

A Privilege Not a Right: How Prevalent are 'Cameras in the Court?'

Michael T. Martinez

Traditionally, the American judicial system has always been open to public observers. The Supreme Court recognized this tradition in *Richmond Newspapers, Inc. v. Virginia*, when Chief Justice Warren Burger "concluded that the right of the public and the press to attend criminal trials is guaranteed under the First and Fourteenth Amendments."¹

In the plurality opinion in *Richmond Newspapers*, Burger wrote that while, "...the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records[,] ...throughout its evolution, the trial has been open to all who care to observe."²

Citing legal historians, Burger wrote of the benefits of an open court system.³ "[I]t gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."⁴ Burger went on to write that enlightenment philosopher Jeremy Bentham

...not only recognized the therapeutic value of open justice but regarded it as the keystone: "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance."⁵

Bentham also emphasized, that "open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public."⁶

In a concurring opinion, Justices William Brennan and Thurgood Marshall wrote that the First Amendment "has a *structural* role to play in securing and fostering our republi-

1. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 555 (1980).

2. *Id.* at 564.

3. *Id.* at 569.

4. *Id.*

5. *Id.*

6. *Id.* at 569, n.7.

can system of self-government...The structural model links the First Amendment to that process of communication necessary for a democracy to survive..."⁷

But as society has grown, fewer and fewer members of the public attend trials in person. Burger went on to write, "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media."⁸

Despite this trend, the Court has found a distinction between print journalists and their electronic brethren, particularly when the latter want to bring the tools of their trade into the courtroom.⁹

Two other Supreme Court cases, *Estes v. Texas* and *Chandler v. Florida*, have addressed the issue of electronic media access to the courts.¹⁰ *Estes* banned cameras in the court and later *Chandler*, while not overturning *Estes*, stopped short of finding that members of the electronic media have the same constitutional right to attend trials if they want to use their electronic equipment. The result is that members of the electronic media must request permission from the presiding judge to attend trials if they want to use cameras and microphones, and the judge has discretion whether to grant permission.

This article will examine the frequency of electronic media access to courtrooms, and how the beliefs, opinions and practices of trial judges have affected this access. This will be accomplished through a survey of state judges, with the results analyzed using the following four sub-questions:

1. How often do state judges allow electronic media access to their courtrooms?
2. How often do state judges allow the use electronic media to blog, tweet or post to the Internet from their courtrooms?
3. How well do the state rules governing electronic media access to courtrooms function as guidance?
4. How can electronic media coverage of trials fulfill a democratic role in the community?

HISTORICAL PERSPECTIVE

The roots of the question of electronic media access to courtrooms must be examined in order to adequately understand the issue.

The 1935 prosecution of Bruno Richard Hauptmann, who was convicted of the kidnapping and murder of Charles and Anne Morrow Lindbergh's young son, garnered extensive media attention, in all forms of media at the time: print, radio and newsreels.

In the aftermath of the Hauptman trial, the press was severely criticized for its actions. Reporters were accused of invading people's privacy and newspapers were faulted for printing rumors convicting Hauptman in their columns.¹¹ Inside the courtroom, reporters were partly responsible for the disruptions by frequently sending copy out by messengers.¹² An editorial in *Editor & Publisher* blamed newspapers, radio and newsreels for their part in "degrading the administration of justice."¹³

7. *Id.* at 587-88 (emphasis in original).

8. *Id.* at 572-73.

9. See Frank William White, *Cameras in the Courtroom: A U.S. Survey*, 60 JOUR. MONOGRAPHS 5 (1979).

10. See *Estes v. Texas*, 381 U.S. 532 (1965); and *Chandler v. Florida*, 449 U.S. 560 (1981).

11. Richard Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 19 (1979).

12. *Id.*

13. Alfred N. Delahaye, *The Case of Bruno Hauptman* (1935), in *THE PRESS ON TRIAL: CRIMES AND TRIALS*

The ABA established a committee, composed of members of the ABA and representatives from news organizations chaired by Judge Newton D. Baker, to report on the publicity surrounding the Hauptmann trial.¹⁴ The committee conceded that "a state criminal trial should be a public trial...and that [p]ublicity is a safeguard against oppression and star chamber tactics."¹⁵ However, the committee was highly critical of the press coverage of the Hauptmann trial stating "more newspaper space was devoted to the Hauptmann trial than any other similar event in the history of journalism."¹⁶ The committee was formed to work out standards governing publicity of criminal trials.¹⁷

At the 1937 American Bar Association (ABA) convention, the committee asked the House of Delegates to adopt six recommendations, but asked if they could continue to work on a seventh recommendation they had not resolved – cameras and sound equipment in the court.¹⁸

Three days later the same House of Delegates accepted a report from another committee, the Committee of Professional Ethics and Grievances, which proposed a wide range of Canons of Professional and Judicial Ethics, one of which was Canon 35 that banned cameras and recording equipment in the courtroom.¹⁹ Canon 35 was adopted without a reading, without discussion and without any reference to the committee report accepted three days earlier.²⁰

The Canon stated:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.²¹

The Canon incorporated three concepts – dignity, decorum and misconception – which will be explored in this research.

All but two states – Texas and Colorado – readily adopted Canon 35, and the ban on electronic media coverage of trials remained in effect for more than 30 years. Finally, in the 1970s, states started opening up and experimenting with access for electronic media in the courts again.²²

AS MEDIA EVENTS 117, 120 (Lloyd Chiasson, Jr., ed., 1997).

14. Oscar Hallam, *Some Object Lesson on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 455 (1940).

15. *Id.* at 480.

16. *Id.* at 484.

17. Marjorie Cohn & David Dow, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* 17 (McFarland and Company, Inc., 1998).

18. Kielbowicz, *supra* note 11 at 21.

19. Joseph Costa, *CAMERAS IN THE COURT: A POSITION PAPER 4* (Communications Report, Ball State University 1980).

20. Kielbowicz, *supra* note 11 at 22.

21. Robert T. McCracken, et al., *Recommendations of Changes in the Canons of Professional and Judicial Ethics*, 23 AMER. BAR ASSN. J 635 (1937).

22. White, *supra* note 9, at 5-8.

*The Court has found a distinction
between print journalists and
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trade into the courtroom.*

In 2012, all 50 states now have court rules that allow electronic media in the courtroom in some form, but the degree of access varies quite a bit.²³ The range of access varies a great deal, from states that allow wide coverage,²⁴ to states that allow appellate coverage only or that have such restrictive trial coverage rules that they essentially prevent coverage.²⁵

Traditionally, these rules referred to still photography cameras, video cameras and audio recording devices: the domain of radio and television broadcast journalists and photojournalists. However, since the blurring of the lines between electronic and print journalism the advent of multiple media platforms, the growth in the use of the Internet by media outlets and the embrace of social media by news organizations since the 1990s, the definition of electronic media needs to be redefined for the 21st century.²⁶

Print reporters are now using small video cameras and recording audio for web posts. Print reporters are now “tweeting”²⁷ and blogging, practices that have made their way into trial reporting.²⁸ Judges are now being faced with reporters who want to use laptops and smart phones to tweet and blog from the courtroom.²⁹ The courts are now faced with determining if the existing court rules can be used to address access requests to use this new technology.

DIFFERING OPINIONS ON ‘CAMERAS IN THE COURT’ CASES

The Supreme Court has established a right of access to the courts in a quartet of cases³⁰ but has carved out an exception when it comes to the broadcast media. The media have a right of access, but some of the tools used by the media may be stopped at the courthouse door.

