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April 6, 2012

VIA EMAIL (criminalrules@pacourts.us)

Jeffrey M. Wasileski, Esquire
Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, Pennsylvania 17106-2635

Re: Proposed Amendments to Pa. R. Crim. P. 112

Dear Mr. Wasileski:

Introduction

We write on behalf of ALDIA News, ALM, The Associated Press, Digital First Media, Dow Jones & Company, Inc. (publisher of *The Wall Street Journal*), Dow Jones Local Media Group, Inc. (publisher of *The Pocono Record*), the Journalism Faculty of Penn State's College of Communications, KDKA-AM, KDKA-TV, KYW-AM, KYW-TV, *The Legal Intelligencer*, The Morning Call, Inc. (publisher of *The Morning Call*), *The New York Times*, *The Patriot-News*, the Pennsylvania Center for the First Amendment, The Pennsylvania Freedom of Information Coalition, *The Philadelphia Gay News*, WCAU-TV and WPVI-TV ("the Coalition"),[1] in response to the invitation of the Criminal Procedural Rules Committee ("the Committee") regarding its Proposed Amendments to, *inter alia*, Rule 112(A)(2) of the Pennsylvania Rules of Criminal Procedure ("the Rules"), dated January 10, 2012. The proposed amendments seek to revise the Rules to protect criminal defendants from the effects of the use by jurors and judges of social media. In particular, they suggest the revision of Rule 112, to clarify, in the Committee's view, that that rule prohibits the transmission of information by "cellular telephones, or other electronic devices with communication capabilities" ("the Amendment" or "the Proposed Amendment"). The purpose of the Amendment, as the accompanying Explanatory Report ("the

[1] Members of the Coalition employ journalists who regularly report from courtrooms across the Commonwealth of Pennsylvania.

Report") makes clear, is to prevent "the posting of 'real-time' commentary, by audience members including members of the press and even trial participants." Report at 21.

The Coalition respectfully urges the Committee to consider that, insofar as the press is concerned, the concerns it has expressed to support its proposed revision of Rule 112 either do not apply or cannot be effectively remedied by the measures the Committee is suggesting. Unobtrusive electronic communications simply do not (1) result in the "disruptive effect" the Committee seeks to avoid; (2) have any impact on "fair trial and privacy" concerns; (3) result in juror bias or witness intimidation; or (4) lead to possible "grandstanding" or pose a threat to the "dignity and decorum" of the proceedings.

The Coalition is not asking here that the Committee amend the rule to permit live broadcasting from the courtroom or to permit live recording. Instead, the Coalition asks the Committee to separate any concerns it may have about the press and public from those involving "trial participants," such as judges, jurors, witnesses and lawyers. Looked at from this perspective, there is not a single example in the Report that demonstrates any negative impact on any trial, civil or criminal, where "real-time" news reporting from the courtroom in any form, including tweeting, blogging, texting or email, has been permitted.

Such real-time reporting – which ensures accuracy and minimizes disruption of courtroom proceedings by permitting observers to explain the proceedings from their seats rather than repeatedly entering and exiting the courtroom to make identical, albeit less complete, reports – has value to our society and should not be curtailed because of the unrelated abuses of trial participants who are, in some instances, acting contrary to the courts' instructions.

Proposal of the Coalition

For the reasons set out more fully below, the Coalition opposes the Proposed Amendment and the proposed new rule providing sanctions for violation of the Proposed Amendment (new Rule 627). Although the Coalition appreciates the Committee's concern that "a balance must be struck between the public's right to observe and be informed of court proceedings and the equally important rights of the participants in the proceedings as well as the orderly administration of justice," such a balance is fully able to be struck without impeding the ability to contemporaneously report on hearings from the courtroom gallery.

