

**MLRC NEWSGATHERING COMMITTEE:
MODEL POLICY ON ACCESS AND USE OF ELECTRONIC PORTABLE
DEVICES IN COURTHOUSES AND COURTROOMS**

Introduction

Electronic devices including personal digital assistants, smart phones (with or without audio and/or video recording capability), Blackberry-brand and other similar hand-held text messaging devices, pocket PCs, and laptop computers have increasingly become a necessary tool for people entering the courthouse and participating in various judicial proceedings therein. Reliance on such devices has become the norm for many attorneys of record (*i.e.*, to schedule hearings and other professional commitments), witnesses, jurors, consultants, and members of the press.

The proliferation and nearly ubiquitous use of such devices raises various concerns within the courthouse, including issues related to security, decorum and solemnity of judicial proceedings, and harassment/intimidation of witnesses and jurors. In order to properly balance the competing interests of the public, the press, attorneys of record, judges, jurors, witnesses, and members of the public entering the courthouse and its courtrooms, this policy, adopted this ____ day of _____, 2010, shall govern the accessibility and use of such devices within the courthouse and within individual courtrooms.

This Court recognizes the expanding wireless communications infrastructures have become integral technologies the media and the public it serves depend upon and that their use enhances the quality and timeliness of reporting on judicial matters. For these reasons, a presumption of use of such technology by the press is desirable and

should be the norm.¹ Even if the court is willing to impose limited restrictions on use of such technology by members of the public within the court house, some accommodation must be made for members of the press to make use of laptops, cell phones, and other wireless devices in performing their function as news gatherers when appropriate.²

The following policies are the standard operating protocols and are subject, in all cases, to a judge or other judicial authority within this courthouse issuing additional specific orders or guidelines for the use of electronic devices in his or her courtroom:³

I. Policy Regarding Access of Electronic Devices to the Courthouse

(1) All persons granted entrance to the courthouse are permitted to possess and use pagers, laptop/notebooks/personal computers, handheld PCs (Personal Digital Assistants, such as Palm Pilots and Pocket PCs, with or without video or audio recording capabilities), digital or tape audio recorders, wireless devices (such as Blackberries), cellular telephones (including cellular telephones with cameras and videostreaming capabilities), electronic calendars, and/or any other electronic device that can broadcast, record, or take photographs (hereinafter “electronic device”) while inside the courthouse.⁴

¹ United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010) (recognizing that “ a broad ban on such devices is not desirable and may not be feasible.”). Copies of each of the court policies cited herein are on file at the Media Law Resources Center, and are available at http://www.medialaw.org/Content/NavigationMenu/Publications1/Articles_and_Reports1/Archive_by_Date1/Articles_and_Reports_Archive_by_Date.htm.

² *Considerations in Establishing a Court Policy Regarding the Use of Wireless Communication Devices*, Administrative Office of the U.S. Courts, C(2)(g); *see also* In the Matter of Personal Electronic Devices, General Order M-400 (S.D.N.Y. Bankr. May 19, 2010); In the Matter of Courthouse Security and Safety Measures, Judgment Entry of Jan. 22, 2010 (Erie Cty. Ct. of Common Pleas, Ohio); In the Matter of Courthouse Security and Safety Measures, Mem. Order of Jun. 22, 2009 (Licking Cty. Ct. of Common Pleas, Ohio).

³ Electronic Devices in Supreme and Appellate Courts, The Use and Possession of Electronic Devices in Superior Court Facilities (Connecticut).

⁴ Combination of: the United States District Court, Eastern District of Missouri General Order on Electronic Device Policy; the Electronic Devices in Supreme and Appellate Courts, The Use and Possession of Electronic Devices in Superior Court Facilities (Connecticut); the District Court of Maryland

(2) Persons possessing an electronic device may use that device while in common areas of the courthouse, such as lobbies and corridors subject to further restrictions on the time, place, and manner of such use that are appropriate to maintain safety (pedestrian traffic, ingress and egress), decorum, and order.⁵

II. Policy Regarding Access of Electronic Devices to the Courtroom

(3) Inside courtrooms, persons may use an electronic device to silently take notes and/or transmit and receive data communications in the form of text, only,⁶ without need for obtaining prior authorization from the presiding judge or judicial officer.