The two leading Supreme Court cases on electronic media in courtrooms are *Estes* and *Chandler*.³¹ While the Court arrived at different conclusions in these two cases, it stated that *Chandler* does not overrule *Estes*.³² As a result, lower courts differ on which of these conflicting precedents to follow.³³

23. The Radio Television Digital News Association (RTDNA) maintains a web page that links to the court rules governing electronic media access to all the states. See Radio Television Digital News Association, *Cameras in the Court: A State-by-State Guide*, http://www.rtdna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php.

24. California and Florida have such rules. See Cal. R. Ct. 1.150 (2012); and Fla. R. Jud. Admin., TECHNOLOGICAL COVERAGE OF JUDICIAL PROCEEDINGS § 2.450.

25. Such rules are in place in Indiana and Minnesota. See IND. CODE JUD. CON., R. 2.17 (2010); and MINN. CODE JUD. CON., R. 4 (2011).

26. For the purposes of this study, members of the electronic media will be defined as any journalists using electronic devices to record and disseminate the news.

27. This is posting short, 140-character bursts on a website called Twitter.

28. See, e.g., Ron Sylvester, *Federal Judge Says 'Twitter Is On'*, “What the Judge Ate for Breakfast” blog (THE WICHITA EAGLE), Feb. 23, 2009, <http://blogs.kansas.com/courts/2009/02/23/federal-judge-says-twitter-is-on/>.

29. See, e.g., K. Daniel Glover, *Trial by Twitter: Real Time Coverage of the Courts*, “JUSTICE 2.0 SOCIAL ORDER IN THE COURTS” blog, May 16, 2011, <http://www.tweetwatchreport.com/justiceweb/trial-by-twitter/>

30. These cases are *Richmond Newspapers, Inc. v. Virginia*, See note 1, *supra*; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise v. Superior Court* 478 U.S. 1, (1986).

31. See *supra* note 10.

32. *Chandler v. Florida*, 449 U.S. 560, 570-74 (1981); See also *Id.* at 583 (Stewart, J., concurring) (“I cannot join the opinion of the Court because I do not think the convictions in this case can be affirmed without overruling *Estes v. Texas*.”) (citation omitted).

33. Richard P. Lindsey, *An Assessment of the Use of Cameras in State and Federal Courts*, 18 GA. L. REV. 389, 399 (1983-84).

Estes v. Texas

Billie Sol Estes was known as the "Texas Wheeler-Dealer."³⁴ Estes, a Texas financier and friend of former President Lyndon Johnson, was convicted of fraud for enticing farmers to buy non-existent fertilizer tanks and equipment and then providing mortgages on that fictitious property.³⁵ He appealed his conviction, claiming that the photographic and broadcast coverage deprived him of a fair trial.³⁶

In a plurality opinion (4-1-4), in 1965 the Supreme Court found that Estes was deprived of his right to due process under the 14th Amendment by televising and broadcasting his trial.³⁷ The Court generally found that there was a high likelihood that the presence of cameras interfered with the trial, but a close reading of all the opinions is necessary to understand the scope of the *Estes* ruling.³⁸ The discussion among the six opinions went far beyond the due process finding, to a discussion of First Amendment rights, the constitutionality of electronic media access to the courts and the possible psychological impact on trial participants.

Estes' trial drew national attention because of his close ties with President Johnson and his fundraising activities for the Democratic Party.³⁹ According to the Court, Estes' national notoriety produced 11 volumes of press clippings just from pre-trial publicity.⁴⁰ During the pre-trial hearing on whether cameras would be allowed, all the available seats in the courtroom were taken and 30 people stood in the aisles.⁴¹

The hearing was "broadcast live by radio and television and still photographs were taken throughout."⁴² According to the opinion in *Estes*, "... [A]t least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judges bench and others were beamed at the jury box and the counsel table."⁴³

All but one other state – Colorado – banned cameras in their courts at the time. Texas followed Judicial Canon 28 of the Integrated State Bar of Texas, which left it to the trial judge's discretion whether to allow the telecasting and photographing of court proceedings.⁴⁴

The defense in *Estes* had entered a motion to prevent broadcasting of the trial, which was denied.⁴⁵

All but two states – Texas and Colorado – readily adopted Canon 35, and the ban on electronic media coverage of trials remained in effect for more than 30 years.

34. See, generally, Pam Estes, *BILLIE SOL: KING OF TEXAS WHEELER-DEALERS* (1983).

35. See, generally, *Id.*

36. Marjorie Cohn & David Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* 19 (1998).

37. *Estes v. Texas*, 381 U.S. 532, 535 (1965).

38. *Id.*

39. *Estes*, *supra* note 34.

40. *Id.* at 535 (majority).

41. *Id.*

42. *Id.* at 536.

43. *Id.*

44. *Id.* at 535; Canon of Judicial Ethics, 27 TEX. B. J. 95 (1964).

45. *Estes v. Texas* at 536.

A motion for a continuance was granted, and when the trial began roughly 30 days later, a booth had been constructed in the back of the courtroom and was painted to blend in with the rest of the walls. "All television cameras and newsreel photographers were restricted to the booth, which had an aperture to allow the lens of the cameras an unrestricted view of the courtroom, when shooting film or telecasting."⁴⁶

Live telecasting was prohibited through a great portion of the trial. But at the request of the defense, no camera coverage, still or television, was allowed of the defense summation to the jury.⁴⁷ Only the opening and closing arguments of the state, the return of the jury verdict and its receipt by the trial judge were carried live with sound.⁴⁸

The judge permitted the rest of the trial to be recorded without sound, although in fact the cameras operated only intermittently.⁴⁹ Coverage was largely confined to film clips shown on the stations regularly-scheduled newscasts and news commentators would use film of a particular part of the days' activities as backdrop for reports during regularly scheduled newscasts.⁵⁰

The apparent chaos in the Estes courtroom during trial led the court's plurality to conclude that television coverage of trials is inherently prejudicial.

Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. ... Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom. This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would be inconsistent with our concepts of due process in this field.⁵¹

In reaching its finding, the Court relied heavily on rules adopted by the states based on the ABA's Canon 35, which banned electronic media in the courts. Justice Clark wrote:

...[A]t this time those safeguards [court rules banning broadcasting] do not permit the televising and photographing of a criminal trial, save in two States and there only under restrictions. The Federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence. We have also held that the atmosphere essential to the preservation of a fair trial the most fundamental of all freedoms must be maintained at all costs."⁵²

Justice Clark was not only concerned with the physical disruption of the trial by the large cameras, cables, microphones and personnel, but perhaps even more so about the psychological impact of cameras on trial participants.⁵³ He specifically described what he saw as dangers to jurors, witnesses, the trial judge and the defendant.⁵⁴

Regarding the psychological impact on jurors, Justice Clark wrote:

The conscious or unconscious effect that [the presence of cameras] may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence.⁵⁵

46. *Id.* at 537.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 544.

52. *Id.* at 540.

53. *Id.* at 545-48.

54. *Id.*

55. *Id.* at 545.

Regarding the psychological impact on witnesses, Justice Clark wrote:

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.⁵⁶

Regarding the psychological impact on the judge, he wrote:

Judges are human beings also and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand—the fair trial of the accused.⁵⁷

And regarding the psychological impact on the defendant in a criminal case, Justice Clark wrote:

Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental – if not physical – harassment, resembling a police line-up or the third degree.^[58] The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance.⁵⁹

Justice Clark wrote that the difficulty of measuring these effects should not be used as a rationale for ignoring them.

The State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored.⁶⁰

Justice John Marshall Harlan's concurring opinion provided the fifth and deciding vote for the plurality, and a close reading suggests it sets limits on the plurality opinion. Justice Harlan wrote:

Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment."⁶¹

... [W]e should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair

56. *Id.* at 547.

