Exhibit 10

GIBSON, DUNN & CRUTCHER LLP
LAWYERS
A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

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October 2, 2009

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Client Matter No.
T 36330-00001

The Honorable Vaughn R. Walker
Chief Judge of the United States District Court
for the Northern District of California
450 Golden Gate Ave.
San Francisco, California 94102

Re: *Perry v. Schwarzenegger, Case No. C-09-2292 VRW*

Dear Chief Judge Walker:

At the conclusion of the hearing before this Court on September 25, 2009, the Court proposed to transmit images of counsel, the witness, and the Judge in our proceeding into an overflow courtroom. All parties indicated their consent to that proposal. The Court also asked the parties to consider their respective positions on the transmission of those same images beyond the overflow courtroom. In response to a question from counsel, the Court indicated that this transmission might potentially include broadcast on a television station. On September 30, 2009, counsel for Plaintiffs initiated meet-and-confer discussions in which the parties expressed their views on the issue raised by the Court. The parties' positions, as expressed by and to Plaintiffs' counsel, are set forth below.

Plaintiffs do not object to the transmission of images from our proceeding beyond the overflow courtroom, and we would be happy to work with the parties, the Court, and others as appropriate regarding the specifics of how this would work.

Counsel for the Attorney General, the City of San Francisco, Alameda County and Los Angeles County have expressed their support for Plaintiffs' position.

Counsel for the Administration has indicated that they will support any position on which the other parties are able to reach an agreement. In the event the other parties cannot reach an agreement, the Administration will take no position.

Counsel for the Defendant-Intervenors have indicated that they are still reviewing the issue raised by the Court and hope to have a position by Monday of next week. We therefore expect Defendant-Intervenors to submit their own, separate statement of position to the Court next week.

Thank you for raising this issue with the parties. Plaintiffs would be happy to discuss further with the Court should the Court wish to do so.

Respectfully submitted,

/s/ Christopher D. Dusseault

Christopher D. Dusseault
Counsel for Plaintiffs

cc: Counsel of Record

ATTESTATION PURSUANT TO GENERAL ORDER NO. 45

Pursuant to General Order No. 45 of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

By: /s/ Sarah E. Piepmeier
Sarah E. Piepmeier

Exhibit 11

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Lawyers
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October 5, 2009

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

Re: Recording and broadcast of proceedings in *Perry v. Schwarzenegger*, No. C-09-2292 VRW

Dear Chief Judge Walker,

I write on behalf of Defendant-Intervenors in response to the Court's inquiry regarding the parties' positions on "projecting [a video recording of the proceedings in this case] … beyond an overflow room," perhaps in the form of a public television broadcast. Hr'g of Sept. 25, 2009, Tr. 70-71.

It is Defendant-Intervenors' understanding that the policy of both the Northern District of California and the Judicial Conference of the United States prohibits any kind of photographic depiction of district court proceedings outside of the courthouse itself. According to this Court's General Order No. 58, the "[p]olicy of the Judicial Conference of the United States prohibits, in both civil and criminal cases in all district courts, broadcasting, televising, recording, or photographing courtroom proceedings for the purposes of public dissemination." *See also* United States District Court for the N.D. Cal., General Information Guide for Journalists at 5 (July 14, 2009) ("Broadcasting of proceedings is prohibited by policy of the Judicial Conference of the United States."); JCUS-SEP 96, p. 54 (adopting ban on broadcasting); JCUS-MAR 96, p. 17; JCUS-SEP 94, pp. 46-47. *See also In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (Memorandum of Chief Judge Easterbrook, 7th Cir. Sept. 28, 2009).

The Judicial Conference's policy is based upon the potentially negative impact that the public broadcast of federal trial court proceedings could have on the

administration of justice. After an extensive study of the issue in 1994, the Judicial Conference rejected proposals for public broadcast of trial court proceedings. *See* JCUS-SEP 94, p. 47. As reflected in this Court's General Order No. 58, that policy, and the reasons undergirding it, remain in effect today. *See* Administrative Office of the U.S. Courts, "Implementation of the Long Range Plan of the Federal Courts: Status Report April 2008," ¶ 86d, *available at* http://www.uscourts.gov/library/Implementation_the_Long_Range_Plan.pdf ("The Conference continues to oppose cameras in the courtroom legislation."). In testimony before Congress in September 2007, Judge Tunheim explained the Judicial Conference's position, in pertinent part, as follows:

> The Judicial Conference position is based on a thoughtful and reasoned concern regarding the impact cameras could have on trial proceedings. [Public broadcast has] the potential to undermine the fundamental rights of citizens to a fair trial. It could jeopardize court security and the safety of trial participants, including judges, U.S. attorneys, trial counsel, U.S. marshals, court reporters, and courtroom deputies. The use of cameras in the trial courts could also raise privacy concerns and produce intimidating effects on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding.
>
> …
>
> Because cameras in trial courts could profoundly and negatively impact the trial process, the Judicial Conference strongly opposes any legislation that would allow the use of cameras in the United States district courts.

Cameras in the Courtroom: The "Sunshine in the Courtroom Act of 2007," H.R. 2128: Hr'g Before the H. Comm. on the Judiciary, 110th Cong. (Sept. 27, 2007) (statement of The Honorable John R. Tunheim, Judge, United States District Court for the District of Minnesota and Chair of the Court Administration and Case Management Committee of the Judicial Conference), *available at* http://www.uscourts.gov/testimony/ Tunheim_cameras092707.pdf. As Judge Tunheim concluded, "the Judicial Conference believes … [that] the presence of cameras has the *potential* to deprive citizens of their ability to have a claim or right fairly resolved in the United States district courts." *Id.*

Publicly televising the proceedings in this case would give rise, we believe, to these concerns. Given the highly contentious and politicized nature of Proposition 8 and the issue of same-sex marriage in general, the possibility of compromised safety, witness intimidation, and/or harassment of trial participants is very real. Indeed, lead counsel for Plaintiffs has acknowledged that

"widespread economic reprisals against financial supporters of . . . Proposition 8" resulted from public disclosure of the names of donors. Doc # 187-1 at 6-7. And the record of other forms of harassment against Proposition 8 supporters is well documented. *See id.* & Exs. B, I, K, M. For these reasons, Defendant-Intervenors must respectfully object to any departure from the policy of the Northern District of California and the Judicial Conference of the United States.

Sincerely,

/s/ Charles J. Cooper

Charles J. Cooper
Counsel for Defendant-Intervenors

Exhibit 12

Pages 1 - 120

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Wednesday December 16, 2009 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS

Reported By: *Katherine Powell Sullivan, CSR #5812, RPR, CRR*
Official Reporter - U.S. District Court

APPEARANCES:

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BY: JUDY WHITEHURST, DEPUTY COUNTY COUNSEL

For Defendant Patrick O'Connell:
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BY: CLAUDE F. KOLM, DEPUTY COUNTY COUNSEL
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For Proposed Intervenor Imperial County, et al.:
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BY: JENNIFER L. MONK, ESQUIRE

So the Court of Appeals did an excellent job of expediting the matter, and hearing it and giving it full consideration when it went up the first time. And I understand that the Court of Appeals is going to make a similar good effort to move that issue along expeditiously.

So you'll know more about that later today. And so I guess it's fair to say that at least in one aspect of this case, you're just touching down here today, and you're soon going to be bouncing back to the Court of Appeals.

(Laughter)

THE COURT: But we are going to make every effort to bring you back here in time for our January 11 trial date.

Now, I've mentioned the things that I think need to be resolved and I think we can accomplish this morning. Are there any things that I've overlooked?

First, from the plaintiffs and the plaintiff-intervenors, any other items you'd like to add to the agenda? Mr. Olson?

MR. OLSON: I think these are mostly in the nature of trial issues and logistic or procedural things.

We had a reference earlier in these proceedings to the possibility of televising the trial. And I think that's still an open item. We expressed support for that, if it could be done. Our opponents were opposed.

And I don't know whether you wish to get into that or

not, but I wanted to mention it.

THE COURT: I appreciate that.

My understanding is that under current Ninth Circuit policy and rules -- and this is true of our local rules, as well -- that is not permitted; that is, dissemination of courtroom proceedings outside the courthouse is not permitted.

However, two years ago the Ninth Circuit Judicial Conference voted for a pilot or experimental program to permit dissemination of District Court proceedings that are nonjury proceedings in civil cases.

The Circuit Council has taken up the issue of whether it wishes to implement that resolution that was adopted by the Conference.

My understanding is that a proposal to implement that is pending before the Judicial Council of the Ninth Circuit, and may very well be enacted in the very near future.

And, if it is, then I think this is an issue that we should probably discuss and decide whether we are going to do it; if so, on what basis we're going to do it, and how we can do it consistent with the needs of the case, and to do it in a way that does not interfere in any way with the processing of this case.

But, at the moment, I don't think we have a green light for it. And I'm inclined to wait to discuss this with you after we get a green light, if in fact one comes through.

