

***Considerations in Establishing A Court Policy Regarding the Use of
Wireless Communication Devices***
(2010 Update)

A. Devices Covered

There is an ever-growing number of wireless communication devices that have the capability of recording and/or transmitting sound, pictures, and video, as well as the ability to instantaneously post content to or through blogs, social media sites (e.g., Facebook, Twitter), and other websites. These devices include cellular phones (including smartphones), personal digital assistants (BlackBerrys, iPhones, Palm Pilots), laptop computers (including iPads), earpiece devices (such as Bluetooth), and digital or other types of video cameras or audio recorders.

Many of these devices are capable of wireless internet access, and have cameras and/or speakerphones. Moreover, many newer wireless devices are being built smaller and/or with materials other than metal. They can be used in a manner that is undetectable.

B. Present Prohibitions on Broadcasting or Taking Pictures in the Courtroom

Presently there are two sources of policy regarding the taking of pictures or broadcasting of proceedings in courthouses: Rule 53 of the Federal Rules of Criminal Procedure, and the Judicial Conference policy on cameras in the courtroom. Rule 53 provides:

Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

Judicial Conference policy states that courtroom proceedings in civil and criminal cases in the district courts may not be broadcast, televised, recorded, or photographed for the purpose of public dissemination. This policy is set forth in the *Guide to Judiciary Policy*, vol.10, ch. 4.

Specific exceptions permit the use of cameras and other equipment for any purpose during ceremonial proceedings, including naturalization proceedings or a judge's investiture. In non-ceremonial proceedings, audio and audio-visual equipment may be utilized only for the limited purposes of presentation of the evidence, perpetuation of the record of the proceedings, and security.¹

Finally, Judicial Conference policy allows a judge to use audio-visual equipment “for other purposes of judicial administration.” One example of the judicial administration exception would permit closed-circuit television linking the courtroom with another location where a disruptive defendant has been detained.

¹ These guidelines do not apply to courtroom security surveillance cameras, nor change the policy adopted by the September 2009 Judicial Conference regarding those cameras.

The cameras in the courtroom rule and the policy were adopted prior to the development and widespread use of wireless portable communication devices. The main intent was to address issues relating to coverage of court proceedings by the media. However, the prohibitions apply equally to private individuals using the new devices, and this presents a number of novel issues.

Recently courts have expressed concern about the implications of media using wireless communication devices in the courtroom. In the Middle District of Georgia, in *U.S. v. Shelnett*, the court denied a reporter's request to use an electronic handheld device to send messages from the courtroom to his newspaper's "Twitter" website regarding proceedings as they were occurring. The court held that:

the contemporaneous transmission of electronic messages from the courtroom describing trial proceedings, and the dissemination of those messages in a manner such that they are widely and instantaneously accessible to the general public, falls within the definition of 'broadcasting' as used in [Federal] Rule [of Criminal Procedure] 53.

2009 U.S. Dist. LEXIS 101427, p. 4; 37 Media L. Rep. 2594.

In the Eastern District of Virginia, in the *Moussaoui* terrorism case, the court denied the media's request to use mobile technology to report from the courtroom, explaining that "nothing in [Federal] Rule [of Criminal Procedure] 53 prevents members of electronic media from attending the trial, taking notes while seated in the gallery and reporting about it [and that] [m]embers of the print media are similarly deprived of the tools of their trade, including laptop computers, cell phones, handheld organizers and other electronic devices."²

On the other hand, at least two district court judges have allowed the media to report from the courtroom during a criminal trial. A judge in Kansas allowed a reporter for the Wichita Eagle to post Twitter messages during trial proceedings of six accused gang members. Another judge in Iowa Northern allowed a Cedar Rapids Gazette reporter to use a laptop computer to cover a tax fraud trial. In addition, a live video and audio feed was streamed into an overflow courtroom in the Scooter Libby, Conrad Black, and Tony Rezko trials, and in the sentencing of Bernard Madoff.

C. Issues Raised by Portable Communication Devices

1. Security Risks

Security should be an important consideration in developing a policy dealing with wireless communication devices. These common devices present security issues because some

² *U.S. v. Moussaoui*, 205 F.R.D 183, 185-86 (E.D. Va. 2002): "[t]he First Amendment 'does not embody an independent right to bring the mechanical facilities of the broadcasting or printing industries into the courtroom'" (quoting *Estes v. Texas*, 381 U.S. 532, 589 (1965)).

can be and have been converted for use as weapons, including explosives. These devices can also be operated remotely, which increases the risk. The current array of devices has raised additional concerns about risks due to increased use of non-metallic materials in manufacturing, smaller size, and the potential inability of scanning equipment to detect these devices and hidden explosives.

