TWITTER IN THE COURTROOM

While short messaging systems such as Twitter provide the public with innovative and current access to trial information, certain rules banning or otherwise restricting cameras in the courtroom can also be read to prohibit tweeting from the courtroom. Rules committees interested in revising rules to allow for courtroom reporting via Twitter should strike a careful balance between prohibiting distracting communications on the one hand, and preserving First Amendment interests and well-settled public policy on the other hand.

A Little Bird Told Me About the Trial:
Revising Court Rules To Allow Reporting From The Courtroom Via Twitter

By Mark L. Tamburri, Thomas M. Pohl, and M. Patrick Yingling

Mark L. Tamburri is a partner in the Pittsburgh Commercial Litigation Group of Reed Smith, LLP. Thomas M. Pohl is an associate in Reed Smith’s Pittsburgh Commercial Litigation Group. Along with W. Thomas McGough, Jr., Tamburri and Pohl represented the Associated Press and the Pittsburgh Post-Gazette in response to the motion to ban the use of Twitter at the 2010 Pennsylvania “Bonugate” trial. M. Patrick Yingling was a 2010 summer associate in the Pittsburgh office of Reed Smith.

Over the past year, a handful of courts around the country have confronted the novel issue of whether to allow reporting on criminal trials from inside the courtroom via Twitter, the micro-blogging and social networking service. Among other things, Twitter allows users to quickly post short (140-character or less) messages called “tweets” onto web pages that can then be viewed by the general public. Using this technology to “tweet” unobtrusively from courtrooms, a few reporters have provided real-time trial updates without the distractions or due process concerns associated with cameras in the courtroom. While courtroom tweeting provides the public with innovative and current access to trial information, certain rules banning or otherwise restricting cameras in the courtroom can also be read to prohibit tweeting from the courtroom. Indeed, at least one court has interpreted one of these rules to ban a reporter from tweeting from the courtroom. These rules, however, were never drafted with Twitter in mind. In fact, the original such rule was crafted in response to the media circus that erupted during the Lindbergh baby kidnapping trial over 70 years ago.

1 See Richard M. Goehler et al., The Legal Case for Twitter in the Courtroom, 27 Comm. Law. 14, 14-16 (Apr. 2010).
2 Twitter has more than 100 million users worldwide. Any Twitter user can send and receive “tweets” via the Twitter website, and can do so using a laptop computer, Blackberry, iPhone, or other portable device.
3 See, e.g., Ga. Sup. Ct. R. 90 (“The Supreme Court shall retain the exclusive authority to limit, restrict, prohibit, and terminate the photographing, recording, and broadcasting of any judicial session.”); Mo. 3d Jud. Cir. Local R. 11.2 (“All persons except those authorized by the court to preserve the record shall refrain and are prohibited from broadcasting, televising, recording, taking photographs in the courtrooms and in the corridors and stairways adjacent thereto while court is in session and during recess.”); Del. Super. Ct. R. Crim. P. 53 (“radio or television broadcasting or transmitting of judicial proceedings from the courtroom shall not be permitted by the court, except in accordance with rules adopted by the Supreme Court”); D.C. Super. Ct. R. Crim. P. 53(b)(1) (“The taking of photographs, or radio or television broadcasting, or except with the approval of the court the use of any mechanical recording device, shall not be permitted in any courtroom of this court during the progress of judicial proceedings ... “); But see Conn. Super. Ct. R. 1-108(a) (“The broadcasting, televising, recording or photographing by the media of court proceedings and trials in the superior court should be allowed subject to the limitations set out in this section ... “).
5 Richard B. Kielbowicz, The Story Behind the Adoption of the Ban on Courtroom Cameras, 63 Judicature 14, 20-21 (1979).

