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# Broadcasting in the Courtroom

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# BROADCASTING IN THE COURTROOM

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THIS subject is governed by, and occasions a discussion of canon 35 of the Canons of Judicial Ethics of the American Bar Association. This canon has been carried into and is now a part of the Code of Judicial Ethics promulgated by the Supreme Court of Appeals of West Virginia, and hence, is a part of the law of this state. Therefore, any amendment to the canon by the American Bar Association would be ineffective in West Virginia until some further action be taken by that court.

Canon 35, as promulgated by the Supreme Court of Appeals, entitled "improper publicizing of court proceedings", is as follows:

> "Proceedings in court should 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 the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.
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> "Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

There is, and has been for some time, agitation by broadcasters and photographers for a relaxation and amendment of the strong language contained in the canon, and a special committee of the American Bar Association has studied and reported on a proposed revision and restatement of the canon. Meeting in March, 1958, in Atlanta, Georgia, the House of Delegates of the American Bar Association granted a hearing to broadcasters and newspapers on the question of the relaxation of this canon, but following the hearing voted to defer any action until the annual meeting of the American Bar Association in Los Angeles in August of this year.

The National Association of Broadcasters and its affiliated organizations contend that with their present equipment, "photographing, broadcasting and televising of trials under present day

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methods can be done without degrading the Court". Those in the bar association who oppose the relaxation of the rule, or the abolition thereof, take the position that cameras and microphones can and do interfere with orderly court procedure and affect trial results.

Canon 35 was adopted in 1937 following the three-ring circus staged by the press and photographers at the celebrated Hauptman trial wherein the defendant was charged with kidnapping the Lindberg baby. I know of no greater degradation of and contempt for a solemn judicial proceeding in recent years than the Hauptman trial, with one exception, and that was the studied effort of some communists and their lawyers to frighten Judge Medina during the trial of a number of members of the Communist Party several years ago. Of course, in that case the lawyers and others participating in the demonstrations were sentenced for contempt of court after the verdict of the jury had been returned.

Generally, some ten arguments are advanced by photographers and broadcasters for the abolition or relaxation of canon 35. These arguments are generally as follows:

1. Newspaper reporters have access to courtrooms. Representatives of other media should have equal rights.
2. Photography, radio and television can and do operate with little or no distraction.
3. Pictures are taken of births, deaths, religious services, marriages, legislative bodies, surgical operations and other events of a semi-private nature while only the courts claim to have dignity which transcends all else in life.
4. We are living in a democracy and thus the people have the right to know what goes on in our courts.
5. Attacks on the media of communication come from attorneys in the large cities who represent gangsters, communists and fellow travelers.
6. The Constitution of the United States and constitutions of most states guarantee public trials of criminal charges and the same reasons apply to all other cases.
7. Judges should be able to control the dignity and decorum of their courts without the aid of a canon.
8. The courts belong to the people and what right does the bar association have to make rules for the courts?
9. Newspaper, broadcasting and telecasting personnel are fine people, and hence, would never deliberately give a wrong impression.
10. The enforcement of canon 35 results in bad public relations for the bar.

Some of these are sound arguments, but they will not all hold water. Let us consider first the constitutional questions. The sixth amendment to the Federal Constitution guarantees, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."; and article III, section 14 of the constitution of West Virginia provides that, "Trials of crimes and misdemeanors . . . shall be by a jury of twelve men, public, without unreasonable delay . . ." Hence, it will be seen that there is no constitutional right to a public trial, except to the accused. In other words, the public per se, or the new media which transmit information to the public, have no right guaranteed to them by either constitution to have any trial made public. Of course, freedom of the press is guaranteed by both constitutions, but this freedom cannot transcend the greater freedom of litigants, witness, or other persons who, unwillingly are forced to appear in court and give evidence. The sixth amendment to the Federal Constitution, and article III, section 14 of the state constitution, are for the benefit of the accused, and were not written into those documents to provide for the entertainment or edification of the populace. In discussing these constitutional provisions, Judge Boldt has said, "there is nothing in the constitutional language indicating that any individual other than the accused in a criminal trial and those of service to his defense has either a right to attend the trial or publicity emanating from the trial."