MR. OLSON: That's perfectly acceptable, of course, to us. And we're happy to address it whenas and if it's an appropriate time to do so.

THE COURT: Very well.

The Ninth Circuit, of course, has had a good deal of experience with this in appellate proceedings, and has broadcast or permitted broadcasting of appellate proceedings in quite a large number of cases.

That, of course, is somewhat different than a District Court proceeding, in that those proceedings last an hour, two hours, three hours at most.

Three hours won't do very much for us here in this proceeding, so --

MR. OLSON: Well, we have a great deal to say about it when it's appropriate and an a propitious time for us to do so. I won't attempt to get into our point of view on it at this time, then.

THE COURT: That's fine. I think it's probably something we should discuss, if it is possible.

There certainly has been a good deal of interest in the case. And it would appear to fit the formula that the Ninth Circuit Judicial Conference contemplated in 2007, when it adopted that resolution that I referred to.

MR. OLSON: One or two other items --

THE COURT: Certainly.

Exhibit 13

Public Information Office
United States Courts for the Ninth Circuit
Office of the Circuit Executive · 95 7th Street, San Francisco, CA 94103 · (415) 355-8800 · (415) 355-8901 Fax

NEWS RELEASE

December 17, 2009

Contact: David J. Madden, (415) 355-8800
dmadden@ce9.uscourts.gov

Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts

SAN FRANCISCO – The Judicial Council of the Ninth Circuit, governing body for federal courts in the western states, has approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit. The action was announced today by Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit.

The Judicial Council voted unanimously to allow the 15 district courts within the Ninth Circuit to experiment with the dissemination of video recordings in civil non-jury matters only. The action amends a 1996 Ninth Circuit policy that had prohibited the taking of photographs, as well as radio and television coverage, of court proceedings in the district courts. It also responds to a resolution supporting the use of cameras, which was passed by judges and lawyers attending the 2007 Ninth Circuit Judicial Conference.

"We hope that being able to see and hear what transpires in the courtroom will lead to a better public understanding of our judicial processes and enhanced confidence in the rule of law. The experiment is designed to help us find the right balance between the public's right to access to the courts and the parties' right to a fair and dignified proceeding," Judge Kozinski said.

Cases to be considered for the pilot program will be selected by the chief judge of the district court in consultation with the chief circuit judge. The participating district courts will be asked to evaluate their experiences and report to the Council.

The Ninth Circuit takes in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands. There are four district courts in California and two in Washington.

- more -

The Ninth Circuit Court of Appeals has permitted television and radio broadcasting of oral arguments with approval of the panel hearing the case. Since 1991, the court has permitted video and audio recordings of oral arguments in approximately 200 cases. All of its oral arguments are available on its website - http://www.ca9.uscourts.gov/media/

# # #

Exhibit 14

Public Notice

Subject:
Notice Concerning Revisions of Civil Local Rule 77-3

Contact:

Date Posted:
12/23/2009

The United States District Court for the Northern District of California Court has approved a revision of Civil Local Rule 77-3, effective December 22, 2009.

77-3. Photography and Public Broadcasting.

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

File for Download:
File Type: Adobe Acrobat

File Size: KBytes

Exhibit 15

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December 28, 2009

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors ("Proponents") to reiterate our objections, conveyed in my letter of October 5, to televising the proceedings in this case beyond the confines of the courthouse. *See* Doc. No. 218.

Proponents respectfully submit that photographic or video depiction of the trial proceedings in this case is not authorized, and it would violate this Court's Local Rule 77-3, this Court's General Order No. 58, and the policy of the Judicial Conference of the United States. As explained in detail below, the concerns animating the policy adopted by the Judicial Conference – particularly the unacceptable danger that the right to a fair trial will be undermined and the potential for intimidation of witnesses and litigants – apply with particular force in this case.

The Media Coalition seeks leave to broadcast and webcast the trial proceedings in this case, relying upon a press release issued by the Ninth Circuit on December 17, 2009. *See* Doc # 313. However, the Judicial Council for the Ninth Circuit has not yet issued an order or resolution setting forth the policies and procedures that will govern the pilot program described in the press release (for example, the Ninth Circuit's press release does not specify whether a trial may be broadcast over the objection of one of the parties). More importantly, the Ninth Circuit has not yet provided notice and an opportunity to comment on the pilot program or the (as yet unpromulgated) policies and procedures that will govern it. As explained below, this Court is bound to comply with its Local Rule unless and until it either is amended by this Court following notice and an opportunity to comment or is abrogated by order of the Judicial Council following notice and an opportunity to comment. *See* FED. R. CIV. P. 83(a)(1); 28 U.S.C. § 2071(b) & (c)(1); 28 U.S.C. § 332(d).

1. Current Governing Policy

This Court's Rule 77-3 flatly prohibits the broadcast or webcast of trial proceedings beyond the courthouse: "the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited." Likewise, this Court's General Order No. 58 provides that the "[p]olicy of the Judicial Conference of the United States prohibits, in both civil and criminal cases in all district courts, broadcasting, televising, recording, or photographing courtroom proceedings for the purposes of public dissemination." *See also* United States District Court for the N.D. Cal., General Information Guide for Journalists at 4 (October 29, 2009) ("Broadcasting of proceedings is prohibited by policy of the Judicial Conference of the United States.").

The Judicial Conference of the United States adopted the current policy in 1996. *See* JCUS-SEP 96, p. 54, *available at* http://www.uscourts.gov/judconf/96-Sep.pdf. The policy is based upon the potentially negative impact that the public broadcast of federal trial court proceedings could have on the administration of justice. After an extensive study of the issue in 1994, the Judicial Conference rejected proposals for public broadcast of trial court proceedings. *See* JCUS-SEP 94, pp. 46-47, *available at* http://www.uscourts.gov/judconf/94-Sep.pdf. "Based upon the data presented, a majority of the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and the Conference declined to approve the Committee's recommendation to expand camera coverage in civil proceedings." *Id*.

In testimony before Congress in September 2007, the Chair of the Judicial Conference's Court Administration and Case Management Committee explained the Judicial Conference's position, in part, as follows:

> The Judicial Conference position is based on a thoughtful and reasoned concern regarding the impact cameras could have on trial proceedings. [Public broadcast] has the potential to undermine the fundamental rights of citizens to a fair trial. It could jeopardize court security and the safety of trial participants, including judges, U.S. attorneys, trial counsel, U.S. marshals, court reporters, and courtroom deputies. The use of cameras in the trial courts could also raise privacy concerns and produce intimidating effects on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding.
>
> * * *
>
> Because cameras in trial courts could profoundly and negatively impact the trial process, the Judicial Conference strongly opposes any legislation that would allow the use of cameras in the United States district courts.

Cameras in the Courtroom: The "Sunshine in the Courtroom Act of 2007," H.R. 2128: Hr'g Before the H. Comm. on the Judiciary, 110th Cong. (Sept. 27, 2007) (statement of The Honorable John R. Tunheim, Judge, United States District Court for the District of Minnesota and Chair of the Court Administration and Case Management Committee of the Judicial Conference), *available at* http://www.uscourts.gov/testimony/ Tunheim_cameras092707.pdf.

2. The Position of the Ninth Circuit Judicial Council

Shortly after the Judicial Conference of the United States adopted its policy against the broadcast of federal district court proceedings, the Judicial Council of the Ninth Circuit followed suit, "vot[ing] to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in courtrooms on May 24, 1996." *See* Resolution 1: Instituting a Circuit Rule Permitting Photographing, Recording and Broadcasting in Non-Jury, Civil Cases Before the District Courts at 1 (copy submitted to the Judicial Conference of the United States on May 7, 2009) (attached as part of Exhibit A) at 3.

In July 2007, the Ninth Circuit Judicial Conference adopted a resolution recommending that the Judicial Conference of the United States change its policy to permit the broadcast of civil, non-jury trials. *Id*. at 2. The Ninth Circuit Judicial Conference also recommended that, "to the extent permitted by Judicial Conference [of the United States] procedures, this Circuit should adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit." *Id*. Despite these recommendations, no action was taken by the Ninth Circuit Judicial Council for nearly two years.

Finally, in May 2009, the Ninth Circuit Judicial Council forwarded the recommendation to the Judicial Conference of the United States. *See* Letter from Cathy A. Catterson to The Honorable John R. Tunheim (May 7, 2009) (attached as Exhibit A at 1). During the interim, "[t]he Ninth Circuit Judicial Council [had] considered the resolution at a number of meetings following the 2007 Judicial Conference but deferred action to await possible developments at the national level." *Id*. For reasons left unstated, the Ninth Circuit Judicial Council decided in May 2009 "that it is appropriate to forward the resolution now and ask that it [be] considered by [the Committee of the Judicial Conference of the United States on Court Administration and Case Management] at its June meeting." *Id*.