57. *Id.* at 548.

58. "The third degree is a euphemism for the 'inflicting of pain, physical or mental, to extract confessions or statements.'" Wikipedia, http://en.wikipedia.org/wiki/Third_degree_%28interrogation%29 (visited Mar. 16, 2012), quoting Jerome Herbert Skolnick, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 43 (1994).

59. *Estes v. Texas*, 381 U.S. at 549.

60. *Id.* at 550.

61. *Id.* at 587.

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in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.⁶²

Justice Harlan agreed that the right of due process was violated in the *Estes* case, and he was not prepared to state that the broadcast media had a constitutional right of access to the courtroom. But he envisioned a future where television would no longer be an anomaly, and where perhaps it would be acceptable in courts.

Perhaps Justice William Brennan's dissent made this point most clearly:

... [T]oday's decision is not a blanket constitutional prohibition against the televising of state criminal trials.

I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. Although the opinion announced by my Brother CLARK purports to be an 'opinion of the Court,' my Brother HARLAN subscribes to a significantly less sweeping proposition.⁶³

The Court's ruling in *Estes* established three things. First, it set a precedent that the high likelihood of prejudicial interference was enough to bar cameras from the courtroom and that the defendant did not have to prove actual harm. Second, that concern over the possible psychological effects of cameras on trial participants was a sufficient reason to ban electronic media access to the courts, an argument that opponents of electronic media access to the courts still use today. And third, that even though the plurality of four justices believed that electronic media presence in the courtrooms was unconstitutional, the fifth concurring vote by Justice Harlan tempered that finding, by at least being open to the possibility that cameras in courts did not necessarily make a court procedure unfair.

Chandler v. Florida

Sixteen years later, in 1981, the Court did revisit the issue, as Justice Harlan predicted in *Estes*. Noel Chandler and Robert Granger, two Miami Beach policemen who were convicted of breaking and entering a popular Miami Beach restaurant, appealed their conviction on burglary and other related charges, citing the *Estes* finding that the presence of cameras in the court had a high likelihood of interfering with their trial.⁶⁴

Their case caught the attention of the media, and a local television station was present in the courtroom for the testimony of an amateur radio operator who overheard and recorded Chandler and Granger as they spoke on police walkie-talkies during the break-in.⁶⁵ The cameras were also present for the closing arguments of the trial.⁶⁶

In an 8-0 decision, the Supreme Court found that Chandler and Granger had not demonstrated "prejudice of constitutional dimensions."⁶⁷ This finding differed from the *Estes* court plurality, which found that the defendant did not need to demonstrate prejudice.⁶⁸ In *Chandler*, the Court shifted the burden of proof to the defendants to show that damage had been done.⁶⁹ Using this new formulation, Chief Justice Burger wrote in *Chandler* that

62. *Id.* at 595-96.

63. *Id.* at 617.

64. *Chandler v. Florida*, 449 U.S. 560, 567, 570 (1981).

65. *Id.* at 568.

66. *Id.*

67. *Id.* at 584.

68. See discussion of *Estes*, *supra* page 212.

69. *Chandler* at 579.

“[t]he appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage – let alone that all broadcast trials would be so tainted.”⁷⁰ However, the *Chandler* court stopped short of affirming a First Amendment right of courtroom access by the electronic media.

Florida was experimenting with cameras in the courts during the time of Chandler and Granger’s trial. In January 1976, the Supreme Court of Florida instituted an experimental program for televising one criminal trial and one civil trial under specific guidelines.⁷¹

These guidelines required the consent of all parties, but in practice no consent could ever be obtained.⁷² The Florida Supreme Court then supplemented its order in July 1977, establishing a new one-year pilot program that did not require consent of the parties.⁷³

In a pretrial motion, the defense sought to have Florida’s camera in the courts experiment “declared unconstitutional on its face and as applied.”⁷⁴ The trial court denied the motion.⁷⁵

During jury selection, the defense “asked each prospective juror whether he or she would be able to be ‘fair and impartial’ despite the presence of a television camera during some, or all, of the trial.”⁷⁶ Each juror selected responded that such coverage would not affect his or her consideration in any way.⁷⁷

The trial judge then denied a defense motion to sequester the jury because of the television coverage.⁷⁸ However, the court instructed the jury not to watch or read anything about the case in the media, and suggested that jurors “avoid the local news and watch only the national news on television.”⁷⁹

The defense then requested that the judge instruct witnesses not to watch any television accounts of testimony presented at trial.⁸⁰ The judge declined because “no witness’ testimony was [being] reported or televised [on the evening news] in any way.”⁸¹

The television camera was initially in place only for one afternoon, during the amateur radio operator’s testimony.⁸² No camera was present for any part of defense’s case, but the camera returned to cover closing arguments.⁸³ Only 2 minutes and 55 seconds of the trial were broadcast, and those depicted only the prosecution’s side of the case.⁸⁴

In 2012, all 50 states now have court rules that allow electronic media in the courtroom in some form, but the degree of access varies quite a bit.

70. *Id.*

71. *Id.* at 564.

72. *Id.*

73. *Id.* at 564-65.

74. *Id.* at 567.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 568.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

Chandler and Granger appealed, based on the *Estes* ruling, specifically Chief Justice Warren's separate concurring opinion in that case.⁸⁵ They argued that the televising of criminal trials was inherently a denial of due process and that *Estes* had announced a *per se* constitutional rule to that effect.⁸⁶

Chief Justice Burger disagreed with this characterization, writing instead in the Court's opinion that "[t]he question presented...is whether, consistent with constitutional guarantees, a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused."

Burger continued:

The six separate opinions in *Estes* must be examined carefully to evaluate the claim that it represents a *per se* constitutional rule forbidding all electronic coverage. Chief Justice Warren and Justices Douglas and Goldberg joined Justice Clark's opinion announcing the judgment, thereby creating only a plurality. Justice Harlan provided the fifth vote necessary in support of the judgment. In a separate opinion, he pointedly limited his concurrence: "I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion."⁸⁷

...[W]e conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.⁸⁸

The Court in *Chandler* accomplished three things. First, it clearly stated that *Estes* did not establish a *per se* constitutional ban on electronic media access to the courts. Second, it established a requirement that appellants must show some evidence that the trial was affected by the electronic media presence. And, finally, it established that states have the right to allow electronic media into the courts.

THE CAMERAS MOVE IN

By the time the U.S. Supreme Court issued its opinion in *Chandler* in 1981, several states were either experimenting with cameras in courtrooms or allowing them on a permanent basis.⁸⁹ This included Florida, which made its pilot program with cameras in the courts permanent in 1979.⁹⁰

The Florida court was of the view that because of the significant effect of the courts on the day-to-day lives of the citizenry, it was essential that the people have confidence in the process. It felt that broadcast coverage of trials would contribute to wider public acceptance and understanding of decisions.⁹¹

85. *Id.*

86. *Id.*

87. *Id.* at 570-71 (quoting *Estes*, 381 U.S. at 587).

88. *Id.* at 572-74.

89. *Id.* at 565, n.6.

90. *Id.* at 565. After evaluating research of its experimental program, the Florida Supreme Court concluded "that on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage." *Id.* (quoting *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 780 (1979)). The Florida Supreme Court revised its 1977 guidelines and adopted a revised Canon 3A(7), giving the judge "sole and plenary discretion to exclude coverage of certain witnesses," and to "forbid coverage whenever ... that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial." The court also barred filming of jurors, and reserved the right to "revise these rules as experience dictates, or indeed to bar all broadcast coverage or photography in courtrooms." *Id.*

91. *Id.* at 565-66.

