

Staying Connected in Court:

The Status and Impact of Local Rules on Cell Phones and PDA Usage

By Seth A. Northrop

It has become almost commonplace for presentations, meetings, or even depositions to momentarily be disrupted by the sudden piercing noise of a colleague's cell phone—or your own. The experience has been further complicated by the explosion of ring tones, allowing that interruption to come at the hands of the latest Britney Spears “hit” or Mr. T. proclaiming that he pities the fool who doesn't answer his phone. Yet, like society as a whole, the legal profession cannot escape the wireless revolution.

Already more than 233 million people nationwide have wireless devices,¹ and more than 23 million of those individuals have completely abandoned their land-line counterparts. Attorneys now leap at the opportunity to remain continuously connected to their e-mail, documents, and calendar. In addition, wireless tools continue to be developed to allow attorneys to perform research remotely,² to collaborate with other counsel, and to review exhibits. Moreover, as new attorneys enter the profession, they come from a world in which cell phones, instant messaging, and e-mail are simply the norm.

The judiciary has attempted to balance the concerns of wireless users with its own desire for decorum, security, and tranquility via a diverse collection of local rules. This article explores some of the strategies that various districts throughout the federal court system have implemented and also attempts to highlight the impact the dizzying number of different rules has upon the profession and those it pledges to serve.

Cell Phones

The most obvious starting point is a discussion of rules directed specifically at cell phones of any type. Courts have taken vastly different approaches—often within the same district—to the issue of cell phones. Many ban them in the courtroom altogether, some require that they be checked in at a security checkpoint, some allow only specific classes of individuals to possess or use them, and many attempt to regulate how such devices are used.

One of the more restrictive districts is the Middle District of Florida. There, local Rule 4.11 states “[e]xcept that of Court personnel, cellular telephones and computer equipment are likewise prohibited in that part of any building where federal judicial proceedings of any kind are usually conducted in this District ... unless otherwise permitted by

the judicial officer before whom the particular case or proceeding is pending.”³ The ban on the possession of wireless devices—combined with no means for checking or storing the phones—has resulted in significant discontent from the bar and from visitors of the court who are forced to hide their phones in bushes outside the courthouse or return the devices to their vehicles or offices.⁴

The Middle District of Florida is not alone in banning phones from its premises, nor is it the most restrictive. The Southern and Eastern Districts of New York prohibit bringing “any camera, transmitter, receiver, portable telephone or recording device into any courthouse or its environs,” which includes the “entire United States Courthouse property, including all entrances to and exits from the buildings.”⁵ The local rules of the Eastern District of Michigan state that “[c]ellular telephones are not permitted in the federal court facilities.”⁶ The Eastern District of Tennessee prohibits the possession of any electronic devices.⁷ Numerous bankruptcy courts, including those for the District of South Carolina⁸ and the Eastern District of Oklahoma,⁹ have similar restrictions.

Such restrictions hamper attorneys' ability to stay in contact with their offices, calendars, or even clients or potential witnesses. Ultimately, however, one individual's discontent may be another's fortune. At least one attorney is attempting to leverage restrictive cell phone courthouse policies by creating a cell phone parking business outside a courthouse.¹⁰

To balance the concerns echoed by the public in response to policies such as those in place in the Middle District of Florida, some districts allow the wireless devices to be brought inside but require that they be checked in at security stations. Districts that have such a policy include the Northern District of Florida,¹¹ the Northern District of Indiana,¹² the Eastern and Western Districts of Kentucky,¹³ the District of Puerto Rico,¹⁴ the District of Rhode Island,¹⁵ and the Eastern District of Tennessee.¹⁶ Such policies at least mitigate the frustration felt by visitors, who must return to their vehicles or hide their phones outside the courthouse, but the policies create a greater administrative burden for court staff, who must manage phones. In fact, at least one district—the Eastern District of Virginia—has suspended its storage of cell phones and no longer allows individuals to enter the courthouse with a wireless device because of “logistical” concerns.¹⁷ Moreover, such policies will do little to alleviate the concerns of many members of the public who perceive their cell phones as essential to their personal security.

Other jurisdictions focus, instead, on who may possess such devices. Many local rules limit possession of cell phones to court staff, members of the bar, or those assisting either. Included in this category are districts such as the Central District of California,¹⁸ the Southern District of Florida,¹⁹ the Central District of Illinois,²⁰ the District of



Kansas,²¹ the Western District of Kentucky,²² the District of New Hampshire,²³ the Eastern District of Pennsylvania,²⁴ the District of Rhode Island,²⁵ and the District of West Virginia.²⁶ Because clients and witnesses tend to be unfamiliar with courthouse procedures, it becomes counsel's responsibility to inform them of the restrictions at individual courthouses so that public visitors to the courthouse will not be confronted with a last-minute surprise—and unnecessary additional anxiety—at the door to the court. Other jurisdictions, such as the District of Alaska, that allow members of the public to possess phones within the courthouse but restrict bringing such devices into the courtrooms to the attorneys appearing before the court.²⁷ Given that many members of the public visit federal courthouses for reasons unrelated to an appearance in court, this may be a reasonable balance between protecting the decorum of the courtroom and the convenience of members of the community.