Accordingly, the Coalition proposes the following amendment to clarify that Rule 112(A)(2) permits unobtrusive communications by those not participating in the trial[2]:

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[2] Contrary to the Committee's view, Rule 112 does not now prohibit electronic communications, which is why, as the Report notes, judges throughout the Commonwealth have permitted such use of electronic

> "The court or issuing authority shall . . . prohibit the transmission of communications by telephone, radio, television or advanced communication technology, **except the quiet electronic transmission or receipt of written or typed text, tweets, e-mails, and other similar electronic text transmissions from a portable or hand-held communication device**." [3]

In addition, Rule 103, which defines "advanced communication technology," should also be amended to clarify that electronic communications are permitted as follows:

> ". . . any communication equipment that is used as a link between parties in physically separate locations, and includes, but is not limited to: systems providing for two-way simultaneous communication of image and sound; closed circuit television; telephone and facsimile equipment; ~~and email,~~ **except the quiet electronic transmission or receipt of written or typed text, tweets, e-mails, and other similar electronic text transmissions from a portable or hand-held communication device**."

With these revisions, Rule 112 would continue to prohibit only television and radio broadcasts and live recordings, except in circumstances not relevant here, and would also continue to permit reporters and members of the public to quietly text, email, post or "tweet" notes taken during the proceeding by reporters seated in the courtroom gallery. The discretion would remain with the judge – as it always has – to impose reasonable restrictions on a case-by-case basis, as necessary, to prevent disruption or any other demonstrated negative impact. Any abuse of those restrictions or of Rule 112 should be dealt with on an individual basis by the court based on evidence of abuse, rather than with sanctions prescribed by rule.

Modern News Reporting

As noted, permitting real-time reporting has no negative impact on the fairness or dignity of the proceeding but does serve the public good, as it enhances the accuracy of news reports and

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devices by non-trial participants in criminal trials. The revision proposed by the Coalition would alleviate any confusion regarding whether such communications are now permissible within the discretion of the Court.

[3] Judge Jeannine Turgeon in Dauphin County issued similar guidelines regarding possession and use of electronic devices in her courtroom on February 14, 2012. *See In re Possession and Use of Electronic Devices in Judge Turgeon's Courtroom* (Dauphin Cty. C.C.P. Feb. 14, 2012); *see also* Mark L. Tamburri, Thomas M. Pohl, & M. Patrick Yingling, *Twitter in the Courtroom- A Little Bird Told Me About the Trial: Revising Court Rules to Allow Reporting From the Courtroom Via Twitter*, 15 E.C.L.R. 1415 (2010) (also proposing a similar amendment). *See also* Comments submitted by Hon. Jeannine Turgeon, discussed below.

ensures that the proceedings will not be interrupted as reporters come and go from the courtroom, as they must if they are required to file their reports and observations from the press room, or just outside the courthouse steps.

Reporters are freely able to take notes in a courtroom with a pen and paper. To a great extent, the notepad has now gone the way of the quill. Thus, reporters, like lawyers, now enter the courtroom with their electronic note-taking devices, including laptops, i-Pads, tablet computers, smartphones and Blackberries. The Committee is not suggesting that such note-taking violates any rule or other prohibition, whether it is done manually or electronically. Nor could the Committee constitutionally make such a suggestion, as the Pennsylvania and the United States Constitutions make clear that the courts must be open to the press, except in the most limited circumstances, because the press serves the role of the eyes and ears of the public, which is largely precluded from observing the events occurring in a courtroom first-hand. *See, e.g.*, *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987); *Commonwealth v. Hayes*, 414 A.2d 318 (1980); *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984) ("Openness thus enhances both the basic fairness of the criminal trial and the acceptance of fairness so essential to public confidence in the system."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (reporters "function[] as surrogates for the public," transmitting "what people in attendance have seen and heard"); *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) ("what exists of the right of access if it extends only to those who can squeeze through the door?"); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981) (right of access to public trials "can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person").

Although the Committee is not attempting to prohibit reporters from taking notes, it is attempting to limit what can be done with those notes. The highest court of Massachusetts has recently ruled that such a restriction would be deemed a prior restraint on speech, which is presumptively unconstitutional. Robert Ambrogi, *SJC Issues Key Ruling on Cameras in Courts*, (Mar. 14, 2012), *available at* http://medialaw.legaline.com/.