As noted above, the Judicial Conference of the United States has not retreated from its policy against the use of cameras in federal district court proceedings. Indeed, as recently as July 2009, the Judicial Conference of the United States strongly reiterated its concern about cameras in the courtroom in a letter to Congress. The Conference again stressed that "[t]he Federal Judiciary is . . . very concerned that the effect of cameras in the courtroom on participants would be to impact negatively on the trial process and thereby interfere with a fair trial." Letter from

James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Among many other concerns, the Judicial Conference again emphasized its considered judgment that "[t]elevision cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast." *Id*.

On December 17, 2009, the Ninth Circuit issued a press release announcing that the Ninth Circuit Judicial Council "has approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit." *See* News Release, Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts, *available at* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf. The press release provided no details as to how the program will be implemented other than to state that "[c]ases to be considered for the pilot program will be selected by the chief judge of the district court in consultation with the chief circuit judge." *Id*. Nor has the Ninth Circuit adopted a Circuit Rule allowing the broadcast of non-jury civil trials as recommended by the 2007 Ninth Circuit Judicial Conference resolution. According to the Office of the Circuit Executive (the contact listed on the press release), there is no resolution, order, or other publicly available information setting forth the policies and procedures that will govern the new pilot program. Nor has the Ninth Circuit Judicial Council taken any action to abrogate this Court's Local Rule 77-3. And it has not yet provided notice and the opportunity to comment concerning the program.

In these circumstances, it is clear that this Court's Local Rule 77-3 "has the force of law," *Weil v. Neary*, 278 U.S. 160, 169 (1929), and therefore remains binding on this Court. *See, e.g.*, *United States v. Yonkers Bd. of Education*, 747 F.2d 111, 112 (2d Cir. 1984) ("So long as [local rule prohibiting television broadcasting of judicial proceedings] do[es] not conflict with rules prescribed by the Supreme Court, congressional enactments, or constitutional provisions, [it has] the force of law. Accordingly, [such local rule is] binding on the district judges until properly amended or repealed.") (citations omitted); *United States v. Hastings*, 695 F.2d 1278, 1279 nn.4-5 (11th Cir. 1983) (district court "was bound by" local rule "prohibit[ing] television cameras in the courtroom").

This Court is, of course, authorized to amend its local rules, but Congress has provided by law that "[a]ny rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b); *see also* FED. R. CIV. P. 83(a)(1) ("After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice."). This Court's own rules are to the same effect. *See* Local Rule 83-1 ("The local rules of this Court may be modified or amended by a majority vote of the active Judges of the Court in accordance with the procedures set forth in this rule."); Local Rule 83-3(a) ("Before becoming effective, any proposed substantive modification of the local

rules shall be subject to public comment in accordance with FRCivP 83."). This Court must also first "appoint an advisory committee for the study of the rules of practice … of such court," which "shall make recommendations to the court concerning such rules." 28 U.S.C. § 2077(b); *see also* Local Rule 83-1 ("Any proposed substantive modification or amendment of these local rules must be submitted to a Local Rules Advisory Committee for its review ….").

The circuit judicial council is authorized to modify or abrogate a district court's local rules. *See* 28 U.S.C. § 2071(c)(1); FED. R. CIV. P. 83(a)(1). But its authority to do so is limited in two significant respects. First, the Judicial Council is authorized to abrogate this Court's rules *only* if the Council determines that the rule is "inconsistent" with the Federal Rules of Civil Procedure. Congress has specified that "[e]ach judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title [i.e., the Federal Rules]. Each council may modify or abrogate any such rule found inconsistent in the course of such a review." 28 U.S.C. § 332(d)(4). Obviously, this Court's Local Rule 77-3 is entirely consistent with the Federal Rules – indeed, it adopts and applies the policy adopted by the Judicial Conference of the United States.

Second, even if the Ninth Circuit Judicial Council had the substantive authority to abrogate this Court's Local Rule 77-3, Congress has prescribed specific procedures that must be followed:

> Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public.

28 U.S.C. § 332(d)(1); *see also In re Sony BMG Music Entertainment*, 564 F.3d 1, 8 (1st Cir. 2009) (holding that notice and opportunity to comment are not required when circuit judicial council review did not result in resolution "to modify or abrogate any local rule but, rather, endorsed existing practice in the districts within the circuit").

Because none of these procedures has been followed (indeed, the Ninth Circuit Judicial Council has not as yet even purported to abrogate Local Rule 77-3), the Local Rule remains in force and binding on this Court. In similar circumstances, the First Circuit recently issued a writ of mandamus overturning an order entered by the District Court of Massachusetts permitting a webcast of a trial. *See In re Sony BMG Music Entertainment*, 564 F.3d 1 (1st Cir. 2009). As in this case, the governing Local Rule barred the broadcast. *See id.* at 10 (reprinting rule). The trial court had sought to read into the text discretionary authority to deviate from the rule, but the

First Circuit rejected that effort. In so holding, the Court of Appeals emphasized the importance of the policy adopted by the Judicial Conference of the United States based on its conclusion that " 'the intimidating effect of cameras' in the courtroom presented 'cause for concern.' " *Id*. at 7 (quoting JCUS-SEP 94, p. 46, *available at* http://www.uscourts.gov/judconf/94-Sep.pdf). The First Circuit held that "the Judicial Conference's unequivocal stance against the broadcasting of civil proceedings (save for those few exceptions specifically noted in the policy itself), is entitled to substantial weight." *Id*. The Court stressed its belief that "the district court, institutionally, would construe its rule to avoid a head-on clash with the national standard." *Id*.[1] *See also In re Complaint Against District Judge Billy Joe McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.) (finding that district court judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" by permitting live broadcast of a civil trial with the agreement of the parties).

3. The Judicial Conference's Fair Trial Concerns Apply With Great Force in This Case

Publicly televising the proceedings in this case would give rise to the Judicial Conference's consistent and oft-repeated concerns "that the effect of cameras in the courtroom on participants would be to impact negatively the trial process and thereby interfere with a fair trial." Letter from James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Most importantly, given the highly contentious and politicized nature of Proposition 8 and the issue of same-sex marriage in general, the possibility of compromised safety, witness intimidation, and/or harassment of trial participants is very real. Indeed, lead counsel for Plaintiffs has acknowledged that "widespread economic reprisals against financial supporters of . . . Proposition 8" resulted from public disclosure of the names of donors during the campaign. Doc #187-1 at 6-7.

And the record of other forms of harassment against Proposition 8 supporters is well documented. *See* Doc #s 187-1, 187-2 at ¶¶ 10-12; 187-9 at ¶¶ 6-8; 187-9 at 12-15; 187-11; 187-12 at ¶¶ 5-6; 187-13 at ¶ 8; *see also* Thomas M Messner, *The Price of Prop 8*, The Heritage Foundation, *available at* www.heritage.org/Research/Family/bg2328.cfm ("expressions of support for Prop 8 have generated a range of hostilities and harms that includes harassment, intimidation, vandalism, racial scapegoating, blacklisting, loss of employment, economic hardships, angry protests, violence, at least one death threat, and gross expressions of anti-

[1] The *Sony* Court also found support in the 1996 resolution of the First Circuit Judicial Council embracing the position taken by the Judicial Conference. *See Sony BMG*, 564 F.3d at 7-8. The Ninth Circuit Judicial Council adopted a similar resolution in 1996, and has not as yet issued an order or resolution formally rescinding it, though the December 17 press release does indicate that the Council has taken a different stance. As demonstrated above, the press release standing alone is insufficient to override this Court's Local Rule and the policy adopted by the Judicial Conference of the United States.

religious bigotry"). This campaign of harassment and reprisal has often been "targeted and coordinated," *id.*, and the retaliation has often been quite serious. *See, e.g.*, Doc # 187-11 at 81 (Brad Stone, Disclosure, Magnified on the Web, N.Y. Times (Feb. 8, 2009) ("Some donors to groups supporting the measure have received death threats and envelopes containing a powdery white substance….").

Relatedly, as the Judicial Conference has emphasized, televising the trial would impinge upon the privacy interests of witnesses, "some of whom are only tangentially related to the case, but about whom very personal and identifying information might be revealed." Letter from James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Already, one website "takes the names and ZIP codes of people who donated to the ballot measure … and overlays the data on a Google map." Doc # 187-11 at 81. Another website was set up with the name, hometown, home phone numbers, workplace, workplace contact information, and pictures of Prop 8 supporters so that "whenever someone Googles them this [website] will come up." *Id*. at 55, 62, 65-66, 73, 77.

With this background, it is not surprising that potential witnesses have already expressed to Proponents' counsel their great distress at the prospect of having their testimony televised. Indeed, some potential witnesses have indicated that they will not be willing to testify at all if the trial is broadcast or webcast beyond the courthouse.

Finally, permitting the recording and broadcast of these proceedings over Proponents' objections would be particularly unfair in view of the fact that the governing rules unequivocally forbade cameras in the courtroom at the time Proponents voluntarily intervened in this case.

For these reasons, Proponents must respectfully object to any departure from this Court's Rule 77-3 and the policy of the Judicial Conference of the United States.