Recognizing that it might be time to modernize its rule, the Pennsylvania Supreme Court’s Criminal Procedure Rules Committee recently announced that it will be evaluating whether to amend its rule to permit reporting via Twitter from the courtroom. Given the increasing use of Twitter and related technologies by the mainstream news media, it is likely that other states and rules committees will also soon be examining this issue. This article provides a brief overview of the media’s increasing use of Twitter to report on trials from within courtrooms. The balance of the article details considerations—both legal and practical—that rules
committees will necessarily have to weigh to address this emerging trend.

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**Twitter and the Modern Courtroom**

The mainstream news media has embraced Twitter as a means of rapidly disseminating breaking news, and CNN, the *New York Times*, and the *Wall Street Journal* are now among the countless traditional news outlets that broadcast news via Twitter. As noted, the use of Twitter by enterprising reporters on the courtroom beat is on the rise. Its use, however, has drawn challenges based upon existing court rules prohibiting cameras in the courtroom or broadcasting from the courtroom.

By way of example, Tracie Mauriello of the *Pittsburgh Post-Gazette* provided the public with real-time updates while covering Pennsylvania's 2010 "Bonusesgate" trial—a six-week criminal trial of a former Pennsylvania state representative and several other state employees. Mauriello posted over a thousand tweets during the preliminary hearing and trial, providing readers with updates on the courtroom atmosphere ("Getting very testy in here. Voices are raised"), as well as witness testimony ("[Witness]: campaigning was necessary to advance legislative career and to get raises and bonuses"). Her posts allowed those not present to follow the trial's progress, and prompted public debate among Twitter followers about the trial. 8

Criminal defendants in that trial had moved to ban Mauriello and other trial "[o]bservers" from "using any and all social networking systems [i.e., Twitter] to electronically publish testimony during trial." 9 The defendants argued that reporting via Twitter from the courtroom violated Rule 112 of the Pennsylvania Rules of Civil Procedure's prohibition of "advanced communication technology" transmissions from the courtroom, 10 and that Mauriello's tweets could have updated sequestered witnesses about proffered testimony. 11

The *Pittsburgh Post-Gazette* and the *Associated Press* opposed the motion on several grounds. The court denied the motion, holding that the restriction sought by the defendants was "overly broad" and that "[o]rdering such a restriction on the media, in advance of trial and without any showing that use of 'Twitter' has been made during trial, would constitute an impermissible prior restraint on speech protected by the First Amendment." 12 In response to the defendants' concern that sequestered witnesses might review Twitter accounts of testimony before testifying, the judge held that the defendants' Due Process rights could be safeguarded via a less-restrictive means. 13 The court, however, avoided expressly deciding whether Rule 112 prohibited reporters from tweeting directly from the courtroom; the defendants never revisited their motion; and Mauriello ultimately used Twitter throughout the trial.

Ron Sylvester, a reporter for the *Wichita Eagle*, has also used Twitter to report on criminal trials from the courtroom. Sylvester uses a mobile phone and foldable keyboard to send updates. He claims that "[j]udges who won't let laptops in will let me use this setup—as long as I keep it on the silent setting." 14 Sylvester's Twitter posts often describe opening arguments and witness testimony.

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7 See, e.g., Paul Farhi, *Twitter breaks story on Discovery Channel gunman James Lee*, Washington post (Sept. 2, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/09/01/AR2010090105987.html?referrer=emailarticle ("News executives say social media sources such as Twitter and Facebook are now regular parts of the news ecology, serving as an early alert system.")

8 See generally Tracie Mauriello, pgPolitweets, Twitter, http://twitter.com/pgpolitweets.


10 Id. See also Pa. R. Crim. P. 112 (prohibiting "the transmission of communications by telephone, radio, television, or advanced communication technology from the hearing room or the courtroom" (emphasis added)).

11 Id.


13 Potential witnesses were ordered "not to permit themselves to be exposed to any media coverage of the trial or any testimony of other witnesses, by whatever means transmitted, including advanced communication technology, in the twenty-four hours prior to their anticipated testimony." Id. (emphasis added).