(4) A judge or other judicial officer may prohibit or further restrict use of electronic devices if they interfere with the administration of justice, pose any threat to safety or security, or compromise the integrity of the proceeding.⁷

(5) It should be anticipated that reporters, bloggers and other observers seated in the courtroom may use electronic devices to prepare and post online news accounts and commentary during the proceedings.⁸ Absent any of the circumstances identified above in paragraph (4), such use is presumptively permitted.

⁵ District Sitting in Prince George's County, 7th Amended Policy Governing Portable Electronic Devices and Controlled Dangerous Substances; and the United States District Court for the Middle District of Pennsylvania Standing Order No. 05-3.

⁵ United States District Court, Eastern District of Missouri General Order on Electronic Device Policy.

⁶ Anyone wishing to employ the photographic or audio capabilities of such devices inside a courtroom should consult with and abide by the statute and/or court rule governing such uses. *See* [insert appropriate statute or court rule].

⁷ United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010); *see also*, District Court of the United States for the Middle District of Alabama, Order on Photography, Broadcasting, Recording and Electronic Devices ("Laptop computers may be used in the courtroom.").

⁸ United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010).

MEMORANDUM IN SUPPORT FOR MLRC'S MODEL POLICY ON ELECTRONIC DEVICES

Introduction

The proliferation of portable electronic devices has expanded to the point that a vast majority of Americans now use and rely upon them. The courts, in response, are struggling with a variety of issues raised by the pervasive use of these devices. In 2009, three state courts of appeals threw out criminal convictions and entered mistrials as a result of jurors conducting independent research with portable devices during jury deliberations.¹ These instances, and others, have prompted many state courts and the federal judiciary to adopt model jury instructions that expressly and unequivocally order jurors not to use portable electronic devices in ways that would contravene instructions against conducting independent research and/or communicating with parties involved in the case.²

Apparently concerned that the new technology is the root cause of the problem, several courts have also enacted broad, sweeping prohibitions against the use of portable electronic

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-research>; 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>.

devices not only by seated 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. The new restrictions on electronic devices unnecessarily impede the efficient flow of information concerning judicial proceedings and impose unnecessary hardships on jurors (some of whom need to contact family members during recesses), and on other participants in the justice system. To avoid such unnecessary adverse effects, the MLRC has promulgated a Model Policy on Electronic Devices that provides a direct and reasonable response to the emerging set of issues. The Model Policy recognizes the distinct concerns presented by the various groups affected by such policies and treats each group in a reasonable and responsible way. To a large extent, the 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 all other members of the public, special accommodations for

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 States 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”).

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

the role of the press in providing coverage to court proceedings is appropriate, as set forth below. Moreover, additional restrictions may appropriately be imposed upon trial participants – in particular jurors and sequestered witnesses – that go beyond those imposed upon the public and the press.⁵

Although the Model Policy authorizes all members of the public to possess and use portable electronic devices outside of courtrooms but within courthouse corridors, hallways, etc., to the extent that any court chooses to limit or restrict such access or use to the general public, the Model Policy recognizes the unique constitutional role of the news media in providing press coverage of the workings of the judicial branch; special dispensation should therefore be given to members of the press to use the modern tools of their trade to provide timely, contemporaneous reports to the public, in fulfilling their constitutional mission.

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, including laptop computers, to send contemporaneous news reports, via text, from inside courtrooms during the conduct of civil and criminal trials and other judicial proceedings. As has been noted, many state and federal 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.⁶ Allowing the press to contemporaneously report on what is transpiring in a public courtroom does not transgress

⁵ The Model Policy does not propose any particular restrictions on sequestered witnesses or seated jurors. Nevertheless, numerous courts have already promulgated such restrictions and accompanying jury admonitions. *See supra* n.2.