Sincerely,

/s/ Charles J. Cooper

Charles J. Cooper
Counsel for Defendant-Intervenors

EXHIBIT A

JUDICIAL COUNCIL OF THE NINTH CIRCUIT
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
James R. Browning United States Courthouse
95 Seventh Street
San Francisco, California 94103

Cathy A. Catterson
Circuit & Court of Appeals Executive

(415) 355-8299

May 7, 2009

Honorable John R. Tunheim
Chair
U.S. Judicial Conference Committee on
Court Administration & Case Management
13E United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Re: ***Cameras in the Courtroom***

Dear Judge Tunheim:

I write on behalf of the Judicial Council of the Ninth Circuit to ask that the Committee on Court Administration and Case Management consider the resolution approved at the July 2007 Ninth Circuit Judicial Conference recommending that the Judicial Conference of the United States (JCUS) change its policy "to permit photographing, recording and broadcasting non-jury, civil cases before the district courts." The Ninth Circuit Judicial Council considered the resolution at a number of meetings following the 2007 Conference but deferred action to await possible developments at the national level. The Council recently concluded that it is appropriate to forward the resolution now and ask that it considered by your Committee at its June meeting.

Enclosed please find the materials that were considered by the Judicial Council. Please let me know if you have any questions or wish to receive any additional materials. Thank you.

Sincerely,

Cathy A. Catterson

c: Ninth Circuit Judicial Council

2007 Ninth Circuit Judicial Conference

RESOLUTION

Recommending a change to the Judicial Conference of the United States' policy to permit photographing, recording and broadcasting non-jury, civil cases before the district courts.

Should the Ninth Circuit encourage the Judicial Conference of the United States to reconsider its position and permit circuits to adopt a rule allowing photographing, recording, and broadcasting non-jury, civil proceedings before the District Courts?

Judges			**Lawyers**			**Overall**		
Yes	*No*	*No Vote*	*Yes*	*No*	*No Vote*	*Yes*	*No*	*No Vote*
90	63	0	81	33	0	171	96	0

RESOLUTION 1

INSTITUTING A CIRCUIT RULE PERMITTING PHOTOGRAPHING, RECORDING AND BROACASTING IN NON-JURY, CIVIL CASES BEFORE THE DISTRICT COURTS

WHEREAS, a study conducted by the Federal Judicial Center from July 1, 1991, to June 30, 1993, using the guidelines approved by the Judicial Conference of the United States, resulted in a recommendation that district judges be allowed to permit photographing, recording, and broadcasting of civil proceedings consistent with those guidelines; and

WHEREAS, the Judicial Conference of the United States has authorized each court of appeal to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments since 1996, but specifically urged each circuit judicial council to adopt an order to prohibit such electronic coverage in the United States District Courts; and

WHEREAS, the Judicial Council of the Ninth Circuit voted to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in courtrooms on May 24, 1996; and

WHEREAS, the Chief Judge of the Ninth Circuit issued an Order in June 1996 to allow photographing, recording and broadcasting in its appellate courtrooms, subject to the discretion of the presiding judges, and under guidelines approved by the Judicial Conference of the United States, but specifically prohibited similar electronic coverage in the United States District Courts; and

WHEREAS, Ninth Circuit panels have permitted electronic coverage more than 130 times between 1991 and 2005 in appellate proceedings; and

WHEREAS, an overwhelming majority of the Ninth Circuit judges who have allowed photographing, recording and broadcasting of their proceedings have had a positive experience with such coverage; and

WHEREAS, significant technological advances have been made to allow electronic coverage of courtroom proceedings with minimally invasive equipment since the Ninth Circuit last considered whether to permit electronic coverage in the United States District Courts; and

WHEREAS, it is recognized that providing the public with greater access to the working of the courts through electronic coverage of civil court proceedings would promote greater public understanding of the role and function of the federal judiciary; and

WHEREAS, the Lawyer Representatives Coordinating Committee ("LRCC") supports a rule that would permit the photographing, recording and broadcasting of non-jury, civil proceedings before the District Courts of the Ninth Circuit, subject to the discretion of the presiding judge and under guidelines similar to those approved by the Judicial Conference.

Now, therefore, be it **RESOLVED:**

1) The Ninth Circuit should encourage the Judicial Conference of the United States to reconsider its prior position concerning the photographing, recording, and broadcasting of non-jury, civil proceedings before District Courts, and to the extent permitted by Judicial Conference procedures, this Circuit should adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit.

2) The proposed Rule would apply guidelines consistent with those already in place and used by the Ninth Circuit in its appellate proceedings.

3) Before the next Circuit Conference, a committee should be appointed by the Chief Judge of the Ninth Circuit to prepare a presentation to the Judicial Conference of the United States setting forth this position and recommendation for change.

EXHIBIT B

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

July 23, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Sessions:

The Judicial Conference of the United States strongly opposes the "Sunshine in the Courtroom Act of 2009," S. 657 (111th Cong.), because it provides for the use of cameras in federal trial court proceedings. Cameras can affect behavior in court proceedings. Cameras can even affect whether a case goes to trial. Cameras can also affect courtroom security of judges, witnesses, employees, and U.S. marshals. This is of particular concern in light of recent increased threats to federal judges. The Judicial Conference believes that these and other negative affects of cameras in trial court proceedings far outweigh any potential benefit. The Judicial Conference also opposes the legislation because it would empower any appellate court panel to permit cameras in their courtroom rather than retain that power within the management of each circuit.

The Judicial Conference bases its policy and opposition to the use of cameras in the federal trial court proceedings on decades of experience and study. The Conference considered the issue in a number of different situations and contexts – including a pilot project – and concluded that the presence of cameras in federal trial court proceedings is not in the best interest of justice. Federal judges must preserve each citizen's right to a fair and impartial trial. Of course, federal trials have long been open to the media and public. But it is the studied judgment of the Judicial Conference that cameras can

interfere with a fair and impartial trial. Thus, the use of cameras in trial courts would differ substantially from the impact of their use in legislative, administrative, or ceremonial proceedings.

Cameras can interfere with a fair trial in numerous ways. First, broadcasting proceedings can affect the way trial participants behave. Television cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast.

Second, and similarly, camera coverage can create privacy concerns for many individuals involved in the trial, such as witnesses and victims, some of whom are only tangentially related to the case but about whom very personal and identifying information might be revealed. For example, efforts to discredit a witness frequently involve the revelation of embarrassing personal information. Disclosing embarrassing facts or accusations in a courtroom already creates challenges in court proceedings. Those challenges would be multiplied enormously if that information were aired on television with the additional possibility of taping and replication. This concern can have a material effect on a witness's testimony or on his or her willingness to testify at all.

Third, and as a consequence of the aforementioned points, camera coverage could also become a potent negotiating tactic in pretrial settlement discussions. Parties may choose not to exercise their right to trial because of concerns regarding possible camera coverage. Thus, allowing cameras could cause a "chilling effect" on civil rights litigation; plaintiffs who have suffered sex or age discrimination may simply decide not to file suit if they learn that they may have to relive the incident and have that description broadcast to the public at large. Or, parties litigating over medical issues may not wish to reveal their personal medical history and conditions to a broad audience.

Fourth, the presence of cameras in a trial court will encourage some participants to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera. Such grandstanding is disruptive to the proceedings and can delay the trial.

The Federal Judiciary is therefore very concerned that the effect of cameras in the courtroom on participants would be to impact negatively the trial process and thereby interfere with a fair trial.

In addition to affecting the fairness of a trial, the presence of cameras in a trial courtroom also increases security and safety issues. Broadcasting the images of judges and court employees, such as court reporters, courtroom deputies, and law clerks, makes them more easily identified as targets by those who would attempt to influence the outcome of the matter or exact retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level. Cameras create similar security concerns for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

Finally, regarding the courts of appeals, in 1996 the Judicial Conference adopted the position that each circuit may decide for itself whether to permit photographic, radio, and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt. This policy ensures consistency within each circuit. The Sunshine in the Courtroom Act of 2009 would allow panels within the circuits to determine whether cameras will be allowed at their proceedings, rather than leaving the initial decision to the circuit's management. This will result in differing treatment of litigants within each circuit. Currently, the circuit-wide policies avoid piecemeal and ad hoc resolutions of the issue among the various panels convened within a court of appeals, and that approach is therefore better than the proposed legislative change.

* * *

For the foregoing reasons, the Judicial Conference of the United States strongly opposes legislation that allows the use of cameras in federal trial court proceedings and permits individual panels to use of cameras in all courts of appeals instead of deferring to each circuit's rules on such use.

