our courts undermines the independent integrity and dignity of our judicial process and courtrooms. This position is supported by the Marist survey, which found that sixty-two percent of the voters surveyed thought television cameras in the courtroom interfered with a fair trial. Only twenty percent

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thought cameras in the courtroom had a positive effect, while fifty-two percent thought they had a negative effect.

C. *Effects on Trial Participants*

Advocates supporting the legislation made several strong arguments before the Commission that witnesses are more likely to overcome the temptation to perjure themselves in public proceedings at which cameras are present. It was also argued that camera coverage helps the public understand and accept the outcome of controversial cases, including cases where defendants are acquitted or are given what might otherwise appear to be light sentences. Further, another basis posed for having cameras in the courts is that they improve the accuracy of the press coverage of judicial proceedings. Forty-seven percent of judges responding to the Commission's survey agreed with this position.

Arguments against the legislation are supported by the fact that a majority of respondents to the Marist Survey would not want their trials to be televised if they were criminal defendants, civil parties, witnesses, or victims. Thirty-seven percent of the New York judges responding to the Judicial Survey agreed that the presence of television cameras in the courtroom tended to cause judges to issue rulings they otherwise might not issue. Additionally, forty percent of the responding judges observed that witnesses appeared more nervous when cameras were present in the courtroom. This argument is further supported by the fact that the U.S. Judicial Conference terminated the use of cameras in the courts because "the intimidating effect of cameras on some witnesses and jurors was cause for serious concern"[13] and that some members of the Conference believed that any negative impact on witnesses or jurors could be a threat to the fair administration of justice.

V. Conclusion

At the heart of the debate over the use of cameras in New York courts is the question of whether they interfere with or violate the individual rights of our state's citizens. When Governor Dewey approved the ban on television cameras in the

13. *Id.* at 23.

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courts, as enacted in Civil Rights Law § 52, he stated: "It is basic to our concept of justice that a witness compelled to testify have a fair opportunity to present this testimony. No right is more fundamental to our traditional liberties. The use of television, motion pictures and radios at such proceedings impairs this basic right."[14]

Almost fifty years after Governor Dewey's administration, the proponents of cameras in the courtroom point to improved technology and increased public interest in the affairs of our judicial system. Yet, cameras are not permitted in federal courts because the U.S. Judicial Conference concluded, "the intimidating effect of cameras on some witnesses and jurors was cause for serious concern."[15] Likewise, cameras are not permitted in English courts for the same reason.

Assuming cameras in the courts do not violate the basic right to a fair trial, the real question becomes, are there public education benefits. Interestingly, the Office of Court Administration study showed that ninety-four percent of all applications for use of cameras in the court were for criminal trials. The educational value of the Marla Maples shoe fetish case was zero but the ratings were excellent and commercial television earned substantial revenues from advertising. Nightly snippets of Colin Ferguson's murder defense provided little that would increase the public's knowledge and respect for the judicial system. Instead, the viewer observed the bizarre behavior of a mentally ill man and this became entertainment during bedtime T.V. snacks. The strong negative reaction to the O.J. Simpson trial is a point in fact. There, television coverage caused the problem of low public esteem for the whole judicial process. For the viewer who believed that Mr. Simpson was innocent, the system was wrong in publicly convicting him through television (and setting the scene for a second civil trial defendant where Simpson was held liable). For the viewer who believed that Mr. Simpson was guilty the system was wrong for failing to convict him.

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14. *Id.* at 220-21 (quoting Governer's Memorandum of Bills Approved, Civil Rights Law, New York State Annual [1952], p.366).

15. NEW YORK STATE COMMITTEE TO REVIEW AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, AN OPEN COURTROOM: CAMERAS IN NEW YORK COURTS 23.

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However, an inherent conflict remains at the end of the day; the business of the commercial T.V. media is to make money, but the business of our courts and our judicial system is the administration of justice. For the media the question is not whether camera coverage of judicial proceedings will educate or not educate the public; the only question is whether it will make money. This inevitably leads to camera coverage in courtrooms which panders to the basic instincts of viewers which does not succeed in furthering the interests set forth by those in support of the legislation and inevitably supports the views of those in opposition to the legislation. The premise underlying the media is that it disseminates the facts to the public and, in doing so, holds up a mirror to reality. Unfortunately, the media's mirror is not reality; the facts are filtered and selected to give the public a story. The primary purpose of the story is to entertain the consumer. As mentioned earlier, New York State currently prohibits cameras in the courtroom pursuant to Civil Rights Law § 52 and the Legislature has allowed § 218 of the Judiciary Law, the temporary experimental legislation, to expire; therefore, only time will demonstrate if the State of New York will remain as one of the three states in the nation to prohibit the use of cameras in the courts.

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