

**Banning** such **technologies** from the courts is **growing increasingly** difficult and impractical.



## “Can You Hear Me Now?”

### Issues and Policy Considerations for Cell Phones and Other Electronic Devices in the Courts

By Nora Sydow

#### “No Cell Phones Allowed in the Courthouse.”

Ten years ago, you would likely have found this simple rule posted in many courthouses around the country. But times have changed. Some courts still maintain a blanket prohibition on cell phones and other electronic devices (“mobile devices”) throughout the entire court complex.<sup>1</sup> However, many

courts realize that such a prohibition is no longer practical or feasible, but also recognize that some legitimate concerns should be addressed by a separate, comprehensive mobile device policy. Recently, many courts have either implemented new policies or updated existing policies to address this rapidly changing technology and the concerns regarding potential misuse of mobile devices within the court complex. Examples of some of the major concerns

addressed include security concerns and fears of the potential adverse impact on court proceedings.

Cell phones, smart phones, and other mobile devices have permeated society, and many individuals find it quite challenging to function personally and professionally without them. We use these mobile devices as our professional and personal organizers, and for many of us, they often function as our primary form of communication with

family, friends, co-workers, and clients. Literally thousands of applications are available through smart phones such as BlackBerry and iPhone, and they allow us to do everything from paying bills and accessing our bank accounts to conducting legal research, checking traffic conditions, tracking billable hours, and looking at weather conditions.

In December 2009, there were 285.6 million wireless subscriptions in the United States, up 37 percent from 2005.<sup>2</sup> Furthermore, in the first half of 2009, more than one in every five (23 percent) American households did not have a landline, relying solely on wireless phone service. By contrast, in the first half of 2006, only one in every 10 American households had only wireless phone service.<sup>3</sup> Mobile devices have also quickly become the sole news source for many Americans. Sixty-one percent of Americans get their news online, and 33 percent of mobile users get news on their mobile devices.<sup>4</sup> Journalists are Tweeting, blogging, and uploading other news content through their mobile devices. With society's desire for nearly instantaneous news, reporters want to sit in the gallery of a courtroom and instantly track and report on every twist and turn of a case through the variety of reporting methods that mobile devices offer.

A comprehensive mobile device policy should be established that addresses questions such as which, if any, locations in the court complex mobile devices are permitted; who may use the mobile devices; and for what uses are they permitted. This article provides an overview of court-related issues concerning mobile devices, an examination of existing mobile policies developed by courts, and a checklist of issues to address when establishing a court mobile device policy.

## Major Issues Associated with Mobile Devices and Courts

Courts are attempting to balance three primary issues regarding mobile devices to include: (1) security concerns, (2) impacts on court proceedings, and (3) efficiency and practicality.

### Security Concerns

If you've recently shopped for a new cell phone, you've probably noticed it is extremely difficult to find one that is not equipped with a camera. However, cell phones with camera functions (both still and video cameras) present security concerns for courts. For example, instances of witness and juror intimidation have occurred when someone in the courtroom snaps photographs of jurors and witnesses, including undercover agents.

Mobile devices also have the capability to be used as weapons, presenting obvious security concerns for the court. Firearms, Tasers, stun guns, etc. have been modified to resemble cell phones. At present, security experts maintain that if the screening process is done correctly, any dangerous devices would be detected before they enter the courthouse, just as airplane passengers are allowed to carry mobile devices onto airplanes once they've gone through security screening.<sup>5</sup>

A potential impact of the implementation of a mobile device policy will likely be a change in workload and training for court security staff. Before Connecticut modified its electronic device policy, court security marshals "bagged-and-tagged" cell phones for court patrons before they entered the court complex, and owners retrieved them upon exiting court.