Thank you for the opportunity to provide the position of the Judicial Conference on this legislation. The legislation raises issues of vital importance to the Judiciary. If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,

James C. Duff
Secretary

cc: Members, Senate Judiciary Committee

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 12, 1996

The Judicial Conference of the United States convened in Washington, D.C., on March 12, 1996, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Juan R. Torruella
Chief Judge Joseph L. Tauro,
District of Massachusetts

Second Circuit:

Chief Judge Jon O. Newman
Chief Judge Peter C. Dorsey,
District of Connecticut

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge Edward N. Cahn,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge J. Harvie Wilkinson, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge William H. Barbour,
Southern District of Mississippi

CAMERAS IN THE COURTROOM

The Judicial Conference agreed to authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt. The Conference further agreed to—

a. Strongly urge each circuit judicial council to adopt an order reflecting the Judicial Conference's decision to authorize the taking of photographs and radio and television coverage of court proceedings in the United States courts of appeals; and

b. Strongly urge each circuit judicial council to adopt an order pursuant to 28 U.S.C. § 332 (d)(1), reflecting the September 1994 decision of the Judicial Conference (JCUS-SEP 94, pp. 46-47) not to permit the taking of photographs and radio and television coverage of court proceedings in the United States district courts. In addition, the Judicial Conference agreed to strongly urge the judicial councils to abrogate any local rules of court that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

COMMITTEE ON CRIMINAL LAW

UNIVERSAL PRETRIAL DRUG TESTING

In December 1995, President Clinton directed the Attorney General to develop a "...universal policy providing for drug testing of all federal arrestees before decisions are made on whether to release them into the community pending trial." In February 1996, the Attorney General submitted a pretrial drug testing proposal to the Executive Committee, which referred the matter to the Committee on Criminal Law for recommendation to the March Judicial Conference. Reporting on the proposal to the Conference, the Criminal Law Committee recommended that the issue be referred back to that Committee. The Judicial Conference voted to refer the Attorney General's proposal regarding universal pretrial drug testing to the Criminal Law Committee for expeditious consideration and report to the Executive Committee, which is authorized to act on the matter on behalf of the Conference.

Exhibit 16

Cooper & Kirk
Lawyers
A Professional Limited Liability Company

Charles J. Cooper
ccooper@cooperkirk.com

1523 New Hampshire Avenue NW
Washington, D.C. 20036

(202) 220-9600
Fax (202) 220-9601

December 29, 2009

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors ("Proponents") to supplement my letter of yesterday (Doc. No. 324), regarding the Media Coalition's request to televise the proceedings in this case beyond the confines of the courthouse.

In yesterday's letter, we stated that broadcast or webcast of the trial proceedings in this case outside the confines of the courthouse would violate this Court's Local Rule 77-3. We have today discovered that this Court posted a Notice on its website dated December 23, 2009, that purports to amend Local Rule 77-3, effective December 22, 2009, to create an exception that would permit a judge to allow photographic or video depiction of the trial proceedings "for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit." *See Notice Concerning Revisions of Civil Local Rule 77-3, at* http://www.cand.uscourts.gov/CAND/FAQ.nsf/60126b66e42d004888256d4e007bce29/1922d32e34847a5588257695007f5f75?OpenDocument. We apologize for any inconvenience to the Court or to Plaintiffs arising from our failure to discover this new notice prior to submission of yesterday's letter.

It does not appear that the Court provided an opportunity for the public to comment on this purported amendment of Local Rule 77-3; nor does the December 23 notice indicate that the amendment was submitted to the Court's advisory committee for review between the time of the Ninth Circuit's press release on December 17 and the effective date of the amendment, December 22. As indicated in yesterday's letter, the Court may amend a local rule "only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b); *see also* FED. R. CIV. P. 83(a)(1); Local Rule 83-3(a). Moreover, Congress has directed the Court to

"appoint an advisory committee for the study of the rules of practice … of such court," which "shall make recommendations to the court concerning such rules," 28 U.S.C. § 2077(b), and this Court's rules state that "[a]ny proposed substantive modification or amendment of these local rules must be submitted to a Local Rules Advisory Committee for review, except that amendments for form, style, grammar or consistency may be made without submission to an advisory committee." Local Rule 83-1. Because the Court did not provide notice of the amendment prior to its effective date, did not provide an opportunity for comment, and does not indicate that it submitted the proposed amendment to an advisory committee for review, we respectfully submit that the amendment cannot properly authorize the broadcast or webcast of proceedings in this case.

For these reasons, and for the other reasons stated in yesterday's letter, Proponents must respectfully object to any departure from this Court's preexisting Rule 77-3 and the policy of the Judicial Conference of the United States.

Sincerely,

/s/ Charles J. Cooper

Charles J. Cooper
Counsel for Defendant-Intervenors

Exhibit 17

Public Notice

Subject:
Notice Concerning Proposed Revision of Civil Local Rule 77-3

Contact:

Date Posted:
12/31/2009

The United States District Court for the Northern District of California has approved for public comment a revision of Civil Local Rule 77-3.

77-3. Photography and Public Broadcasting.Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambersor assigned courtroom for ceremonial purposes or for participation in a pilot or other projectauthorized by the Judicial Council of the Ninth Circuit, the taking of photographs, publicbroadcasting or televising, or recording for those purposes in the courtroom or its environs, inconnection with any judicial proceeding, is prohibited. Electronic transmittal of courtroomproceedings and presentation of evidence within the confines of the courthouse is permitted, ifauthorized by the Judge or Magistrate Judge. The term “environs,” as used in this rule, means allfloors on which chambers, courtrooms or on which Offices of the Clerk are located, with theexception of any space specifically designated as a Press Room. Nothing in this rule is intendedto restrict the use of electronic means to receive or present evidence during Court proceedings.

File for Download:
File Type: Adobe Acrobat

Notice-12-09A.pdf

File Size: 36 KBytes

NOTICE CONCERNING PROPOSED REVISION OF CIVIL LOCAL RULE 77-3

The United States District Court for the Northern District of California has approved for public comment a revision of Civil Local Rule 77-3.

A copy of the revised rule appears below.

All comments and suggestions regarding the content of the revised rule should be sent as soon as convenient and, in any event, no later than January 8, 2010 to the following:

Hon. Phyllis Hamilton
Chair of the Rules Committee
United States Courthouse
1301 Clay Street
Oakland, CA 94612

Hon. Vaughn Walker
Chief Judge
United States Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

77-3. Photography and Public Broadcasting.

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

Exhibit 18

Cooper & Kirk
Lawyers
A Professional Limited Liability Company
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Charles J. Cooper
ccooper@cooperkirk.com

(202) 220-9600
Fax (202) 220-9601

January 4, 2009

The Honorable Vaughn R. Walker
Chief Judge of the United States District Court
for the Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger, et al.*, N.D. Cal. Case No. C-09-2292 VRW

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors and in response to the Court's order dated December 30, 2009. The order states that "the court is considering seeking approval from Chief Judge Kozinski to record or webcast the January 6 hearing" concerning the issue of whether to televise further proceedings in this case. Doc # 332 at 2. For the reasons previously submitted to the Court, *see* Doc #s 218, 324, 326, Defendant-Intervenors respectfully object to the recording or webcasting of the January 6 hearing. Moreover, the Court's December 30 order cites as authority "the … amendment of Civil LR 77-3." Doc # 332 at 2. During the afternoon of December 31, however, notice of the amendment was removed from the Court's website. In its place was posted a "Notice Concerning Proposed Revision of Civil Local Rule 77-3." Accordingly, it appears that, as of today, this Court's current Local Rules still prohibit the recording or public broadcast of proceedings in the courthouse. Defendant-Intervenors thus respectfully submit that the Court is obliged to abide by this prohibition.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Counsel for Defendant-Intervenors

Cc: Counsel of Record

Exhibit 19

Text Only Site Map

ADR
CALENDARS
CJA
ECF-PACER
EMPLOYMENT
FAQS
FOR ATTORNEYS
FORMS
JUDGES
JURY
LINKS
PHONE LIST
OPINIONS
RULES

Local Rules
General Orders
Media Info

United States District Court
Northern District of California

Vaughn R. Walker, Chief Judge..... .....Richard W. Wieking, Clerk of Court

PUBLIC ANNOUNCEMENTS

CASES

Perry v. Schwarzenegger - C09-2292 VRW (Challenge to Proposition 8)
FTC v. Pricewert LLC dba 3fn.net, et al. C09-2407 RMW
USA v. Bonds 3:07-cr-00732
Plata/Coleman v. Schwarzenegger (Prison Overcrowding)
Bextra and Celebrex

RULES & ORDERS

Notice Concerning Revision of Civil Local Rule 77-3
Local Rules Changes - Effective 12/01/09
Revised General Order 56
Notice Concerning Revisions of Civil Local Rule, 3-2 and 5-1
Standing Order for All Judges of the Northern District of California Effective 3/1/07

CLERK'S NOTICES

Job Announcement - Deputy Chief Pretrial Services Officer (Type II)
Revised Forms 12/09: Bill of Costs, Summons in a Civil Action and Summons on Third-Party Complaint
San Jose Help Desk Revised RFP: Grant Amount $75,000
Announcement re Reappointment of Magistrate Judge Howard R. Lloyd
Media Conference: New Media in the Courtroom, November 4, 2009
Notice re: Judge Hamilton's Relocation to Oakland
Clerk's Office Now Accepting Payments By Credit Card
New Federal Magistrate Judge Appointments
Notice Concerning Relocation of Judges
Judicial Misconduct and Disability