It would be useful to consider each category of person utilizing the courthouse to identify needs and risks. For example, some groups, such as court employees, members of the bar, and contract employees who have undergone a background check, might be allowed greater use of electronic devices in the courthouse or courtroom, compared to the general public and jurors. (See Section E).

2. Considerations Favoring Entry of Devices

- a. It is estimated that there are 285 million cell phones in use in the United States today. It is very likely, therefore, that a number of individuals seeking to enter the courthouse will be carrying cell phones or some similar wireless portable communications device. The vast majority of the phones sold in the United States are equipped with picture, video and recording capabilities. The level of restrictions on entry and use of these devices may well determine the level of burden placed on the court security officers and the public's right of access to the courthouse. Updating and augmenting screening equipment, as has been done at airports, will assist in reducing these concerns, as will better and more frequent training of screening equipment operators.
- b. Many attorneys find that these portable communication devices are essential to their practice. Payphones are no longer readily available in most courthouses since they are no longer economically viable as a result of cell phone usage. Although courts are permitted to provide free local phone service, the number of such phones is usually limited and attorneys need a method of quickly communicating with their offices, their clients, and witnesses. Some districts only allow attorneys and court employees to have phones.
- c. Electronic courtrooms are now common, and often attorneys must bring in laptop computers in order to present their case on electronic evidence display systems. Some districts require attorneys to have permission from the judge to bring laptops into the courthouse and the courtroom for the trial. The court will also likely need to consider how to address pro se requests to use electronic devices in the courtroom during trial.

- d. Some courts are located in buildings with other tenants, such as the Social Security Administration, and congressional or postal offices. Any policy adopted by a court will also impact citizens who are seeking access to the building for other types of business. This is a particularly important consideration in those facilities where court security officers are providing lobby entry screening for all tenant agencies.
- e. Stenotype wireless systems allow the court reporter to move about the courtroom and to attend a sidebar without being tethered to a wire.
- f. In some courts, judges use instant messaging to communicate with courtroom deputies and pretrial and probation officers who are using portable wireless devices such as BlackBerrys.
- g. Some accommodation may need to be made for the press to bring in laptops, cell phones, and other wireless devices when appropriate. Alternatives to this might include setting up a media room where the press could view the trial by audio-video feed and use their laptops and other devices from the media room.

3. Considerations Favoring Restrictions on Entry of Devices

The use of these devices can also have a detrimental impact on court proceedings in the following ways:

- a. Surreptitious filming, photographing, recording or transmitting of court proceedings outside of the courtroom in violation of prohibitions. This has happened in some state and federal courts, with photos being published in the newspaper, on the internet or on television.
- b. Taking pictures of jurors, witnesses, or undercover agents which may be used to intimidate or bring harm to these individuals.
- c. Disruption of court proceedings by noises emitted by these devices when someone is being contacted (even when the device is in silent mode) or by individuals responding to calls in the courtroom. (This has happened in courthouses even when there is a requirement that these devices be turned off, and judges have felt the need to fine or even jail offenders to prevent recurrences.)
- d. Use of cell phones by jurors during deliberations.
- e. Use by jurors of wireless devices with internet access to research issues or even access court files during the course of a trial.

- f. Use of cell phones on standby status has produced interference with court recording and reporting systems.

D. Types of Rules Adopted by Courts

Federal courts have adopted a variety of rules to address the entry and use of these devices in federal courthouses. Among the variations are the following:

1. All devices for anyone coming into the courthouse are allowed entry after screening, but their use is limited in the courtrooms. Forty-one district courts (44%) allow the public to bring electronic devices into the courthouse, usually with some restrictions on their use. Some courts require that all cell phones be turned off, while others allow the phones to be left on, but in silent mode. The devices can be used in the halls and other public places in the courthouse.

Of the forty-one districts that allow the public to possess electronic devices in the courthouse:

- nearly a third prohibit the public from bringing the devices in the courtroom,
 - the remaining two thirds allow the devices in the courtroom, but they must be off or in silent mode unless the judge gives permission to use them (and permission can be granted in differing ways, such as by the presiding judge, the chief judge, or court order).
2. 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 officers or, if storage is not provided, leave the building and store the device elsewhere. Forty-eight district courts (51%) do not allow devices inside the courthouse, requiring either that they be left with court security officers or left at a location outside the courthouse (home, car, etc.). Some of those courts provide for exceptions from the ban with express permission from the court or presiding judge, for example, for attorneys requiring laptops for evidence presentation.
 3. Only certain devices are banned from the courthouse, usually cell phones with cameras, and these are either checked or the individual is directed to leave the building.
 4. Five districts (5%) have no policy on their websites, but might have a working policy. For instance, several courts describe their electronic courtrooms, suggesting that attorneys could bring laptops inside the courthouse and the courtroom for official use during proceedings.