As a result, the Florida Supreme Court revised the 1977 guidelines to reflect its evaluation of the pilot program and established a revised Canon 3A(7).⁹²

The Florida Supreme Court instituted the revised Canon based upon its supervisory authority over the Florida courts.⁹³ In *Chandler*, the U.S. Supreme Court had only the limited question of the Florida courts allowing camera coverage of trials of cases violated the Constitution.⁹⁴

Courts in all 50 states may allow some form of electronic media access, but it is still a privilege, granted at the discretion of the presiding judge, as opposed to a right guaranteed by the First Amendment.⁹⁵ Some states are very open to electronic media coverage, while other states have court rules that are so restrictive making access virtually non-existent.

The Radio Television Digital News Association has categorized the states into three tiers of access.⁹⁶ The first tier is the states that allow the most coverage.⁹⁷ Tier II is composed of states with restrictions prohibiting coverage of important types of cases, or prohibiting coverage of all or of large categories of witnesses who object to coverage of their testimony. The third tier is composed of states that allow appellate coverage only or that have such restricting trial coverage rules that essentially prevent coverage.⁹⁸

TRIAL JUDGES' ATTITUDES TOWARD ELECTRONIC COVERAGE

Throughout this spectrum of access, the decision to grant permission still comes down to an individual – the judge – and is necessarily based, at least in part, on that individual's attitude towards the media. Much has changed since the *Estes*' decision, both philosophically and technologically. Through an Internet-based survey, this study sought to find out the practices, beliefs and opinions of judges regarding electronic media access at the trial level.

Survey Methodology

Survey research is an effective vehicle for measuring attitudes and orientations of large populations.⁹⁹ The purpose of the survey research was to reach the actual decision-makers and study the practices that take place in individual jurisdictions. All state judges who preside over trial courts in five purposefully selected states were contacted via email and in one instance via surface mail and invited to participate in the survey.

The five states – Arkansas, Florida, Kansas, Tennessee and Texas – were not randomly selected but instead were chosen to make sure there was a variety in the range of access by the electronic media among the states included in the study.¹⁰⁰

92. *Id.* at 566.

93. *Id.* at 569-70.

94. *Id.* at 570.

95. Kenneth Jost, *Cameras in the Courtroom*, CQ RESEARCHER, Jan. 14, 2011, at 28, 40, 42.

96. Radio Television Digital News Association, *CAMERAS IN THE COURT: A STATE-BY-STATE GUIDE*, http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php.

97. *Id.*

98. Ryan Murphy, *Cameras in the Court State-by-State Map* (RADIO TELEVISION NEWS DIRECTORS ASSOCIATION 2011). Personal correspondence, May 25, 2011.

99. Earl Babbie, *THE PRACTICE OF SOCIAL RESEARCH* 244 (11th ed. 2007).

100. Jennifer Mason, *QUALITATIVE RESEARCHING* 94 (1996). To address validity, it is important in purposeful sampling to include both study samples that may support the argument, as well as those that may not.

All three tiers of access, as defined by RTDNA, are represented in the selected states. Florida and Tennessee are Tier I states; Texas and Kansas are included in Tier II; and Arkansas is included in Tier III¹⁰¹

The court rules in Florida, a Tier I state, presume that electronic and still photography will be allowed in trials and any decision by a judge to bar the electronic media is subject to appeal.¹⁰²

In the other Tier I state in the study, Tennessee, court rules state that media coverage shall be allowed subject to the authority of the presiding judge.¹⁰³ Before denying, limiting, suspending or terminating media coverage the judge must hold an evidentiary hearing and the burden of proof shall be on the party seeking limits on media coverage.¹⁰⁴

The court rules in Texas, a Tier II state, permit electronic media coverage of civil and appellate proceedings.¹⁰⁵ Any objection

The Chandler court stopped short of affirming a First Amendment right of courtroom access by the electronic media.

to media coverage must state specific and demonstrable injury alleged from the media coverage.¹⁰⁶ But the Texas Supreme Court rules do not apply to criminal trial courts and, without guidance from the Court of Criminal Appeals, individual criminal court trial judges may decide whether to allow electronic media access to their court.¹⁰⁷

In Kansas, also a Tier II state, the court rules provide that the news media may photograph and record public proceedings, but that the trial judge shall prohibit the audio recording or photographing of a victim or witness of a crime if that participant requests such a ban.¹⁰⁸

The court rules in Arkansas, a Tier III state, provide that a judge may authorize broadcasting, recording or photographing in the courtroom, but an objection by a party or an attorney shall preclude electronic media access and the court shall inform witnesses of their right to refuse to be covered by the electronic media.¹⁰⁹

Two of the states – Kansas and Tennessee – have had reporters routinely blog from courts.¹¹⁰ One of the states in the study, Arkansas, has specifically addressed the use of social media by journalists in its court rules. Two of the states – Texas and Florida – were the

101. Radio Television Digital News Association, *supra* note 93.

102. Fla. R. Jud. Admin., Technological Coverage of Judicial Proceedings § 2.450.

103. TENN. CODE ANN. VOL. 5A, Rules of the Tennessee Supreme Court, Rule 30 (2007).

104. *Id.*

105. TEX. R. CIV. PROC., Rule 18c, Recording and Broadcasting of Court Proceedings (2010) and TEX. R. APP. PROC., Rule 14, Recording and Broadcasting Court Proceedings (2008).

106. SUPREME COURT OF TEXAS, REPORT ON CAMERAS IN THE COURTROOM AND MEDIA GUIDELINES (2002), available at <http://www.supreme.courts.state.tx.us/rules/scac/sep-2002/2.2%20report.pdf>

107. Thomas S. Leatherbury & John D. Thompson, *Cameras in the Courtroom*, in *The Texas Freedom of Information Handbook* (FREEDOM OF INFORMATION FOUNDATION OF TEXAS 2010), <http://www.foift.org/foihandbook/index.php?page=chapter&ch=11#go>.

108. KAN. CT. R. & PRO., Rule 1001, Media Coverage of Judicial Proceedings (1999).

109. ARK. CODE ANN., Administrative Orders of the Supreme Court, Order 6. Broadcasting, Recording or Photographing in the Courtroom (1987).

110. See Sylvester *supra* note 25 and Jamie Satterfield@jamiescoop: News Sentinel reporter covering the courts, twitter (Knoxville News Sentinel), <https://twitter.com/#!/jamiescoop>. Note that Ron Sylvester left The Wichita Eagle in 2012. See Ron Sylvester, (tweet), Jan. 30, 2012, <https://twitter.com/#!/rsylvester/status/164097858340007938> ("My tweets will be changing in coming weeks, as I move from @kansasdotcom to work w/ @robcurley, covering the casino beat @LasVegasSun").

origins of *Estes* and *Chandler*, the two seminal Supreme Court cases regarding electronic media in the courts.

Contacting all judges in a particular state directly was not feasible or advisable. Instead, court administrators for the selected states were approached directly. Once they agreed to participate, an email request was sent to each administrator who then forwarded it under their email to all the judges in the state. Individual judges were sent reminders according to each administrator's wishes.¹¹¹

On average, the response rate is 11 percent lower on internet surveys.¹¹² One reason might be that the email inviting participation may be treated as spam.¹¹³ This is one of the reasons administrators were asked to contact the judges, since an email coming from the court administration office would less likely be treated as spam. Even though Internet-based surveys have a lower response rate than some other methods¹¹⁴ – an acceptable response rate ranges from 1 to 30 percent.¹¹⁵

PURPOSEFUL SAMPLING

After approaching the court administrative offices in several states, it became apparent that not all 50 states would agree to participate in this study, so a purposeful sample was selected. A purposeful sample focuses in depth on a relatively small sample – in this case, five states out of 50.¹¹⁶ While this sample is not large enough to make generalizations about judges in all 50 states,¹¹⁷ the five representative states provided an in-depth look at themes generated from the responses.¹¹⁸

The states included in this survey spanned the range of very restrictive to a presumption of openness to make sure the central themes that emerged cut across a great deal of variation.¹¹⁹

Survey Questions

This survey itself was composed of both closed and open-ended questions. The open-ended questions were coded to identify common concepts.