⁶ *See* 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.).

federal or local rules prohibiting “broadcasting” of trial proceedings from the court,⁷ and does not create any incremental adverse effects in comparison to press reports sent on frequent intervals throughout a trial proceeding.

LEGAL BASIS FOR THE MODEL POLICY

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

A. News reports on 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 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 all 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*

⁷ 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.10.

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 to trials and hearings 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 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 569-71.⁸ 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

⁸ 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).

but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”). A responsible press thus has “always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.” *Id.*

Accordingly, the constitutional role played by the press when it provides the public with 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 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).⁹

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

⁹ *See also Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (“In seeking out the news the press . . . acts as an agent of the public at large. It is the means by which the people receive the free flow of information and ideas essential to effective self-government.”) (Powell, J., dissenting); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials . . . responsible to all the people whom they were selected to serve.”).

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 modern press be permitted to utilize electronic devices within the courthouse to fulfill their constitutional mission of providing the public with timely reports on the conduct of 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.

As indicated above, it is vital to the press’ ability to provide timely, contemporaneous reports on judicial proceedings that they be permitted to utilize modern technological means, including cell phones, text messaging devices, handheld PDAs, etc., to transmit such information to their readers/viewers. Any governmentally-imposed restrictions on such constitutionally-protected activity 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 upon 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: “The achievement of a legitimate governmental object cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”) (internal quotation and citation omitted); *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 court house, such restriction must be “narrowly tailored” to further a significant governmental interest. While concerns such as noise, disruption, and particular security challenges may, in isolated and particular circumstances, justify narrowly tailored restrictions on use of such devices (including

prohibitions on use in certain delimited areas at certain specified times), 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.¹⁰

Several courts (including the United States District Courts in criminal cases) have enacted policies or rules of court that prohibit 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 Court 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. Shelnett*, 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.

With all due respect, Judge Land’s decision is erroneous because treating textual *descriptions*, including opinions, observations and commentary on court proceedings, as the

¹⁰ 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.

equivalent of live simultaneous audio or video rendition of the actual proceedings would constitute a substantive change, which the Advisory Committee expressly disclaimed. 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. Thus, [the author] believe[s] Judge Land's interpretation of Rule 53 is overly broad."); 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 provide live blogging and tweet feeds from federal criminal trials.¹¹ Indeed, in February 2010, the Judicial Council for the United States Court of Appeals for the Ninth Circuit authorized U.S.

¹¹ 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_lan_dlor/ (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); 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); *Sony BMG Music Entertainment v. Tenenbaum* (D. Mass.) (civil case concerning unauthorized music downloads by college student), 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).

District Court judges throughout that circuit to permit reporters to provide live blogging and other text transmissions in criminal cases.¹²

Also, 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 (whether it was transmitting text outside the courtroom or not).¹³ 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 retain the inherent authority and discretion to impose appropriate restrictions on the conduct of all individuals who enter their courtroom, in order to maintain appropriate solemnity, decorum and order to 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 quotation mark and citation omitted).¹⁴ Thus, courts are empowered

¹² See Ninth Circuit Judicial Council, Policy on Electronic Devices (Feb. 25, 2010).

¹³ See *Morris Publ'g Co., LLC v. State of Florida*, No. 1K10-226, 2010 WL 363318 (Fla. Ct. App. Jan. 20, 2010).

¹⁴ 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 take corrective measures in response to a spectator who is unduly noisy as a result of an uncontrollable hacking cough, or engaging in disruptive speech or conduct, or a member of the press whose conduct is equally incompatible with accepted standards of courtroom decorum.¹⁵ Barring any such aberrational behavior, however, members of the press (and the public, more generally) have a right under the First Amendment to take notes on what they observe transpiring 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 MLRC, like Judge Bucklow in *Goldschmidt v. Coco*, is “not aware of any federal district court that has a rule or order limiting the right of the press or anyone else to take notes during a public criminal or civil trial.” *Id.*, 413 F. Supp. 2d at 953.