15 Id.

16 Like Mauriello, Sylvester has also faced motions to stop him from tweeting from within the courtroom. During a federal racketeering trial of six alleged gang members in Kansas, attorneys unsuccessfully opposed Sylvester's use of Twitter by arguing that jurors might read the Twitter posts. The district court refused to prohibit Sylvester from reporting via Twitter while within the courtroom; the judge instead instructed jurors to avoid newspaper, broadcast, and online reports of the trial. Mauriello and Sylvester are but two examples. Overall, it appears that the use (or attempted use) of Twitter by reporters during trials is becoming increasingly common.
Not every court, however, has interpreted the rules as permitting Twitter reporting. In November 2009, a Georgia federal court interpreted Rule 53 of the Federal Rules of Criminal Procedure as banning not only video broadcasts of trials, but also Twitter “broadcasts” as well: “the contemporaneous transmission of electronic messages from the courtroom describing the 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.’”

To the extent that rules committees want to encourage or expressly permit the media’s continued attempts to rely on Twitter reporting, they may have reconsider and revise many of the current rules on the books, particularly those that are ambiguous and could be interpreted to prohibit Twitter.

Food for Thought: Five Points to Consider

Given the rise of Twitter use in court, here are five points—ranging from broad legal concepts to specific practical considerations—that rules committees should consider when deciding whether, and how, to revise any courtroom broadcasting rules to address the use of Twitter (and whatever technology supplants Twitter) in the courtroom:

1. Public Policy: Court Proceedings Should Be Open To Public Scrutiny, And Revisions Should Reflect The Public's Increasing Reliance On Electronic Media

As future Supreme Court Justice Oliver Wendell Holmes held while serving as a state court judge: "It is desirable that the trial of causes should take place under the public eye [so that] every citizen should be able to satisfy himself with his own eyes are to the mode in which a public duty is performed." The Supreme Court has repeatedly emphasized the importance of public access to court proceedings, explaining that “[the press] guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”

This policy favoring public access to judicial proceedings should not, however, extend only to those members of the public who are able to squeeze into a courtroom’s gallery. Roughly thirty years ago, the Supreme Court, while emphasizing the media’s role as surrogates for the public, recognized that instead of “acquiring information about trials by first hand observation or by word of mouth from those who attend, people now acquire it chiefly through the print and electronic media.”

The public’s reliance on electronic media, and Twitter in particular, as a source of news has only skyrocketed since the Supreme Court made this observation. Indeed, a 2010 Pew Research Center study found:

- at least 59 percent of Americans get some of their news online on a typical day;
- the internet is now the third most popular source of news, behind only local and national television news;
- 19 percent of online Americans use Twitter or other status update functions;
- of those Twitter users, virtually all (99 percent) are online news consumers; and
- 6 percent of all internet users get news via Twitter feeds.

In light of this heightened reliance on electronic media for news, and in keeping with public policy, rules should favor nondisruptive technology—like Twitter—that enhances the public’s access to trials. As one judge who recently allowed Twitter reporting from his courtroom told the Associated Press, “The more we can do to open the process to the public, the greater the public understanding.”

Sylvester also faced opposition to his use of Twitter in a recent child-abuse trial, where prosecutors and defense attorneys filed a joint motion to ban bloggers from the courtroom. The federal judge in that case ordered witnesses to refrain from reading about other witnesses’ testimony, stating: “[T]hat is a more appropriate way to proceed than shutting off the reporting at the front end.” See Ernest Luning, Judge Orders Twitter in the Court, Lets Bloggers Cover Infant-Abuse Trial, Colo. Indep. (Jan. 5, 2009), available at http://coloradoindependent.com/18805/judge-orders-twitter-in-the-court-lets-bloggers-cover-infant-abuse-trial.