Some districts, however, are more lenient regarding who can possess wireless devices in the courtroom. For example, the District of New Jersey,²⁸ the District of Oregon,²⁹ the Bankruptcy Court for the Middle District of Pennsylvania,³⁰ and the Middle District of Tennessee³¹ restrict members of the public from possessing cell phones only when they are jurors in the process of deliberation.

Alternatively, some district courts focus on limiting the use of wireless devices instead of restricting their possession. The most common restriction of this type is simply disallowing the use of phones without permission within the courtrooms and chambers of the court. Diverse requirements are used to implement this rule. Certain districts require turning off cell phones or rendering them inoperable before entering a courtroom or chambers. These districts include the District of Alaska,³² the Bankruptcy Court for the Western District of Kentucky,³³ the District of Maine,³⁴ the District of New Jersey,³⁵ the District of North Dakota,³⁶ the Northern District of Oklahoma,³⁷ the District of Oregon,³⁸ the Eastern District of Pennsylvania,³⁹ and the Bankruptcy Court for the District of Rhode Island.⁴⁰ Different districts require that cell phones merely be placed in a silent or vibrating mode. For example, the Northern District of California,⁴¹ the Northern and Southern Districts of Iowa,⁴² and the District of Nebraska⁴³ allow phones to be on so long

as they do not emit any noises. Numerous districts that require phones to be checked in with security personnel nonetheless allow use of those devices—but only in close proximity to the security stations. These districts include the Northern District of Florida,⁴⁴ the Northern District of Indiana,⁴⁵ and the Eastern District of Tennessee.⁴⁶

At least two districts focus on how a cell phone can be used. The Eastern District of Carolina restricts the use of cell phones to situations where their use is “related to [the] official duties” of authorized parties.⁴⁷ Possession of cell phones in the District of New Hampshire is allowed “for the limited purpose of facilitating [attorneys'] participation in mediation sessions and providing legal representation.”⁴⁸ Finally, other districts such as the District of Vermont⁴⁹ and Eastern District of Oklahoma are more restrictive in the use of wireless devices; although these courts do not ban the possession of these devices, they nonetheless generally prohibit “the use of cellular telephones, pagers, or other electronic communication devices in the courthouse.”⁵⁰

Camera Phones

The 1972 Judicial Conference banned photographs and television cameras from all federal courts. It has been a challenge to reconcile this prohibition with the advent of wireless devices that integrate still and video cameras. It is becoming increasingly difficult to purchase a wireless device that does not incorporate some form of a digital camera. Indeed, virtually all the available “smart” phones on which many attorneys rely for their scheduling, e-mail access, and voice communications integrate a still camera or a video camera.

Numerous district courts' local rules are simply ambiguous when considered in light of wireless devices that have integrated cameras. For example, many districts forbid cameras to be brought into the courtroom but explicitly allow wireless devices that may in fact be integrated with cameras. Other districts, however, have tackled the issue with differing approaches. The District of New Mexico forbids “cameras, cellular telephones with cameras, transmitters, receivers or recording equipment” being brought near courtrooms.⁵¹ The Northern District of Georgia,⁵² the Bankruptcy Court for the Western District of Michigan,⁵³ and the Southern District of Ohio⁵⁴ are two examples of districts with similar policies. The Bankruptcy Court for Vermont, on the other hand, merely requires that attorneys “disclose” to security officials the capacity of a phone to take photographs, make audio recordings, or shoot video images.⁵⁵ The most common approach, however, is exemplified by the Southern District of Alabama, which generically forbids “the taking of photographs and the operation of audio or video recording equipment.”⁵⁶ This approach has been adopted by numerous districts, including the Northern and Southern Districts of Iowa,⁵⁷ the District of Nebraska,⁵⁸ the District of North Dakota,⁵⁹ and the Northern District of Oklahoma.⁶⁰

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Personal Data Assistants

A recent article in the *New York Law Journal* highlighted a problem facing both the bench and the bar as they attempt to schedule future dates before the court.⁶¹ When Judge Nicholas G. Garaufis asked counsel if he would be available for a future scheduling conference, the attorney was forced to say that he didn't know. The reason? His calendar—stored on his wireless device—was checked at the court's security desk. Increasingly, attorneys are ditching bulky paper day planners for wireless devices that are integrated into their office scheduling applications. This trend, however, presents a serious complication for federal courts when they attempt to restrict the use of wireless devices within the court.

