

Open to the (On-Screen) Public: Navigating Media Coverage in the Courtroom

On November 7, 1994, Judge Lance A. Ito (ret.) made a controversial decision in a widely-publicized case, a case and a decision which are still the subject of much debate and discussion today – he allowed a television camera to remain in the courtroom throughout the duration of the *People of the State of California v. Orenthal James Simpson*.¹ As a result, more than 150 million people were able to watch the famous murder trial.² There were undoubtedly many considerations that went into this decision, including that attorneys on both sides agreed (albeit driven by different motivations) media coverage was essential in this particular case. Because of Judge Ito’s decision, Johnnie Cochran’s famous statement, “If it doesn’t fit, you must acquit,”³ in closing arguments is just a few mouse clicks away, and people still continue to weigh in, even now, on whether the jury came to the right decision.

When it comes to allowing media coverage in the courtroom, there are arguments on both sides. Those in favor contend the public has a right to observe nearly all court proceedings, and allowing media in the courtroom could be viewed as an extension of that right. The counterargument is the camera, and by extension the individuals with ultimate creative control over what content the public sees, is not unbiased, and footage can be manipulated to showcase only carefully-selected aspects of the proceedings. This could in turn influence the public perception of the proceedings and the evidence. There is also the risk the camera’s presence could cause the attorneys, the judge, or even the jurors to behave differently under to the strict scrutiny of the camera. Indeed, jurors could feel pressure to come to a certain decision – particularly in high-profile cases – which could be driven more by how the public views and reacts to the case, as opposed to how the jurors feel about the evidence and law presented.

Courts and legislatures across the country have recognized these opposing arguments, and many have adopted specific procedures for allowing media in the courtroom. For example, in California, California Rules of Court, rule 1.150 acknowledges the importance of “ensur[ing] that the fairness and dignity of the proceedings are not adversely affected” with broadcasting in court and provides 18 specific factors for the judge to consider in ruling on the media’s request to record court proceedings.⁴ Among the considerations are “the importance of promoting public access to the judicial system” and

¹ David Margolick, *Judge in Simpson Trial Allows TV Camera in Courtroom*, The New York Times (November 8, 1994), <http://www.nytimes.com/1994/11/08/us/judge-in-simpson-trial-allows-tv-camera-in-courtroom.html> (last visited Feb. 18, 2018).

² Julia Zorthian, *How the O.J. Simpson Verdict Changed the Way We All Watch TV*, Time (October 2, 2015), <http://time.com/4059067/oj-simpson-verdict/> (last visited Feb. 24, 2018).

³ CNN [CNN]. (2014, June 19). O.J. Simpson defense: ‘If it doesn’t fit, you must acquit’. Retrieved from https://youtu.be/NH-VuP_5cA4.

⁴ See Cal. Rules of Court, rule 1.150.

“the difficulty of jury selection if a mistrial is declared.”⁵ Media is expressly prohibited from covering certain proceedings, including those held in chambers, those closed to the public, jury selection, jurors or spectators, and conferences between the attorneys and clients, witnesses, or the judge.⁶

Likewise, New York courts have adopted administrative rules to govern media in the courtroom⁷ because a “fair, open and transparent judiciary is one of the most fundamental and treasured pillars of our democracy.”⁸ In fact, before media may be permitted into New York courtrooms, the judge must hold a pretrial conference to allow the parties and counsel to raise any objections and place certain restrictions on the media coverage.⁹ There are also listed factors for the judge to consider in determining whether to permit broadcasting and media coverage,¹⁰ and coverage is forbidden during certain aspects of the proceedings, similar to the limitations in California.¹¹

In addition to the protections adopted by the courts themselves, litigators can take it upon themselves to either object to media coverage entirely, or to attempt to minimize any potential negative impacts prior to trial commencing.

