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CANON 35: CAMERAS, COURTS AND CONFUSION

I. INTRODUCTION

Canon 35,¹ which provides that press photography and radio or television broadcasts should not be permitted in the courtroom, was reaffirmed by the House of Delegates of the American Bar Association at its meeting in New Orleans on February 4-5, 1963.²

The canon, with minor deletions approved by the House in parenthesis, now reads in part as follows:

Canon 35

Improper Publicizing of Court Proceedings in court shall be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings, (are calculated to) detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, (degrade the court) and create misconceptions with respect thereto in the mind of the public and should not be permitted.³

This reaffirmation by the policy-making body of the ABA represents the end of years of indecision by that group on the advisability of modifying the absolute exclusionary feature of the canon in light of great technological refinements in photography and broadcast equipment. The House agreed with the findings of a special ABA study committee to the effect that, despite gains in technology, the paraphernalia connected with the media's presence in the courtrooms tends to disrupt normal judicial atmosphere and jeopardizes the right to a fair trial.⁴

The basic assumption of Canon 35 is that photography and broadcasting detract from the dignity of the proceedings, distract participants and create public misconceptions. It is the purpose of this paper to show that this assumption is no longer valid, and if the audio-video media's exclusion is to be justifiably continued, the canon should be reworded so as to include the real reasons why the media should be excluded. As one writer has said:

If the magnificent isolation prescribed by Canon 35 is to be maintained, we still need a better reason for maintaining it than the Canon presently contains.⁵

The wording of the canon has not been basically changed since its inception when the equipment was assumed to cause what we will

¹ American Bar Association's Canons of Judicial Ethics.

² American Bar News, Vol. 8, No. 2, p. 1, Feb. 15, 1963.

³ *Id.* at 8.

⁴ *Id.* at 1.

⁵ Miller, *Should Canon 35 be Amended? A Question of Fair Trial and Free Information*, 42 A.B.A.J. 384, 398 (1956).

term a "physical" interference with the fair administration of justice in that the bulky and noisy presence of the media equipment alone, detracts from the dignity, distracts participants and creates misconceptions. As the media are proving, this physical interference no longer exists.

However, the Canon's exclusion of the media is well justified on *other* grounds. While the media argue that they cause no physical interference and therefore their exclusion is unjustified, the legal profession defends the exclusion with reasons extrinsic to those stated in the canon. The profession argues mainly that the presence of cameras and microphones—direct representatives of unseen millions—causes witnesses and participants to either "clam up" or "ham it up" that judges and attorneys will "play" for votes; that in the face of editorial scorn, a vote-conscious judge will admit the media where justice demands he should not; and, that the court has a duty to protect a certain right of privacy of participants. We will label these as "psychological" interferences. They represent the true reasons why the media should be excluded. Yet, the outdated wording of Canon 35, merely ignoring these reasons, has just been reaffirmed.

The highest courts of at least two states have recently decided to relax the absolute exclusion.⁶ This alone should be an indication to the profession that if the absolute exclusion is to be maintained, the canon's wording must be updated.

A. History of Canon 35

Canon 35 was adopted by the House of Delegates in 1937 following a year-long study of the then-existing 34 Canons of Judicial Ethics. The reasons for adopting the canon were clear. As one writer states:

Although the Committee's report did not disclose any of the reasons which prompted the proposal, the sensational publicity which engulfed the Hall-Mills, Gray-Snyder, Bruno Hauptmann proceedings, and other trials in the 1920s and 1930s left no doubt that the legal profession had to curb the abuses of the information media in order to preserve the dignity of the court and insure the prompt and impartial administration of justice.⁷

The original canon was directed only at photography and radio broadcasting. However, in 1952 the House of Delegates extended the ban to include television.⁸

⁶ *In re Hearings*, 296 P. 2d 465 (Colo. 1956); *Lyles v. State*, 330 P. 2d 734 (Okla. 1958).

⁷ Oppenheim, *Shall We Have Cameras in Our Courtrooms?*, 4 Student Law, J. 19 (Dec. 1958).

⁸ *Ibid.*

Because of constant pressure from the press, special committees were appointed in 1954 and 1955 to investigate the advisability of altering the canon. In a report made public November 1, 1957, the committee recommended no change in the exclusion in Canon 35, but did recommend a change in the phraseology to comprehend the psychological interferences. The House rejected this proposal in 1958 and referred the matter to the committee⁹ which recommended the reaffirmation of the canon, mentioned above.¹⁰

Canon 35, or a rule similar in nature, has been adopted in 16 states,¹¹ including Kentucky.¹² State bar associations have accepted it in 10 states, and the remainder of the states either allow coverage or have no written rule.¹³

The federal courts are committed to the exclusion by Rule 53 of the Federal Rules of Criminal Procedure.¹⁴

B. *Weight of Canon 35*

The weight of the canon in enforcing a standard of conduct on members of the profession was generally stated by the Oklahoma Supreme Court in a recent case:

The adoption of the canons of ethics by the courts did not give the canons force of law. They are nothing more than a system of principles of exemplary conduct and good character. They are recommended to the bench and bar as patterns which, if adhered to, will promote respect for the bar and better administration of justice.¹⁵

The Kentucky Court of Appeals, in recognizing the canon, provides in its rules:

The court recognizes and accepts the principle embodied in the American Bar Association's Canons of Professional and Judicial Ethics as a sound statement of the standard of professional conduct required of members of the Bench and Bar, and the court regards

⁹ *Courtroom Photography Research Report*, 26 J. Bar Ass'n Kan. 197, 315 (1958).

¹⁰ American Bar News, Feb. 1, 1963 (Press release of Midyear Meetings).

¹¹ Oppenheim, *supra* note 7, at 20.

¹² Rules Ky. Ct. App. 3.170 (1963).

¹³ Oppenheim, *supra* note 7, at 20.

¹⁴ Fed. R. Crim. P. 53 states: "The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

In addition to this statute, on March 12, 1962, the Judicial Conference of the United States, consisting of the chief judges of the federal courts and presided over by the Chief Justice of the United States, adopted a unanimous resolution condemning photography of and broadcasting from the courtroom as "inconsistent with fair judicial procedure" and stating it ought not be permitted in any federal court. Grswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A.B.A.J. 615, 618 (1962).

¹⁵ *Lyles v. State*, 330 P. 2d 734, 738 (Okla. 1958).

these Canons as persuasive authority in all disciplinary proceedings against members of the Bar.¹⁶

Generally, the canon has only persuasive power and will have the effect of law only when its violation is also a violation of the parties' rights to a fair trial.¹⁷ Therefore the exclusion of the media cannot be legally enforced under the canon but must be based on the threat to the fair administration of justice. The assumption in the canon that the media do pose a necessary threat, however, is persuasive to judges in their determination as to the existence of an actual threat.