The judges were asked four lines of questions.

The first line of questions was aimed at finding out how often members of the electronic media requested access to trials, how often the judges granted the requests for access and if they denied access, what were the reasons for the denials.

The second line of questions was aimed at finding out if members of the media, both print and electronic, were requesting to use new media tools (such as Twitter, blogs,

111. The administrator in one state, Arkansas, pointed to a directory online and said to contact the judges directly. Two administrators agreed to send out reminders and one sent a third reminder through her own initiative.

112. Katja Lozar Manfreda, et al., *Web Surveys Versus Other Survey Modes: A Meta-Analysis Comparing Response Rates*, 50 *INTERNATIONAL JOURNAL OF MARKET RESEARCH* 79, 97 (2008).

113. *Id.* at 80.

114. Surveys via postal mail generally have response rates of between 1 and 4 percent. The response rate for telephone surveys is between 10 to 75 percent; for shopping center intercept surveys, 5 percent; and for face-to-face interviews, 40 percent. Roger D. Wimmer & Joseph R. Dominick, *Mass Media Research* 205 (Thomson Wadsworth 8th ed. 2006).

115. Wimmer & Dominick, *Id.*

116. Michael Quinn Patton, *Qualitative Research & Evaluation Methods* 230 (SAGE PUBLICATIONS 3RD ED. 2002).

117. *Id.*

118. *Id.*

119. *Id.* at 234-35.

Facebook) to report from trials and, if judges granted permission for use of such tools, what criteria they used in making their decisions.

The third line of questions was aimed at finding out the judges' opinions, beliefs and practices regarding electronic media access to the courts, whether they thought that the presence of electronic media in the courtroom was disruptive and whether they believed the electronic media served a democratic function in their communities.

The fourth line of questions was aimed at finding out whether judges believed that the court rules in their state adequately addressed the issue of electronic media in the courts and whether a distinction should be made between print journalists and electronic media journalists.

Survey Responses

There were 224 respondents from the 2,715 judges in the five states surveyed, an eight percent response rate (see table 1).¹²⁰ While this response rate is within the general range of response rates for Internet surveys,¹²¹ one of the limitations of the study is the low response rate. The results of this survey were analyzed in the aggregate to provide richness and to look for common themes across the different states.

Table 1

Judges participating in survey by state			
	Total respondents	Total judges in state	Percent return
Arkansas	17	140	12%
Florida	39	989	4%
Kansas	25	187	13%
Tennessee	46	337	14%
Texas	97	1062	9%
Total respondents	224	2715	8%

Demographic Information

The majority of judges responding to the survey preside in courts in either medium-sized or large cities: 35.9 percent of respondents preside in a city with a population from 10,000 to 99,000 and 32.3 percent preside in a city with a population from 100,000 to 999,000.

More than three fourths (78.4 percent) of the judges who responded to the survey were older than 50 years old. By gender, 72.9 percent are male and 27.1 percent are female.¹²²

120. Arkansas has seven state Supreme Court justices, 12 court of appeals judges and 121 circuit court judges, for a total of 140 judges. Florida has 989 judges: seven Supreme Court justices, 61 appeals court judges, 599 circuit court judges and 322 county court judges. There are 187 judges in Kansas: seven Supreme Court justices, 13 appeals court judges and 167 district judges. Tennessee has 337 judges: five state Supreme Court justices, 24 appellate court judges, 154 trial court judges and 154 general sessions court judges (courts of limited jurisdiction). And there are 1,062 judges in Texas: nine state Supreme Court justices, nine Court of Criminal Appeals judges, 80 court of appeals justices, 456 district court judges and 508 county court judges.

121. See *supra* note 112, and accompanying text.

122. It is difficult to determine how these characteristics align with the general demographics of judges overall. A 2004 study found that the average age of judges was 55 and that 78.5 percent were male and 21.5 percent were female. Erin J. Williamson, DEMOGRAPHIC SNAPSHOT OF STATE TRIAL COURT JUDGES: 1979 and 2004, (American University), http://www.naspaa.org/initiatives/paa/pdf/Erin_Williamson.pdf

RESULTS

Grants and Denials of Electronic Media Access to Courtrooms

Three-quarters of the judges surveyed – 75.9 percent – reported receiving less than five requests by the electronic media (either traditional media or new media) for access to their courtroom in the last year. Slightly more than 12 percent received from six to 10 requests, and another 12.1 percent reported that they received more than 10 requests.¹²³

Even though the court rules in all of the selected states allow some level electronic media access,¹²⁴ when requests have been made, 26.7 percent of the judges said they never granted access to television, 50 percent said they never granted access to radio and 31.7 percent said they never granted access to photojournalists (see table 2). At the other end of the spectrum, when requests have been made, 18 percent of judges reported that they routinely granted permission for television coverage, 14.1 percent allowed radio coverage and 17.3 percent allowed still photography.

When requests have been made, the majority of the judges do not allow the use of new media in their courtrooms. Overwhelmingly, 80.8 percent said they have never allowed blogging, 83.3 percent said they never allowed tweeting and 84.4 percent said they never allowed posting to Facebook. Again, at the other end of the spectrum, when requests have been made 5.7 percent said they allowed blogging, 5.7 percent said they allowed tweeting and 5.2 percent said they allowed posting to Facebook.

Table 2

How often do you grant requests for permission to photograph or record by members of the electronic news media in your courtroom?

	Never	Rarely	Sometimes	Often	For almost every trial
Television	26.7%	20.3%	20.3%	14.7%	18.0%
Radio	50.0%	20.2%	7.1%	8.6%	14.1%
Photojournalists	31.7%	17.3%	18.8%	14.9%	17.3%
Blogs	80.8%	6.2%	3.6%	3.6%	5.7%
Twitter	83.3%	6.8%	2.6%	1.6%	5.7%
Facebook	84.4%	6.8%	2.6%	1.0%	5.2%

Among the judges surveyed, 33 judges, or 14.7 percent, reported that they had denied at least one request for access by members of the electronic media – either traditional media or new media – in the past year.

Reasons for Denial

Of these judges who denied electronic media requests, 29 judges (87.8 percent) responded when asked for their reasons for denying access (see table 3). A few judges provided more than one reason. Overall, five themes emerged.

123. For a different type of analysis of media coverage requests to courts, See Stacy Blasiola, *Say "Cheese!": Cameras and Bloggers in Wisconsin's Courtrooms*, 1 REYNOLDS CTS. & MEDIA L. J. 197, 207-08 (2011).

124. See *supra* pages 222 & 223.

Table 3

If you have denied requests of access from the electronic media (either traditional media or new media) within the last year, would you explain why?

	Distrust of the media	Interference with the administration of justice	Potential effect on trial witnesses	Affect the dignity and decorum of the court	Existing court rules do not permit access
Reasons for denial	13	10	5	4	3

1. DISTRUST OF THE MEDIA

The most prevalent theme was a distrust of the media, reported by 13 judges. “They (television) tend to be a needless distraction for an industry that is interested in the crying witness or the pounding on the rail during final arguments,” one judge said. “To forget that TV news is a form of entertainment is to forget reality,” one judge said.

