



TBJ | Feature

October 2004

Cameras in the Courtroom: Limited Access Only

By Bill Delmore

The television camera should have a limited place in the Texas courtroom. The presence of the camera can interfere with the performance of our solemn tasks of determining the truth and administering justice, and the minimal benefits that might be obtained from increased television coverage are greatly outweighed by the danger that trial participants will be overly concerned with their eventual portrayal on millions of television screens.

In the last decade, two Harris County district attorneys have initiated mandamus proceedings in an effort to limit the role of the television producer in criminal litigation (the second suit was more successful than the first, which resulted in one of those dreaded one-sentence orders denying leave to file the petition). I was eager to volunteer for the most recent effort because, on a very personal level, I do not like video cameras.

My antipathy for video recording may have resulted from a traumatic incident during one of the first birthday parties for our twins, in which I stood too close to my wife's camcorder while we all sang "Happy Birthday." I cannot carry a tune in a proverbial bucket, and after having been forced to endure multiple playbacks of that horrendous vocal performance, I now limit myself to humming the melody when party guests commence to sing. I also flee when the camcorder swings in my direction. In short, my usual behavior changes when a video recording is being made, and that, in a nutshell, is why I do not like to see television cameras in a courtroom.

Scientific studies confirm what common sense suggests. Behavioral scientists are familiar with the "Hawthorne effect," a phrase that has become shorthand for the proposition that test subjects alter their behavior as the result of being watched, regardless of the variables that are supposed to be the point of the study. The methodology of the original experiment at the Hawthorne plant of the Western Electric Company in the late 1920s has been discredited, but few challenge the basic premise.

The Hawthorne effect on trial participants was noted during an early Arizona experiment in televised trial proceedings, about which commentator George Higgins wrote: "The Hawthorne effect occurs when people aware that they are being observed alter their behavior (in this case adopting vast eloquence and extreme circumspection) to meet what they imagine to be expectations of the observers."

Texas prosecutors have observed this phenomenon in the courtroom. After one Harris County trial was

televised in part several years ago, a prosecutor told me that the judge's behavior conspicuously changed when the red light was on. The judge ordinarily ruled swiftly and firmly, and expressed impatience with unnecessary quarreling. When the cameras switched on, however, decisiveness was replaced with excessive courtesy and patience. Attorneys were allowed to go on and on, and their arguments went back and forth, until counsel prayed for a break in the filming so that a ruling might be obtained.

A greater concern, however, is the potential effect of television cameras on witnesses. As noted by Justice Tom Clark in his opinion in the landmark Billy Sol Estes case, which is essential reading for anyone exploring this issue, the "impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable." Televised proceedings can affect witnesses in several ways:

- reluctant witnesses, including crime victims, might fail to appear altogether, because of the fear of being portrayed testifying against a violent criminal or gang member;
- witnesses who do appear might tone down their testimony, for fear of public approbation or retaliation;
- camera-shy individuals might be rattled and embarrassed and incapable of testifying effectively because of the knowledge that they are being televised; and
- less-shy witnesses might play to the camera by exaggerating their testimony or putting on a performance, instead of simply answering the questions put to them.

Also, attorneys are not always on their best behavior during televised proceedings. Even if the great majority of lawyers will focus on the business at hand rather than the opportunity to grandstand, there is always going to be one publicity-seeking attorney who feels the need to impress prospective voters, employers, or clients with boorish or inflexible courtroom behavior, during what could be perceived as hours and hours of free advertising time.

Then there is the potential effect on jurors. The dynamics of jury selection and jury deliberations can be skewed in so many negative ways that one can only hope that the recent actions of the Texas Court of Criminal Appeals and the Texas Legislature (which both acted in 2003 to bar the recording and broadcast of jury deliberations) will serve to keep jurors off-camera for the foreseeable future. Even if jurors are not filmed, however, the possibility remains that the result of a trial may be influenced by jurors' concern for how their verdict will be accepted by a mass television audience comprised, in part, of their friends, neighbors, and employers.

Finally, as a career prosecutor, the sensibilities of criminal defendants have not been one of my highest priorities, but they are relevant to this issue. Defense attorneys have voiced legitimate concerns about subjecting their clients to televised public humiliation and disgrace. The counsel table should not be the modern equivalent of the stocks in which criminals were put on display for public amusement in colonial times.

Granted, these potential problems will not arise in every televised trial, but given the importance of what we do in the courtroom, why risk them at all?

It is true that one benefit of increased television coverage would be increased citizen awareness of what actually occurs in our courtrooms, but there is already a high level of public awareness of the reality of

the operation of our judicial system. In addition to the physical presence of jurors and trial spectators, criminal trials are the subject of heavy print media coverage. Limited coverage of non-evidentiary portions of trial can contribute to public awareness, and any remaining need for gavel-to-gavel coverage is satisfied by the occasional broadcast of a proceeding in which all parties and witnesses have consented to the taping. There is no shortage of information about the operation of our courts.

Judges and lawyers should resist a push for additional television coverage that is motivated not by a need for increased public awareness of court proceedings, but instead by the television producer's quest for spectacle and titillation. We should resist being co-opted by the reality television industry. That is not what our courts are for. What we do in the courtroom is too important to jeopardize the outcome in an effort to satisfy the growing appetite for reality-television programming.

Eventually, either the Legislature or the court system should implement a uniform policy for the televising of judicial proceedings. At this time, the Code of Criminal Procedure is silent on the issue, so the decision to televise all or part of criminal trials is left to local rules or the discretion of individual judges, which can lead to inequity in the treatment of similarly situated defendants in various regions of the state.

On the civil side, Rule 18c of the Texas Rules of Civil Procedure provides that non-ceremonial proceedings may be broadcast either (a) "in accordance with guidelines promulgated by the Supreme Court for civil cases"; or (b) if taping and broadcast "will not unduly distract participants or impair the dignity of the proceedings," so long as all parties and witnesses consent to the recording.

It appears that no guidelines have been promulgated by the Supreme Court, other than Rule 18c itself, so the rule effectively gives civil litigants a veto power over the televising of proceedings, which the parties to a criminal case do not share. This result seems backwards, since criminal trials are typically more sensational and more likely to be disrupted by the effects of television cameras on the participants.

In 1999, the Legislature asked the Office of Court Administration (OCA) to "study and develop uniform guidelines for media pooling agreements for courtroom coverage." The OCA asked the Texas Judicial Council to form a committee to draft proposed guidelines, and that committee has forwarded "Proposed Uniform Court Rules of Coverage of Judicial Proceedings in Texas Trial and Appellate Courts" to both the Supreme Court and the Legislature. Prosecutors and other concerned citizens should oppose any effort to make those proposed rules effective in criminal cases, however, because they require only that trial courts consider — but not necessarily honor — the "objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought." Permitting the recording and broadcast of a proceeding in which a party or a witness has objected to the presence of the television camera is wrong and elevates the quest for spectacle and entertainment over the legitimate purposes of our judicial proceedings.

The proposed rules contain useful guidelines on the technological aspects of pool coverage of proceedings, but the Legislature should adopt for criminal cases the restriction set out in Subsection (b) of Rule 18c, and preclude the broadcast of judicial proceedings without the consent of both parties and the witnesses who will be portrayed.

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