At least one district has addressed this issue. The Eastern District of Tennessee allows attorneys to bring such wireless devices into the courthouse "provided the attorney enters into an agreement regarding the use of the device and obtains the permission of a United States District or Magistrate Judge."⁶² The agreement, in essence, requires attorneys to deactivate all wireless and digital camera components of their smart phones before entering the courthouse. Depending on the software the attorney is using, such an approach may allow attorneys to consult their calendars without the need to operate the wireless components of their devices. The District of West Virginia goes one step further, allowing the use of wireless devices such as "PDAs, Blackberries, and laptop computers" to "assist attorneys in data entry or data display in furtherance of courtroom proceedings."⁶³

Conclusion

With more and more attorneys becoming increasingly reliant on wireless devices to manage their practices, courts will find it more difficult to balance accommodating legitimate uses of these devices with the court's desire to ensure an orderly, secure environment that is free of unnecessary interruption. The plethora of local rules governing the use of wireless devices within courthouses—even differing from judge to judge⁶⁴—reflects the judiciary's experimentation with solutions to the problem. This diversity in procedure, complicated by continually updated restrictions, makes it critically important for attorneys and their staff to keep apprised of the local rules. Yet, until there is an effective way to ensure that Britney Spears remains silent during judicial proceedings, visitors to federal courthouses will have to adjust their digital lifestyles to an environment that is often decidedly nondigital. **TFL**



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Endnotes

¹Press Release, CTIA Wireless Association (Mar. 28, 2007), available at www.ctia.org/media/press/body.cfm/prid/1680.

²By way of example, West and LexisNexis have recently announced wireless versions of their popular research software that allows users to perform tasks using their wireless devices.

³M.D. Fla. R. 4.11(b), M.D. Fla. (2006).

⁴See, for example, Henry Curtis, *Court's Cell Phone Ban Rings Sour Note*, ORLANDO SENTINEL at B1 (Dec. 1, 2003).

⁵S.D.N.Y. R. 1.8 (2007); E.D.N.Y. R. 1.8 (2007).

⁶E.D. Mich. R. 83.31 (2006).

⁷E.D. Tenn. R. 83.1 (2006).

⁸Bankr. D.S.C. R. 5073-1 (2006).

⁹General Order 46 *In re Electronic Communication Devices* (E.D. Okla. 2006).

¹⁰Stephanie Francis Ward, *Cell Phone Parking—\$4 a Day*, ABA JOURNAL E-REPORT (Apr. 13, 2007).

¹¹Media Guidelines (N.D. Fla. 2007), available at www.find.uscourts.gov/forms/General/mediaGuidelines.pdf.

¹²N.D. Ind. R. 83.3 (2006).

¹³Gen. Ord. 05-04 (E.D. Ky. 2005).

¹⁴D.P.R. R. 83.6 (2004).

¹⁵D.R.I. R. 112(b) (2006).

¹⁶E.D. Tenn. R. 83.1(a) (2006).

¹⁷Announcement, *Attention Alexandria Courthouse Visitors*, available at www.vaed.uscourts.gov/lockers.html.

¹⁸C.D. Cal. R. 83.6-5.1 (2007).

¹⁹Administrative Order, 03-04 (S.D. Fla. 2003).

²⁰C.D. Ill. R. 83.7 (2007).

²¹D. Kan. R. 83.2.4 (2006).

²²General Order 2005-04 *In re Use of Wireless Communication Devices in Courthouses* (W.D. Ky. 2005).

²³D.N.H. R. 83.7(b)(2) (2006).

²⁴Clerk's Office, PROCEDURAL HANDBOOK, at xlv (E.D. Penn. 2003).

²⁵D.R.I. R. 112(b) (2006).

²⁶D.W. Va. R. 83.10 (2006).

²⁷Miscellaneous General Order 06-02 (D. Alaska 2006).

²⁸Standing Order 05-3 (D.N.J. 2005).

²⁹D. Oreg. R. 83.14(c) (2006).

³⁰Standing Order No. 05-03 (Bankr. M.D. Pa. 2005).

³¹M.D. Tenn. R. 83.02(a)(2) (2006).

³²Miscellaneous General Order 06-02 (D. Alaska 2006).

³³Bankr. W.D. Ky. R. 11.2(b)(4) (2006).

³⁴D. Maine R. 39(h) (2006).

³⁵Standing Order 05-03 *Adoption and Implementation of the Model Third Circuit Electronic Device Policy* (D. N.J. 2005).

³⁶D.N.D. R. 77.3(G)(3) (2000).

³⁷N.D. Okla. R. 39.3(c) (2006).

³⁸D. Oreg. R. 83.14(c) (2006).