C. Press Efforts to Revise Canon 35

The press' crusade to effect a change in the canon dates back to the canon's inception, reaching its peak in the middle 1950's and early 1960's. As a 1956 article states:

Representatives of the media through the American Society of Newspaper Editors, the National Press Photographers Association, the National Association of Radio and Television Broadcasters, and other organizations have launched and are relentlessly pursuing a well-planned and forceful campaign to secure a modification of the Canon. That they have made progress in this campaign cannot be denied.¹⁸

As a tangible fruit of the campaign, a number of states have permitted the media access to the courts on an experimental or rule-approved basis including Colorado, Kentucky, North Carolina, Oklahoma and Texas.¹⁹ The National Press Photographers Association reports nearly 200 judges have permitted courtroom press photography, and at least three states, Colorado, Oklahoma and Texas, have modified their canons and rules to allow photography and broadcasting in the discretion of the individual judge.²⁰

The degree of commitment to the campaign by the media is indicated in a statement made by one of the chief spokesmen, John Daly, vice-president of the ABC Television Network:

¹⁶ Rules Ky. Ct. App. 3.170 (1963).

¹⁷ Lyles v. State, 330 P. 2d 734 (Okla. 1958).

¹⁸ Tinkham, *Should Canon 35 Be Amended? A Question of Proper Judicial Administration*, 42 A.B.A.J. 843 (1956). Justice Douglas gives one example of the intensity of the campaign:

In one state the radio and television industry leveled its guns at a court which had banned those broadcasters. At 15-minute intervals there were spot announcements over the air reminding the people that 'the courts do not belong to the lawyers and urging the listeners to get busy and write the members of the court to change the rule. Douglas, *The Public Trial and the Free Press*, 33 Rocky Mt. L. Rev. 1 (1960).

¹⁹ Oppenheim, *supra* note 7, at 20.

²⁰ *Ibid.*

We have an obligation to ourselves, to the public, and to our way of life to accept nothing short of full freedom of information and access. We cannot and will not stop short.²¹

The media are pledged to an all-out campaign to gain access to the courtrooms. If the profession believes the psychological distractions justify the denial of this access, it must fortify the defense of the canon. A rewording so as to include these psychological distractions as a reason for denying the media access to the courtrooms is necessary to that defense.

II. THE LEGAL BASIS OF THE EXCLUSIONARY POWER OF THE COURT

Assuming there is a threat by the media to the fair administration of justice in the courts, it is well-settled the courts have an inherent power to exclude the media even to the derogation of freedoms of the press and speech, or the public's "right to know" of the proceedings. This power lies in the court's inherent interest in the fair administration of justice and has, on occasion, also been partly based on the court's claimed duty of protecting a right of privacy of the participants.

A. *Freedom of Speech and Press*

The development of the principle that the court's exclusionary power is superior to the freedoms of press and speech when in conflict was not without its difficulties.²² As stated by Justice Frankfurter in a leading case,

freedom of the press, properly conceived, is basic to our Constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication. 23

²¹ Address by John Daly, Section of Bar Activities of the American Bar Association, New York City, New York, July 15, 1957.

²² Speaking generally on the interplay between the press industry and the legal profession, one writer states:

Relationships between the press and the legal and judicial professions have never been particularly cordial. Each group, approaching mutual problems from its own framework, accuses the other of base motives in its dealings and opinions. Newspapers, for example, complain that lawyers and judges make a deliberate attempt to withhold information from them, and thus undermine the constitutional right of 'freedom of the press'. The lawyers and judges, on the other hand, retort that newspapers are a big business, dedicated to profit, not public enlightenment, and that they distort or slant legal information to make it sensational and salable. The legal profession has its own constitutional password, the right of the accused to a fair trial by an impartial jury. Geis and Talley, *Cameras in the Courtroom*, 47 J. Crim. L., C. & P.S. 546 (1956-1957).

²³ *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950).

1. *The court's authority is exclusive*

When these two principles clash, one or the other must yield. It is obvious which one must be held dominant:

In the present situation, while it is recognized that the public should have the fullest information about the courts, it is more important that every litigant have a fair trial. The rights of the individual person to a fair trial are of such paramount importance as to require the most scrupulous attention and protection.²⁴

Among the cases upholding this principle is *State v. Clifford*,²⁵ decided in 1954, in which a photographer violated a court order forbidding photographs at the arraignment of a person indicated for embezzlement. The court said:

A judge is at all times during the sessions of the court empowered to maintain decorum and enforce reasonable rules to insure the orderly and judicious disposition of the court's business. When the court is in session it is under the complete control of the judge whose directions, *reasonably necessary to maintain order and prevent unnecessary disturbance and distraction*, must be obeyed and in preserving such right, the court does not interfere with the freedom of the press.²⁶ (Emphasis added.)

Chief Justice Hughes in a 1941 case, foresaw a danger even to the press itself if it were to be allowed to supersede the power of the court. He said:

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order which liberty itself would be lost in the excesses of unrestrained abuses.²⁷

Another writer perhaps phrases this thought in more definite language:

[A]s freedom of speech does not allow the free speaker to shout "fire" in a crowded theatre, so also freedom of press does not allow

²⁴ Cedarquist, *The Case for Canon 35*, 24 Nev. St. B.J. 101, 106 (1959).

²⁵ 118 N.E. 2d 853 (Ohio 1954).

²⁶ *Id.* at 855-56. In a recent Oregon case, the court labelled the press demands of access as the "insistence upon an unreasonable extension of the right of the press to gather and disseminate news." *State v. Langley*, 323 P. 2d 301, 320 (Ore. 1958). In *Ex parte Sturm*, 152 Md. 114, 136 Atl. 312 (1927), the court's authority over its proceedings was termed "exclusive." Suggesting that there is somewhere a balance between the two rights, the court said:

The high importance of the press as an agency of modern civilization is nowhere more fully recognized than in courts of justice.

But the duty and disposition of the court to accord a justly ample scope to the liberty of the press should not be carried to the point of an undue abridgment of the court's own freedom.

In this case the liberty of the press has been invoked in support of acts which were an invasion of the domain within which the authority of the courts is exclusive. *Ex parte Sturm*, *supra* at 316.

²⁷ *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

unrestricted free pressure upon the only protection to its freedom possessed by a free society.²⁸

2. *The court does not exist to furnish entertainment*

Another reason the supervisory power of the court is held dominant, is the belief that the sole function of a court is to administer justice and not to furnish entertainment or even education. This objection to the presence of cameras or microphones is based to some extent on their threat to the actual decorum of the courtroom,²⁹ but more so on the threat of distorting the general image of those institutions which represent the ultimate protector of the entire "organized society." A retired federal district judge has said:

Confidence in and respect for our trial courts is an absolute necessity for the preservation of our form of government. Such courts must be preserved from all taint of commercialism and sensationalism. ³⁰

This can be classified as either a physical or a psychological interference, or both.