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. (As indicated above, the court may impose restrictions, or an outright prohibition, on use of laptop computers or other devices that are noisy or otherwise distracting.) 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

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.”).¹⁵ *Id.* 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.”).

uploads them at the breaks or the end of the day, as opposed to sending those posts ‘live’ from inside the courtroom?¹⁶ 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.”¹⁷

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.**¹⁸ To some extent, allowing reporters to post their blog or other live text-transmitting reports to a newspaper or television station website *reduces the disruption* of having reporters enter and exit the courtroom (during recesses or otherwise) in order to periodically update those websites in the course of a day’s proceedings.

Nor are the incremental “adverse impacts” 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/or witnesses who are subject to exclusion orders may come upon such blog postings, they would be doing so in violation of court orders prohibiting their accessing any news media accounts of the trial. There are more narrowly tailored means to address this concern than restricting the stock of information that is available to the rest of the public. *See, e.g., United States v. McMahon*, 104 F.3d 638, 643-44 (4th Cir. 1999) (affirming contempt sanction against witness who was subject to courtroom exclusion order but who reviewed daily transcripts and notes provided by his secretary who attended the trial); *see*

¹⁶ *See* Eric Goldman, *Courtroom Coverage in the Internet Era – A Conference Recap*, (Jan. 6, 2010), <http://blog.ericgoldman.org/personal/>.

¹⁷ *Id.*

¹⁸ *See* Ross Reily, *Courtroom tweeting not a distraction*, (Nov. 10, 2009), <http://msbusiness.com/reilysramblings/2009/11/10/courtroom-tweeting-not-a-distraction/> (arguing that “[t]he reporter who tweets is doing nothing more than he/she would be permitted to do (under the First Amendment) with pencil or paper”); Susan Brenner, *Courtroom Tweets?*, (Nov. 25, 2009), <http://cyb3rcrim3.blogspot.com/2009/11/courtroom-tweets.html> (“I don’t see why a reporter tweeting during a criminal trial is any more disruptive than letting a reporter take notes by hand or on a laptop during a trial . . . or letting an artist create sketches that will later be broadcast to the public via television.”).

also Press-Enterprise II, 478 U.S. at 14 (holding the prior to imposing restrictions on press coverage of criminal trials, the judge must find that no less speech-restrictive means are available to advance compelling governmental objective); *cf. Richmond Newspapers*, 448 U.S. at 557 (including “sequestration” of witnesses among the less restrictive, and therefore constitutionally mandated, alternatives to barring the press and public from being present in courtroom during a criminal trial). Typically, accessing a blog requires greater proactive effort than the occasional banner headline visible in a newspaper vending box or newsstand display; to avoid such exposure, jurors and excluded witnesses should be directed to not seek out such reporting or commentary, and, of course, to unsubscribe from any RSS feeds that may bring such material into their hands automatically.¹⁹

Conclusion

In today’s technological age, information travels at the speed of electrons, and handheld electronic devices have become an integral [indispensable?] “tool of the trade” for the working press, just as much as note pads and pencils were a century ago. In order to provide the public with timely and informative reports of what is transpiring in public courtrooms, the press must be permitted to utilize these devices both inside the courthouse, and, so long as they do not create adverse effects (*i.e.*, noise or other distraction), inside the courtroom. The Model Policy recognizes that judges have both the authority and the duty to maintain the solemnity, dignity, and decorum of all court proceedings, and to impose appropriate limitations and restrictions on the conduct of all who enter the courtroom; at the same time, the Model Policy recognizes and supports the pivotal role that the news media play in our democracy by providing the public with information about our judicial system, information that is a necessary precondition to meaningful and informed self-governance.

¹⁹ See resources for juror admonitions, *supra* n.2.