

OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

MAY 02 2011

BY _____ FILED



**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF MEMBERS
OF THE STATE BAR OF ARIZONA,

**ANDREW P. THOMAS, BAR NO. 014069,
LISA M. AUBUCHON, BAR NO. 013141,
and
RACHEL R. ALEXANDER, BAR NO.
020092**

Respondents.

PDJ-2011-9002

**RULING ON MEDIA'S
REQUESTED CAMERA
COVERAGE TO ALL
PROCEEDINGS IN THIS
MATTER AND THOMAS' AND
AUBUCHON'S OPPOSITION TO
REQUEST**

**[Nos. 09-2293, 09-2294,
09-2296, 10-0423, 10-0663,
10-0664]**

On February 28, 2011, pursuant to Rule 70 and Rule 122 of the Arizona Rules of the Supreme Court, KPNX Broadcasting ("KPNX") requested camera coverage to all proceedings in this matter. Respondents Thomas and Abuchon opposed that request.

BACKGROUND

The Constitution of Arizona Art. II, § 11, mandates that the administration of justice in "all cases shall be administered openly, and without unnecessary delay." This provision of the Constitution has been referred to as the "open courts" provision of our Constitution. John D. Leshy, *The Arizona State Constitution: A Reference Guide* 51 (1993). "The 'open courts' provision essentially commands public judicial proceedings." *State v. Ramirez*, 178 Ariz.

1 116, 871 P.2d 237, cert. denied, 513 U.S. 968, 115 S. Ct. 435, 130 L. Ed. 2d
2 347 (1994). It has long been clear in Arizona that no individual is entitled to a
3 "secret" trial. *State v. White*, 97 Ariz. 196, 398 P.2d 903 (1965). In that case
4 the Arizona Supreme Court explained the reason for this. "The community is
5 deeply interested in the right to observe the administration of justice and we
6 feel the presence of its members at a public trial is as basic as that of a
7 defendant." As a result, while a judge has the power to exclude the coverage
8 of a proceeding, it must balance the public benefit of camera coverage versus
9 the likely harm that may arise from such coverage. How to weigh these
10 competing interests was explained by the Arizona Supreme Court in *Phoenix*
11 *Newspapers v. Jennings*, 107 Ariz. 557, 561, 490 P.2d 563, (1971). While rule
12 changes have changed some of the analysis; great insight is given by that case.

13 We think the Supreme Court of the United States has
14 indicated where the line shall be drawn. If
15 circumstances exist which establish a clear and
16 present danger that the judicial process will be
17 subverted by an open hearing, appropriate action
18 should be taken by a court to preserve judicial
19 integrity. See *Thomas v. Collins*, 323 U.S. 516, 65
20 S.Ct. 315, 89 L.Ed. 430; and *Bridges v. California*,
314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R.
1346. Clear and present danger means that the
substantive evil must be extremely serious and the
degree of imminence extremely high.

19 *Bridges, supra*.

20 **RULE 122 DISCUSSION**

21 It is in the context of this constitutional background that the Rules of the
22 Supreme Court must be applied. Rule 122, Ariz.R.Sup.Ct., provide that
23 electronic and still photographic coverage of public judicial hearings "may be
24 permitted" in accordance with the guidelines set forth within that rule. Typically
25 the use of the word "may" in a rule reflects a choice to act or not to act as

1 distinguished from the use of the word "shall" which makes an action
2 imperative. However, Rule 122 (c) restricts such discretion by its clear limiting
3 language.

4
5 The judge may limit or prohibit electronic or still
6 photographic coverage only after making specific, on-
7 the-record findings that there is a likelihood of harm
8 arising from one or more of the above factors that
9 outweighs the benefit to the public of camera
10 coverage.

11 Thus these powers of discretion to "limit or prohibit" coverage may only
12 be exercised *if* specific findings in accordance with the rule are made on the
13 record signifying the factors outweigh the public benefit. However that
14 balancing act begins in the context of the constitutional mandate for "open
15 proceedings" because "Historically, this state has always favored open
16 government and an informed citizenry." Rule 123(c)(1), Ariz.R.Sup.Ct.

17 **PUBLIC PROCEEDINGS**

18 Respondent initially questions whether these proceedings are in fact open
19 to the public. They are. These proceedings became public when probable
20 cause was found by the probable cause panelist. A respondent under the
21 Ariz.R.Sup.Ct., is entitled to a determination of probable cause before a
22 complaint may be filed. Every individual also has a right to due process. While
23 who determines probable cause has changed, the impact has not. Respondent
24 argues because the rules were amended effective 2011, that the prior finding of
25 probable must reoccur under the new rules for this case to proceed.
Respondent misapplies the rule changes. There is no substantive or procedural
right to a repetitive finding of probable cause under the prior rules and another

1 finding of probable cause under the amended rules. Both the prior rules and
2 the present rules provide that a disciplinary matter is open to the public after a
3 finding of probable cause.