“[C]ourt is open to the public and if they wish to see and hear what transpires, they are welcome to come and sit,” another judge wrote. “[I] do not wish to open a trial/hearing to only “partial” interpretation by one to tell the many. [T]wenty-second sound bites are not true coverage.”

Still another judge said he refused access “[b]ecause ... [the journalists] have no intention of broadcasting the entire hearing and, were they to do so, no member of their audience would watch the entire broadcast. So, inevitably, what they would broadcast would be a sound bite that would be likely to mislead by its brevity.”

Finally, another judge said, “The press is always allowed to report on court cases. They may take notes or use a computer to make notes; however, I have not allowed cameras or recorders in the courtroom. Being from the old school, and having watched the circus atmosphere of the O.J. Simpson case, I have not yet changed my opinion. That is not to say that I won’t be open to allowing electronic media in the future.”

2. INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE

The second most prevalent issue was concern about the electronic media interfering with the administration of justice. One judge expressed “[c]oncern that the parties might attempt to use the publicity for political reasons rather than to advance legal arguments.”

Another judge said, “I do not want the trial recorded. ... I do not want there to be a conflict with the official court reporter.”

Finally another judge said, “I have also denied both Facebook and Twitter because of the immediacy of their posting to the media and the possible affect it could have on witnesses or litigants during the trial.”

3. POTENTIAL EFFECT ON TRIAL WITNESSES

The third theme that emerged, mentioned by five judges, was the potential effect on trial participants. “I am of the opinion that all parties act differently when electronic media is in the courtroom. The print media can do the job and protect the public interest,” one judge said.

Another judge said, “Cameras make me as well as counsel self-conscious and thereby interfere with our concentration on the evidence and law.”

Still another judge said, “I believe that the witnesses and especially the attorneys would behave differently if they were being recorded on video.”

4. AFFECT THE DIGNITY AND DECORUM OF THE COURT

The fourth theme was concern that the electronic media's presence would affect the dignity and decorum of the court. One judge said that he does "not wish to compromise the integrity of the system." Another judge said the electronic media presence was an "[u]nnecessary distraction." Another judge said that the presence of electronic media was "[d]isruptive to the proceedings."

5. EXISTING COURT RULES DO NOT PERMIT ACCESS

Finally, the fifth most-common rationale was that the existing court rules did not permit access even though a request was made. For example, one judge reported that the request was made for a proceeding regarding "termination of parental rights in dependency court." Another judge explained that while "court rules deny any/all recording devices during the actual hearing, we do allow for and make arrangements with the media to have access to the defendant before and after hearings."

Use of Electronic Media Tools by Traditional Media

Since media are starting to converge and tools that used to be solely in the domain of broadcast media are increasingly being used by print media organizations (and vice versa), the judges were asked whether they had experienced print reporters asking permission to use electronic tools. The majority of the judges said that they had never or rarely received such requests. But a significant number of judges said that they sometimes or often received such requests, or did so for almost every trial (see table 4).

Table 4

How often have you had newspaper reporters ask to use tools that in the past were typically used by television reporters, radio reporters or still photojournalists?

	Never	Rarely	Sometimes	Often	For almost every trial
Video cameras	53.7%	18.8%	17.0%	8.7%	1.8%
Still cameras	35.6%	16.0%	31.5%	14.2%	2.7%
Audio recorders	45.9%	19.7%	20.6%	11.9%	1.8%

More than half of the judges said they would not at all likely grant permission for a journalist to blog, tweet or post messages to the Internet from the courtroom (see Table 5).

Table 5

What is the likelihood you would grant permission, if you received a request by a member of the professional news media, either electronic or print, to blog, tweet or post messages to the Internet from your courtroom?

	Not at all likely	Somewhat likely	Likely	Very Likely	Almost certain
Blogging	56.9%	12.7%	14.7%	6.6%	9.1%
Tweeting	59.1%	12.4%	13.5%	5.7%	9.3%
Post to the Internet	52.6%	15.1%	16.1%	5.2%	10.9%

Rationales for Granting / Denying Electronic Access

The judges were also asked what criteria they would use in either granting or denying permission. Five themes emerged from their responses to this open-ended question.

The greatest concern was to make sure that it would not disrupt the proceedings or the decorum of the court, mentioned by 72 judges "I strongly believe in keeping court proceedings fully in public view, and in the role of the news media as the eyes and ears of the public," one judge said. "I would almost certainly allow it (the use of social media) unless and until it created a problem in a particular case – that is, until something occurred that required me as judge to step in and exercise some control over the situation."

Another judge wrote, "I would deny permission because a real-time post may cause a disruption in the courtroom by inviting people to come in during certain portions of the trial. For example, if someone posts 'The defendant is taking the stand now,' I know that people around the courthouse would start coming into the courtroom. I have found that in high interest cases, the in and out of spectators is a huge distraction to the jury."

Another judge wrote, "All that (the use of social media) must be done outside the courtroom, as to not disrupt the proceedings. We didn't allow typewriters into the courtroom, and I view my courtroom as a place to calmly weigh and determine facts, laws, and justice."

The second most-common theme, mentioned by 38 judges, was the fair administration of justice. "Determination as to whether witness testimony that could influence future witnesses might be disseminated or whether information might improperly be made available to jurors," one judge wrote.

Another judge said, "The concern about the use of this type of media is that it is accessible to witnesses who have not yet testified and are barred from the courtroom. The Rule of Sequestration is designed to prevent witnesses from tailoring their testimony to conform it to what other witnesses have said in court. The instant accessibility of this type of media would defeat the purpose of the rule."

The third concern was distrust of the media. "We have sufficient room for people to come watch court proceedings in person," one judge wrote. "We do not need any additional distractions from people having electronic devices. In the past photographers who have

been granted permission to take photos in the courtroom have ignored directions about where to place their cameras and have even entered the jury box on one occasion during a bench trial to take photos back into the face of litigants. They cannot be trusted. Moreover, television and print media rarely have sufficient space or time to cover proceedings fully, and it is not uncommon to read an account of court proceedings that varies substantially from what actually happened or from the issues at trial. In addition there is the possibility that microphones could be

Courts in all 50 states may allow some form of electronic media access, but it is still a privilege, granted at the discretion of the presiding judge, as opposed to a right guaranteed by the First Amendment.

sensitive enough to record the private conversations of litigants and their lawyers either before or during trial."

Another judge explained that his criteria was "whether the request actually advances the news media's interests in accurately reporting the matter, and whether those interests can be properly managed by using traditional methods of reporting."

One judge expressed the concern "that the media ... not upset the court proceedings and

make a circus out of it If I have had a good experience with the media [the professionals making the request] or have not been misquoted I [will] gladly allow them to cover the trial.”

Another judge wrote, “I would look to the uniqueness/public interest of the legal question of the case. I’m no fan of the ‘If it bleeds it leads’ mentality of most requests.”

The fourth theme was concern over the protecting the privacy of individuals involved in the litigation. Several judges said it would depend on the nature of the case: for example, whether juveniles were involved. One judge said the decision regarding electronic access requests would be based on “[w]hether it is a closed proceeding (termination of parental rights is closed) and/or whether its use would disrupt the orderly process of the case or cases.” Still another judge said the determination would depend on, “[w]hether trial by jury or judge; age of witnesses, defendants or complainants; degree of interference.”

The decision to grant permission still comes down to an individual – the judge – and is necessarily based, at least in part, on that individual’s attitude towards the media.

The fifth theme was judges’ personal preferences for keeping social media out. “I would deny any and all requests to be allowed to have immediate posting to any various social media,” one judge said.

Another judge said, “I don’t believe that court proceedings need to be recorded or broadcast.” A third judge said, “If they want to tweet about something they can leave the courtroom and do so.”

