F. "SHE WON'T LET ME BLOG FROM THE COURTROOM"

Introduction

As the use of portable electronic devices has expanded, courts are struggling with issues raised by the use of these devices in connection with trials and other judicial proceedings. In 2009, three state appellate courts threw out criminal convictions because jurors conducted independent research with portable devices during jury deliberations.[1] These experiences, and others, have prompted many courts to adopt model jury instructions expressly and unequivocally ordering jurors not to use portable electronic devices in ways that could contravene instructions not to conduct independent research or communicate with parties involved in the case.[2]

Apparently concerned that it is the technology, not the misuse of the technology, causing the problem, several courts have also enacted broad, sweeping prohibitions against the use of portable electronic devices not only by jurors, but by others in the courtroom, and have extended those bans beyond the courtroom in some cases.[3]

Such sweeping prohibitions represent an overbroad reaction to a limited and discrete set of problems, and unnecessarily impede the efficient flow of information concerning judicial proceedings. To avoid these adverse effects, the MLRC has promulgated a Model Policy on Electronic Devices, which is set forth at the end of this chapter, which provides a reasonable response to the emerging set of issues. The proposed Model Policy, which could be adapted into a court order (either a standing order or a case-specific order) recognizes the distinct concerns presented by the various groups affected by such policies and treats each group in a reasonable

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[1] *See* Eric Robinson, *Courts in Colorado, Maryland, New Jersey, Florida Declare Mistrials After Juror Internet Research*, Citizen Media Law Project, Jan. 25, 2010, http://www.citmedialaw.org/blog/2010/courts-colorado-maryland-new-jersey-florida-declare-mistrials-after-juror-internet-researc; Douglas L. Keen & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet (The "Google Mistrial")*, The Jury Expert – The Art and Science of Litigation Advocacy, Vol. 21 No. 6 (Nov. 2009), http://www.astcweb.org/public/publication/article.cfm/1/21/6/Why-Jurors-Turn-to-the-Internet; Jeffrey T. Federick, *You, The Jury and the Internet*, The Brief, Vol. 39, No. 2 (Winter 2010).); *see also State v. Aguilar*, __P.3d__, 2010 WL 1720613 (Ariz. Ct. App. April 29, 2010) discussed in Susan Brenner, *Jurors Going Online . . . Again*," (May 17, 2010), http://cyb3rcrim3.blogspot.com/2010/05/jurors-going-online-again.html.

[2] *See, e.g.*, Memorandum from Judicial Conference Committee on Court Administration and Case Management to Judges, U.S. District Courts (Jan. 28, 2010), *available at* http://www.wired.com/images_blogs/threatlevel/2010/02/juryinstructions.pdf; Wisconsin – WIS JI-CRIMINAL 50 (2009), *available at* http://www.postcrescent.com/assets/pdf/U014968718.PDF; New York – CJI2d[NY] Required Jury Admonitions (2009), *available at*, http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf; *see also Juror Use of Social Media: A State-by-State Guide*, May 2, 2010, http://bloglawonline.blogspot.com/2010/02/juror-use-of-social-media-state-by.html.

[3] *See, e.g.*, Circuit Court Baltimore City, Addendum to Administrative Order on the Use of Cell Phones and Other Communications Devices (Jan. 5, 2010), *available at* http://www.baltocts.state.md.us/about/publications, then select "admin order addendum_electronic devices 2010jan05.pdf" hyperlink; *see also* United Stated Judicial Conference, Considerations in Establishing Court Policy Regarding the Use of Wireless Communications Devices (2007) (summarizing different types of rules that have been adopted by courts across the nation, including "all devices are banned, and all seeking to enter the building, except judges, clerk's office, and chambers personnel, and probation and pretrial officers, are required to either store the devices with the court security officer or, if storage is not provided, leave the building and store the device elsewhere").

and responsible way. To a large extent, the proposed policy is modeled after the policy governing electronic devices recently adopted by the Judicial Council for the United States Court of Appeals for the Ninth Circuit.[4]

The Model Policy's fundamental presumption is that members of the public, the press, attorneys, and jurors should be allowed to possess and use portable electronic devices within the courthouse unless a restriction is specifically required. It then imposes specific restrictions on use of such devices in courthouses and in courtrooms, *e.g.*, no photography, audio or video recording is permitted inside a courtroom unless authorized in conformity with statutes and/or rules of a particular jurisdiction. Although the Model Policy affords members of the press the same rights and responsibilities as the general public, special accommodation for the role of the press in providing coverage to court proceedings is appropriate.

