John T. Zastrow (002738)
308 East Claremont Street
Phoenix, Arizona 85012
Telephone: (602) 266-3665

In Pro Se

ARIZONA SUPREME COURT

In the Matter of:	)	
	)	**No. R-07-0016**
Petition to Amend Rule 122, Rules of The Supreme Court of Arizona	)	**COMMENT IN OPPOSITION TO PETITION TO AMEND ARIZONA SUPREME COURT RULE 122**

This Comment is submitted by John T. Zastrow, who has been a member of the Bar of this Court since April, 1971. The Commentator has served as a Justice of the Peace pro tempore (2003-present), United States Immigration Judge (1983-2000), Judge of the City of Phoenix Municipal Court (1976-1983) as well having presided over felony criminal cases in the Superior Court, Maricopa County, as a Judge pro tempore (1982). He received a B.A. in Political Science (1961), an M.P.A. in Public Administration (1964) from the University of California, Los Angeles and his J.D. from Arizona State University in 1971. Additional biographical information can be found under his profile in 2 WHO'S WHO IN AMERICA 4055 (1995).

Although the Commentator presided over various Arizona and Federal Courts in the last thirty-two years, Judge Zastrow had limited experience with the media's involvement in judicial proceedings, except for one case. On July 9, 2004, he presided over the sentencing of Valinda Jo Elliot in the Agua Fria Justice Court in an extreme

DUI- BAC 0.15 or more case. *State v. Elliot*, No. 14TR0209617 (Super. Ct. Ariz. July 9, 2004). Having not presided over the prior proceedings, he was unaware that the Defendant was the same person who, in 2002, allegedly started the Chediski forest fire, one of two that led to the Rodeo-Chediski forest fire; Arizona's largest and most costly to date. *See* Joseph A. Reeves, *Hell Comes to White Mountains How 'Rodeo' and 'Chediski' Burned Their Names in Arizona History*, THE ARIZONA REPUBLIC, June 30, 2002, at SP2. When Judge Zastrow arrived for the sentencing, he was greeted by camera trucks, reporters and a courtroom overcrowded with both media and interested citizens. Citing a need for space, he invoked Rule 122. Nonetheless, members of the media occupied much of the front portion of the courtroom. The remainder of the sentencing was completed without incident; however, it left this Commentator with a lasting appreciation for the tender balance between the interests of the Press and Court.

Preliminary Statement and Comments on Proposed Changes

This debate is one between two conflicting, and fundamental, Constitutional rights. The Press champions the First Amendment's right to a free Press, arguing, as the Petitioner does, that press access to trial proceedings promotes the interests of a free and informed public, judicial and governmental transparency and accountability. The Judiciary's concern is with the Sixth Amendment's right to a fair trial and the Defendant's Fourteenth Amendment right to due process. Judicial writers note that unfettered access may distract and influence witnesses, jurors and motivate lawyers and judges to act detrimentally to a Defendant and the dignity of the court. All of these arguments, on both sides, are legitimate and persuasive. The question then becomes how to best balance these two, vital interests.

This argument has continued to evolve since the seminal case on the matter, *Estes v. Texas*, 381 U.S. 532, 540 (1965), held that there was no Constitutional right to camera access in the courtroom when it said that "[t]he television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press." Nearly thirty years later, in *Chandler v. Florida, infra*, the Court revisited *Estes*, refining its previous decision and opening the doors to state experimentation with cameras in the courtroom: "Absent a showing of prejudice of constitutional dimensions to these appellants, there is no reason for this Court either to endorse or to invalidate Florida's experiment." 449 U.S. 560, 582 (1981). While the United States Supreme Court and the District of Columbia have steadfastly refused to allow camera access, most state courts have instituted or are experimenting with rules governing cameras access to Court proceedings.