A 1952 special ABA committee reported:

To treat trials as mere entertainment, educational or otherwise, is to deprive the court of the dignity which pertains to it and can only impede that serious quest for truth for which all judicial forums are established. ³¹

²⁸ Quat, *The Freedom of Pressure and the Explosive Canon* 35, 33 Rocky Mt. L. Rev. 11, 16 (1960).

²⁹ A Tennessee Circuit Court judge, writing on the point, stated:

Our courts were established for the administration of justice. Lawyers are men set apart by law to expound to all persons who seek them the law of the land, relating to high interests of property, liberty and life. The relation he bears to his client and to the court implies the highest trust and confidence. The client lays bare to his attorney his very nature and heart; leans and relies upon him for support and protection in the saddest hours of his life. Knowing not which way to go to attain his rights, he puts himself under the guidance of his attorney, and firmly believes that he will lead him aright. Thus the duty rests heavily upon the court to see in this solemn hour that justice is done. The business of the court is grave and the judge should see that dignity and solemnity prevail. Smith, *Judicial Ethics and Courtroom Decorum*, 27 Tenn. L. Rev. 26, 31 (1959).

³⁰ Wilkin, *Judicial Canon 35 Should Not Be Changed*, 48 A.B.A.J. 540, 541 (1962).

³¹ Douglas, *supra* note 18, at 4. The head of the American Bar Association's 1955 special committee on Canon 35 cited recent examples which cast doubt whether there is a "serious quest for truth." He stated:

In recent years we have witnessed in the hearings before some congressional committees many examples of the fact-finding process turned into irresponsible inquisitions for the entertainment of the public. McCoy, *The Judge and Courtroom Publicity*, 37 J. Am. Jud. Socy 167, 181 (1954).

The ground for this objection perhaps arose in great measure from the infamous Bruno Hauptmann trial and its entertainment image, which, in large part, brought about Canon 35 as mentioned *supra*.

3. *Media claims to equal access*

Another adjunct of the media's assertion of freedom of speech is their insistence that all the media of the press have an equal right to be present and to report—each in its own way—the proceedings of the court. The argument is that since newspaper pencil reporters are allowed free access to compose word pictures of the proceedings, the media should be allowed to report in their own unique ways.

The basis of the contention is that the media should be allowed to represent the public to as great an extent as possible, giving the public the full benefit of the technological improvements that have taken place over the past 20 years. In addition the media say they furnish a completely accurate report of the proceedings since impressions of the actual proceedings are transmitted, whereas the pencil reporters typically record their impressions which obviously must contain opinion.³² However, the media have never been successful in their effort to rebut the argument that since they cannot report the entire proceedings because of their inherent time problem, they too, tend toward an inaccurate portrayal since they must select only portions to be reported and this involves discretion. A further consideration is that since these media must of necessity program for the largest audience possible, the selection will cater toward the sensational, entertaining portions of the proceedings, which tend to give the public a distorted view of the administration of justice.

In discarding the media arguments as without merit, the Canon 35 study committee in its report to the House of Delegates gave the profession's representative answer:

Radio and television reporters have exactly the same rights as the newspaper reporter to come to court, observe the proceedings, and report [their] observations over radio and television.³³

³² Miller, *supra* note 5, at 892.

³³ American Bar News, *supra* note 10, at 3. A member of the committee in a separate article, addressing himself to this point, said:

The courts are just as accessible to all media as they are to the pencil reporter. The broadcasters can and do gather the news in the courtroom and disseminate it many times each day through their news commentaries. No one is barred from any courtroom. The complaint is that they can't gather the news in the ways they prefer—with cameras and microphones. The media want something more. It might be called 'freedom of the lens and microphones.' Tinkham, *supra* note 18, at 844.

However, even if it is granted that the audio-video media are being discriminated against, it is only because their particular methods of reporting conflict with the necessary operations of a court in dispensing impartial justice, which, as stated, must prevail.

B. Public "Right to Know"

The media have seized on the portion of the sixth amendment to the federal constitution that "the accused shall enjoy the right to a public trial" and similar provisions in the constitutions of 41 states,³⁴ in asserting that they as members of the public have a right to attend criminal trials, and that the general public has a right to attend through their media. The profession, on the other hand, answers that the guarantee of a public trial is for the benefit of the accused only. The result is one of the most controversial phases of the discussion of Canon 35.

The media assert that the guarantee of a public trial is two-fold. One writer summarizes:

First, it is one of the safeguards granted to a defendant in a criminal action. It is deemed an important element of a fair trial granted to a defendant so that he may be secure in knowing that he will be fairly dealt with and not unjustly condemned. To this extent the right may be deemed a personal one. [T]he second purpose of the guarantee [is] the right belonging to the public to be kept informed. By the requirement that trials be public there has been established a potent safeguard against the possible use of the courts as institutions of persecution. To the extent the public has an interest in preventing a repetition of the Star Chamber, this right must be deemed public.³⁵

Thus satisfying themselves that they as members of the public have rights to attend, the media then reason along these lines:

Should the public's right of access to the court be confined to that part of the public which is present in the courtroom or should it be extended as far as modern facilities can extend it, to those who can view the proceedings on television screens, films or in the newspaper columns? Those who might view the proceedings on television surely would constitute a more representative cross section of the society which the court serves. ³⁶

Although there is language in the opinions of some courts which accepts the view that the sixth amendment guarantee of a public trial has this twofold purpose, the great weight of authority holds the right belongs solely to the accused.³⁷ As stated by Cooley

³⁴ Cedarquist, *supra* note 24, at 108.

³⁵ 32 So. Cal. L. Rev. 281, 287 (1959).

³⁶ Wiggins, *Should Canon 35 be Amended? A Newspaperman Speaks For the News Media*, 42 A.B.A.J. 838, 839 (1956).

³⁷ Cedarquist, *supra* note 24, at 108.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned.³⁸

Representative of the majority view is *United Press Ass'n v. Valente*,³⁹ decided in 1954 in New York. The court said:

It is for the defendant alone to determine whether, and to what extent, he shall avail himself of [the right to a public trial]. To permit outsiders to interfere with the defendant's own conduct of his defense would not only upset the orderly workings of the judicial process, but could well redound to the defendant's exceeding prejudice. The public's interest is adequately safeguarded as long as the accused himself is given the opportunity to assert on his own behalf his right to a trial that is fair and public.⁴⁰

Even if the right is said to be one belonging to the general public, the minority of cases so holding recognizes it as being far from absolute.⁴¹ This right is held subordinate to the power of the court to administer a fair trial, just as is the freedom of the press.