GENERAL NOTICES

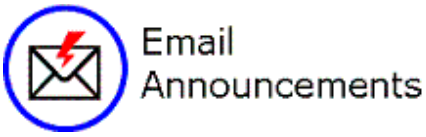
RFQ Audio / Video Recording Project - Due January 5, 2010
RFQ for Mailing Juror Questionnaires for fiscal year 2010 - Due January 8, 2010
Submitting Matters to the ADR Magistrate Judge
Notice Regarding Surveys Sent from this Court
Pro Bono Project Guidelines
Legal Help Center Open to Assist *Pro Se* Litigants
Pro Se Handbook - Now in Spanish & Chinese Translations
Courtroom Technology Upgrades
Teleconferencing Guidelines

Please drop us an email at:

COURT xxxINFORMATIONxxx

- Address & Jurisdiction
- Accessibility
- ADR Magistrate Judge
- Attorney Lounge
- Attorney Status
- California state site
- Current Interest
- Electronic Case Filing
- Federal Judiciary
- Extern Application
- Fee Schedule
- Filing Guidelines
- FirstGov Website
- Getting Docket Info
- Historical Society
- Magistrate Judge Profiles
- Seminars Disclosure
- Library of Congress
- Local Rules
- Naturalization
- Practice Program
- Pro Se Handbook
- T-bill Rate for Judgment

Web-CAND@cand.uscourts.gov



NOTICE CONCERNING REVISION OF CIVIL LOCAL RULE 77-3

The United States District Court for the Northern District of California Court has approved a revision of Civil Local Rule 77-3, effective December 22, 2009.

77-3. Photography and Public Broadcasting.

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

The revised rule was adopted pursuant to the "immediate need" provision of Title 28 U.S.C. Sec. 2071(e). All comments and suggestions regarding the content of the revised rule should be sent as soon as convenient and, in any event, no later than January 8, 2010 to:

Hon. Phyllis Hamilton
Chair of the Rules Committee
United States Courthouse
1301 Clay Street
Oakland, CA 94612

Hon. Vaughn Walker
Chief Judge
United States Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Exhibit 20

available at: www.uscourts.gov/testimony/Tunheim_cameras092707.pdf

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE JOHN R. TUNHEIM

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FOR THE
COMMITTEE ON THE JUDICIARY
OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON CAMERAS IN THE COURTROOM:
THE "SUNSHINE IN THE COURTROOM ACT OF 2007," H.R. 2128

September 27, 2007

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700.

SUMMARY OF STATEMENT OF JUDGE TUNHEIM
ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
September 27, 2007

The Judicial Conference of the United States strongly opposes H.R. 2128 to the extent that it allows the use of cameras in the federal trial courts. The Conference also opposes the bill's provisions permitting each appellate panel to decide whether to allow cameras, believing instead that the existing Conference policy – which requires that decision to be made by the entire court of appeals – is appropriate.

This opposition is not based on a knee-jerk reaction against increased publicity for the federal courts. In fact, the Federal Judiciary is arguably one of the most publicly accessible government institutions. Nearly every hearing, trial, appellate argument, filing, decision, and opinion is open and available to the public. And, over the past decade, the Judicial Conference has dramatically expanded that openness by making its entire filing system electronically available to the public through the Internet. This major initiative has put the Judiciary at the forefront of public access.

The Judicial Conference position is based on a thoughtful and reasoned concern regarding the impact cameras could have on trial proceedings. This legislation has the potential to undermine the fundamental right of citizens to a fair trial. It could jeopardize court security and the safety of trial participants, including judges, U.S. attorneys, trial counsel, U.S. marshals, court reporters, and courtroom deputies. The use of cameras in the trial courts could also raise privacy concerns and produce intimidating effects on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding. In addition, appearing on television could lead some trial participants to act more dramatically, to pontificate about their personal views, to promote commercial interests to a national audience, or to increase their courtroom actions so as to lengthen their appearance on camera. Finally, camera coverage could become a negotiating tactic in pretrial settlement discussions or cause parties to choose not to exercise their right to have a trial.

Unlike congressional hearings or sessions, a courtroom trial takes place to determine individuals' rights and to administer justice. Private livelihoods, property, and even personal liberty and human life itself are among the crucial matters at stake. The right to have these matters decided in a fair and impartial trial sets the court proceedings apart from the oft-televised legislative, administrative, or ceremonial proceedings.

The paramount question in determining whether cameras should be used in federal courts should not be whether more openness would be enjoyed by the public and media. Virtually all court proceedings are public and open today with very limited exceptions (such as of those related to juveniles). Rather, the Judicial Conference believes the question is whether the presence of cameras has the potential to deprive citizens of their ability to have a claim or right fairly resolved in United States district courts. Although

the legislation gives the presiding judge the discretion to deny the use of cameras, the potential for compromising a citizen's right to a fair trial may not become evident until a televised trial is underway. Therefore, the Conference has taken the position that any perceived benefit from allowing cameras is outweighed by the potential for harm to an individual involved in the litigation process.

Because cameras in the trial courts could profoundly and negatively impact the trial process, the Judicial Conference strongly opposes any legislation that would allow the use of cameras in the United States district courts.

STATEMENT OF JUDGE JOHN R. TUNHEIM
ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
September 27, 2007

Mr. Chairman and Members of the Committee, my name is John R. Tunheim. I am a United States District Judge in the District of Minnesota and Chair of the Court Administration and Case Management Committee of the Judicial Conference. I have been asked to testify today on behalf of the Judicial Conference regarding the issue of cameras in the courtroom and the pending legislation, H.R. 2128, the "Sunshine in the Courtroom Act of 2007." As a preliminary point, I want to emphasize that the Judicial Conference does not speak for the Supreme Court regarding the bill's application to that Court.

The Judicial Conference strongly opposes H.R. 2128 to the extent that it allows the use of cameras in the federal trial courts. The Conference also opposes the bill's provisions allowing the use of cameras by any panel in all courts of appeals, rather than allowing that decision to be made by each court of appeals as a whole, which is the present practice.

I. Background

The Federal Judiciary has reviewed the issue of whether cameras should be permitted in the federal courts for more than six decades, both in case law and through Judicial Conference consideration. The Judicial Conference, in its role as the policy-making body for the Federal Judiciary, has consistently expressed the view that camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial. The Conference believes that the intimidating effect of cameras on litigants, witnesses, and

jurors has a profoundly negative impact on the trial process. In both civil and criminal cases, cameras can intimidate defendants who, regardless of the merits of the case, might prefer to settle or plead guilty rather than risk damaging accusations in a televised trial. Cameras can also create security and privacy concerns for many individuals, many of whom are not even parties to the case, but about whom very personal information may be revealed at trial.

These concerns are far from hypothetical. Since the infancy of motion pictures, cameras have had the potential to create a spectacle around trial court proceedings. Examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnaping trial, the murder trial in 1954 of Dr. Sam Sheppard, the Menendez brothers and O.J. Simpson trials, as well as the more recent hearings relating to the death of Anna Nicole Smith. We have avoided such incidences in the federal courts due to the long-standing bar of cameras in the trial courts, which H.R. 2128 now proposes to overturn.

I want to emphasize that our opposition to this legislation is not based on a knee-jerk reaction against new technologies. In fact, the federal courts have shown strong leadership in the continuing effort to modernize the litigation process. This has been particularly true of the Judiciary's willingness to embrace new technologies, such as electronic case filing and access to court files, videoconferencing, and electronic evidence presentation systems. Indeed, some courts, such as the district court here in the District of Columbia, have set up special media rooms for high visibility trials, allowing reporters to provide continual and contemporaneous reports on the conduct of a trial to the public. In

addition, many of the appellate courts provide recordings of oral arguments on their web sites. And this policy to promote openness in the courtroom continues. For example, earlier this year, on the recommendation of the Committee that I chair, the Judicial Conference approved a pilot program to make digital audio recordings of proceedings in district and bankruptcy courts in which the official record is taken using digital recording devices available on the Internet. Our opposition to this legislation, therefore, is not, as some may suggest, based on a desire to stem technology or access to the courts. Rather, the Judicial Conference opposes the broadcasting of federal trial court proceedings because it believes it to be contrary to the interests of justice, which it is our most basic duty to uphold.

Today I will discuss some of the Judicial Conference's specific concerns with this legislation, as well as with the issues of cameras in the trial courtroom, generally. Before addressing those concerns, however, I would like to provide you with a brief history of the Conference's consideration of the cameras issue, which will demonstrate the time and effort it has devoted to understanding this issue over the years.

II. Background on Cameras in the Federal Courts

Whether to allow cameras in the courtroom is far from a novel question for the Federal Judiciary. Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that "the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of

judicial proceedings from the courtroom." And, in 1972, the Judicial Conference adopted a prohibition against "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto. . . ." The prohibition applied to both criminal and civil cases.