In Connecticut's 2008 press release announcing the state's new electronic device policy allowing electronic devices, to include camera phones, into the court facilities, Chief Court Administrator Barbara M. Quinn referred to this "bag-and-tag" process as "...very time-consuming." Judge Quinn added, "especially when you consider that the marshals bagged and tagged 290,000 camera phones last year."<sup>6</sup>

### Impacts on Court Proceedings

How might justice be impacted if journalists use Twitter to report on a trial while in court? What if the "tweeter" was a juror or even the defendant? Is it problematic if journalists or other courtroom spectators record a proceeding on their iPhone and immediately upload it to YouTube? The question for discussion is whether these types of activities could adversely impact court proceedings — and ultimately, the fair and effective administration of justice.

At a minimum, jurors are prohibited from discussing the ongoing jury trial, and courts are beginning to specifically address mobile devices and social media applications such as Facebook and Twitter in jury instructions and jury rules. Many courts are revising their jury instructions and rules to include prohibitions on the use of mobile devices as a method to discuss the case or conduct research.<sup>7</sup> But should jurors be prohibited from bringing their cell phones to court altogether? If yes, are there other potential considerations with that prohibition? Most jurors aren't sequestered, so we know that they have access to Facebook, Google, etc. while at home; a blanket prohibition on mobile devices in the courtroom and jury room would only control juror activity while in court. Since

many courts have great difficulty in finding jurors, some have advised against prohibiting jurors from bringing mobile devices to court. The recently approved federal Ninth Circuit's Special Subcommittee for Electronic Devices Recommendations stated that "Considering the difficulty the judiciary has in finding jurors, courts should not make the prospect of jury service even less attractive and more cumbersome by prohibiting use of wireless communications devices."<sup>8</sup>

Additionally, mobile devices have the potential to be disruptive during court proceedings — the ringing cell phones, the buzzing of devices in "silent" mode, and the annoying taps and pecks of text messaging. Many courts have addressed the potential disruption and the impact on the solemnity of court proceedings by requiring that mobile devices be turned off while in the courtroom, and some policies simply require that devices be silenced. Further, many court policies restrict the usage of mobile devices while in the courtroom.

The Conference of Court Public Information Officers (CCPIO) is undertaking a project to study the potential effects of new media,<sup>9</sup> which

often involves mobile devices, on the courts. One of the project's five primary objectives is to study the ways this new technology impacts the courts and media coverage of the courts, and a project report will be made available later this year.<sup>10</sup>

## Efficiency and Practicality

The considerations that support allowing mobile devices in court facilities relate primarily to efficiency and practicality. As discussed above, mobile devices are increasingly essential to our personal and professional lives, and mobile communication technologies are being incorporated into a wide variety of business processes. Banning such technologies from the courts is growing increasingly difficult and impractical.

Mobile devices are essential to many attorneys' practice. Attorneys use mobile devices to check calendars; communicate with clients; and send, receive, and store case-related documents to access while in court. Attorneys are often unable to check their calendars for hearing date availability at the request of a judge unless they have a mobile device with

them in court. Many courts have "high-tech" courtrooms and allow attorneys to bring in mobile devices in order to present their case. Doing so permits attorneys to practice law efficiently and serve their clients effectively. Many court mobile device policies recognize the needs of the bar by allowing attorneys to use these mobile devices in court.

For court patrons, coming to court is often an extremely time-consuming and unpleasant experience. Allowing court patrons the use of mobile devices inside the court complex would allow them to conduct other business while they wait. Arguably this results in happier court patrons and improved court-community relations.

Mobile device policies that prohibit mobile devices from entering the court facilities altogether will likely result in the delay of entry into the court complex. This is especially true for courts that utilize a "bag-and-tag" procedure. A court policy that includes holding cell phones for court patrons while they conduct court business should also address the storage and handling of mobile devices, the process for handling complaints of loss or damage to mobile devices, and liability issues that might accompany those complaints.