Tweeting/Blogging from the Courtroom

The Model Policy also approves, presumptively, the practice of allowing members of the press (and the public) to use portable electronic devices to send contemporaneous news reports, via text, from inside courtrooms during trials and other judicial proceedings. Many courts have authorized such live press reporting and in no instance has any such reporting been found to interfere with the solemnity, dignity, or decorum of the proceeding, nor has it otherwise interfered with any party's substantive fair trial rights.[5] Allowing the press to report contemporaneously on what transpires in a public courtroom does not violate federal or local rules prohibiting "broadcasting" of trial proceedings from the court,[6] nor does it create any incremental adverse effects in comparison to press reports sent on frequent intervals throughout a trial.

LEGAL BASIS FOR THE MODEL POLICY

I. Reporters Should Be Permitted To Use Electronic/Wireless Devices While Covering Court Proceedings

A. Reporting of judicial proceedings facilitates justice and fosters better public understanding of, and respect for, government institutions.

"News gathering is an activity protected by the First Amendment." *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986); *see also Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]e do not question the significance of free speech, press, or assembly to the country's

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[4] *See* United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010).

[5] *See, e.g.*, General Order M-400, United States Bankruptcy Court, Southern District of New York (May 19, 2010), permitting press representatives to use Personal Electronic Devices in the courthouse. *See, also*, Citizen Media Law Project, *Live-Blogging and Tweeting from Court*, http://www.citmedialaw.org/legal-guide/live-blogging-and-tweeting-from-court (last visited May 26, 2010) (providing examples of live blogging and tweeting from inside state and federal courtrooms in California, Colorado, Florida, Iowa, Kansas, Michigan, Pennsylvania, Massachusetts, and Washington, D.C.).

[6] For this reason, the Model Policy does not address the use of electronic devices for transmitting photographic or video images or audio signals from inside the courtroom, which *is* subject to state and federal rules addressing such activity. *See infra* n.8.

welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."). Because of the vital role that public scrutiny of judicial proceedings plays, the Supreme Court has held that the First Amendment requires that criminal trials and related proceedings must be open to both the media and the public, absent compelling and clearly articulated reasons for closing such proceedings. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 & n.17 (1980) (holding media and public possess First Amendment right to observe criminal trials); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982) (recognizing right to attend testimony at criminal trial of minor victim of sexual offense); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984) (right to attend *voir dire* examinations of jury venire in criminal case) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (right to attend preliminary hearing in criminal case) ("*Press-Enterprise II*"); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 148 (1993) (same). Although the Supreme Court has not yet addressed this issue, numerous lower courts have recognized that the same First Amendment right to attend and observe judicial proceedings applies in civil cases as well. *See, e.g.*, *NBC Subsidiary (KNBC-TV) v. Super. Ct.*, 980 P.2d 337, 361 (Cal. 1999); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *In re Cont'l Ill. Sec. Lit.*, 732 F.2d 1302, 1310 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 801-02 (11th Cir. 1983); *Associated Press v. New Hampshire*, 888 A.2d 1236, 1247 (N.H. 2005).

The U. S. Supreme Court has identified a variety of interests advanced by having criminal proceedings open to the public and the press: (1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial's results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted by government. *See Richmond Newspapers*, 448 U.S. at 569-71.[7] Although press' right to *attend* judicial proceedings is co-terminus with that of the public, the Supreme Court has recognized that news reporting, in addition to general public access, helps to further these same objectives. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

Accordingly, the constitutional role played by the press when it reports on judicial proceedings is well-established. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("[I]n a society in which each individual has but limited time and resources with which to

[7] *See also Globe Newspaper Co. v. Super Ct.*, 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and the society as a whole[,] permit[ting] the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.") (footnotes omitted); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 501, 592 (1984) (Brennan, J.) ("public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'") (citation omitted).

observe first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations."); *Richmond Newspapers*, 448 U.S. at 573-74 ("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. . . . This contributes to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.") (Burger, C.J.) (internal quotations and citations omitted).