Slightly more than three-fourths (77.1 percent) of the judges said that they allow members of the news media, either electronic or print, to bring electronic devices — mobile phones, laptop computers, electronic notepads, etc. — into their courtrooms. But only 9.4 percent responded that they have had requests by members of the media to blog, tweet or post items to the Internet in their courtroom.

Of that 9.4 percent who have had such requests, 66.7 percent said they had less than five requests in the past year. 14.3 percent said they had received six to 10 requests in the past year, and 19 percent said they received more than 10 requests in that time.

Of the 9.4 percent of the judges who received media requests to use social media, 72.7 percent said they granted the requests, while 27.3 percent said they denied permission.

Of the 72.7 percent who granted permission, 87.5 percent cited a general overview of court rules¹²⁵ as the rationale for their decision. One judge said, “No specific criteria is established [in the rules]; the expectation is that the persons doing this do not disrupt the proceedings in any way and that they conduct themselves professionally.”

Another judge said, “Along with the court administrator and sometimes our public relations person, we go over the guidelines. Anyone can use a device that is inconspicuous and silent. I feel that as we let journalists use legal pads in the 1800s, we need to let them use the latest devices in 2011.”

Of the 27.3 percent of the judges who denied requests to blog, tweet or post items to the Internet from court, two-thirds — 66.6 percent — explained what criteria they used in denying permission. None cited court rules, but there were two themes. The first was a distrust of the media. One judge said he denied permission based on “[t]he danger of selective, slanted reporting in compressing a full trial into a sound bite.”

125. Of the selected states, only Arkansas has court rules specifically addressing blogging, tweeting or posting to the Internet. ARK. CODE ANN., *supra* note 106, at 6 d(7).

The second theme was to maintain dignity and decorum in the courtroom and the fair administration of justice. One judge said, "They can blog/tweet/whatever from the hall during trial breaks ... or leave and do so. [I] do not allow devices operating during actual testimony as often distracting to parties and jurors." Another judge said, "The court must have some element of control."

When the judges were asked if they allow members of the general public (non-media, and non-trial participants) to bring electronic devices such as mobile phones, laptop computers, electronic notepads, etc., into their courtrooms, 39.5 percent said that they always allow such devices, 28.3 percent said that they sometimes allow them and 32.3 percent said they do not allow such devices.

Some judges (8.6 percent) reported that there had been members of the public (non-trial participants and non-journalists) who have blogged, tweeted or posted items to the Internet from the courtroom, without asking the judge or any other court official or staff member for permission in advance. But the majority of the judges (71.5 percent) said they did not know if anyone had used the social media in their courtrooms, and 19.9 percent said that there had been definitely no use of social media in their courtrooms.

Use of State Rules Governing Electronic Media Access to Courtrooms

When asked about existing court rules, 44.8 percent of the judges believed the existing rules adequately address the issue of electronic media in the courts, 31.8 percent said that existing rules are not adequate to address such access, and 23.3 percent said they did not know. Similarly, 44.3 percent did not believe the current rules need to be expanded to include other types of trials in their state.

When asked to allow blogging, tweeting or posting messages to the Internet, 59.3 percent of the judges said they would use existing court rules regulating electronic media access as a basis for making this determination. But even though different judges responded, 59.3 percent also believe the rules need to be updated to address the changing technology (i.e., smart phones, laptop computers, iPads, Blackberrys, etc.).

However, 40.7 percent of the judges said they would *not* use existing court rules as a basis, primarily because the existing court rules do not address the issue directly. These judges explained what criteria they would use, with four themes emerging:

First, judges said distraction or disruption in the courtroom would be the basis for their decision about whether to allow blogging, tweeting or posting messages to the Internet

More than half of the judges said they would not at all likely grant permission for a journalist to blog, tweet or post messages to the Internet from the courtroom.

from their courtroom. "Criteria is always the same: so long as no disruption in the court proceedings occurs, tweeting, etc. is permissible," one judge wrote. "It's a judge's discretion in this regard. Fundamentally, our courts **MUST** be open and transparent.¹²⁶ Thus, I welcome the media. So long as they do not disrupt my job, I do not restrict them in performing their jobs". Another judge said, "[M]y criteria would be to liberally al-

low access to the Courtroom by the media with their equipment as long as the Courtroom proceedings are not disrupted with particular emphasis on the effect on a jury."

The second theme that emerged was the fair administration of justice. Several judges were concerned how use of social media from the courtroom may affect jurors and whether

126. Emphasis in original.

it would invade juror privacy. Some of the judges who cited this concern said that they would base their decision on use of new media on consent of the parties in a case.

The third theme that emerged was personal preference. One judge said:

Why should I allow them under any circumstances? Court proceedings are open to the public. What is actually going on here is the creation no, the extension, the expansion, of an artificial existence made possible by new technology. These devices have the effect of progressively destroying (together with countless other devices in other settings) what remains of an organic human existence. This is the realm of technique which has the effect not only of regimenting and standardizing life, but of eventually centralizing power in the hands of an authoritarian elite.

Another judge said, "I do not believe blogs, Twitter, or Internet posting is appropriate in a courtroom. The existing rules allow me to control my courtroom and I will not allow this activity in my courtroom."

One judge, said he would base his decision on "[w]hether the media interest in reporting in this manner is unable to be fairly advanced through the use of ordinary reporting methods."

The Role of Electronic Media Coverage of Trials

Judges in the survey were asked about their beliefs, on a five-point scale from strongly disagree to strongly agree, concerning the role that electronic media play in the coverage of trials (see table 5).

Overall, 48.4 percent of the judges agreed that coverage of trials by traditional electronic media educates the public about the judicial process, but 31.8 percent disagreed with the idea that such coverage allows the public to directly evaluate the veracity of testimony. More than half, 57 percent, agreed that it contributes to the public's right to know how the judicial process is functioning in their community, and 36.6 percent agreed that radio and television coverage of court proceedings instills confidence among the public that justice is being served. Thirty-six percent were neutral about whether it informs citizens so that they may make informed decisions in their community and be self-governing, and 36.5 percent agree that the electronic media acts as a surrogate for the public's right to observe a public proceeding.

When asked which Supreme Court decision they would rely on as guidance regarding electronic media access to the courts, 41.1 percent of the judges said they would rely on Chandler v. Florida.

Effects of Electronic Media Coverage of Trials

Judges were asked about their beliefs, on a five-point scale from strongly disagree to strongly agree, about what impact the presence of electronic media – television cameras, still cameras or radio recorders – might have on a trial (see table 6).

Slightly more than half (51.8 percent) agreed that the presence of electronic media intimidates witnesses, but fewer (41.4 percent) agreed that it intimidates jurors. Slightly more than one third (35.1 percent) disagreed with the idea that court coverage by traditional visual and audio media affects the behavior of judges negatively. About one-third (31.8 percent) disagreed that it affects the rights of a defendant to a fair trial.

Table 6

Please tell me how much you agree or disagree with the following statements. The presence of the electronic media – television cameras, still cameras or radio recorders...

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree
Intimidates witnesses	14.0%	51.8%	20.7%	12.2%	1.4%
Intimidates jurors	21.2%	41.4%	20.3%	15.3%	1.8%
Affects the behavior of judges negatively	5.4%	19.4%	35.1%	35.1%	5.0%
Affects the behavior of judges positively	2.2%	22.4%	47.1%	23.8%	4.5%
Affects the behavior of attorneys negatively	7.3%	32.7%	33.2%	25.9%	0.9%
Affects the behavior of attorneys positively	0.5%	20.7%	45.0%	29.7%	4.1%
Disrupts trial proceedings	11.2%	28.7%	30.5%	24.2%	5.4%
Is prejudicial to court proceedings	8.1%	16.3%	35.3%	33.0%	7.2%
Affects the right of a defendant to a fair trial	10.8%	18.4%	30.0%	31.8%	9.0%

Distinctions Between Print and Electronic Journalists

A little more than half (51.1 percent) of the judges said the courts should make a distinction between access for print journalists who report with a pen and electronic journalists who report with a camera or microphone.