First, an important argument to raise is that allowing media in the courtroom in the first place creates a huge risk of prejudice to both sides. The lawyers, and even the judge, ultimately have no editorial control once the video or audio recording leaves the courtroom. The media outlet may choose to film or broadcast certain aspects of the trial, edit video clips how they see fit, and add their own commentary or spin on the trial proceedings. For example, in a recent, highly publicized San Diego Superior Court civil case, the judge allowed opening statements and closing arguments to be streamed live. However, the news outlet ultimately decided to air only the plaintiff’s opening statement. When this came to light shortly after plaintiff’s opening statement aired online, the judge prohibited cameras in the courtroom for the remainder of the trial. But, even though the judge took corrective action, the damage was arguably already done. To the court’s credit, as soon as the Judge learned that only the plaintiff’s opening was streamed live – all cameras were kicked out of the courtroom as the media failed to follow the rules set by the Judge. Although it is difficult to control what the news agency ultimately chooses to broadcast, there is at least the threat of sanctions or being held in contempt of court for violating a court order.¹²

It is also important to consider the far-reaching consequences of live broadcasting and who outside the courtroom could potentially see and hear the proceedings. A final

⁵ *Id.* at subd. (e)(3)(B), (N).

⁶ *Id.* at subd. (e)(6).

⁷ Uniform Rules for Trial Courts (22 NYCRR) §§ 29.1, 29.3.

⁸ Robert Gavin, *Final blessings for cameras in court*, Times Union (December 22, 2015), <https://www.timesunion.com/tuplus-local/article/Final-blessing-for-cameras-in-court-6716236.php> (last visited Feb. 24, 2018).

⁹ N.Y.Ct.Rules, § 131.5.

¹⁰ N.Y.Ct.Rules, § 131.3.

¹¹ N.Y.Ct.Rules, § 131.7.

¹² See e.g., Cal. Rules of Court, rule 1.150, subd. (f) [“Any violation of this rule or an order made under this rule is an unlawful interference with the proceedings of the court and may be the basis for an order terminating media coverage, a citation for contempt of court, or an order imposing monetary or other sanctions as provided by law.”]

example concerned a now-defunct company, Agency-Rent a-Car, and a young girl who was allegedly stuck with a needle left in one of the rental cars. The court in this case again allowed a news agency to broadcast opening statements live. Plaintiff's counsel spoke to the media outside of court and the newscast displayed a picture of the car describing the circumstances of his client's injuries. The defense counsel also spoke to the media outside of court and stated there was absolutely no evidence that would establish the company had notice of someone leaving a needle in the rental car. Unfortunately for Agency-Rent-a-Car, one of the people watching the news that evening had in fact rented the same car and reported to the rental staff that a needle was found in the backseat. That witness, who was incensed by the defendant's statements, came forward to the court. The judge ultimately allowed the witness to testify as an impeachment witness.

If media will be permitted in the courtroom, litigators should consider requesting limitations, including filing a motion *in limine* to instruct counsel and parties to limit trial witnesses, who are excluded from the courtroom, from viewing any recorded or streamed proceedings prior to testifying. Such a limitation would minimize the chance of the witness's testimony becoming tainted. Further, if the court has not already placed limitations on filming certain aspects of trial in local court rules, it would be wise to ask the court to prohibit the jurors, as well as the verdict, from being filmed. Along those same lines, the jurors should be told that certain aspects of the trial will not be filmed. These measures could help put jurors, particularly those who are uncomfortable with the prospect of being filmed and having their decision scrutinized, at ease. Finally, if possible, counsel should request broadcasts be delayed until after the verdict is rendered, as opposed to live streamed. Because social media makes it easy for the public to weigh in and offer comments on videos or online content, delaying any broadcasts makes it less likely jurors will be tempted to review broadcast proceedings or be persuaded by comments – online or otherwise – from members of the public. A delayed broadcast would also help avoid surprise impeachment witnesses, like in the Agency-Rent-a-Car case.

Media in the courtroom is a double-edged sword – on the one hand, it helps maintain transparency with respect to the judicial system and gives greater public access to the courts. It can also give validation to a verdict, as it allows the public to see what the jury sees. But on the other hand, there is the possibility the media coverage can negatively impact the integrity of the judicial process. There is ultimately no right answer, and each case will have its own unique set of circumstances and considerations when faced with media in the courtroom.