B. Providing *contemporaneous* reports on judicial proceedings lies at the core of the press' constitutional role.

In today's world of "breaking news" occurring around the clock – and instantly available to citizens on their desktops, over broadcast and cable channels, and in the palms of their hands – the role that electronic devices play in enabling the press to provide timely coverage of judicial proceedings cannot be overstated. Part and parcel of the press' role is to provide *contemporaneous* coverage, live, of unfolding events. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) (recognizing that "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly"); *id.* at 609 (Brennan, J., concurring) (noting that "delay . . . could itself destroy the contemporary news value of the information the press seeks to disseminate"); *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring) ("contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power") (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)); *Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (recognizing "the critical importance of contemporaneous access . . . to the public's role as overseer of the criminal justice process"); *Courthouse News Serv. v. Jackson*, No. H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (finding that a 24 to 72 hour delay in access to civil complaints was unconstitutional "[i]n light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous . . . [t]he newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.") (internal quotation and citation omitted). Put simply, it is imperative that the press be permitted to utilize electronic devices within the courthouse to fulfill its mission of providing the public with timely reports on the judicial system.

C. Restrictions on the news media's ability to provide contemporaneous coverage of judicial proceedings should be narrowly tailored and provide reasonable accommodation of the press' needs.

Any governmentally-imposed restrictions on constitutionally-protected activity, such as newsgathering, must satisfy the standards applicable to time, place, and manner restrictions: they must be "narrowly tailored to serve a significant government interest" while leaving open "ample alternative channels" for the press to conduct their newsgathering activity. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Courts have found that orders restricting the right to conduct newsgathering activities in the corridors of a public courthouse implicate the First Amendment rights of the press and the public. *See Dorfman v. Meiszner*, 430 F.2d 558, 561-62 (7th Cir. 1970) (striking down as

overbroad a court rule prohibiting all photography in courthouse corridors); *Angelico v. Louisiana*, 593 F.2d 585, 588-89 (5th Cir. 1979) (holding unconstitutionally vague a state court rule prohibiting interviews with witnesses and use of electronic recording devices in "halls" and "hallways" of court building). Accordingly, to justify any restriction on the use of portable electronic devices inside a public courthouse, such restriction must be "narrowly tailored" to further a significant governmental interest. While concerns such as noise, disruption, and particular security challenges may justify narrowly tailored restrictions on use of such devices in specific situation, a blanket ban on use of all such devices at all times does not satisfy the constitutional standard.

II. Existing Court Rules Governing Audio-Visual Recording Devices Do Not Apply to, and Should Not Be Extended to, Wireless Text-Transmitting Devices

A. Rules of court that prohibit or limit the presence of cameras and audio recording devices do not apply to text-transmitting devices.[8]

Several courts (including the United States District Courts in criminal cases) have enacted policies or rules prohibiting still camera photography and electronic recording or broadcasting of video and/or audio signals that capture and reproduce the actual proceedings transpiring within the courtroom. For example, Rule 53 of the Federal Rules of Criminal Procedure states that a "court must not permit the taking of photographs in the courtroom during judicial proceedings or the *broadcasting of judicial proceedings* from the courtroom." (emphasis added). In November 2009, United States District Judge Clay D. Land, of the Middle District of Georgia, ruled that Rule 53 encompasses text messaging from the courtroom and therefore a reporter from *The Columbus Ledger-Inquirer* newspaper was prohibited thereby from using a handheld electronic device to send live "tweet" posts from the courtroom to the Twitter website. *See United States v. Shelnutt*, Case No. 09-CR-14-CDL, 2009 WL 3681827 (M.D. Ga. Nov. 2, 2009). Judge Land noted that Rule 53 was amended in 2002 to delete the word "radio" as the qualifier on "broadcasting," and that the Advisory Committee that recommended that amendment "did not consider the change to be substantive." *Id.* at *1.

