UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX KOZINSKI
Chief Judge

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January 10, 2010

The Honorable Anthony J. Scirica
Chairman, Executive Committee
Judicial Conference of the United States
Washington, D.C. 20544

James C. Duff, Esq.
Secretary
Judicial Conference of the United States
Washington, D.C. 20544

Dear Tony and Jim:

Thank you for your letter and your interest. As you probably know, Chief Judge Walker has denied motions by the media to record and broadcast the trial. And, at present, his request to place a video recording of a non-jury civil trial on the Northern District's website is not ripe for decision; necessary technical issues have not yet been resolved. To date, I have therefore only approved real-time streaming of the case to other federal courtrooms, consistent with procedures used in other high-profile cases. Viewers in the other courtrooms will, of course, be prohibited from taking audio or video recordings of the stream.

I believe I can nevertheless allay the general concerns expressed in your letter about the Ninth Circuit's pilot project. The pilot project was developed after considerable deliberation and careful research. As you are aware, there is no Judicial Conference policy prohibiting trial courts from placing video recordings of non-jury civil proceedings on their websites. That policy decision rests exclusively with the Judicial Council of each circuit, consistent with the statutory governance structure of the courts. 28 U.S.C. § 332; *see also Armster v. U.S. Dist. Ct.*, 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) ("Except for judicial disciplinary proceedings, the Judicial Conference does not have binding or adjudicatory authority over the courts.").

Our Council is well aware that some 22 years ago the Judicial Conference first considered allowing cameras in courtrooms, 20 years ago authorized a pilot program of the same, and 14 years ago adopted a resolution urging the circuits' Judicial Councils not to permit radio and television coverage of proceedings in our district courts. *See* Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 17 (Mar. 12, 1996); Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 15 (Mar. 15, 1994); Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 103–04 (Sept. 12, 1990); Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 34 (Mar. 14, 1989). The issue came before the Judicial Conference in 1994 and 1996 as the result of a study of electronic media coverage of federal civil proceedings conducted by the Federal Judicial Center, which conducted pilot projects allowing the media to record and broadcast trials. The results of the study were positive. The FJC reported that there were "small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice." Federal Judicial Center, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals* 7 (1994). As a result of the study, the FJC research project staff recommended authorizing cameras in civil proceedings in federal courtrooms nationwide, subject to guidelines. *Id.* at 43.

The decision on this question was ultimately left in the hands of the circuits. *See 1996 Judicial Conference Report, supra*, at 17. In response to the Judicial Conference resolution, the Ninth Circuit Judicial Council adopted a policy in 1996 that prohibits the broadcast of trial court proceedings. However, not all circuits elected to follow the Judicial Conference's suggestion; some courts even adopted rules permitting courts to use video broadcasting equipment. E.D.N.Y. Local Civ. R. 1.8; S.D.N.Y. Local Civ. R. 1.8.

The Judicial Conference resolution also left the question of broadcasting federal appellate proceedings to each Court of Appeals. In response, the Ninth

Circuit Court of Appeals adopted a resolution in 1996 that allows the recording and broadcast of appellate arguments, subject to conditions. Since that time, hundreds of appellate arguments have been recorded and broadcast without incident.

The FJC study, and the Judicial Conference resolution, were focused exclusively on electronic coverage of the courts by the media. The Judicial Conference did not—and has not—considered video recording and dissemination by court units. Thus, the request by the Northern District of California to record and distribute video under the careful control of the court—not the broadcast media—involves circumstances far different from those considered by the Judicial Conference so long ago: New, cheaper video technology has made it possible for courts to control that which only the media could have controlled in 1996.

While the Judicial Conference has not formally considered this matter in the intervening decade and a half, a great deal has happened in the world since then, notably the advent of affordable video systems and the proliferation of the internet. Technology has changed the way trials are conducted and reported. The public, too, demands far more transparency from its public institutions today than it did in 1996. *E.g.*, Op. Ed., *Federal Courts Should Join 21st Century*, DES MOINES REGISTER (Jan. 8, 2010) (attached).

Our court, and most others, has responded to these public demands. We make digital audio recordings of each appellate argument available to the public on our website. A substantial number of arguments are video recorded and broadcast. We post all of our decisions, precedential and non-precedential, on our website. I post all of my decisions on judicial misconduct complaints, with appropriate redactions to preserve privacy, on our website. Our Circuit Council has recently adopted provisional guidelines for the use of electronic devices in courtrooms by jurors, media and the bar. Simulcasting of district court proceedings has become fairly common, especially in high profile cases in which courtroom space is limited. Even the Supreme Court is now releasing audio recordings—sometimes in near-realtime.