In any event, from a practical standpoint, it cannot be disputed that, given today's 24-hour updated online newspaper websites and television and cable news programs, the public is no longer restricted to learning the news from early morning newspapers delivered to a driveway or an evening newscast watched during dinner. When news reporting was meted out in that way, it was possible and perhaps appropriate to ask reporters to wait until the end of the day to gather their notes, write a news story and then take steps to publish it in a newspaper or broadcast it. However, that pace does not suit the current realities of news reporting, in which viewers and readers seek up-to-the minute coverage. In order to provide it, reporters must either take notes, step out of the courtroom and miss the events that occur while they are out of the courtroom, send the text of their notes electronically from a doorway outside the courthouse, and then return,

or they can send updates electronically from the courtroom, with no disruption of the proceedings and no sacrifice to accuracy. The Coalition suggests that the latter is the appropriate means of dealing with the realities of news reporting, at no sacrifice to the goals the Committee is attempting to fulfill.

At least two Pennsylvania judges have already objected to the Committee's Proposed Amendment, recognizing the logical weakness in the proposed prohibition. Centre County President Judge Thomas Kistler has reportedly stated that the court "shouldn't slow the speed at which news can be reported. . . . information can still be communicated quickly, whether it's tweeted from the courtroom or if a reporter writes a note, hands the paper to someone who runs outside the courthouse and phones it to an editor or broadcasts it live." Mike Dawson, *Pa. courts may ban tweets*, Centre Daily Times, Jan. 31, 2012, *available at* http://www.centredaily.com/2012/01/31/3072497/pa-courts-may-ban-tweets.html. And, Judge Jeannine Turgeon of Dauphin County lodged her own comments with this Committee on March 13, 2012, objecting to the Proposed Amendment. Letter from Hon. Jeannine Turgeon to Jeffrey M. Wasileski, Esq. (Mar. 13, 2012), at 2 ("To prohibit journalists from taking notes and transmitting their notes electronically absent a security or other particular basis, does not make much sense in today's world.").

Meeting the Goals of the Committee Does Not Require Restriction of Electronic Transmissions by the Press

The Committee cited several policy concerns as the underpinnings of the amendments it proposes. Viewed carefully, none of those concerns is implicated in reporters' electronic transmission of their notes and reports on in-court proceedings.

No "Disruptive Effect" on Court Proceedings

Despite numerous cases in which reporters have used Twitter and other "micro-blogs" to contemporaneously report on courtroom proceedings without disruption (*see* list below), the Committee rejects the notion without offering a single example of disruptive use. The differences between (1) taking notes with an electronic device and (2) taking notes and then silently pressing "send" is non-existent for purposes of this analysis. *See MLRC Model Policy on Access & Use of Electronic Portable Devices in Courthouses & Courtrooms*, Media Law Resource Center, at 13, July 2010 ("MLRC Report").

In fact, as some have noted, allowing reporters to post to Twitter or other live-blogging reports to a website actually *reduces* the disruption of having the reporters enter and exit the courtroom to regularly update those websites throughout the proceeding. *See* MLRC Report. Under the Proposed Amendment, a reporter could presumably play "'tag-team. . . [by] typ[ing] a