Since then, the Conference has, however, repeatedly studied and considered the issue. In 1988, Chief Justice Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended that a three-year experiment be established permitting camera coverage of certain proceedings in selected federal courts. In 1990, the Judicial Conference adopted this recommendation and authorized a three-year pilot program allowing electronic media coverage of civil proceedings in six district and two appellate courts, which commenced July 1, 1991.[1]

The Federal Judicial Center (FJC) conducted a study of the pilot project and submitted its results to a committee of the Judicial Conference. After reviewing the FJC's report, the Conference decided in September 1994 that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern in that it could impinge on a citizen's right to a fair and impartial trial. Therefore, the Conference concluded that it was not in the interest of justice to permit cameras in federal trial courts.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue and urged each circuit judicial council to adopt, pursuant to its

[1]The courts that volunteered to participate in the pilot project were the U.S. Courts of Appeals for the Second and Ninth Circuits, and the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of New York.

rulemaking authority set forth in 28 U.S.C. § 332(d)(1), an order reflecting the Conference's September 1994 decision not to permit the taking of photographs or radio and television coverage of proceedings in U.S. district courts. The Conference also voted strongly to urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

Interestingly, however, the Conference distinguished between camera coverage for appellate and district court proceedings. Because an appellate proceeding does not involve witnesses and juries, the concerns of the Conference regarding the impact of camera coverage on the litigation process were reduced. Therefore, the Conference in 1996 "agreed to authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt."

The current policy, as published by the Administrative Office of the U.S. Courts in the *Guide to Judiciary Policies and Procedures*, states:

> A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:
>
> (a) for the presentation of evidence;
> (b) for the perpetuation of the record of the proceedings;
> (c) for security purposes;
> (d) for other purposes of judicial administration; or

> (e) for the photographing, recording, or broadcasting of appellate arguments.
>
> When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will be consistent with the rights of the parties, will not unduly distract participants in the proceeding, and will not otherwise interfere with the administration of justice.

Guide, Vol. 1, Ch. 3, Part E. 3.

Presently, two of the 13 appellate courts, the Second and Ninth Circuits, have decided to permit camera coverage in appellate proceedings. This decision was made by the judges of each court. As for cameras in district courts, most circuit councils have either adopted resolutions prohibiting cameras in the district courts or have acknowledged that the district courts in that circuit already have such a prohibition.

Finally, it may be helpful to describe the state rules regarding cameras in the courtroom. While it is true that most states permit some use of cameras in their courts, such access by the media is not unlimited. The majority of states have imposed restrictions on the use of cameras in the court or have banned cameras altogether in certain proceedings. Although it is somewhat difficult to obtain current information, it appears that approximately 31 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as allowing coverage only in certain courts, prohibiting coverage of certain types of proceedings or of certain witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Thirteen states, including the District of Columbia, do not allow coverage of criminal trials. In

nine states, cameras are allowed only in appellate courts. The District of Columbia prohibits cameras altogether. Utah allows only still photography at civil trials. In fact, only 19 states appear to provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation. It is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the courtroom.

III. Judicial Conference Concerns Regarding H.R. 2128, As Applied to Trial Courts

I would now like to discuss some of the specific concerns the Judicial Conference has with H.R. 2128, as well as the more general issue of media coverage in trial courtrooms.

A. Cameras Have the Potential to Negatively Impact the Trial Process

Supporters of cameras in the courtroom assert that modern technology has made cameras and microphones much less obvious, intrusive or disruptive, and that therefore the Judiciary need not be concerned about their presence during proceedings. The Conference respectfully argues that this is not the paramount concern. While covert coverage may reduce the bright lights and tangle of wires that were made famous in the Simpson trial, it does nothing to reduce the significant and measurable negative impact that camera coverage can have on the trial participants themselves.

Proponents of cameras in the courtroom also argue that media coverage would benefit society because it would enable people to become more educated about the legal system and particular trials. The Judiciary strongly endorses educational outreach but

believes it could better be achieved through increased and targeted community outreach programs. The Judicial Conference also believes, however, that this increased public education should not interfere with the Judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases.

While judges are accustomed to balancing conflicting interests, weighing any potential "positive" effects of cameras against the degree of harm that this type of coverage could have on a particular proceeding would be difficult, if not impossible. This includes the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses, and even judges. For example, a witness telling facts to a jury will often act differently if he or she is aware that a television audience is watching and listening. Media coverage could exacerbate any number of human emotions in a witness from bravado and over-dramatization, to self-consciousness and under-reaction. These changes in a witness's demeanor could have a profound impact on a jury's ability to accurately assess the veracity of that witness. In fact, according to the FJC study (which is discussed in more detail later in this statement), 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous. In addition, 46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses. Such effects could severely compromise the ability of jurors to assess the veracity of a witness and, in turn, could prevent the court from being able to ensure that the trial is fair and impartial.

B. H.R. 2128 Inadequately Protects the Right to a Fair Trial

The primary goal of this legislation is to allow radio and television coverage of federal court cases. While there are several provisions aimed at limiting coverage (*i.e.,* allowing judges the discretion to allow or decline media coverage, authorizing the Judicial Conference to develop advisory guidelines regarding media coverage, requiring courts to disguise the face and voice of a witness upon his or her request, and barring the televising of jurors), the Conference is convinced that camera coverage could, in certain cases, so indelibly affect the dynamics of the trial process that it would impair a citizen's ability to receive a fair trial.

For example, Section 2(b)(1) and 2(b)(2) of the bill would allow the presiding judge to decide whether to allow cameras in a particular proceeding before that court. If this legislation were enacted, I am sure that all federal judges would use extreme care and judgment in making this determination. Nonetheless, we are not clairvoyants. Even the most straightforward, "run of the mill" cases have unforseen developments. Obviously a judge never knows how a lawyer will proceed or how a witness or party will testify. And these events can have a tremendous impact on the trial participants. Currently, courts have recourse to instruct the jury to disregard certain testimony or, in extreme situations, to declare a mistrial if the trial process is irreparably harmed. If camera coverage is allowed, however, witnesses or litigants may be tempted to speak to the larger television audience, and there is no opportunity to rescind these remarks. This concern is of such importance to the Conference that it opposes legislation that would give a judge

discretion to evaluate in advance whether television cameras should be permitted in particular cases.

The Judicial Conference is also concerned about the impact of the legislation on witnesses. Although the bill provides witnesses with the right to request that their faces and voices may be obscured, anyone who has been in court knows how defensive witnesses can be. Frequently, they have a right to be. Witnesses are summoned into court to be examined in public. Sometimes they are embarrassed or even humiliated. Providing them the choice of whether to testify in the open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community. It would not be in the interest of the administration of justice to unnecessarily increase the already existing pressures on witnesses.

These basic concerns regarding witnesses were eloquently described by Justice Clark in *Estes v. Texas,* 381 U.S. 532 (which I discuss more fully at the end of my statement):

> The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

Estes, 381 U.S. at 547. It is exactly these concerns that cause the Judicial Conference of

the United States to oppose enactment of H.R. 2128.

C. Threat of Camera Coverage Could be Used as a Trial Tactic

Cameras can provide a strong temptation for both attorneys and witnesses to state their cases in the court of public opinion rather than in a court of law. Therefore, allowing camera coverage would almost certainly become a potent negotiating tactic in pretrial settlement negotiations. For example, in a high-stakes case involving millions of dollars, the simple threat that the president of a defendant corporation could be forced to testify and be cross-examined, for the edification of the general public, might well be a real disincentive to the corporation in exercising its right to a public trial.

D. Cameras Can Create Security Concerns

Although the bill includes language allowing a witness to request that his or her image be obscured, the bill does not address security concerns or make similar provision regarding other participants in judicial proceedings. The presence of cameras in the trial courtroom is likely to heighten the level and the potential of threats to judges. The number of threats against judges has escalated over the years, and widespread media exposure could exacerbate the problem. Witnesses, jurors, and United States Marshals Service personnel might also be put at risk with this increased exposure and notoriety.

Finally, national and international camera coverage of trials, especially those relating to terrorism, could place federal courthouses and their occupants at greater risk and may require increased personnel and funding to adequately protect participants in such court proceedings.

E. Cameras Can Create Serious Privacy Concerns

There is a rising tide of concern among Americans regarding privacy rights and the Internet. Numerous bills have been introduced in both the Congress and state legislatures to protect the rights of individual citizens from the indiscriminate dissemination of personal information that once was, to use a phrase coined by the Supreme Court, hidden by "practical obscurity,"[2] but now is available to anyone at any time because of the advances of technology.

The Judiciary takes these concerns very seriously. In fact, the Committee that I chair, the Court Administration and Case Management Committee, has spent the last eight years ensuring that the Judiciary's electronic case files system provides adequate privacy safeguards to protect sensitive and personal information, such as Social Security numbers, financial account numbers, and the names of minor children from the general public, while at the same time providing the public with access to court files.