4 Under the prior Rule 54(b)(4), a recommendation by the state bar for a
5 disposition other than dismissal was required to be reviewed by a probable
6 cause panelist to determine whether probable cause existed to proceed with the
7 recommendation to prosecute. A "panelist" under prior Rule 46 was defined as
8 one or more members of the board of governors of the State Bar of Arizona.
9 Probable cause was found by a "panelist" under the prior rules in 2010. Under
10 prior Rule 70(a) the disciplinary matter "shall be open to the public upon: ... the
11 filing of an (probable cause) order by the panelist pursuant to Rule 54(b)(4)".

12 Under the amended rules, probable cause is determined by the Attorney
13 Discipline Probable Cause Committee of the Supreme Court of Arizona as
14 established by Rule 50. As with the probable cause panelist's finding of
15 probable cause, the disciplinary matter "shall be open to the public upon: the
16 filing of an (probable cause) order by the committee..." "Committee" is defined
17 as the Attorney Discipline Probable Cause Committee of the Supreme Court of
18 Arizona by amended Rule 46.

19 There is no substantive change to when attorney discipline matters
20 become public. They become public upon a finding of probable cause being
21 filed. That order was filed with the disciplinary clerk on December 6, 2010.
22 This matter became public at that time.

23 **BALANCING DISCUSSION**

24 Respondents set forth four basic objections to electronic coverage. These
25 objections are 1) televising the proceedings will have a "spill-over effect of

1 tainting the jury pools for the ten-and-counting civil lawsuits that are being
2 pursued" by various parties; 2) Witness privacy will be impacted including
3 potential ethical violations of disclosure of attorney privileged information; 3)
4 There is a potential for a "three-ring circus" atmosphere; and 4) the press will
5 edit the statements and perceptions will be impacted.

6 The response to these objections note there has already been substantial
7 media coverage, some at the request of Respondent Thomas. It is argued that
8 even with camera coverage there is little likelihood of other juries being tainted.
9 The Response further states that because the proceedings are public, the public
10 may attend the hearings with or without electronic coverage. More to the point
11 is the argument that the public would benefit from camera coverage citing
12 *Phoenix Newspapers supra*, "[d]emocracy blooms where the public is informed
13 and stagnates where secrecy prevails."

14 In reply, Respondent refers this court to *Hollingsworth v. Perry*, 558 U.S.
15 ____, ____, 130 S.Ct. 705, 709 (2010) to support that the impact of media is
16 recognized as negative. However that case addressed an entirely different
17 issue. The opinion of the United States Supreme Court in that case did not
18 address the issues that are before this court. The opinion begins, "We are asked
19 to stay the broadcast of a federal trial. We resolve that question without
20 expressing any view on whether such trials should be broadcast." Instead the
21 court found "the courts below did not follow the appropriate procedures set
22 forth in federal law before changing their rules to allow such broadcasting."
23 That Court went further, "We do not here express any views on the propriety of
24 broadcasting court proceedings generally." The rules and law in Arizona as
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1 cited above are clear. While the application of the rules and law has caused
2 much contemplation, that law and the rules have been followed.

3 Regardless of the reasons for the publicity preceding this disciplinary
4 matter, this court believes information will not taint the public but rather
5 reported proceedings will clarify and better inform a public that is presently left
6 with little other than innuendo or partisan conjecturing. Few things are more
7 certain to trigger an increase in public distrust than the removal of proceedings
8 from public scrutiny. The best clarification to dark allegations is not more
9 darkness but rather the light of informed reasoning.

10 Respondents speculate that the media itself may frame or prejudge the
11 public through its power of an editorial disguised as reporting. If members of
12 the press choose to wrongly prejudge, however, they will likely one day
13 discover they cannot do wrong without suffering wrong. Biased reporting
14 assures a tree without bloom or fruit and tragically assures a public's lack of
15 trust in the very institution of a free press. But this judge does not believe that
16 will occur beyond a few.

17 Regardless, both the refusal to accurately report pertinent news and the
18 preclusion of an ability to report pertinent news are thorns of similar thistles.
19 Either injures the public confidence. A sacrifice of principle for fleeting
20 popularity ratings of the moment is always a bad bargain. Despairing of the
21 few who may be irresponsible cannot be a reason for drawing a shade on these
22 proceedings. As the sand passes through the hourglass of this trial, the public
23 will hold an infinitely better opportunity to see more clearly by watching the
24 resulting clarity of that glass than if it is hidden from view. This court finds the

25

1 likelihood of harm arising from one or more of the factors listed in Rule 122 do
2 not outweigh the benefit to the public of camera coverage.

3 Pursuant to Rule 122, the media shall elect a spokesperson to act on
4 their behalf. Strict compliance with Rule 122 shall be required. The media is
5 directed to advise this Judge of their proposals for coverage in writing and
6 thereafter shall meet with a representative of this court designated by this
7 Judge to review the practical means and methods for allowing unobtrusive
8 electronic coverage.

9 DATED this 2 day of May, 2011.

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11 
12 William J. O'Neil, Presiding Disciplinary Judge
13 Office of the Presiding Disciplinary Judge

14 COPY of the foregoing e-mailed
15 this 2 day of May, 2011, to:

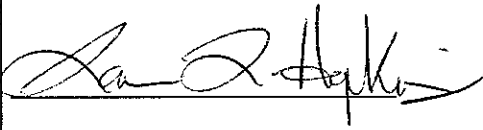
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