The majority view is believed to be on much more solid ground. There are two reasons for this conclusion: (1) If the general public has a right to attend the accused's trial, then the accused cannot waive his right to the derogation of the public's right even where it would be prejudicial to the accused for the public to attend. This is especially true where the accused has committed a crime considered by the public to be heinous. This was the subject of the matter before the court in the *Valente* case where a photographer sought to enjoin a judge from enforcing an order barring the general public from the courtroom. In upholding the exclusion, the court said:

Actually petitioners are seeking to convert what is essentially the right of the particular accused into a privilege for every citizen, a privilege which the latter may invoke independently of, and even in hostility to, the rights of the accused.⁴²

The court further stated the public has no such right, since the accused may deem it to his benefit to bar the public in certain cases.

(2) The real basis of the media's assertion of the public's right to a "public trial," is the assertion of the public's "right to know" of the proceedings of a government body so as to keep it within its constitutional boundaries. As one writer artfully phrases it:

³⁸ 1 Cooley, *Constitutional Limitations* 647 (8th ed. 1927).

³⁹ 140 N.Y.S. 2d 71, 123 N.E. 2d 777 (1954).

⁴⁰ *Id.* at 74, 123 N.E. 2d at 780.

⁴¹ The Oklahoma court, in recognizing the two rights involved, said:

These conflicts must be resolved so as not to do violence to the civil liberties of the individual, the rights of the public, and so as not to detract from the essential dignity of the proceedings and degrade the court. *Lyles v. State*, 330 P. 2d 734 (Okla. 1958).

⁴² 140 N.Y.S. 2d 71, 75, 123 N.E. 2d 777, 781 (1954).

The basic problem is to distinguish between the right to a public trial and the public's right to a trial—or to distinguish between the public interest and what interests the public.⁴³

The right to know is nothing more than another phrasing of freedom of the press. The basic thought behind the assertion of the right to know was best phrased by Justice Frankfurter in *Maryland v. Baltimore Radio Show*,⁴⁴ where he said:

One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.⁴⁵

Justice Douglas, commenting on the *Valente* case, said:

The concept of the public trial is not that every member of the community should be able to see or hear it. A public trial means one that is open rather than closed. The public trial exists because of the aversion which liberty-loving people had toward secret trials and proceedings. That is the reason our courts are open to the public, not because the framers wanted to provide the public with recreation or with instruction in the ways of government.

As long as the defendant is assured the right to invoke the guarantees provided for his protection, the public interest is safe and secure, and there is neither need nor reason for outsiders to interject themselves into the conduct of the trial.⁴⁶

However, it matters not whether the assertion is really freedom of the press or of a public right to a "public trial," because the question finally resolves itself into what has been called, one of "social-psychological philosophy."

What is the privilege of a public to disclosure and examination of society's efforts at justice? What is the effect upon justice and fairness of disclosure to the public? If there is probability that observation affects the [judicial] process, which shall prevail in the ultimate conflict between the free speech and press and the independent judiciary in our Constitutional government?⁴⁷

⁴³ Swindler, *Commentary on Press Photographers and the Courtroom*, 35 Neb. L. Rev. 13, 14 (1956).

⁴⁴ 338 U.S. 912 (1950).

⁴⁵ *Id.* at 920.

⁴⁶ Douglas, *supra* note 18, at 5. One writer raises the following point:

The media have elaborated on the public trial argument to the point where it might almost seem that John Lilburne made his famous attack on Star Chamber proceedings in the England of 1649 for the sole purpose of assuring newsmen and their heirs of a right of access to court proceedings. Nothing could be farther from the truth. John Lilburne was a cantankerous and obstinate *individualist* who was insisting on *his* right to a fair and public trial. And thus, essentially, is what the right to a public trial means today—it is the right of the individual defendant in a criminal case to have enough of the public present to assure that *he* is fairly tried and judged. Cedarquist, *supra* note 24, at 109.

⁴⁷ Quat, *supra* note 28, at 17.

However, it is recognized that the press does have certain duties in satisfying the public's right to know. In the words of one writer, the public interest requires that

the people should see and hear at proceedings in order that they might know how the participants—including the judges—behaved themselves, thus learning about their government and acquiring confidence in their judicial remedies; that the witnesses should give their testimony in public, in order that key witnesses, unknown to the parties, might be induced thereby voluntarily to come forward and give important testimony that witnesses, knowing they are subject to the attention and scrutiny of the public at large, would be more apt to tell the truth.⁴⁸

Public trials also educate citizens as to their rights where they might not have known them before:

[T]he public proceedings of the court operate as a check and deterrent upon those who might otherwise be inclined to commit offenses. They see in the proceedings what the law means to forbid. They are furnished examples of the consequences of wrong doing and the certainty of detection and punishment.⁴⁹

Whether the public right to know is a full-fledged right in itself or is merely a healthy by-product of the recognized purpose of the freedom of the press in keeping a close watch on governmental operations, it is in the public interest and should be pursued by the press to the limit, *i.e.*, until there is interference with the fair administration of justice in a court of law.⁵⁰

C. Right of Privacy of Trial Participants

On several occasions, the court has claimed it has a duty to protect the participants in a trial in their rights of privacy and used this assertion as one of the grounds to exclude the audio-video media. This particular right has always been used in conjunction with the interest in a fair trial in the exclusion, and a survey indicates it has never been used as the sole ground. This perhaps would indicate the judiciary's lack of complete confidence in the merits of its assertion. Nevertheless, in support of the claim, the judiciary has used

⁴⁸ Miller, *supra* note 5, at 890.

⁴⁹ Wiggins, *supra* note 36, at 839.

⁵⁰ In answer to a questionnaire sent to practicing attorneys, among others, as part of a nationwide survey on Canon 35, one attorney wrote:

The main reason for encouraging the public to attend trials in the first place, and to have the context reported in the public press, is to assure the public that our courts are free from bias and undue influences, and to act as a check upon arbitrary policies of any officer of the court. I do not believe that these desirable social purposes would be enhanced by permitting photography. (Howard H. Campbell, Portland, Oregon). Geis and Talley, *supra* note 22, at 557.

rather confident language, as in *Ex parte Sturm*.⁵¹ In this case the court, in stating liberty of the press does not include the privilege of photographing an unwilling accused person, said:

The ordeal of the defendant's approaching trial was one to which he was required to submit. But it was not essential that his humiliation should be intensified by his compulsory submission to a photographic portrayal, for publicity purposes, of his appearance. [A]s he was then under the court's control, it was natural and just that the court should have a sense of responsibility for his protection against unauthorized invasions of his personal rights. If he had not been in custody, he might have defended himself against the photographer's objectionable act.⁵²

In an earlier case, the court spoke of its "inherent duty" to safeguard a prisoner's privacy.⁵³ To the argument that the accused was a public figure who had lost his right of privacy, the court said since he was an involuntary subject of court restraint, it had a duty to protect his right of privacy as well as his right to a fair trial.

