

Minutes of the Meeting
Committee on Judicial Proceedings
July 25, 2006

Those in attendance: Atty. Aaron Bayer, Judge Clifford, Erin Cox, Judge Lavine, Ken Margolfo, Judge Ment, Judge Quinn, Patrick Sanders.

The meeting was called to order at 8:25 AM by Atty. Bayer.

The minutes of the last meeting were accepted as distributed.

Atty. Bayer began the meeting with a review of what the committee had discussed at the last meeting. The committee had agreed to put together a proposal for a pilot program regarding media access to cover all aspects of criminal proceedings in a single judicial district. This pilot would permit the refining and development of rules since the more complicated issues concerning rights and protection of juries, witnesses, victims, and defendants are involved. Judge Ment stated that there was no agreement; rather the committee had agreed to look at a proposal.

Atty. Bayer then went on to review the committee's discussion of media access to civil proceedings. That discussion centered around recommending changes to existing rules without a pilot since there are not the same issues (i.e., defendant's and victim's rights), although there are certain aspects of civil cases, i.e., juries and trade secrets, that are problematic but not as many as on the criminal side. Certain categories of cases, i.e., juvenile and family, pose such problems in terms of media coverage that they require more discussion. The committee will not reach all of these in the limited time available.

The committee has also arrived at recommendations on expanded media coverage for the Supreme and Appellate Courts and a proposal on the formation of a Judicial-Media committee, including a "fire brigade" for informal resolution of access disputes.

Atty. Bayer said that the committee had not drafted revisions to the Practice Book rules, but Judge Ment suggested that the committee need not draft specific revisions since the Rules Committee will do the drafting at the appropriate time.

The group then began a discussion of the criminal pilot proposal which had been prepared by Mr. Sanders. Mr. Sanders summarized the proposal saying that much of the language is taken from the practice book. In essence, everything is open for electronic coverage with no notification to the court. The onus is on the media to figure out who is responsible for setting up the feed and logistics for the pool, handling it responsibly without getting the court involved. The proposal is intended to make it very clean and easy for the court to run. Aside from the court determining where the one still camera and one video camera can be placed, there is nothing else for the court to do, unless there is a violation of the provisions of the rules.

Judge Clifford said the proposal seems more expanded and does not appear to provide for discretion of the trial judge. Atty. Bayer said that there should be an introduction that includes statements as to why the committee is recommending the creation of the pilot in a single judicial district for a one or two year period and stating that nothing in the proposal is intended to eliminate or restrict a trial judge's authority to protect the rights of criminal defendants, and to ensure order and decorum in the courtroom. An extensive

discussion ensued regarding the proposal, the absence in the proposal of notice to the court or of opportunities for objection by counsel, victims, witnesses, or parties. Judge Clifford said that without notice of some kind to the court, the court may have to hear arguments on closing a proceeding to media coverage even if the media had no intention of covering the proceeding. This would be a tremendous drain on court resources. Further discussion ensued regarding the need for establishing some standards, putting the onus on the attorneys to object to media coverage, how to handle situations that arise during a proceeding, the potential problems with respect to digitally disguising the identity of a person, the potential for delay and interruption of trials, and the concerns of judges with a proposal that makes such a great change in the way media coverage has been handled to date. Judge Ment expressed concern about protecting the ability of the court to function in an expeditious way. There was extensive discussion about what should be included in the initial rules of the proposal and whether media should have the ability to challenge denial of access at the trial level. Atty. Bayer said there was conflicting law on this issue. Ms. Cox said that the proposal should provide something new for the media or they would be unlikely to participate, which would defeat the purpose of the pilot program.

Atty. Bayer asked about the most significant issues that a trial judge would have to address in connection with the proposed pilot program. Judge Clifford said that there was always a concern about jurors. He also said that there should be some notice provision so that any issues could be addressed. Atty. Bayer said there was an inherent conflict in notice provisions in that sometimes the media does not know what they will be covering until it comes up or changes in plans occur because a bigger story comes up. Judge Quinn agreed that there should be a waiver provision to provide for those situations, but judges would prefer to address issues in advance so that the business of the court can proceed in a timely manner. Mr. Sanders said that if there is a presumption of openness, the media should not have to give notice. Judge Ment suggested that the proposal switch the obligation to counsel to object by providing notice that all trials are subject to coverage. He also said that the rule requiring televising of the entire proceedings should be removed.