## Establishing a Mobile Device Policy

In drafting a mobile device policy, it is often helpful to review policies developed in other jurisdictions. The National Center for State Courts' Knowledge and Information Services Division recently compiled online court mobile device policies and has made them available on the National Center's website.<sup>11</sup> The author has reviewed various mobile device policies and processes used by courts in developing these policies, identified the common



The screenshot shows the NCSC (National Center for State Courts) website. At the top left is the NCSC logo. To the right is a search bar and a 'MY CENTER LOGIN' section with fields for username and password, and links for 'not registered?' and 'forgot your password?'. Below the logo is a navigation bar with links for 'Newsroom', 'Publications', 'About Us', 'Contact', and 'Donate'. The date 'March 24, 2010' is displayed on the right. A secondary navigation bar contains 'INFORMATION & RESOURCES', 'SERVICES & EXPERTS', 'EDUCATION & CAREERS', 'CONFERENCES & EVENTS', and 'NCSC International'. The main content area is titled 'NCSC > INFORMATION & RESOURCES > BROWSE TOPICS A-Z'. On the left is a sidebar with 'Browse by topic category' and several sub-links. The main content area is titled 'Media Relations' and 'Social Media and the Courts' and lists 'Cell Phone and Electronic Device Policies' and 'State Links'. A table lists state links for California, Connecticut, and Federal Courts, with corresponding policy titles and descriptions.

California	Guam	Mississippi	Vermont
Connecticut	Maryland	Pennsylvania	
Federal Courts	Michigan	South Dakota	
California	<a href="#"><u>General Usage Wireless Access Policy</u></a> . Superior Court of the County of Riverside.		
Connecticut	<a href="#"><u>Use and Possession of Electronic Devices in the Superior Court Facilities</u></a> . Connecticut Judicial Branch.		
	<a href="#"><u>Supreme and Appellate Courts, Guidelines for the Possession and Use of Electronic Devices</u></a> . Connecticut Judicial Branch.		
Federal Courts	<a href="#"><u>General Order No. 2009-21. In Re: Cell Phones, Cameras, Laptops and Other Electronic Devices in U.S. Courthouses</u></a> . United States District Court Northern District of Ohio (2009).		
	<a href="#"><u>Resolution of Board of Judges to Permit Lawyers, the News Media and Jurors To Bring Cellular Telephones, Laptop Computers, and PDA</u></a>		

issues found in the most comprehensive policies, and compiled a checklist at right to aid courts in the development of a comprehensive mobile device policy.

### Get input from groups affected by the policy.

Mobile device bans in court facilities are not popular with court patrons, particularly when exceptions are made for attorneys. Restrictions on the use of mobile devices in court

facilities are also unpopular with the media. The Circuit Court for Baltimore City recently banned the “use of any device to transmit information on Twitter, Facebook, LinkedIn, or any other current or future form of social networking from any of the courthouses within the Circuit Court for Baltimore City.”<sup>12</sup> As a result of this ban, extensive criticism has come from the media, to include the assertion that such bans “shield the workings of the courthouse from public scrutiny” and a call for the order to be reversed.<sup>13</sup>

### MOBILE DEVICE POLICY DEVELOPMENT CHECKLIST

- Gathered input from stakeholders affected by the policy?
- Will devices be allowed inside the court facilities? If so, in which specific areas?
- Who will the policy cover?
- What devices will the policy cover?
- Where devices are permitted, what is their permitted use(s)?
- How will the policy be enforced and what will the penalties be for violations?
- How will the new policy be distributed?

As with most policy development, it is important to solicit input from all identified stakeholders. Stakeholder feedback is instrumental in bringing new ideas and suggestions to the discussion. Allowing stakeholders a voice in the development process could also ease tensions that might result from mobile device policy restrictions and also enhance stakeholder “buy-in.”

How can courts solicit input on the mobile device policy development? Some jurisdictions conduct a survey. Before developing a recent draft cell phone policy, the Judiciary of Guam surveyed judges, justices, and court employees.<sup>14</sup> The state of Washington recently conducted a similar cell phone policy survey in an attempt to gather feedback to assist with the development of mobile device policies.