Broadcasting of trials presents many of the same concerns about privacy as does the indiscriminate dissemination of information on the Internet that was once only available at the courthouse. Witnesses and counsel frequently discuss very sensitive information during the course of a trial. Often this information relates to individuals who are not even parties to the case but about whom personal information may be revealed. The reality is that many of the trials the media would be interested in televising are those

[2]United States Department of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749, 764 (1989).

that involve testimony of an extremely private nature, revealing family relationships and personal facts, including medical and financial information. While this type of information is presented in open court, televising these matters could sensationalize and provide these details to a much larger audience, which again raises significant and legitimate privacy concerns.

Involvement in a federal case can have a deep and long-lasting impact on all its participants – parties to the case as well as witnesses – most of whom have neither asked for nor sought publicity. In this adversarial setting, reputations can be compromised and relationships can be damaged. In fact, according to the FJC study on live courtroom media coverage, 56% of the participating judges felt that electronic media coverage violates a witness's privacy. This is not to say that the Conference advocates closed trials; far from it. Nevertheless, there is a common-sense distinction between a public trial in a public courtroom – typically filled with individuals with a substantive interest in the case – and its elevation to an event that involves the wider television audience.

The issue of privacy rights is one that has not been adequately considered or addressed by those who would advocate the broadcasting of trials. This heightened awareness of and concern for privacy rights is a relatively new and important development that further supports the position of the Judicial Conference to prohibit the use of cameras in the courtroom.

F. H.R. 2128 Does Not Address the Complexities Associated with Camera Coverage in the Trial Courts

Televised coverage of a trial would have a significant impact on that trial process. Major policy implications as well as administration issues may arise, many of which are not addressed in the proposed legislation. For example, televising a trial makes certain court orders, such as the sequestration of witnesses, more difficult to enforce and could lead to tainted testimony from witnesses. In addition, more technical issues would have to be addressed, including advance notice to the media and trial participants, limitations on coverage and camera control, coverage of the jury box, and sound and light criteria.

Finally, I should note that H.R. 2128 includes no funding authorization for its implementation, and there is no guarantee that such funds would be appropriated. The costs associated with allowing cameras, however, could be significant, such as retrofitting courtrooms to incorporate cameras while minimizing their actual presence to the trial participants. Also, to ensure that a judge's orders regarding coverage of the trial were followed explicitly (*e.g.*, not filming the jury, obscuring the image and voice of certain witnesses, or blocking certain testimony), a court may need to purchase its own equipment, as well as hire technicians to operate it. Large courts might also feel compelled to create the position of media coordinator or court administrative liaison to administer and oversee an electronic media program on a day-to-day basis. Such liaison's duties might include receiving applications from the media and forwarding them to presiding judges, coordinating logistical arrangements with the media, and maintaining

administrative records of media coverage. Thus, the cost of this legislation could be significant.

G. There is No Constitutional Right to have Cameras in the Courtroom

Some have asserted that there is a constitutional "right" to bring cameras into the courtroom and that the First Amendment requires that court proceedings be open in this manner to the news media. The Judicial Conference responds to such assertions by stating that today, as in the past, federal court proceedings *are* open to the public; however, nothing in the First Amendment *requires* televised trials.

The seminal case on this issue is *Estes v. Texas,* 381 U.S. 532 (1965). In *Estes*, the Supreme Court directly faced the question of whether a defendant was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. The Court held that such broadcasting in that case violated the defendant's right to due process of law. At the same time, a majority of the Court's members addressed the media's right to telecast as relevant to determining whether due process required, in general, excluding cameras from the courtroom. Justice Clark's plurality opinion and Justice Harlan's concurrence indicated that the First Amendment did not extend the right to the news media to televise from the courtroom. Similarly, Chief Justice Warren's concurrence, joined by Justices Douglas and Goldberg, stated:

> [n]or does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. . . . So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgement of the freedom of press.

Estes, 381 U.S. at 584-85 (Warren, C.J., concurring).

In the case of *Westmoreland v. Columbia Broadcasting System Inc.*, 752 F.2d 16 (2d Cir. 1984), the Second Circuit was called upon to consider whether a cable news network had a right to televise a federal civil trial and whether the public had a right to view that trial. In that case, both parties had consented to the presence of television cameras in the courtroom under the close supervision of a willing court, but a facially applicable court rule prohibited the presence of such cameras. The Second Circuit denied the attempt to televise that trial, saying that no case has held that the public has a right to televised trials. As stated by the court, "[t]here is a long leap. . . between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history." *Westmoreland*, 752 F.2d at 23.

Similarly, in *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986), the court discussed whether the First Amendment encompasses a right to cameras in the courtroom, stating: "No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials. To the contrary, the Supreme Court has indicated that the First Amendment does not guarantee a positive right to televise or broadcast criminal trials." *Edwards*, 785 F.2d at 1295. The court went on to explain that while television coverage may not always be constitutionally prohibited, that is a far cry from suggesting that television coverage is ever constitutionally mandated.

These cases forcefully make the point that, while all trials are public, there is no

constitutional right of media to broadcast federal district court or appellate court proceedings.

H. The Teachings of the FJC Study

Proponents of cameras legislation have previously indicated that the legislation is justified in part by the FJC study referred to earlier. The results of that study, however, were part of the basis for the Judicial Conference's opposition to cameras in the courtroom. Given this apparent inconsistency, it may be useful to highlight several important findings and limitations of the study. (I should also note that the recommendations included in the FJC report were proposed by its research project staff, but were not reviewed by its Board.)

First, the study only pertained to civil cases. This legislation, if enacted, would allow camera coverage in both civil and criminal cases. One could expect that most of the media requests for coverage would be in sensational criminal cases, where the problems for witnesses, including victims of crimes, and jurors are most acute.

Second, the Conference believes that the study's conclusions downplay a large amount of significant negative statistical data. For example, the study reports on attorney ratings of electronic media effects in proceedings in which they were involved. Among these negative statistics were the following:

- 32% of the attorneys who responded felt that, at least to some extent, the cameras distract witnesses;

- 40% felt that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;

• 19% believed that, at least to some extent, the cameras distract jurors;

• 21% believed that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;

• 27% believed that, at least to some extent, the cameras have the effect of distracting the attorneys; and

• 21% believed that, at least to some extent, the cameras disrupt the courtroom proceedings.

When trial judges were asked these same questions, the percentages of negative responses were even higher:

• 46% believed that, at least to some extent, the cameras make witnesses less willing to appear in court;

• 41% found that, at least to some extent, the cameras distract witnesses;

• 64% reported that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;

• 17% responded that, at least to some extent, cameras prompt people who see the coverage to try to influence juror-friends;

• 64% found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;

• 9% reported that, at least to some extent, the cameras cause judges to avoid unpopular decisions or positions; and

• 17% found that, at least to some extent, cameras disrupt courtroom proceedings.

For the appellate courts, an even larger percentage of judges who participated in the study related negative responses:

• 47% of the appellate judges who responded found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;

• 56% found that, at least to some extent, the cameras cause attorneys to change the emphasis or content of their oral arguments;

• 34% reported that, at least to some extent, cameras cause judges to change the emphasis or content of their questions at oral arguments; and

• 26% reported that, at least to some extent, the cameras disrupt courtroom proceedings.

These negative statistical responses from judges and attorneys involved in the pilot project dominated the Judicial Conference debate and were highly influential in the Conference's conclusion that the intimidating effect of cameras on witnesses and jurors was cause for alarm. Since a United States judge's paramount responsibility is to seek to ensure that all citizens enjoy a fair and impartial trial, and since cameras may compromise that right, allowing cameras would not be in the interest of justice. For these reasons, the Judicial Conference rejected the conclusions made by the FJC study with respect to cameras in district courts.

IV. Conclusion

When one thinks of cameras in the trial courtroom today, the O.J. Simpson case inevitably comes to mind and how the presence of cameras in that courtroom impacted the conduct of the attorneys, witnesses, jurors, and the judge. Admittedly, few cases will have this notoriety, but the inherent effects of the presence of cameras in the courtroom are, in some respects, the same, whether or not it is a high-publicity case. Furthermore, there is a legitimate concern that if the federal courts were to allow camera coverage of cases that are not sensational, it would become increasingly difficult to limit coverage in

the high-profile and high-publicity cases where such limitation, almost all would agree, would be warranted.

This is not a debate about whether judges would have personal concerns regarding camera coverage. Nor is it a debate about whether the federal courts are afraid of public scrutiny or about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. Open hearings are a hallmark of the Federal Judiciary.

Rather, this is a question about how individual Americans – whether they are plaintiffs, defendants, witnesses, or jurors – are treated by the federal judicial process. It is the fundamental duty of the Federal Judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the trial courtroom would seriously jeopardize that right. It is this concern that causes the Judicial Conference of the United States to oppose enactment of H.R. 2128 as applied to federal trial courts. As the Supreme Court stated in *Estes*, "[w]e have always held that the atmosphere essential to the preservation of a fair trial – the most fundamental of all freedoms – must be maintained at all costs." 381 U.S. at 540.