Two law professors have criticized Judge Land's interpretation of Rule 53. *See* Anita Ramasastry, *Should Courtroom Proceedings be Covered via Twitter? Why the Better Answer is "Yes,"* (Dec. 29, 2009), http://writ.news.findlaw.com/ramasastry/20091229.html (stating that "'broadcasting,' in Rule 53, refers to the direct, unmediated audio or video communication of a proceeding's sights and sounds – not of a journalist's own comments, notes, and reflections); Eric Goldman, *Courtroom Coverage in the Internet Era – A Conference Recap* (Jan. 6, 2010), http://blog.ericgoldman.org/personal/ (describing "the illogic of [the *Shelnutt*] rule is overwhelming"). Moreover, several United States District Court judges have disagreed with Judge Land's interpretation of Rule 53 and have allowed members of the press, and others, to

[8] The Model Policy points to such statutes, codes, and rules for use of electronic devices for photography or video/audio recording or transmitting inside the courtroom. *See also* RTDNA, *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, last visited June 3, 2010.

provide live blogging and tweet feeds from federal criminal trials.[9] Indeed, in February 2010, the Judicial Council for the United States Court of Appeals for the Ninth Circuit authorized District Court judges throughout that circuit to permit reporters to provide live blogging and other text transmissions in criminal cases.[10]

On January 20, 2010, the First District Court of Appeals in Florida issued an emergency writ finding that use of a laptop computer, including possible live text transmitting from a trial, was not prohibited by Florida's Rule of Judicial Administration 2.50 (which governs cameras in the courtroom) and vacated a trial court's ruling barring a newspaper reporter from using a laptop computer in the courtroom.[11] The appellate court did not determine whether live blogging from the courtroom should be permitted, leaving that to the court's discretion on remand, but directed the trial judge "to allow [the *Florida Times-Union* reporter] the use of a laptop in the courtroom unless the court finds a specific factual basis to conclude that such use cannot be accomplished without undue distraction or disruption." *Morris Publ'g Co., LLC v. State of Florida*, No. 1K10-226, 2010 WL 363318, at *1 (Fla. Ct. App. Jan. 20, 2010).

B. Use of live text-transmitting devices in courtrooms does not produce "adverse effects" any greater than those produced by "traditional" news media.

Judges have the inherent authority to impose appropriate restrictions on the conduct of all who enter the courtroom, in order to maintain appropriate solemnity, decorum and order in the proceedings. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.") (internal

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[9] *See, e.g., United States v. Nacchio*, Criminal Action No. 05-cr-00545-MSK (D. Colo.), coverage at http://blogs.rockymountainnews.com/nacchio_trialwire/ (last visited May 26, 2010); *State v. Midyette* Case No. 07-CR-918 (Colo. Dist. Court), coverage at http://coloradoindependent.com/18805/judge-orders-twitter-in-the-court-lets-bloggers-cover-infant-abuse-trial (last visited May 26, 2010); *State v. Reiser* (Ca. Super. Ct.); coverage at http://www.sfgate.com/cgi-bin/blogs/localnews/detail?blogid=37&entry_id=21674 (last visited May 26, 2010); *United States v. McCarty*, (S.D. Fla.), coverage at http://www.palmbeachpost.com/localnews/content/local_news/epaper/2009/03/24/0324fedorder.html (last visited May 26, 2010); *United States v. Miell* (N.D. Iowa), coverage at http://www.abajournal.com/news/article/bloggers_cover_us_trials_of_accused_terrorists_cheney_aide_and_iowa_landlor/ (last visited May 26, 2010); *United States v. Schneider* (D. Kan.), coverage at http://www.cbsnews.com/stories/2009/03/06/tech/main4847895.shtml?source=related_story (last visited May 26, 2010); *State v. Blake* (Mich. Cir. Ct.), coverage at http://www.fox17online.com/news/fox17-troy-brake-trial-blog,0,4058702.story (last visited May 26, 2010); *United States v. Fumo* (E.D. Pa.), coverage at http://www.philly.com/inquirer/special/fumo/ (last visited May 26, 2010); *United States v. Libby* (D.D.C.), coverage at http://www.mediabloggers.org/taxonomy/term/19 (last visited May 26, 2010); *United States v. Tenenbaum* (D. Mass.), coverage at http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-trial-opens-following-last-minute-dismissal-of-fair-use-defense.ars (last visited May 26, 2010); *see also Perry vs. Schwarzenegger* (N.D. Cal.) (civil trial challenging the constitutionality of California's Proposition 8), coverage at http://firedoglake.com/prop8trial (last visited May 26, 2010).