### **Will mobile devices be allowed in court facilities, and if so, in what areas?**

Some courts ban mobile devices from the court complex completely, while some policies include exceptions for attorneys, law enforcement, court staff, judges, etc. Nevada’s Justice Court of the Las Vegas Township bans the general public from bringing cell phones and camera phones into court, but attorneys and law enforcement are exempt from the policy. Citizens may leave their phone with court security, or they may leave them outside of the courthouse.<sup>15</sup> When courts ban devices from the court complex completely, it does present some problems. A citizen using public transportation or taxi would not have a personal vehicle in which to leave their mobile device. Some courts will hold the devices

for citizens. However, as previously discussed, holding mobile devices for court patrons can be a time- and-resource-consuming process and also poses some potential liability questions.

The majority of court policies do allow mobile devices inside the court complex, but the extent that they may be used within the court complex varies significantly. In addition to the courtroom and hearing rooms, a mobile device policy should address whether mobile devices are allowed in other areas of the court complex, such as jury rooms, judges’ chambers, offices, waiting areas, lockup, etc.

### **Who will the policy cover?**

A mobile device policy should precisely address who the policy covers and who is exempted from the policy. Many courts only allow attorneys, court staff, and judges to bring mobile devices into the courthouse. What about litigants, jurors, witnesses, or other groups of individuals who frequent the courts, such as law enforcement, contract court reporters and interpreters, social workers, and vendors? If a different organization, such as the sheriff’s department, is responsible for providing court security, will the policy apply to that organization?

Some courts that permit court staff to bring mobile devices into the court complex have developed a separate policy to address how and when such mobile devices may be used during working hours. For example, Scottsdale City Court in Arizona has a Personal Electronic Device Usage Policy that prohibits court staff from using cell

phones (including text messaging), mp3s, and PDAs while engaged in the following activities:

- Front Counter — window open
- Answering phones
- Courtrooms — during proceedings
- Meetings/Conferences — while in session
- Anytime you are dealing directly with the public
- Anytime as directed by a manager or supervisor<sup>16</sup>

### **What devices will the policy cover?**

Ten years ago, it was adequate to call a mobile device policy a “cell phone policy.” Today, there are a multitude of mobile devices that must be considered and addressed by the mobile device policy. In addition to the obvious mobile devices, such as cell phones and camera phones, will the policy cover PDAs (personal digital assistants such as Palm Pilot), smart phones (such as BlackBerry and iPhone), personal computers, and digital or tape audio recorders? Many court policies state that the policy applies to all cell phones and all other electronic devices that can broadcast, record, or take photographs. For example, Connecticut’s electronic device policy for its superior courts specifies that persons may have any of the following devices:

- A cell phone
- A camera phone
- A personal computer with or without video or audio recording capabilities
- A digital or tape audio recorder

- A personal digital assistant (PDA) with or without video or audio recording capabilities
- Any other electronic device that can broadcast, record, or take photographs<sup>17</sup>

### Where devices are permitted, what will be their permitted use(s)?

Where mobile devices are permitted, be sure the policy addresses the specific uses that are permitted in each area of the court complex. For example, do mobile devices have to be turned off when inside the courtroom, or can they be set on “silent” mode? Can the devices be used for non-verbal communication when inside the courtroom, i.e., texting and sending emails? Vermont’s electronic device policy states that “Each person with a cell phone, pager, computer and other devices shall ensure that the cell phone or device is placed on silent mode before entering a courtroom. Cell phones or devices may be used in a courtroom for purposes other than oral communication (e.g. text messaging) unless the presiding judge has prohibited such use for good cause in a particular instance.”<sup>18</sup>

Prudent practice is to ensure that the court’s mobile device policy is consistent with any applicable court rules on broadcasting and taking photographs in the courtroom. Also, it is important to note that many courts now offer free wireless Internet access for the benefit of court patrons, attorneys, court staff, etc. Some courts have incorporated rules regarding wireless Internet use into the mobile device policy, while other courts have established a separate policy concerning wireless access usage rules. The Superior Court of California, County

of Riverside’s General Usage Wireless Access Policy addresses acceptable uses and security considerations, and provides a disclaimer and the terms and conditions of use.<sup>19</sup>

### How will the policy be enforced and what will the penalties be for violations?

When developing a mobile device policy, consider addressing how the mobile policy will be enforced, who will be responsible for enforcement, and what the penalties will be for policy violations. Most mobile device policies don’t specifically address enforcement. Anecdotally, it appears that many courts leave the extent and method of enforcement up to individual judges. As the Ninth Circuit’s Special Subcommittee for Electronic Devices notes, there is the “inherent authority of a judge presiding over a proceeding to control activities in his or her courtroom, including the use of electronic devices capable of wireless communications.”<sup>20</sup> However, if enforcement is left to the discretion of individual judges, consider examining who will be responsible for enforcing the policy in areas outside of the courtroom, such as in the hallways and common areas.