The media's ability to record court proceedings is a privilege granted by the state and is not absolute. This Court stated, in *KPNX Broadcasting v. Super. Ct*, that "[w]e conclude that the 'news gathering right' in the context of criminal trials means nothing more nor less than the right to attend." 139 Ariz. 246, 256, 678 P.2d 431, 441 (1984). Any further ability to record court proceedings has been reserved at the discretion of the Court and state.

Your Commentator commends KPNX's efforts to increase public access and understanding to the judicial process and he has no objection to much of what the petition suggests. Judge Zastrow does, however, find two of the suggested amendments problematic for reasons stated below and, in addition, has his own suggested amendment.

Argument

I. THE INCREASED BURDEN ON THE COURT OF THESE AMENDMENTS CAN BE OFFSET BY INCREASING THE DURATION OF THE NOTICE REQUIREMENT.

Arizona Rule of the Supreme Court 122(f) governs the timing of a request for media coverage and is currently written as follows:

> (f) Requests by the media for coverage shall be made to the judge of the particular proceedings **sufficiently in advance** of the proceeding or portion thereof as not to delay or interfere with it. Ariz. R. Sup. Ct.122(f) (emphasis supplied).

A survey of other Ninth Circuit courts is informative regarding what sister courts find as adequate notice of media participation. Currently Washington, Hawaii, Oregon, Montana and Idaho have similarly vague requirements for advanced notice by the media. *See* Wash. Gen. R. 16(a)(1) "permission shall have first been expressly granted"; Haw. Sup. Ct. R. 5.1 "All requests for media coverage of court events must be served on the attorneys or parties prior to the scheduled event"; Or. Uni. Ct. R. 3.180(1) "upon request…"; Mont. R. Civ. App. P. Rule 18 (no notice requirement for coverage of opening arguments); and Idaho.Ct.Admin.R. 45(a) (allowing coverage subject to authorization of the presiding judge). Alaska requires that applications for media coverage be submitted "at least 24 hours prior to the proceedings." Alaska R. of Ct. 50(b)(1). Nevada and the Ninth Circuit observe a 72 hour requirement. *See* Nev. Sup. Ct. R. 230; 9th Cir. (1)(b) and 9th Cir., Guidelines for Photographing, Recording, and Broadcasting in the Courtroom, *available at* http://207.41.19.15/Web/OCELibra.nsf/504ca249c786e20f85256284006da7ab/ba060a3e

537d2866882569760067ac8e?OpenDocument. California follows a 5 day rule. Cal. R. of Ct. 1.150(e)(1).

Arizona's rule that the media request access to court proceedings "sufficiently in advance" is vague, leading to surprises such as the one Judge Zastrow experienced as described above. By not allowing the Court adequate time to consider and prepare for the presence of the media, the likelihood of trial delay and injustice greatly increases. The proposed, amended Rule 122 submitted by KPNX's Petition further exacerbates the problem already present under the current Rule 122. The proposed amendment introduces a *per se* standard requiring a finding of fact to be made on an application; which could be made, at any time, without any prior notice to the Court. It is unclear whether a favorable finding for the media would be required as well as a factual finding for a negative result. There is no provision for the type of hearing- evidentiary or argumentative- that would be required under this *per se* standard.

Instead, the Commentator suggests that this State institute procedures and time limits such as those in Nevada and the Ninth Circuit (three days) or California (five days). Given Arizona's burgeoning population, location and docket size, Nevada and California provide greater guidance on the issue than the Ninth Circuit's other, less populous states. By providing concrete time limits and procedures to the application process, this State would minimize the possible intrusive and distracting process of deciding on the extent of media access and provide ample time for appeal hearings that would not be intrusive judicial process.

II. THE PETITION'S PROPOSED "SUBSTANTIAL LIKELIHOOD OF AN OVERRIDING HARM" STANDARD ATTEMPTS TO STRIKE AN INAPROPRIATE BALANCE BETWEEN FIRST, SIXTH AND FOURTEENTH AMENDMENT INTERESTS.