³⁹Clerk's Office, PROCEDURAL HANDBOOK, at xlv (E.D. Penn. 2003).

⁴⁰D.R.I. R. 5072-1(e) (2000).

⁴¹N.D. Cal. Gen. Ord. 58 (2005).

⁴²N.D. Iowa R. 83.5(a)(6) (2006).

⁴³D. Neb. R. 1.6(e)(1) (2006).

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posters, and to establish a prima facie cause of action for defamation (the court then balances the defendant's First Amendment right to anonymous free speech against the strength of the prima facie case) (*see Dendrite Int'l Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. 2001)); and

- analyzing a defendant's motion for a protective order under existing civil rules, balancing First Amendment rights against a plaintiff's right to the information sought (*see Klebr Harrison Harvey Branzburg & Eilers LLP v. JPA Development Inc.*, 2006 WL 37020 (Pa. Com. Pl. 2006)).

Vicarious liability for employees' misuse of a company's electronic communication poses yet another risk to employers. In *Booker v. GTE.net LLC*, 350 F.3d 515 (6th Cir. 2003), the Sixth Circuit affirmed the district court's dismissal of claims of negligent supervision and vicarious liability for an employee's inappropriate e-mail. Although the court concluded that many of the required elements of the claims had been met, the court dismissed the claim of negligent supervision, because there was no evidence that the employer knew or should have known the employee would send an inappropriate e-mail. The court also dismissed the claim of vicarious liability, because the employee's act was not in furtherance of the company's business. In another recent decision, however, a New Jersey court ruled that an employer may be civilly liable to a victim of child pornography when the employer fails to investigate or stop an employee's use of a workplace computer to view and transmit child pornography. *See Doe v. XYC Corp.*, 2005 WL 3527015 (N.J. App. Div. 2005).

Because employers face risks of such misuse, many companies have increased the level of discipline that corresponds to employees' activities in this area. A survey of employees' use of workplace e-mail, instant messaging, and blogs conducted by the American Management Association and the ePolicy Institute in 2006 indicates that 26 percent

of employers have terminated employees for misusing the company's e-mail, 2 percent have dismissed workers for inappropriate instant messaging, and nearly 2 percent have terminated employees for offensive content on blogs.

Conclusion

Electronic communication obviously offers a wealth of benefits for employers as well as for employees. But new risks accompany the benefits offered by today's technology. Both employers and employees have exposure concerning issues of privacy, defamation, and protection of proprietary information, just to name a few. With effective e-policies, employee training, and consistent monitoring and implementation of such policies, many of the pitfalls encountered in cyberspace can be avoided. Those who cannot avoid them, however, have existing and emerging laws that can provide guidance to employers and employees alike. As this area of law continues to evolve, it remains to be seen how the courts will treat issues such as blogging and online social network research. **TFL**

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⁴⁴*Media Guidelines* (N.D. Fla. 2007), available at www.fnd.uscourts.gov/forms/General/mediaGuidelines.pdf.

⁴⁵N.D. Ind. R. 83.3 (2006).

⁴⁶E.D. Tenn. R. 83.1(a) (2006).

⁴⁷General Order *In re: Prohibition of Wireless Communication Devices in Courtroom Facilities* (E.D.N.C. 2005).

⁴⁸D.N.H. R. 83.7(c)(2) (2006).

⁴⁹D. Vt. R. 83.5(b)(2) (2007).

⁵⁰E.D. Okla. R. 83.7(c) (2006).

⁵¹D.N.M. R. 83.1 (2006).

⁵²N.D. Geo. R. 83.4(A) (2006).

⁵³Bankr. W.D. Mich. R. 5091(b) (2007).

⁵⁴Gen. Ord. 05-05 (S.D. Ohio 2005).

⁵⁵Bankr. D. Vt. R. 5073-1(b) (2006).

⁵⁶S.D. Ala. L.R. Appendix (2006).

⁵⁷N.D. Iowa R. 83.4(a)(3) (2006).

⁵⁸D. Neb. R. 1.6(f)(1) (2006).

⁵⁹D.N.D. R. 77.3(G) (2000).

⁶⁰Gen. Order 06-15 *In the Matter of Electronic Devices* (N.D. Okla. 2006).

⁶¹Tim Perrotta, *District May Relax Phone Ban for Lawyers*, N.Y. L.J., Aug. 3, 2006.

⁶²E.D. Tenn. R. 83.1(b) (2006).

⁶³D.W. Va. R. 83.10 (2006).

⁶⁴Interim Order 2006-11 *In re Cell Phones in U.S. Court-houses* (N.D. Ohio 2006) (affirming that "each Judicial Officer has the authority to prohibit cell phones, hand-held devices, and/or laptop computers ... from their courtrooms and chambers").