Some court mobile device policies do contain penalty provisions for policy violations. For example, New Mexico’s 9th Judicial District Court’s administrative order provides that “cell phones and devices will be confiscated and may result in contempt of court and fines of \$25 for the first instance, \$50 for the second instance, and progressively higher fines, at the discretion of the Judge, for the third and subsequent instances. Phones and devices will be returned when the contempt fine is paid and any other

sanctions imposed are fulfilled.”<sup>21</sup> The policy of Pennsylvania’s Allegheny County Court of Common Pleas, Family Division, includes a contempt of court penalty for violators and also directs the sheriff’s department to enforce the policy as well as promulgate policies for the storage, retention, and disposition of confiscated mobile devices.<sup>22</sup>

As a cautionary note, the issue of penalties for mobile device policy violations has been reviewed by at least one state’s appellate court. Florida’s Fifth District Court of Appeal recently reversed a contempt order resulting from a Florida woman’s cell phone ringing in the courtroom.<sup>23</sup> When the woman inadvertently left her phone on during a juvenile court proceeding, the presiding judge found her in direct criminal contempt and ordered her phone confiscated and destroyed. The appellate court held that “Contempt does not exist just because a judge feels aggrieved or vexed.” The court explained that there was no evidence beyond a reasonable doubt that the woman’s “. . . actions, annoying as they undoubtedly were, embarrassed, hindered or obstructed the court in the administration of justice, or lessened the court’s authority or dignity.”<sup>24</sup> The court concluded that “Trial judges must be allowed to control their courtrooms. They must have the tools suitable to the purpose when the loss of control is threatened and the dignity and the purpose of the court are challenged. However, because of the potency of the powerful remedy of criminal contempt, we must carefully guard the requirements for its use. . . .”<sup>25</sup>

If your policy specifies penalties, consider if all violations should have the same penalty, or should more serious violations, such as photographing witnesses and jurors,

carry more serious penalties than minor violations, such as forgetting to turn a phone off while in court?

## How will the new policy be distributed?

If your court establishes a new policy or makes changes to an existing policy, ensure that those affected by the policy are made aware of the new rules. Examples of court efforts to publicize a new mobile device policy include press releases, prominent notification on the court's website, social media updates

through Twitter and Facebook, and clearly visible postings throughout the court complex. Summoned jurors should be notified of the court's mobile device policy as it applies to jurors before they arrive at the court. This can be done through the summons, jury questionnaires, and through the court's website.

## Conclusion

Expanding technologies always bring challenges and opportunities. Advances in mobile communications technology have presented the courts

with competing issues, including security concerns, impacts on court proceedings, and considerations of efficiency and practicality. Courts should carefully examine these issues and develop a comprehensive mobile device policy that is fair, defensible, operational, and economically feasible.

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### ABOUT THE AUTHOR<sup>1</sup>

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### NOTES

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8. Electronic Device Policy. Ninth Circuit, Special Subcommittee for Electronic Devices Recommendations, Approved by the Judicial Council Feb. 2010.

9. The CCPIO New Media Project has defined "new media" as "a far-reaching term to describe online information technologies that facilitate mass communication and social interaction between courts and their constituents. This also includes certain hardware that enables connection to these technologies."

10. CCPIO New Media Project. <<http://ccpionewmedia.ning.com/>>.

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23. *McRoy v. State of Florida*, No. 5D09-1571, (Fla. 5th DCA March 26, 2010).

24. *Id.* at 2.

25. *Id.* at 4.