Committees contemplating rule changes should consider the history behind these rules and the policies that they are intended to serve. Most rules banning cameras in courtrooms trace their origins to the 1935 trial of Bruno Hauptmann, the alleged kidnapper and murderer of Charles Lindbergh’s infant son. The Lindbergh kidnapping trial resulted in unprecedented, highly-disruptive media coverage.

The American Bar Association (“ABA”) responded by appointing a Special Committee on Publicity in Criminal Trials at its 1935 convention. That committee ultimately announced a finding that shaped many state court rules in the decades to come, concluding that “recording equipment tended to distract trial participants from their primary task.” This led the ABA to adopt Canon 35 of its Code of Judicial Ethics, which provided that the “taking of photographs … and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceeding … and should not be permitted.” Rule 53 of the Federal Rules of Criminal Procedure was then adopted in 1946 to implement the provisions of Canon 35 in federal court proceedings.

In 1965, the Supreme Court affirmed the policy considerations at the core of Rule 53 by concluding that a criminal defendant’s due process rights had been violated by an exceedingly sensational criminal trial. The Court described the negative impact that televised broadcasts had on jurors, witnesses, judges, and defendants, and specifically concluded that television cameras would: cause a juror’s mind to be “preoccupied”; make witnesses “frightened,” “cocky,” or absent minded; create extra responsibilities for judges; and construct an inevitable temptation for attorneys to play to the public audience, thus depriving the defendant of effective counsel.

Rule 53 was most recently amended in 2002, four years before the advent of Twitter, as part of a “general restyling of the Criminal Rules.” The 2002 amendment deleted the word “radio” from the rule based on the Advisory Committee’s belief that “[g]iven modern technology capabilities … a more generalized reference to ‘broadcasting’ is appropriate.” The Committee cited “video teleconferencing” as one example of such modern technology. 34


35 Id.

There is an obvious distinction between the well-studied consequences of having television cameras, lights, and camera crews in a courtroom and reporters silently typing on handheld devices in the gallery. Any amended rule should reflect this practical difference. While televised broadcasting or video teleconferencing may interfere with a defendant’s due process rights to a fair and orderly trial, Twitter reporting does not implicate the same concerns.


27 Kielbowicz, supra note 5.


29 Id.

30 In its current form, Rule 53 provides: “[T]he court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.” Fed. R. Crim. P. 53. See also Brenner at 33 (discussing implementation of Canon 35 via Rule 53).


33 Estes, 381 U.S. at 545-50.
3. Prudential Concerns: The Existence of Less-Restrictive Means of Shielding Witnesses and Jurors

Concerns regarding juror and witness access to Twitter accounts of pending proceedings are legitimate and not to be taken lightly. If rule amendments expressly permit tweeting are adopted, these concerns can be addressed through sequestration orders and jury instructions. For example, the judge in the Pennsylvania “Bonusgate” trial ordered witnesses “not [to] permit themselves to be exposed to any media coverage of the trial or any testimony of other witnesses, by whatever means transmitted, including advanced communication technology, in the twenty-four hours prior to their anticipated testimony.”

Similarly, the Ohio State Bar Association has adopted a proposed jury instruction that admonishes jurors not to obtain any information from sources such as “a Blackberry, iPhone, smart phone, and any other electronic device,” and further admonishes jurors not to send or receive “e-mail, Twitter, text messages or similar updates.”

4. Consider the Alternative: Reporters Playing Tag-Team

Rules committees should also consider the practical result of reconciling the media’s well-established right to report on criminal trials with a blanket ban on Twitter reporting from the courtroom, i.e., reporters playing tag-team. A reading of Pennsylvania’s Rule 112 illustrates this. Rule 112 prohibits “the transmission of communications by telephone, radio, television, or advanced communication technology from the hearing room or the courtroom or its environs during the progress of or in connection with any judicial proceedings.”

A purely textual reading of Rule 112 suggests that it could apply to blackberries and other text-messaging devices used for Twitter. However, because the rule does not ban mere use of these devices—it only bans transmitting from them—a reporter could arguably type a tweet in the courtroom but delay sending it until after exiting the courtroom.