In short, the public has demanded greater access to our courtrooms, we have provided it and it has not caused problems.

All states allow media broadcast of court proceedings in some form. Some states have even imposed great restrictions on state trial judges' discretion to limit broadcasting. For example, Montana has incorporated a requirement for media access into its code of judicial conduct, making it an act of judicial misconduct to *refuse* without good cause any request by the media to broadcast court proceedings. Canon 35, *Montana Canons of Judicial Ethics*. As you are aware, legislation is now pending before Congress that would authorize or require federal courts to allow media recording and broadcast of court proceedings. *See* Sunshine in the Courtroom Act of 2009 (S. 657); Sunshine in the Courtroom Act of 2009 (H.R. 3054); *see also* http://jnet.ao.dcn/Legislation/Cameras_in_the_Courtroom.html. If we do not respond to the legitimate public expectations, we create a serious risk that Congress will impose camera requirements on the courts based on guidelines developed outside the court system.

In light of developments such as these, the Judicial Conference of the Ninth Circuit began debating how to respond at its 2007 meeting. It voted to have the current Ninth Circuit rule, which prohibits all cameras in district courts, reconsidered. Lawyers and judges, voting separately, approved the resolution by resounding margins. This sentiment reflects the strong view of our bar, as evidenced by the many resolutions we have received from various bar associations throughout our Circuit. *E.g.*, Letter of the Federal Bar Association of the Northern District of California to Judge Hamilton and Chief Judge Walker (Jan. 7, 2010) (attached).

Following the vote of the Ninth Circuit Judicial Conference, the Ninth Circuit Judicial Council passed a resolution urging the Judicial Conference to re-examine its historical opposition to video technology and endorse video recording and broadcasting of non-jury civil cases. The Judicial Conference Committee on Court Administration and Case Management (CACM) examined the request at its June 2009 meeting. It deferred formal action, but noted that "the limitations

inherent to the proposal (i.e., non-jury civil cases) would avoid many of the concerns of the Conference . . . and [the proposal] was therefore much more akin to what is already permitted in circuit courts." *CACM Report to the Judicial Conference of the United States, reprinted in Agenda of the Judicial Council of the Ninth Circuit* 7 (Oct. 22, 2009). Although the Committee was not unanimous in its view, it reported to the Judicial Conference that "the Committee also appears to be supportive of camera proposals in general that grant full discretion to the district judge, that allow for protection of the images of jurors and witnesses, and that proceed only with great care in criminal cases." *Id.* at 7–8. The matter was referred to the Judicial Conference's Executive Committee before its August 2009 meeting, but it declined, without explanation, to place it on the agenda for the September 2009 meeting of the Judicial Conference. *See* Judicial Conference Executive Committee, *Memorandum of Action* 2 (Aug. 20, 2009).

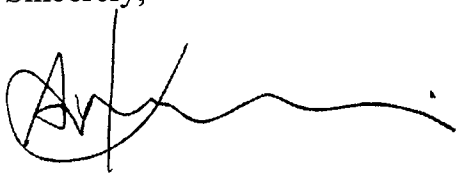
After extensive deliberation, and mindful of these considerations, our Judicial Council voted to approve a carefully-controlled pilot program to experiment with the use of video in non-jury civil cases. This approach, as the CACM report noted, is very limited and designed to avoid the concerns expressed by the Judicial Conference a decade and a half ago. The Council will use the experience gained during the pilot program to consider whether to adopt a permanent rule.

We hope and trust that other federal circuits and the Judicial Conference will take advantage of our experience when they reconsider the matter, as we believe they soon must. Like it or not, we are now well into the Twenty-First Century, and it is up to those of us who lead the federal judiciary to adopt policies that are consistent with the spirit of the times and the advantages afforded us by new technology. If we do not, Congress will do it for us.

Let me assure you that we will be proceeding with great caution. Every project is subject to my personal approval, and I am examining the details of each proposal meticulously. If and when the request from the Northern District of

California becomes ripe for my consideration, you may rest assured that I will examine all aspects of it with great care.

Sincerely,



Alex Kozinski

AK/dms

Attachments

cc: Ninth Circuit Judicial Council
The Honorable Vaughn R. Walker
Chief Judges, United States Courts of Appeals
Circuit Executives