The media have attacked the court's position principally on two interrelated grounds: (1) That a court is a public institution about which the public has a right to know, and, as such, is without grounds for a claim to privacy for its participants; and, (2) that individuals who seek the services of these institutions leave their "seclusion" and become figures about which the public has a right to know.

The first ground appears based on the idea that the press should vigorously exercise its function of checking governmental functions. One writer states:

A court is a public institution. Trials are public business because they are important governmental functions. The courtroom is public property. When a person enters a courtroom, whether to participate or observe, and whether in response to process or other court order, the protection of his privacy legally ceases to the extent of reporting such proceedings but not for any other purposes.⁵⁴

The second-mentioned ground amounts to an agreement that an appearance by one in court is effective as a waiver to any claim of right of privacy by the person:

The right of privacy is the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity. There are times, however, when one willingly or unwillingly becomes an actor in, or otherwise identified with, an occurrence of public or general interest and it is not an invasion of his right of privacy

⁵¹ *Ex parte Sturm*, 136 Atl. 312 (Md. 1927).

⁵² *Id.* at 314.

⁵³ *In re Mack*, 386 Pa. 251, 126 A. 2d 679 (1956).

⁵⁴ Blashfield, *The Case of the Controversial Canon*, 48 A.B.A.J. 429, 433 (1962).

to publish his picture with a true account of such occurrence. In short, the law does not recognize the right of privacy in connection with that which is inherently a public matter.⁵⁵

Possibly a third ground exists. One judge has applied the "equal access" argument of the media as a ground for not recognizing a right of privacy.

If, on the basis of a defendant's right of privacy, he is not to be photographed, reporters then should be prohibited from describing him in written language, because a skilled and experienced writer can often draw a word picture which can be as revealing as a photograph. Thus, press artists should also be prohibited from drawing pen-and-ink sketches of an accused. ⁵⁶

The reasoning of these arguments appears sound and should preclude the court from recognizing any rights of privacy in participants. However, in *In re Hearings Concerning Canon 35*,⁵⁷ the Colorado court recognized these rights in modifying its rule so as to leave exclusion to the discretion of the individual judge in each case; the Colorado rule provides the judge may allow the media, but no witness or juror in attendance under subpoena shall be photographed or broadcast over his objection.

Whether or not there is a legal duty of the court to protect participants' rights of privacy, there are certain ethical considerations which undoubtedly carry much weight. As one committee reported:

Pictures of the accused, taken without his consent, and of witnesses who are obliged to be present, often under circumstances of great emotional distress, seem to a majority of us to impose an unnecessary hardship upon the doing of a duty which society demands. The accused is still protected by the presumption of innocence and would seem entitled not to be photographed without his consent merely because he is temporarily rendered unable to protect his own rights.⁵⁸

It may be reasonably concluded that on whatever basis the court considers the protection of the privacy of participants, in excluding audio-video media, whether this consideration is purely legal or merely ethical, it is assured of having at least some weight whether overtly manifested or not.⁵⁹

⁵⁵ *Ibid.*

⁵⁶ *In re Mack*, 386 Pa. 251, 270, 126 A. 2d 679, 697 (1956) (dissenting opinion). *Accord*, *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W. 2d 972 (1929).

⁵⁷ 133 Colo. 417, 296 P. 2d 465 (1956).

⁵⁸ *Tinkham*, *supra* note 18, at 885.

⁵⁹ Since a subpoenaed witness cannot avoid testifying merely on the ground that he will be embarrassed or damaged by his testimony, unless discriminating, one writer concludes:

It is believed that almost all judges and lawyers will agree that it is improper to force a witness to testify in front of a camera.

(Continued on next page)

III. THE LEGAL LIMITS OF THE EXCLUSIONARY POWER OF THE COURT

Up until now, in discussing the courts' absolute power over the procedure in the courtroom to the derogation of the media's rights, this note has assumed the media's exclusion was reasonably necessary to maintain the fair administration of justice. It must now be considered whether this assumption is necessarily justified in every case, and if not, whether the absolute exclusion should be continued.

Concerning itself with the existence of the unquestionable exclusionary power of the court, the Colorado court, in *In re Hearings Concerning Canon 35*, stated:

No one denies the existence of broad powers inherent in the judiciary. This power unquestionably includes the right of the courts to determine the manner in which they shall operate in order to administer justice with dignity and decorum, and in such manner as shall be conducive to fair and impartial trials and the ascertainment of truth uninfluenced by extraneous matter or distractions.⁶⁰

However, this power is subject to restraint. There is a certain condition precedent to its exercise. Considering the high degree of protection afforded freedom of speech and press, the public's right to know, and the great purpose in closely checking an important governmental function, the court should use its power only when reasonably necessary to maintain the fair administration of justice. Unless the court's action is well-grounded these important purposes are arbitrarily subverted, certainly in contravention of the Constitutional guaranties.

The Colorado court likened the situation to those cases involving civil rights versus the public policy. It said:

In every case the power to regulate must not be arbitrarily imposed; it must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. We must take precautionary measures to guard against two dangers: first, lest under the guise of preserving dignity and decorum in court cases the civil liberties guaranteed under our Bill of Rights be unnecessarily invaded or nullified; second, lest using the Bill of Rights as a cloak, individuals are permitted to detract from the essential dignity of the proceedings by the use of camera, radio or television in the course of a trial.⁶¹

The court, by its adoption of a relaxed exclusionary rule, implied that an absolute exclusion "unnecessarily invaded or nullified" freedom of speech and press.

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Indeed the prospect of receiving such treatment in court might well deter witnesses from coming forward and testifying, to such a point as actually to obstruct justice. Cedarquist, *supra* note 24, at 162.

⁶⁰ 133 Colo. 417,, 296 P. 2d 465, 467 (1956).

⁶¹ *Id.* at 468.

A. *Traditionally, the Courts Have Predicated Their Power on a Threat of Physical Interference*

As to what is or what is not an interference with the fair administration of justice, it is well to begin by saying the courts have jealously defended the theory that they are the proper agencies to determine this question. As stated in the *Sturm* case:

It is essential to the integrity and independence of judicial tribunals that they shall have the power to enforce their own judgment as to what conduct is incompatible with the proper and orderly course of their procedure. If their discretion should be subordinated to that of a newspaper manager in regard to the use of photographic instruments in the courtroom, it would be difficult to limit the further reduction to which the authority of the courts would be exposed. It would be utterly inconsistent with the position and prerogatives of the judiciary, as a coordinate branch of government, to require its submission to the judgment of a non-governmental agency as to a question of proper conduct in the judicial forums.⁶²

Traditionally the test, in determining whether the condition precedent to the court's exercise of its exclusion power exists, is whether such exclusion is reasonably necessary to maintain the fair administration of justice.⁶³ The courts have based this determination on actual or threatened physical interference.⁶⁴ This is the sole basis on which Canon 35 is predicated.