[10] *See* Ninth Circuit Judicial Council, Policy on Electronic Devices (Feb. 25, 2010).

[11] *See Morris Publ'g Co., LLC v. State of Florida*, No. 1K10-226, 2010 WL 363318 (Fla. Ct. App. Jan. 20, 2010).

quotation mark and citation omitted).[12] Thus, courts are empowered to take corrective measures if a spectator (press or public) is unduly noisy or engages in disruptive speech or conduct. Barring any such aberrational behavior, however, members of the press have a First Amendment right to take notes in the courtroom. *See, e.g.*, *Goldschmidt v. Coco*, 413 F. Supp. 2d 949, 952-53 (N.D. Ill. 2006) (recognizing that a court-imposed limitation on the right to take notes in a courtroom is a "limitation [that] must still withstand scrutiny for its neutrality and reasonableness. . . . A prohibition against note-taking is not supportive of the policy favoring informed public discussion; on the contrary, it may foster errors in public perception.").

The difference between taking notes by pen and paper and quietly using a laptop or other text-recording device is immaterial for purposes of maintaining courtroom decorum, solemnity, and order. Once it is accepted that a laptop computer or other electronic device may be used by the press in the courtroom for purposes of taking notes on the proceedings, the question then becomes "Does it change the analysis if the reporter writes his posts (or news reports) in the courtroom and then uploads them at the breaks or the end of the day, as opposed to sending those posts 'live' from inside the courtroom?[13] As one law professor and legal commentator has stated, such a distinction "is silly – it's the exact same content, just posted on a delay."[14]

Thus, in terms of the actual physical/aural/visual impacts upon the courtroom environment, there is no meaningful distinction between handwritten note-taking, use of a laptop for note-taking, and live text transmitting from a courtroom. Nor is the incremental "adverse impact" of live text transmissions *outside* the courtroom of any greater significance to other governmental interests than traditional press coverage of trials. To the extent that jurors and witnesses who are subject to exclusion orders may come upon such blog postings, for example, they would be doing so in violation of traditional court orders not to read any news media accounts of the trial.

Conclusion

Today information travels at the speed of electrons, and handheld electronic devices have become an important "tool of the trade" for the working press. To provide the public with timely and informative reports of what transpires in public courtrooms, the press must be permitted to utilize these devices both inside the courthouse, and, so long as doing so is not disruptive, inside the courtroom. The Model Policy recognizes and supports the pivotal role that the news media play in our democracy by providing the public with timely information about our judicial system, while recognizing that judges have, and should have, the authority and duty to maintain the solemnity, dignity and decorum of court proceedings.

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[12] *See also ABA Standards for Criminal Justice: Special Functions of the Trial Judge* (3d ed. 2000): Standard 6-3.5(a) ("A trial judge should maintain order and decorum in judicial proceedings. The trial judge has the obligation to use his or her judicial power to prevent distractions from and disruptions of the trial."); Standard 6-3.10 ("Misconduct of spectators and others: (a) Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if such conduct is intentional, may be punished for contempt.").

[13] *See* Eric Goldman, *Courtroom Coverage in the Internet Era – A Conference Recap*, (Jan. 6, 2010), http://blog.ericgoldman.org/personal/.

[14] *Id.*