When asked what criteria they use to justify a distinction between electronic and print journalists, several themes emerged from the responses.

The most common theme was the fear of disruption of the proceedings. “Taking notes with pen and pencil can be done virtually without notice and from almost anywhere in the courtroom, video/photos cannot be done so easily or discretely,” one judge wrote. Another judge wrote that “Print media is much less disruptive to the sanctity of the courtroom.”

The second most common theme cited was misleading editorial content. “Editing of movies or pictures is more prejudicial than manipulation of the written word,” one judge wrote. Another wrote, “People give undue importance to what they see in video or hear in a recording – even if it’s a misleading, totally out-of-context sound bite.”

Another judge wrote:

Reporters who use a camera are perfectly welcome to come, sit quietly, take notes and then go do a standup and report. Reporters who use cameras don’t want to do that because it is not exciting enough. I make no distinction in the access I allow the two types of reporters. The camera-based reporters are often not willing to behave as journalists. They want to get in people’s faces, ask provocative questions in hopes of causing “news” to happen – to produce a sexy moment that they can sell on their programs. I will let them film under our guidelines: One camera, fixed, pooled, film

available to all. They want to come in for 5 minutes, excerpt a sexy moment and leave without really informing anyone about the proceeding. A long proceeding seems to bore the TV folks.

Third, many judges – 13 percent in this survey – believe that the differences between the two forms of media pose a threat to a fair trial. “I believe people behave differently when they know they are on camera and I fear this can have an adverse effect on judges, witnesses, and attorneys, all of which could have an impact on the outcome of some trials,” one judge wrote. Another said:

I try many cases involving child sex victims and gang murders. It would be harmful to show the faces of the children when they testify and allow their humiliating testimony to be video'd [sic] by their friends/schoolmates, discourage them from reporting sex crimes committed upon them. Gang members could record the faces of the witnesses who testify against their own gang's defendants electronically and kill or otherwise retaliate against them, creating hesitancy for witnesses of gang crimes to come forward to report and testify in these crimes.

Fourth, some judges said they felt nature of the electronic media was a threat to judicial integrity. “There is only one official record of the trial and that is the court reporter's duty. To allow others to record the testimony would corrupt the trial,” one judge said. Another judge wrote, “Experience and the era of ‘gotcha’ journalism. Electronic (especially digital) is VERY subject to manipulation and is unreliable. In courts of record there is an established TRUTHFUL perfect record of the trial or hearing.”¹²⁷

Reliance on Precedents

When asked which Supreme Court decision they would rely on as guidance regarding electronic media access to the courts, 41.1 percent of the judges said they would rely on *Chandler v. Florida*.¹²⁸ Smaller shares said that they would rely on other cases: 28.9 percent would rely on *Richmond Newspapers, Inc. v. Virginia*,¹²⁹ 20 percent would rely on *Estes v. Texas*,¹³⁰ and 10 percent would rely on *Shepard v. Maxwell*.¹³¹

Some judges offered alternative means as guidance. One judge said, “Short of fundamental federal constitutional issues, I would rely entirely on state and local law.” Another judge said, “I would apply all controlling cases; it's my job.”

When asked, 39.2 percent of the judges said they believe the electronic media, using the tools of their trade in a courtroom, should have the same constitutional right of access to criminal trials that the print media do, as found by the court in *Richmond Newspapers*.

When asked about access to the federal courts, 55.3 percent said they believe the electronic media should have access to Federal District Courts, 53.7 percent said they believe the electronic media should have access to Federal Courts of Appeal and 54.2 percent said they believe the electronic media should have access to the U.S. Supreme Court

Even though a majority of judges believe the electronic media fulfills many democratic functions in a community, they are still concerned that electronic media presence in the courtroom intimidates witnesses and jurors.

127. Emphasis in original.

128. 449 U.S. 560 (1981).

129. 448 U.S. 555 (1980).

130. 381 U.S. 531 (1965).

131. 384 U.S. 333 (1966).

CONCLUSION

The purpose of this survey research was to find out, at the individual court level, how the attitudes, beliefs and practices of trial judges affect electronic media access to the courts through four sub-questions.

One of the most surprising results of the survey was that the media rarely request access to trials. Slightly more than three-fourths of the judges said they had fewer than five requests for access in the last year.

Slightly more than a fourth of the judges said that they never grant access to television journalists. About half of them said that they never grant access to radio reporters, and slightly more than one-third never grant access to photojournalists.

Regarding new media, the vast majority of the judges said they do not allow them in their courtrooms, with more than 80 percent never allowing blogging, tweeting or posting to Facebook.

A moderate number (14.7 percent) of the judges had denied requests for media access to their courtroom, and the reasons given echoed the rhetoric articulated in concepts of former A.B.A. Canon 35¹³² and the Supreme Court's finding in *Estes*.¹³³

Even though media are converging and newspapers websites are becoming ubiquitous, there are not very many requests by print reporters to use audio and visual media tools. As for new media, an overwhelming number of judges are not likely to allow blogging, tweeting or posting to the Internet from trials.

Again, the rhetoric used by judges to explain their opposition echoed the concepts articulated in Canon 35 and the Court's finding in *Estes*.

Slightly less than half of the judges believe the existing court rules adequately address the electronic media, but slightly more than half believe the rules need to be updated to address the changing technology.

The greatest concern judges expressed regarding both traditional electronic media and the use of new social media is that it disrupts the proceedings. Their attitude is that print reporters taking notes is unobtrusive, but the presence of cameras or of a reporter tapping on a keyboard with frequent posts would be disruptive.

Judges had mixed beliefs about how well the electronic media fulfills a democratic role in the community it serves. Most agreed that electronic media coverage of trials educates the public about the judicial process, instills confidence among the public that justice has been served, contributes to the public's right to know how the judicial process is functioning in their community and acts as a surrogate for the public's right to observe a public proceeding. Most were neutral on the idea that electronic media coverage helps the public feel safe in their community and informs the public so they might make informed decisions in their community and be self-governing. And most disagreed that it allows the public to directly evaluate the veracity of testimony.

Most judges agreed that the presence of electronic media intimidates witnesses and jurors, but disagreed with the idea that the presence of the electronic media affects the behavior of judges negatively. Most judges also disagreed that it affects the rights of a defendant to a fair trial.

Based on the judges' attitudes towards electronic media, we now turn to the fundamental question of this study:

How have the beliefs and practices of trial judges affected electronic media access to the courts?

132. See discussion of Canon 35, *supra* page 4.

133. See discussion of *Estes*, *supra* page 212.

Even though court rules in all states permit some level of electronic media access to courts, in practice a significant number of judges still do not grant permission to traditional electronic media, and overwhelming number say that they will not grant permission to new media.

According to the judges, print reporters are not asking to record audio or use video or still cameras in court. But even if they did, it is highly unlikely that judges would grant permission to allow it.

Even though a majority of judges believe the electronic media fulfills many democratic functions in a community, they are still concerned that electronic media presence in the courtroom intimidates witnesses and jurors. But, they do not think the presence of electronic media goes so far as to affect judges' behavior, or a criminal defendant's right to a fair trial.

Even though state court rules now allow access to the courts, the results of this survey suggest that there are still a significant number of barriers to electronic media in courtrooms: not from the law, but in the beliefs and practices of judges.