B. *The Threat to Canon 35*

The audio-video media are asserting, and daily proving, that they no longer pose a physical threat making their exclusion "reasonably necessary" to maintain the fair administration of justice. This is the chief weapon of the media in their attack on Canon 35. Their ammunition is the recent decisions of the Colorado and Oklahoma courts and the relaxing of the rule in Texas, to the effect that the threat of interference from the media has been so greatly reduced by technological refinements that the decision as to the exclusion should be made in each case after a decision by the individual judge.

1. *Technological refinements in media equipment*

The technological advancements made by the audio-visual media, and television in particular, have been remarkable.⁶⁵ Television and still cameras are no longer bulky, are noiseless, need only natural

⁶² *Ex parte Sturm*, 152 Md. 114, , 136 Atl. 312, 315 (1927). Cf. *Tribune Review Publishing Co. v. Thomas*, 254 F. 2d 383 (3d Cir. 1958).

⁶³ *State v. Clifford*, 97 Ohio App. 1, 118 N.E. 2d 853 (1954).

⁶⁴ *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E. 2d 421 (1960).

⁶⁵ For an excellent summary of the technological refinements, see *Blashfield*, *supra* note 54.

light and can be placed outside the courtroom so that only a tiny hole in the wall evidences their presence. Microphones are now so small, and sensitive that they may be completely hidden. Even though the media emphasize the Colorado and Oklahoma decisions as proof that they do not cause disturbances in all instances, most of the great refinements in equipment, through the use of transistors, have occurred since these decisions. In this light, they take on added weight. The Colorado court, in adopting an exclusionary rule to be exercised in the discretion of the individual judge in each case, was speaking through Referee Moore when it said:

For six days I listened to evidence and witnessed demonstrations which proved conclusively that *the assumption of facts as stated in the canon is wholly without support in reality*. At least one hundred photographs were taken at various stages of the hearing which were printed and introduced as exhibits. All of them were taken without the least disturbance or interference with the proceedings, and with one or two exceptions, without any knowledge on my part that photographs were being taken. Radio microphones were not discovered by me until my attention was specifically directed to their location. The television cameras were of several kinds, varying to the small one which is 4" x 5" x 7" in size. All equipment used is capable of installation outside the courtroom with only an otherwise concealed door or window many persons entered and retired from the courtroom without being aware that a live telecast was in progress.⁶⁶ (Emphasis added.)

Another advancement, non-technical in nature, was a factor in both the Colorado and Oklahoma decisions. To avoid the inevitable clamor of each audio-video outlet setting up its own individual equipment, the outlets formed "pools" whereby only one set of equipment was installed and the other outlets joined the "feed" from the courtroom. Therefore, the judge had to supervise the location of only one set of equipment and confer with only one representative.

These are just two of many demonstrations. Another was the televising of a murder trial in Waco, Texas, in 1955. After the trial the Waco-McLennon County Bar Association reported that:

[T]he fact that the trial was being televised seemed to dignify the proceedings and that the case was more orderly than any other of like importance and public interest with as many lawyers involved.

Judge Bartlett stated that there was no 'grandstanding' by the witnesses or the attorneys and the television camera was no more distracting than a court reporter taking notes. ⁶⁷

The most successful experiment of this type is being conducted in Michigan. There, the law school of the University of Michigan has

⁶⁶ *In re Hearings*, *supra* note 57, at 468.

⁶⁷ *Blashfield*, *supra* note 54, at 432.

installed a remote-control camera in the courtroom of the circuit court of Washtenaw County for the purpose of watching its proceedings by closed circuit at the college. The procedure has worked smoothly and the judge reports there is no loss of decorum.⁶⁸

2. *The psychological interferences*

Despite the growing number of courts that are beginning to admit the media because they are satisfied the media cause no physical interference, the House of Delegates chose to reaffirm the old wording based on a threat of physical interference. The special study committee, in recommending no substantial change, acknowledged that photography and broadcasting

have made great advances in technology and techniques. Yet, the very presence in the courtroom of various photographic and sound devices, with operators working under the intensely competitive pressures of their craft, tend to cause distractions and are disruptive of the judicial atmosphere in which trials should be conducted. We feel that a serious doubt exists that a fair trial can be guaranteed if Canon 35 is relaxed. ⁶⁹

What the committee failed to realize is that state courts *are* relaxing the canon because it is defenseless to the media demonstrations. If the committee feels a "serious doubt exists that a fair trial can be guaranteed if Canon 35 is relaxed," the solution is clear. The canon should be bolstered with the inclusion of the real reason why the media should be excluded, *i.e.*, the psychological interferences. Without such a change it appears possible that fifty separate relaxed canons will result.

With the advent of the great refinements by the media, the profession, in defending Canon 35, has had to rely on reasons which are extrinsic to those stated in the canon. The profession claims that even if there are no threats of physical interference, there certainly are psychological interferences. This, of course, disregards the fact that the canon excludes only because of physical interferences. As stated by Dean Griswold:

In any event, noise and disturbance in the courtroom are only a part of the problem. Even if this could be completely controlled, as under ideal conditions, as merely may be, there would still remain the *fact* of broadcasting and televising, and the inevitable psychological impact which arises from that fact. This is by far the most important aspect of the matter.⁷⁰

This is the general opinion. A nationwide survey indicated that judges' basic objection to the media was that they would interfere

⁶⁸ *Id.* at 429.

⁶⁹ American Bar News, *supra* note 10, at 4.

⁷⁰ Griswold, *supra* note 14, at 617.

with the orderly processes of justice, and the main factor was not physical but *psychological* interference.⁷¹

What are these psychological interferences? Generally, they can be defined as the reactions of participants to the knowledge that a great number of people are watching their every move, or the effort required to prevent such reactions.

Any list of these interferences would be incomplete because new ones arise with every fact situation. However there are six frequently mentioned:

- (1) "The presence and participation of a vast, unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth."⁷² The resulting effect on most witnesses is obvious.⁷³ A practicing lawyer has stated:

No matter how naively the proponents argue that their cameras will not be noticed in the courtroom, the pictures will be printed in the daily newspapers and appear on TV screens, and the radio will broadcast its verbatim reports, with comments. And when that has happened a few times, the timid person will be more fearful. Already reluctant to face the comparatively mild publicity of the courtroom, the mere possibility that he may be photographed, televised and broadcast for the world to see his struggle to express himself and to outwit the cross-examiner—that mere possibility will greatly increase his reluctance to testify.⁷⁴

To those who would claim a layman is so ill-at-ease in a trial that he would not be too concerned with his appearance to the masses over the media, it is sufficient to refer to a statement by a professional news commentator:

The most experienced performers in show business know the horrors of stage fright before they go on television. This psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die. The administration of justice is more important than a few fleeting movements of fascinating television.⁷⁵

- (2) Trial participants are made actors, willingly or not. As the special study committee stated:

If they are unwilling actors, then their dignity as human beings and perhaps their vital legal rights are violated. If willing actors, then

⁷¹ Geis and Talley, *supra* note 22, at 553.

