

1 Jan E. Kearney  
2 Presiding Judge  
3 Superior Court in Pima County  
4 110 West Congress  
5 Tucson, Arizona 85701

6 In the Matter of PETITION TO AMEND  
7 RULE 122, RULES OF SUPREME COURT  
8 OF ARIZONA

Supreme Court No. R-07-0016  
COMMENT OF THE PRESIDING JUDGE  
OF THE SUPERIOR COURT IN PIMA  
COUNTY IN OPPOSITION TO THE  
PETITION TO AMEND RULE 122

11  
12 The pending proposal to amend Supreme Court Rule 122 is very troubling. The  
13 proposal, which would greatly restrict the discretion of trial judges to limit the use of  
14 cameras in the courtroom, has been circulated to our bench. Without exception, all of our  
15 judges who have expressed an opinion have indicated that they do not favor the proposed  
16 change. These judges include several who have permitted extensive television coverage  
17 of proceedings in their courtroom.  
18

19 Our objections include a number of specific practical difficulties, concerns about  
20 the need for more wide-ranging discussion of the issues raised by the petition, as well as  
21 consideration of the impact of the proposal on emerging technologies. The various  
22 objections raised by the Pima County Superior Court bench have a common thread:  
23 concern for preserving fairness and dignity in courtroom proceedings.

24 It is the consensus of our bench that the present rule properly balances these  
25 critical values with the need for public access to our courts, and that the proposal favors  
26 the commercial interests of the broadcast media over the fair and efficient progress of  
27 cases heard in our courts.

28 The following concerns have been raised:

1           1. The core of the proposal is the requirement that a court must make findings of  
2 "substantial likelihood of overriding harm" to one or more of the interests stated in Rule  
3 122, and consider alternatives to foreclosure, before cameras can be precluded from the  
4 courtroom. The petition recognizes that one important result of this change will be to  
5 permit appellate review of such a decision. While the proposal does not speak  
6 specifically to the question whether a stay should be granted during review, the likely  
7 outcome is that cases scheduled for trial -- especially high profile cases involving victims,  
8 expert witnesses and large jury panels -- will be delayed for unspecified times in almost  
9 every case where cameras are precluded. The expense and personal hardship attendant  
10 upon such delays is necessarily very significant, and is not consistent with the interests of  
11 justice. Furthermore, the impact of a third-party request for review on speedy trial limits  
12 and similar time constraints governing court proceedings is unknown. For this reason if  
13 for no other, the proposed amendments do *not* "preserve important safeguards for trial  
14 participants, jurors and victims."

15           2. Similarly, the procedure proposed by the petition will hamper the necessary  
16 control of the courtroom by the trial judge. A couple of examples will illustrate the  
17 problem:

18                   A. The proposal ignores that circumstances may arise *during a trial* or  
19 other proceeding that may require preclusion of camera coverage. If a judge, who has  
20 permitted camera access in a particular case, notes an abuse of such access such as  
21 recording of the jury, and determines that such access should be terminated, what kind of  
22 fact-finding would be required? Would the case be delayed mid-stream for collateral  
23 proceedings addressing the access issue, with the potential for mistrial greatly enhanced  
24 by such delay?

25                   B. In a case with gang overtones, a prudent judge may wish to limit  
26 camera access to discourage altercations, display of gang signs and other misconduct by  
27 observers in the courtroom. The same is true in other highly-charged proceedings where  
28 the existence of television cameras is a likely catalyst for misbehavior in the courtroom.

1 Prior to any problem actually occurring, the decision of the judge to limit camera  
2 coverage is unlikely to meet the high standard required by the proposed rule change. It  
3 hardly seems consistent with the responsibility of a trial judge to protect the safety of  
4 participants in a courtroom proceeding, and the dignity and integrity of the proceeding, to  
5 make it difficult if not impossible for a court to take action before an incident occurs.

6 3. When a party comes to court, whether as a criminal defendant, a victim, a  
7 divorcing husband or wife, an individual injured in an auto accident, a plaintiff or  
8 defendant in a malpractice action, a business attempting to enforce a contract, or the  
9 personal representative of an estate, chances are that important private matters will be  
10 publicly aired during courtroom testimony. This is the price that must be paid for seeking  
11 the assistance of the court in resolving these issues. But the publicity attendant upon  
12 camera coverage, especially in the Internet Age, is very different and much more  
13 intrusive than that occasioned by traditional print coverage. It is important that the value  
14 of enhanced public access to court proceedings be carefully weighed against the chilling  
15 effect such access may have. People must feel that, when they come to court, the primary  
16 focus of court proceedings is the fair and legally-correct resolution of their problems, and  
17 not providing the media with material for their broadcasts. The proposed provision  
18 dealing with objections to camera coverage of a party or witness does not adequately  
19 address this issue; and in fact makes it less likely that the objections of a party or witness  
20 will be honored, as discussed in the following paragraph.