E. Adopting a Court Policy Regarding Portable Communication Devices

Courts should work closely with the district U.S. marshal and the judicial security inspector responsible for courthouse security in developing a policy regarding portable communication devices in the courthouse. Court security committees are well suited to this task and should take the lead in policy development.

In developing the court's policy, the court should consider, and seek to clearly define as appropriate:

1. The devices to which the policy applies, including cellular phones (including smartphones), personal digital assistants (BlackBerrys, iPhones, Palm Pilots), ear piece devices (such as Bluetooth), laptop computers (including iPads), and digital or other types of video cameras or recorders;
2. To whom the policy will apply and how it applies to various types of persons entering the courthouse and courtrooms. Some courts distinguish among the following groups in their policies, while others apply the same policy for all persons:
 - a. court personnel, law enforcement personnel, and tenants of the building are often given full access for any devices;
 - b. attorneys (who are members of the district's bar or state bar or admitted pro hac vice) and their staffs, public defenders, assistant U.S. attorneys, and parties to the case;
 - c. contract court reporters and interpreters who bring the equipment necessary for their work;
 - d. general public;
 - e. members of the traditional media – journalists and TV and radio reporters who are credentialed – and bloggers who may or may not be credentialed; and
 - f. jurors.

In most courts that distinguish among users, the first two groups mentioned above are given the greatest levels of access in terms of the types of devices that can be brought in and the extent to which they are allowed to be used in the courthouse and courtroom, while the public's and jurors' access are more restricted (e.g., devices, usually limited to cellular devices, can be brought into the courthouse, but must be off at all times or off/silent on floors with courtrooms).

3. The times, locations, or proceedings at which the devices may be used (e.g., in the courtroom versus a media room or separate courtroom with live feed, during court session versus only during recess or before or after proceedings to record ceremonial events, such as naturalizations and swearing in of new judges);
4. Whether the same policy should apply in every division and courthouse of the district or circuit, or if different provisions should apply to different courthouses;
5. The effect the policy will have on access to the courts by the general public, and especially on the service by jurors (permitting wireless devices may further encourage juror service), and the family and friends of litigants or defendants;
6. The effect the policy will have on other tenants in the building and visitors to these tenants and the applicability of the policy to them;
7. Whether the court should provide training or other awareness methods to make persons entering the courthouse aware of the risks and benefits of bringing the device into the courthouse or courtroom; and
8. The court administration implications of banning the entry of certain devices, including:
 - a. the impact on the workload of court security officers³;
 - b. the extent of the delay in entry to the building that may result from the process;
 - c. the need and feasibility of providing storage facilities in the courthouse for these devices and the process for returning devices to building entrants and dealing with any complaints of damage or liability issues relating to the devices that may arise;
 - d. if no storage facilities for these devices can be provided, the manner of dealing with entrants who cannot simply store the device in their nearby cars or offices because neither of these options is available to them; and
 - e. for stenotype wireless equipment, that court reporters use only point-to-point configurations, following all vendor configuration instructions to ensure the confidentiality and integrity of court proceedings.

³ No additional court security officer resources can be made available for any increased workload associated with a particular court's policy.

F. Possession of Electronic Devices in the Courtroom by the Media

Several districts have special provisions for members of the press to possess electronic devices in the courthouse; however, only six of those districts' policies specifically address allowing press members to bring the devices into courtrooms, with the presiding judge retaining discretion in nearly all courts to make exceptions to the policy.

Courts that are allowing the media to bring communication devices into the courthouse include some or all of the following restrictions:

1. devices may be used only in designated areas (not on courtroom floors, or anywhere in the courthouse but the courtroom);
2. devices may be used only at certain times, such as when a jury is not in session;
3. press members must show credentials; and
4. the use of the device is limited to certain activities (i.e., emailing, note-taking, word processing or, in contrast, real time reporting).

One court permits real time news reporting in the courtroom but explains the risks in its policy. Another consideration is how to distinguish, if at all, between members of the traditional press and those who report solely through social media sites or other internet venues.

G. Notice to Public of Court Policy

Whatever policy is adopted, **there should be ample notice provided, including signs posted outside the courthouse and at the security posts, and the policy should be featured prominently on the court's website and in notices provided to attorneys and jurors.** The court security officers should be apprised of both the letter and spirit of the policy by the United States Marshals Service judicial security inspector (JSI), who is the contracting officer's technical representative for the court security officer program and integral to implementing this program. The court security officers are contract employees, and should only receive their working procedures from their supervisors, who receive it from the JSI. It is important that the JSI provide the contractor with a written copy of the policy, and that the post orders and training describe clearly what actions the court security officers are to take.