⁷² Douglas, *supra* note 18, at 5.

⁷³ The human element is predominant in our entire system of justice. Any influence which distorts it or tends to affect its normal functioning impedes the court in its search for the truth—a search which is difficult enough at best. Malone, *Courtroom Television and Administration of Justice*, 26 J. Bar Ass'n Kan. 302, 306 (1958).

⁷⁴ Cantrall, *A Country Lawyer Looks at Canon 35*, 47 A.B.A.J. 761 (1961).

⁷⁵ N.Y. Times, Mar. 11, 1956, p., col.

they may be even more dangerous because their concern may well be their effectiveness as actors rather than compliance with their oaths.⁷⁶

(3) The judge is given further burdens of supervising press arrangements in addition to his regular judicial duties of seeing to the fair administration of justice. He is given the duties of supervising the arrangement of equipment, determining the number of media reporters, declaring parts of the room that are ruled to be off limits, prohibiting the photographing and broadcasting of a witness who so objects, censoring those parts of the trial that might affect public morals, settling intra-media disputes, and dealing with other imponderables. It is obvious the "quiet search for truth" might not be so quiet. It is equally obvious that the judge just might not have time to supervise the proceedings of the case at bar.⁷⁷

(4) Vote-conscious prosecutors and judges might exploit the opportunity for private gain. Justice Douglas points up this possibility:

The opportunities for men to exploit the situation are greatly multiplied. Prosecutors usually run for office. And nowadays about three-fourths of our states provide for the election of judges prosecutors and judges—as well as defense counsel—are human; and the temptation to play to the galleries will be stronger than any can resist.⁷⁸

One writer reveals another danger:

As for the lawyer participants, it is not difficult to conjure up the impetus and encouragement that photography and broadcasting would give to that growing group who now practice and advocate dramatic and sensational effects with demonstrative evidence.⁷⁹

(5) The image of the courts as dignified, reserved, and worthy to be the final arbiter of most important rights is tarnished. In a recent case, a federal court stated:

The very thought of members of the press and/or amateur photographers and others employing cameras, no matter how silent and concealed, to photograph different parties and witnesses to a court proceeding while the parties are engrossed in the determination of matters of tremendous moment to the parties involved, is repugnant to the high standard of judicial decorum to which our

⁷⁶ American Bar News, Feb. 1, 1963 (Press release).

⁷⁷ Cf. Tinkham, *supra* note 18; Cedarquist, *supra* note 24.

⁷⁸ Douglas, *The Public Trial and the Free Press*, 33 Rocky Mt. L. Rev. 1 (1960).

⁷⁹ Tinkham, *Should Canon 35 be Amended? A Question of Proper Judicial Administration*, 42 A.B.A.J. 843, 845 (1956).

courts are accustomed and, indeed, may prove an opening wedge to a gradual deterioration of the judicial process.⁸⁰

(6) As previously discussed, the participants' right of privacy, if any, is violated.

Aside from these interferences, there is a further danger involved because pictures or broadcasts, which must be selective, may distort the trial, inflame the proceeding by depicting an unimportant minuscule of the whole, or lower the judicial process in public eyes by partraying only the sensational or entertaining moments.

All of these interferences tend to cause a serious threat to the administration of justice and represent the real reasons why the audio-video media should not be admitted to the courtroom. This is especially true when it is considered that the media will be attracted primarily to those cases involving emotion-packed issues which inherently require a greater degree of care in the avoidance of any extraneous distractions.

3. *The discretionary exclusion rule*

The media do not dispute the fact that there are threats of psychological interference but argue that they do not exist in every case as the absolute exclusion rule would indicate, and that each judge should be allowed to decide in each case if there exists a threat of interference.

This argument, on its face, is the most forceful the press has to offer. It has been the one which has been the primary cause for the three states to "revolt" and permit the media in the discretion of each judge.

The very heart of the press argument against Canon 35 was stated most clearly by James S. Pope, president of the American Society of Newspaper Editors:

We object to Canon 35 because it does not simply underline the importance of dignity, but sets up an arbitrary prohibition against the camera, which today can frequently be used with as little offense or commotion as a pencil making notes on paper. We think the judgment in individual cases should be left to the judges.⁸¹

The results of a nationwide survey of individual editors bears out this view. The general opinion of the editors was that Canon 35 takes from the individual judge the liberty of action which is rightfully his. They reached this conclusion by the observation that

⁸⁰ *Tribune Review Publishing Co. v. Thomas*, 153 F Supp. 486, 494 (W.D. Pa. 1957), *aff'd*, 254 F 2d 833 (3d Cir. 1958).

⁸¹ *Bulletin of the American Society of Newspaper Editors*, Jan. 1, 1954, p. 5.

although supporters of the canon interject every conceivable extrinsic argument possible, the bare fact remains that the canon relates physical interference with dignity and decorum and cameras no longer so interfere.⁸²

This compelling logic was the cornerstone of the Colorado and Oklahoma decisions. These courts reasoned that in view of the great utility in protecting freedom of speech and press to the greatest possible extent, and the proof they had seen that the equipment no longer necessarily physically interfered with the decorum in every case, the absolute exclusion rule, based on threat of physical interference, was no longer justified. Rather, whether a threat existed should be determined by each judge in each case.⁸³

4. *The case for absolute exclusion*

If one believes in continuing the exclusion of media from the courtroom, these cases demonstrate the need for changing the wording of the canon so as to comprehend not only physical but psychological interferences. Even though the canon expressly states as one of the reasons for excluding media that they "distract participants and witnesses in giving testimony," this phrase is not interpreted as compassing psychological interferences. The Colorado and Oklahoma decisions are sound, as based on the presently interpreted canon, and it is highly conceivable that other states will adopt their position. The basic assumption of the canon as now interpreted is that the exclusion of the media on grounds of a physical interference is reasonably necessary to the fair administration of justice. This is no longer true as these recent cases hold.

There is one argument which tends to prove that the discretionary exclusion rule cannot produce the proper result. The main facet of this argument is that if individual judges are given the discretion to decide in each case whether to allow the media, their decisions will not always be objectively reached in view of the massive pressure of the media which will be brought to bear on them.⁸⁴ Dean Griswold points up the danger:

⁸² Geis and Talley, *Cameras in the Courtroom*, 47 J. Crim. L., C. & P.S. 546, 551 (1956-1957).