Judge Quinn asked how members of the media should be notified regarding the filing of an objection. Atty. Bayer suggested posting notice of objections on the website as a means of letting media know. Judge Ment said to state in the proposal that everything is open to electronic media coverage at the particular location, with the onus on the attorneys to object. If the media chooses not to exercise their right, they say that and waive their right at that time. Mr. Margolfo added that the committee should say that the media has the right of access. Atty. Bayer said it is a qualified right of access. Judge Clifford would still like to include a way to determine if the press will be at a trial so that there is only a hearing on an objection if media coverage is a possibility.

Atty. Bayer suggested the following proposal:

- there is a limited right in the pilot area of all media access to criminal trials and all parties are effectively on notice that there can be coverage by print, still and video cameras;
- Parties and their counsel can object in advance and if they object, notice of the objection must be made public and if the press is interested in covering

the trial, judge will hold a hearing in accordance with standards that will be established;

- Any objections that arise during the course of the trial will be addressed consistent with the presumption of openness.

Judge Ment said that this proposal would be an amendment to the present rules so that the committee would not be changing certain restrictions, i.e., regarding victims of sexual assault.

Atty. Bayer said there would be restrictions as far as permitting one pool still camera and one pool video camera. Mr. Margolfo said the proposal should also include one pool audio. A discussion ensued as to whether specific restrictions on coverage should be in the rules, i.e. no photographing jurors or victims, or whether there should be a generic rule. Mr. Sanders suggested a provision in the proposal that would leave decision on these issues to the discretion of the trial judge with due concern for the rights of the victims, jurors, and witnesses. There was also a discussion about sketch artists and how those requests are handled by trial judges.

Ms. Cox raised the issue of exhibits and access to such items as autopsy photos. Mr. Sanders said that such photos are an issue, but not a real issue because the media would not put these on display. Currently, if it is an exhibit, the media should have access to it. Judge Ment said that it is not only the mainstream media that is involved. There are also bloggers, for example. Attorney Bayer said that there will have to be reliance on the judges to make informed decisions because it would be impossible to think of every situation.

Attorney Bayer asked if pretrial and post-trial proceedings would be different. Judge Ment said that a sentencing would follow the same rules as a trial, but arraignments are more difficult. Mr. Margolfo said that the media would be interested in seeing the defendant brought out in front of the judge. Currently sentencings are not open to cameras. Judge Clifford said that one of the concerns in an arraignment is that most of the time there is no lawyer there at the arraignment. Judge Ment said that sometimes the victim is there, for example in a family violence case, and it would be difficult to provide the opportunity for an objection because of the short time available. Judge Ment said that disruption is not really the problem in an arraignment. The problem is determining when the camera should be on or off. Judge Clifford said it would be difficult for the arraignment judge to know what type of case or defendant was coming up next for arraignment. Besides family violence, the camera could broadcast the young person whose case ends up being nolleed or dismissed. Attorney Bayer asked if arraignments could be included if the committee recommended excluding cameras from particular kinds of cases. Mr. Sanders said that the media would turn on the cameras if they saw something interesting and they should be able to do so. A discussion ensued. The suggestion was made to allow cameras in arraignments, but exclude victims categorically unless they have no objection or to require some notice from the media if they want to have cameras at an arraignment.

Attorney Bayer said that it is important to have specific reasons for excluding arraignments from the criminal pilot program in order to meet the task force guidelines on access and openness. Judge Clifford said that the logistics are much more difficult;

there are concerns about identifying the victims; and the environment of an arraignment court is extremely hectic. Judge Lavine said it is difficult to manage the docket so as to avoid problems. In a large district, Judge Ment said there might be between one and two hundred arraignments on one day.

Ms. Cox raised a question as to when the cameras would be able to roll. For example, is she were in the hallway outside the courtroom, could she shoot there? Judge Ment said that no cameras are permitted in the courthouse adjacent to a courtroom, not even in public areas like the lobby.

Attorney Bayer asked whether the procedures governing criminal trials would be applicable to earlier proceedings, i.e., motions to suppress, evidentiary hearings, and hearings on probable cause. Ms. Cox said there might concerns about tainting the jury if, for example, the information is all put forth in the hearing and then is subsequently suppressed. There will be further discussion of the pretrial proceedings.

Attorney Bayer offered to draft a proposal on media access to criminal proceedings in accordance with today's discussion. He will circulate the proposal for review to other members of the committee.

Judge Lavine handed out a memorandum that he received from Judge Kass regarding the Judiciary Media Committee, including the fire brigade as well as an educational component, that operates in Massachusetts. The committee will review the memorandum for the next meeting.

The next meeting is scheduled for August 1st at 8:15 AM.

The meeting adjourned at 10:10 AM.