Simply permitting Twitter and allowing reporters to sit in the back of courtrooms, discretely tweeting from laptop computers or handheld devices, causes none of the problems discussed above, nor the panoply of problems purportedly caused by cameras in the courtroom.

5. Accounting for the Next Generation of Twitter and the ‘Tweet-script’

Twitter currently only allows users to type 140-character text messages. Thus, tweets from reporters like Mauriello and Sylvester read more like modern-day telegrams than a verbatim broadcast of the proceedings. The pithy nature of the messages certainly enhances the media’s ability to argue that tweets are not broadcasts, and, therefore, should not be swept up in a ban on broadcasts. What if the next generation of Twitter, however, includes no character limits for tweets? What if the reporter simply hires a stenographer to provide a streaming and unofficial “tweet-script” of the proceedings? Should rules amended to allow for courtroom reporting via Twitter in its current state allow for this possibility?

While a rule revised to expressly allow Twitter would only permit the 140-character messages if the technology never evolved, that same rule could eventually be read to allow the tweet-script if Twitter made that possible. Would the harm from the tweet-script, however, be the same harm that erupted from the Lindbergh trial? It seems unlikely. Jurors would hardly become distracted knowing the public had real-time access to an unofficial transcript of the proceedings. Moreover, would attorneys be any more inclined to “mug” for a tweet-script than they otherwise would be for coverage of the trial posted online during breaks, during evening television news reports or next-day editions of newspapers? It would seem not.

On the flip side, any rule amendment that purports instead to allow what Twitter currently allows—pithy text messages—without expressly tying itself to Twitter, may start to run headlong into the First Amendment. Such a rule could arguably be interpreted as regulating content or imposing an impermissible prior restraint on speech, “the most serious and least tolerable infringement on First Amendment rights.”


E.g., Burson v. Freeman, 504 U.S. 191, 197 (1992) (impermissible restrictions include “prohibition of public discussion of an entire topic”); Neb. Press Ass’n v. Stuart, 427 U.S. 539, 558 (1976) (holding invalid, on First Amendment grounds, an injunction sought against the media’s reporting of a criminal trial). See also Snepp v. United States, 444 U.S. 507 (1980) (generally limiting the permissible suppression of speech in advance of its publication to situations involving national or
Based on these considerations, a revised rule that simply allowed the transmission of written or typed text from silent portable communication devices that do not cause distractions would seemingly allow for the best of Twitter without creating any potential First Amendment problems.

A Model Rule Allowing for Reporting Via Twitter

Rules committees interested in revising rules to allow for courtroom reporting via Twitter would be well-advised to adopt revisions that account for the above considerations. They must strike a careful balance between prohibiting distracting communications on the one hand, and preserving First Amendment interests and well-settled public policy on the other hand. An appropriate balance can be struck. Because the Pennsylvania Supreme Court's Criminal Procedure Rules Committee is mulling over whether to amend Pennsylvania's Rule 112, that rule provides a timely example of how at least one existing rule can be updated to reconcile all of these interests:

The court or issuing authority shall prohibit the taking of photographs, video, or motion pictures of any judicial proceedings or in the hearing room or courtroom or its environs during the judicial proceedings; and, with the exception of written or typed text transmitted from silent portable communication devices that cause no distractions to the proceedings, the court or issuing authority shall prohibit the transmission of communications by telephone, radio, television, or advanced communication technology from the hearing room or the courtroom or its environs during the progress of or in connection with any judicial proceedings, whether or not the court is actually in session.

With the boldfaced language incorporated, amended Rule 112 would allow reporters to use Twitter and similar technologies to discreetly provide the public with ongoing trial updates. This furthers well-recognized public policies favoring unfettered access to judicial proceedings, but does so in a way that preserves existing prohibitions on cameras and other broadcasting devices.