⁸³ *In re Hearings Concerning Canon 35*, 133 Colo. 417, 296 P. 2d 465 (1956); *Lyles v. State*, 330 P. 2d 734 (Okla. 1958).

⁸⁴ This facet appears to be one of the main reasons behind the ABA special committee's recommendation to retain Canon 35. In the committee's report to the House, the group stated:

Since most of our state judges still are elected in political campaigns, in which their success can be affected by the media of public communication, it is unfair to subject them to potentially powerful

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We should not forget that a very high proportion of the judges in this country are elected. [I]t is simply unfair for the profession to leave them in a position where they can be subjected to the intense pressure which we knew can be brought by newspapers, radio and television. Those who decide not to allow broadcasting and televising will be subjected to the charge that they have discriminated, that they are old-fashioned, and that they are not as concerned with pleasing the public as are the judges who do allow broadcasting and televising from the courtrooms. And when the next election comes, such judge will surely run the very serious risk that the organs of communication to the public will take a dim view about the desirability of his re-election.

Of course, there would be judges who would not allow broadcasting or television under any circumstances. Such judges should not have to go through the time-consuming process, case after case, of patiently hearing representations about this matter.

It is here that the problem appears as one which involves a truly professional responsibility. Insofar as a decision against broadcasting and televising is unpopular in certain quarters, the brunt of the decision should be taken by the profession as a whole, and should not be shifted to individual judges.⁸⁵

This appears to be one of the major reasons the ABA has retained the absolute exclusion rule. In fact, before reaffirming the old canon, a motion to adopt the discretionary exclusion rule was tabled with very few dissents.⁸⁶ One of the other important facets of the argument is that to allow the media access to the courtroom is to place on the judge distractions and disturbances which are inimical to judicial conduct.

In commenting on the argument that "pooling" arrangements alleviate some of these distractions, the ABA special committee stated:

The most recent example of the failure of any such system was clearly exhibited at the outset of the Billie Sol Estes trial. Quoting from press reports that the courtroom at Tyler, Texas, was crowded with cameras and other broadcast gear, the report said this unconscionable situation was somewhat corrected' later by the trial judge requiring the cameras to be partially hidden behind screens. 'However, the report added, similar instances have come to our attention when the case was deemed sufficiently newsworthy and the competition was keen for electronic reporting advantages.'⁸⁷

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pressures for a favorable decision as to courtroom privileges, the denial of which may result in open and effective opposition of the disappointed media. *American Bar News*, *supra* note 76, at 7.

⁸⁵ Grnsword, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A.B.A.J. 615, 616 (1962). This is the view adopted by the special committee. In its report, the committee stated:

The right to a fair trial does not belong to the trial judge to dispense or curtail as he sees fit. We believe that the decision should be made by the legal profession acting through the rule-making authorities. *American Bar News*, *supra* note 76, at 4.

⁸⁶ *American Bar News*, Vol. 8, No. 2, p. 1, Feb. 15, 1963.

⁸⁷ *American Bar News*, *supra* note 76, at 6.

Normally, the individual judge is the one who determines whether there exists a threat to the fair administration of justice. But he should not be forced to be the one who determines whether the media have access to his courtroom because of the unique considerations involved. The decision should be made if at all by the profession. Thus, it is clear that the House of Delegates has made the correct decision in retaining the absolute exclusion feature of Canon 35. However, it failed to provide the canon's defenders with sufficient basis to justify its decision to media which possess powerful arguments.

IV CONCLUSION

The decision by the profession to leave Canon 35 as is and to defend its exclusionary feature on grounds extrinsic to its original purpose and its unchanged language, is producing several undesirable results both to the media and the profession.

To the media, the retention of the canon's phraseology is a direct and arbitrary rebuff. The media have proved they do not do what the rule says they do—interfere with the physical decorum of the courtroom. Yet this same rule precludes the media from performing their chief function. The media then are again precluded from successfully asserting their valuable right to freedom of speech and press because the profession's members in the courts assert the right must be compromised, but for reasons not included in the exclusion rule. To the media this practice is at least unfair and quite possibly a denial of due process. All of the cases on the point hold that the exercise of the court's exclusion power must be reasonably necessary to maintain the fair administration of justice. If Canon 35 is to be taken as the standard, then the press has a meritorious claim to admittance to court. Since the media have not been successful in their assertions in the courts, they feel forced to resort to extra-judicial proceedings. The only remaining means of asserting their rights is to conduct a massive campaign to the general population. Not deciding whether they are justified in such procedure, the fact remains that the profession is promoting the very thing which it was designed to extinguish—the substitution of rule by emotional appeal to the masses for rule by reason.

To the profession the retention of the old canon produces two unsatisfactory results. First, it reduces the probability of the profession's success in continuing the absolute exclusion rule. Retention of the physical interference theory encourages individual states to accede to media claims because the canon is defenseless to their arguments and demonstrations. Also, with each state's profession going

its separate way on the issue, the effectiveness of the entire profession is destroyed, even though most of the members might believe absolute exclusion is needed.

Secondly, the respect for the profession is badly tarnished. The profession has been entrusted with the heavy duty of protecting the individual and collective rights of our society including freedom of speech and press. In carrying out this duty it is inescapable that some rights of individuals or groups will have to be compromised when their exercise involves conduct which causes interference with the system that protects all rights. This inherent authority, however, must be used in as reserved a manner and degree as possible and invoked only when it is reasonably necessary. Otherwise, the profession would destroy that which it is entrusted to preserve.

In the retention of the old phraseology of Canon 35, the profession outwardly appears to be using the inherent authority in an arbitrary manner. This power is being used against the media when it is not necessary. Although its use of the power is justified, the basis of the justification lies outside the boundaries of the reasons stated in the rule. The result is a loss of respect for the profession. This takes on greater significance when it is realized that it is lost to such a persuasive group as the media.

The media have proved the stated reasons for the rule no longer exist and therefore neither should the rule. The profession replies that there are reasons for the rule but it refuses either to formally state them or to repeal the outdated rule. As a result, the profession invites disrespect and the consequences of such. It is not the media that are distracting from the "essential dignity" of the courts, but in fact, the profession itself. Above all, the profession should be aware of the old maxim, that the first step toward confidence in the government, including the courts, is confidence in and respect for, those individuals who administer the same. The consequences of the disease are too calamitous and the remedy too easy, to simply ignore.⁸⁸

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⁸⁸ A suggested wording of the canon is that contained in the recommendation made by the Special Committee of the American Bar Foundation and submitted to the House of Delegates in February, 1958, which subsequently was turned down:

The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. The taking of photo-

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