December 9, 2014

Honorable Robert W. Goodlatte
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We are writing to commend you for recently holding a hearing on H.R. 917 and for continuing to focus public attention on the issue of “cameras in the courtroom.” We would appreciate your including this letter in the hearing record.

The American Bar Association has had a long and cautious history with respect to broadcast coverage of federal judicial proceedings. In 1937, the ABA formulated its original ban on camera coverage as Canon 35 of the then Canons of Judicial Ethics because of concerns about preserving the dignity and decorum of the courtroom, safeguarding the right to a fair trial in criminal proceedings, and avoiding potential adverse impact on the fact-finding process and the administration of justice.

During the 1970s, state courts started to permit camera coverage of judicial proceedings. As courts became more experienced and technology improved, the vast majority reported favorable results. After observing state initiatives, and following the 1981 unanimous decision in Chandler v. Florida, 449 U.S. 560, holding that due process does not require an absolute ban on cameras in the courts, the ABA revised the Model Code of Judicial Conduct to permit judges “to authorize broadcasting, televising, recording, or photographing of judicial proceedings,” consistent with the right to a fair trial and in manner that would not interfere with the administration of justice. A year later, despite the ban against coverage of criminal proceedings in the Federal Rules of Criminal Procedure, the ABA made clear that we believed that electronic coverage should be permissible in criminal proceedings as well as civil proceeding by incorporating the language of the revised Code into its Criminal Justice Standards for Fair Trial and Free Press.

By 1990, 45 states permitted some form of electronic media access to judicial proceedings. The states’ acceptance of, and extensive experience with, electronic media coverage likely informed the decision of the ABA to delete the provision in its 1990 Model Code of Judicial Ethics and recast the issue as a matter of court administration rather than one with ethical dimensions.

In 1991, the Judicial Conference of the United States began a three-year pilot program to permit electronic coverage of federal civil proceedings in selected trial courts and courts of appeals. The
Association welcomed these developments and recommended that the U.S. Supreme Court participate in the pilot program, a recommendation that was not followed.

Without a satisfactory explanation, the Judicial Conference voted in 1995 to terminate all electronic coverage of federal courtroom proceedings, despite the favorable assessment of the Federal Judicial Center that electronic media coverage had not adversely affected the administration of justice. The ABA, believing that the issue had not been examined fully, strongly objected to the finality of the Judicial Conference’s action and urged it to authorize further experimentation with electronic media coverage. In 1996, the Judicial Conference reconsidered its position and compromised by authorizing federal appellate courts to permit coverage in accordance with promulgated guidelines. Many court observers commented at the time that their reluctance to include district courts in the authorization was understandable, given the breakdown in court decorum during the televising of the O.J. Simpson case the year before.

In 2010, the Judicial Conference announced a new three-year pilot project “to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings therein, and publication of such recordings”; the Conference subsequently extended the project for an additional year. Fourteen courts are participating in the pilot, which began in June 2011 and will end in July 2015.

Guidelines issued for the pilot project state that proceedings in civil cases may be video-recorded only with the approval of the presiding judge and consent of the parties. Jurors may never be recorded, and bankruptcy proceedings are not included in the pilot project. Video recordings will be made available to the public unless the presiding judge determines otherwise. As with the first pilot project, the Federal Judicial Center is tasked with evaluating the pilot project and issuing a report with recommendations.

The current pilot, while limited to civil proceedings, is operating under guidelines that closely resemble provisions contained in H.R. 917 and predecessor legislation. In fact, there seems to be substantial agreement between Congress and the Judicial Conference over the structure for implementation of such a program and the safeguards needed to prevent cameras from interfering with the administration of justice. Although progress is slow, the federal judiciary is paying attention to Congress’s interest in expanding public access to court proceedings.

Even the Supreme Court, which is not subject to the governance of the Judicial Conference and has never permitted video recording of its proceedings, has taken significant steps over the past decade to increase transparency and to simplify and expedite access to oral arguments.

In 2000, the Supreme Court, for the first time, released same-day audio recordings of oral arguments in the case of Bush v. Gore. Since then, it has released same-day audio recordings in 20 additional high-profile cases. In 2006, the Supreme Court instituted another heralded change, making same-day transcripts of its oral arguments available for free on its website. Prior to that, same-day transcripts were available only through transcription services and often cost hundreds of dollars. The last notable public access policy change occurred in 2010, when the Supreme
Court announced that all oral argument recordings would be released on the Friday of the week in which they occurred, rather than after the term ended.

In August 2014, the ABA deleted its endorsement of electronic media coverage in its Fair Trial and Free Press Criminal Justice Standards and replaced it with a best-practice standard advising courts to think proactively and develop plans that address electronic media coverage and other methods for accommodating the public interest in criminal proceedings. This revision reflects the ABA’s recognition that individual jurisdictions are best suited to address these issues based on their specific experiences.

The ABA remains committed to the belief that all federal courts, including the Supreme Court, should experiment with and expand electronic media coverage of both civil and criminal proceedings. We, like many congressional supporters of this legislation, believe that courts that conduct their business under public scrutiny protect the integrity of the federal judicial system by advancing accountability and providing an opportunity for the people they serve to learn about the role of the federal courts in civic life.

We suspect that most judges share these views and that the Judicial Conference’s reluctance to move quicker stems from outdated experiences and lingering concerns that electronic media coverage will taint proceedings. Its willingness to reexamine the bases for its views, and to reevaluate its policies in light of the results of the current pilot project, is a welcome change.

Once the pilot project concludes, we hope that Congress will engage the Judicial Conference in rigorous discussion over the Federal Judicial Center’s analysis of the pilot project and will work to make sure that empirical data inform future decisions with regard to expanding electronic media coverage of federal court proceedings. The ABA supports this objective but prefers to defer to the Judicial Branch in the first instance to effectuate the transition and establish the necessary framework.

Thank you for the opportunity to present the ABA’s views on this topic.

Sincerely,

Thomas M. Susman

cc. Members of the Committee