Justice Blackburn stated, in *In Re Murchison*, that "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." 349 U.S. 133, 136 (1955). This ideal was tied to media related issues in *Estes*: "[w]hile maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial system." 381 U.S. at 539. The judiciary's main concern must be with ensuring the Defendant's absolute right to a fair trial and preserving the integrity of the judicial process. As this court stated in *KPNX:*

> [A] trial court's obligation to assure an accused a fair trial does not rise and fall depending on the level of activity and the degree of attention given by the media to the trial. The obligation is constant although the measures for protection of a fair trial will necessarily differ depending upon the circumstances. 139 Ariz. at 255, 678 P.2d at 440.

The Petitioner, however, suggests a different, much more permissive, standard for allowing camera coverage; a standard that, if adopted, well might be in violation of Sixth and Fourteenth Amendment safeguards. The suggested "substantial likelihood of an overriding harm" standard ignores the judicial ideal that a Defendant deserves absolute fairness, or as close to it, as possible.

For these reasons, the Commentator suggests that any standard adopted more accurately convey the ideals embodied in the Sixth and Fourteenth Amendments.

III. THE SENTENCE STRUCK IN RULE 122(G) OF THE PETITION MAY SERVE TO ELIMINATE ANY JUDICIAL ABILITY TO FURTHER CONTROL CAMERA ACCESS ONCE THE TRIAL HAS COMMENCED.

The petition edits Rule 122(g) as follows:

> (g) Objections of a party to coverage must be made on the record prior to commencement of the proceedings or portion thereof for which coverage is requested. Objections of the non-party witness to coverage of his or her appearance or testimony may be made to the judge at any time. Any objection not so made will be deemed waived. ~~This provision shall not diminish the judge's authority or limit coverage of a proceeding in the judge's sole discretion as above provided.~~

The Commentator is concerned that the struck through sentence may serve to completely eliminate the judiciary's ability the further eliminate or limit camera access to court proceedings once underway by resting that power solely in the objections by parties and non-party witnesses. Trials are dynamic and often evolve and change in unforeseen ways as they proceed. A presiding judge has the responsibility to ensure that the action be adjudicated free from distractions and influence regardless of party or non-party objections.

The Commentator's concern may be covered by reading Rule 122(g) along with the suggested Rule 122(c), "The Judge may limit or prohibit electronic or still photographic coverage only after making specific, on-the record findings that there is a substantial likelihood of an overriding harm arising from one or more of the above factors." Read together Rule122(c) may cover the Commentator's concerns about Rule 122(g) but, as it is currently written, Rule 122(g) is confusing and open to interpretation.

To this end, Judge Zastrow instead suggests that Rule 122(g) be amended as follows:

> …Any objection not so made will be deemed waived. This provision shall not diminish the judge's authority to preclude or limit coverage of a proceeding ~~in the judge's sole discretion~~ as above provided.

This simple rewriting of the rule will eliminate the Petition's ambiguity, retain the spirit of its suggestion and remain consistent with the rest of the rule.

Conclusion

For the foregoing reasons, John T. Zastrow's Comment In Opposition to Petition to Amend Arizona Supreme Court Rule 122 should be adopted.

RESPECTFULLY SUBMITTED this __ day of March, 2008.

John T. Zastrow
308 E. Claremont St.
Phoenix, Arizona 85012-1113

In Pro Se

ACKNOWLEDGEMENT: The Commentator wishes to acknowledge with appreciation the services of Jared H. Cloutier, a 2007 graduate of Sandra Day O'Connor College of Law at Arizona State University and Applicant awaiting admission to the State Bar of Arizona, in the preparation, research and writing of this Comment.

COPY of the foregoing Comment
In Opposition to the Petition to
Amend Arizona Supreme Court
Rule 122 mailed/delivered to:

David J. Bodney, Esq.
201 E. Washington St.
Suite 1600
Phoenix, AZ 85004-2382

Jared H. Cloutier