It, therefore, seems to me that where the first amendment to the Federal Constitution proclaiming freedom of expression clashes with the fifth amendment guaranteeing due process of law to one accused of crime, the first must give way to the fifth. Probably the most important, most discussed, and most controversial section of the Federal Constitution is the fifth amendment guaranteeing due process of law, and the greatest protection afforded to any person charged with crime is the impartiality of the court trying the case. The Honorable C. C. Chambers, Judge of the Seventh Judicial Circuit of West Virginia, said a few years ago in an address before the Charleston Bar Association, "Judicial impartiality and decorum must be maintained at all hazards for, in the final analysis, our courts constitute the last bulwark—the last citadel of our liberty".

This discussion of the canon on my part is not necessarily personal. I doubt seriously that any radio or television station would be interested in televising or broadcasting the drab, dull civil contests involving the State of West Virginia, or concerning property

lines and automobile accidents which are among those cases customarily tried in the Circuit Court of Kanawha County. However, I spent many years in the business of representing the state as a prosecuting attorney, and I believe that it is fair to say that publicity attendant upon some of the more notorious of the trials in which I participated subconsciously affected the results thereof, either for conviction or acquittal. Jurors are but human beings and while they may upon their solemn oaths declare that they have not formed opinions as to the guilt or innocence of any particular person, yet there is always the possibility that they cannot erase from their minds subconscious opinions which they have formed without being aware thereof, from reading newspapers, listening to radio and watching television. If this were not so, broadcasters and televisors would not be in business, for their advertising techniques would avail nothing.

Moreover, if television or other cameras are permitted in courtrooms, or if a broadcaster is permitted to install his microphones, a person connected with the case may immediately have one of two reactions. He may either become a ham actor determined to strut across the stage for perhaps the only time in his life, or he may withdraw into a shell of reticence, reluctant to give his evidence. Contrary to what appears to be a popular misconception, the trial of any case, civil or criminal, does not constitute a contest of wits between lawyers, or the opportunity for lawyers and witnesses, or litigants, to make impressions upon the populace generally; but to the contrary, is a solemn, serious and scientific search for the truth. A good judge will keep this uppermost in his mind at all times and will endeavor to prevent anything from occurring in his courtroom which would tend to detract from this essential purpose of the law.

It must be remembered that judges, too, are but human beings and they cannot, simply by the act of donning their black robes of office, abandon the essential natures which they have acquired by heredity or environment. Judges in this state must periodically run for reelection. They are prohibited, by another canon of ethics, from engaging in political activity except when actually running for reelection. However, what more natural result, if television cameras be permitted in the courtroom, than for the judge to forget the solemn obligation which is his and begin to strut and preen before the camera for the benefit of the listening and viewing audience, in the hope that he may gain some favor which will be

remembered at the next election? By this I do not mean to indict all judges; I simply recognize them for what they are, men who by virtue of training and political fortune have the duty and obligation of passing upon other men's lives, rights, and liberties, and at the same time, in order to earn their livelihood, are required to entertain thoughts of favor with the voters in order that they may retain their offices.

In 1956, an extensive and penetrating investigation of canon 35 was conducted in the state of Colorado. The purpose of the investigation, according to the Associated Press, was "to explore the facts and the law in order to determine whether canon 35 should be repealed, amended or continued and enforced in its present form". Following the investigation, and a decision that the enforcement of canon 35 should be left to the trial judges, Thomas K. Younge, President of the Colorado Bar Association, made the assertion that newspapers had brought "a lot of political pressure" to bear in behalf of the cameras. He added, "If you are going to have photographers in the courts you are going to have to take the judges out of politics". According to Gilbert Geis, an assistant professor of sociology at the University of Oklahoma, "there is a general feeling in the legal profession that allowing discretion to individual judges [in permitting the use of cameras and microphones in courtrooms] places an undue burden upon the judge since he is often at the mercy of the press in the manipulation of public opinion on him and his behavior. This appears to be one of the reasons that the photographers advocate a laissez-faire attitude by the organized bar toward courtroom photography."[1] Parenthetically, there is presently much agitation for the proposition of taking judges out of politics, but to do so in West Virginia would necessitate an amendment to the constitution.