21 4. The proposed rule provides for notice to victims and witnesses who may object  
22 to camera coverage, and a hearing is required if such an objection is made. This places  
23 an unacceptable burden on those who, in many cases, are most likely to be harmed by  
24 such coverage. Must the victims and witnesses take additional time off from their jobs to  
25 testify at such a hearing? If the objection is made immediately prior to the witness's  
26 testimony, will the proceedings come to a halt for hearing and, if coverage is denied,  
27 appellate review? What is to prevent this from happening multiple times during a long  
28 trial, or to prevent witnesses from making such objections for the purpose of obstructing

1 the progress of the trial? In supporting an objection to camera access, will a victim be  
2 required to testify to painful personal information? Be cross-examined about such  
3 information by the attorney for the press outlet? Who, if anyone, would represent a  
4 victim or witness who wished to avoid the additional publicity accompanying televised  
5 testimony? If the testimony of such a witness at the hearing on the witness's objection to  
6 coverage, particularly in a criminal case, is inconsistent with later trial testimony, can it  
7 be used as impeachment? Is the prohibition against use of media reproductions of  
8 judicial proceedings as evidence effective in a criminal case if such reproductions contain  
9 the sole record of exculpatory information? These and other such questions raise serious  
10 questions about the propriety and practical effect of this aspect of the proposal.

11 5. Print access remains unaltered, and the concept of public access remains a  
12 cherished value. The more detailed reports available by non-broadcast means will  
13 continue to provide significantly better access to what actually happens in the courtroom  
14 than the typical snippet found on the nightly news.

15 6. Making such a sweeping change in a rule that will have a heavy impact on our  
16 courts is a step that should only be taken after thorough examination by representatives of  
17 all major affected groups: not just a television station that will profit from broader  
18 camera access, but concerned judges, victims' representatives, prosecutors, criminal  
19 defense lawyers, and members of the family, probate and civil bars, to name a few groups  
20 with specific and important issues that should be part of this discussion. It would be  
21 extremely useful, in answering some of the questions raised by responses to the petition  
22 to obtain information from judges and others in Florida and other states who have had  
23 experience with broader camera access. While certainly not preferable to such a study  
24 process, at very least an extension of the comment period of no less than six months  
25 would advance the discussion of the issues, and the counterproposals being made during  
26 the comment process.

1           7. The rule assumes definitions that will soon be outdated, if they aren't already.  
2 The rise of Internet journalism, including blogs, podcasts and other innovations, and the  
3 introduction of high-quality and affordable camcorders makes the determination of what  
4 constitutes "media coverage" far more complex than the rule anticipates. The increasing  
5 number of people without traditional journalism credentials who wish to provide  
6 combined video-text coverage will further complicate press access issues, and would  
7 make the proposed "overriding harm" standard even more difficult to apply. As  
8 illustrated by the existence of more than one clip of Pima County coverage on YouTube,  
9 the future portends issues considerably more subtle and difficult than determining the  
10 effect of a story on the evening TV news. Consideration of the potential effect of the  
11 proposed changes in the Internet Age - where many more people participate and coverage  
12 can be played indefinitely - is an essential part of any discussion of a rule change like that  
13 proposed in the pending petition.

14           8. The petition notes that it is prompted in part by the petitioner television  
15 station's perception that, "courts have increasingly denied requests for camera coverage,  
16 even where less restrictive alternatives to closure exist. . ." If this is true, one must ask  
17 why. The perception of many judges is that extensive television coverage makes the  
18 proceedings last much longer than they would without the coverage, changes the  
19 behavior of the participants in the proceedings, has the potential to distort the outcome,  
20 intimidates parties, witnesses and juries, and, in short, has a negative impact on the  
21 fairness and efficiency of the proceeding itself. The perception of the more usual  
22 coverage consisting of five- to fifteen- second sound and video clips is that such coverage  
23 does not accurately portray court proceedings, focuses on celebrity and sensational cases,  
24 and provides a minimum of useful public education concerning the courts. Before taking  
25 a step that radically restricts the ability of a judge to protect the safety and integrity of  
26 courtroom proceedings, shouldn't these concerns be seriously examined?

27           9. The pending petition, if enacted, would place Arizona with the states at the  
28 outer edge of camera access in the courts. As Petitioner acknowledges, there is no

1 constitutional presumption for or against cameras in the courtroom. The proposal  
2 nevertheless applies a presumption that can only be overcome by applying a test with a  
3 very high bar, and requires a court to risk significant disturbance of the court proceedings  
4 in order to limit camera access. The highest court in the land continues to prohibit  
5 cameras altogether, as the federal courts in general, and for reasons grounded in the  
6 fundamental responsibilities of the courts. The central assumption of the pending petition  
7 is that the "public access" protected by the First Amendment may be equated with  
8 broadcast access. Far from being an issue resolved in favor of the position advocated by  
9 the petition, this topic has been, and continues to be, the subject of the most serious  
10 debate. See the comprehensive treatment contained in a recent law review comment,  
11 Audrey Maness, *Does the First Amendment's "Right of Access" Require Court*  
12 *Proceedings to be Televised? A Constitutional and Practical Discussion*, 34 Pepp. L.R.  
13 123 (2006). There are many compelling reasons, some of which are summarized above,  
14 for rejecting the petitioner's view.

15 In short, the members of this bench wish to express the position that the current  
16 rule is appropriate and adequate. The proposed change places the financial interests of a  
17 television station above the interests of the court and parties in prompt, dignified and fair  
18 hearings, and is likely to add significantly to the financial and emotional cost of such  
19 proceedings.

20 Respectfully submitted this 13 day of May, 2008.

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25 Jan E. Kearney  
26 Presiding Judge  
27 Superior Court in Pima County

28 A copy of this comment has been mailed this 13<sup>th</sup> day of May, 2008, to:

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