I fully recognize that the persons in charge of radio and television broadcasts are in the main high-minded people who are determined, and who are required by their own code of ethics, to do nothing to degrade the courts or to embarrass the persons who must of necessity appear before the courts. I further recognize, and I know that you recognize, that radio and television stations stay in business only because of the revenues derived from advertising. While I am sure that any station which asks for the privilege of broadcasting or televising the trial of a lawsuit would do it as a public service and hence, would present the broadcast or telecast

[1] 43 A.B.A.J. 419, 475 (1957).

as an unsponsored program; and while it is true that broadcasters and televisors say that the courts would be in control of such projection of courtroom activity into the homes of the public generally, yet it is further true that so-called public service broadcasts are frequently followed by spot announcements and short advertisements. Therefore, for myself, I feel that I would be embarrassed, when at the conclusion of my reading of lengthy instructions to the jury in any particular case, the producer of the program would throw the switch which would transfer the broadcast from the courtroom to the studio, there to be followed by an advertisement having nothing to do with the issues on trial.

In 1954, Richard P. Tinkham of Hammond, Indiana, Chairman of the Public Relations Committee of the Board of Governors of the American Bar Association, spoke on this subject before the annual meeting of The West Virginia State Bar at Elkins. I quote a portion of his address:

> "I do not pretend to pose as an expert in this field, but let me quote one. The gentleman whom I quote was for many years the general counsel of one of the largest newspaper chains in the country. He is a man who has directed the defense of many newsmen under the First Amendment; a man whose income during his present retirement comes largely from his newspaper holdings. He is Thomas L. Sidlo of Cleveland, Ohio, formerly Chairman of the American Bar Association Public Relations Committee. He said last week:
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> > " 'I just don't believe that the idea of permitting cameras in court rooms during actual trials will go down with the American public. It has seemed to me all along, and still does, that those who advocate lifting the ban on cameras from trials miss the point as to the why and wherefore of the prohibition.
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> > " 'The interdict has little or nothing to do with the relative inconspicuousness of the camera or broadcasting device. It is concerned almost wholly and solely with the effect of their presence on the course or bearing of the hearing. I have yet to be convinced that the presence of this paraphernalia is innocuous or that it cannot help interfere with the search for the truth of what is being tried or investigated. I think I have had enough experience with this sort of thing to know that it cannot help but influence the process of arriving at the facts; that it not only does not help in achieving this purpose, but almost certainly—judging from the experience we have thus far had—succeeds in producing one kind of distortion or another.

> " 'The newspaper has its place and its rights and its duties, and the same thing applies to the other more recently invented media. But these rights do not embrace the right, consciously or unconsciously, to influence the course of arriving at the facts in a judicial proceeding.' "

Much more could be said on this subject. For example, shall all newspaper photographers, all radio stations, and all telecasters be permitted in the courtroom at once, or shall they be required to pool their facilities and efforts? If so, which of the media would be admitted, who would direct the pooling and who would direct which camera? However, the time at my disposal does not permit a full discussion of all of the arguments which have been advanced for the abolition or relaxation of canon 35. Should you be interested in knowing what those arguments are, I refer you to a splendid article by Justin Miller,[2] a distinguished former law school dean, and former federal judge, now engaged in the general practice of law. Judge Miller takes the other side of this question and presents logical arguments for the relaxation of the rule. If you would hear the arguments against the relaxation, I refer you to the report of the special committee of the American Bar Foundation made to the House of Delegates of the American Bar Association in November, 1957.

Suffice it to say, that viewing the whole picture, it is my present and carefully considered opinion that canon 35 should not be abolished or relaxed. As was said in the concluding paragraph of the special committee's report:

> "No trial judge, mindful of his lawful duties and responsibilities, would wittingly place himself in the position of censor. Certainly no trial judge should be expected to interrupt the orderly trial of a case before him to ascertain whether the jurors or witnesses object to having their photographs taken, or to ascertain whether witnesses object to having their testimony broadcast.
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> "In short, no judge should be called upon to deviate in any manner from the proper discharge of his proper functions as a judge, responsible to the people for the administration of justice according to law."

Therefore, I will again advert to Judge Chambers and his speech before the Charleston Bar Association. He said, and I conclude with his statement:

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[2] 42 A.B.A.J. 834 (1956).

"Let us never forget that the judicial process is the central pivot about which a free society revolves. Let us not, therefore, deprive the court of the dignity which pertains to it and which is so essential to the proper administration of justice. Let us not impede that serious quest for truth for which all judicial forums are established."