tweet in the courtroom but delay sending it until after exiting the courtroom." Tamburri, *et al.*, 15 E.C.L.R. 1415. *See also Courtroom tweeting not a distraction*, Miss. Bus. J., Nov. 10, 2009, *available at* http://msbusiness.com/reilysramblings/2009/11/10/courtroom-tweeting-not-a-distraction/ (noting that "it would still be permissible for one reporter to be in the courtroom writing notes, and then passing them to someone else directly outside the courtroom who then Tweets them"). These potential distractions were no doubt the underlying reason why the Courts in *Commonwealth v. Sandusky* and *Commonwealth v. Curley* revised their initial Decorum Orders to permit tweeting and texting but restricting the press and public from returning to the courtroom once they had left a morning or afternoon court session. *See* Order, *Commonwealth v. Sandusky*, No. CP-14-MD-2008-2011 (Centre Cty. C.C.P. Dec. 12, 2011) ("Dec. 12, 2011 Order"); Amended Decorum Order, *Commonwealth v. Curley & Commonwealth v. Schultz*, No. CP-22-MD-0001375-2011 (Dauphin Cty. C.C.P. Dec. 15, 2011) ("Dec. 15, 2011 Order").

Additionally, the Proposed Amendment virtually ensures additional distractions as courtroom deputies or other court personnel are tasked with policing those in the audience to ensure that they are not transmitting their notes. Attempts to ferret out senders from pure note-takers requires close and difficult surveillance and the ejection of violators would obviously result in interruptions of courtroom proceedings.

"Fair Trial and Privacy" Concerns Are Unwarranted With Respect to the Press

The Committee cites "fair trial and privacy concerns" as a reason to bar electronic transmissions from the court gallery. However, the Proposed Amendment is not the right solution for this perceived problem and, in this context, it is clear that it attempts to fix a situation that is not broken. There is simply no discernible difference between a reporter tweeting or otherwise communicating his or her observations of events occurring in open court or doing so just steps away outside of the courtroom, moments later.[4]

Indeed, the Report states that the analysis of the rules in this regard began with an inquiry in July 2010 from the Chief Justice, who was concerned about a report that *jurors* were using electronic devices inappropriately during their service. Report at 20. Jurors are, of course, in a completely different position than the press or public. Conduct of jurors must be regulated in ways that reporters' conduct cannot be. The point is further illustrated by the fact that the Civil Procedural Committee, to whom the Chief Justice also wrote, did *not* propose any restrictions on the press or public, but only proposed that the issue be addressed in instructions to jurors. *See* Supreme Court of Pennsylvania Civil Procedure Rules Committee, Proposed New Rules,

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[4] It bears reiterating that the proceedings in court are not private and therefore publication of the events transpiring there cannot be precluded.

available at http://www.pacourts.us/NR/rdonlyres/3FB3338E-41BC-49E6-AACB-62EBF4F9A0D3/0/rec254civ.pdf.

No Juror Bias and Witness Intimidation

The inappropriate use of social media by jurors, judges, lawyers and testifying witnesses should be evaluated through a completely different lens than such electronic transmission by journalists and members of the public in the courtroom gallery. Jurors may be tempted to read blogs, tweets or updated website reports of court proceedings, just as they may be tempted to read any newspaper account or online report, or watch a television program about the trial they are involved in. Simply because these publications are more current does not change the analysis or warrant the wholesale exclusion of more accurate and updated information from these publications. Jurors who violate a judge's instructions to avoid the media, including the social media, can and should be dealt with on a case-by-case basis, as has always been the case. To the extent that witnesses have been directed not to read about a trial, their disregard of the order has nothing to do with whether simultaneous transmissions from the courtroom are permitted. *See* MLRC Report at 13.

Additionally, the Committee's concern regarding juror bias is already addressed by its proposed revisions to Rules 626, 631 and 647 regarding jury instructions. The Committee proposes adding a paragraph to Rule 647 specifically requiring all judges to instruct jurors that they are prohibited from using such devices during trial. This is sufficient. Fear of posts by jurors does not support and should not result in a blanket ban on journalists.

Finally, the Committee does not explain how the simultaneous transmission of notes or a report about the proceedings from the courtroom can result in witness intimidation. The Coalition does not understand how it could, any more than a report transmitted from just outside the courthouse could do so at any point during a trial.

"Grandstanding" Is Not a Threat,
Nor is There a Threat to "Dignity and Decorum"

Because the Rule does not permit live broadcasting or recording, the transmission at issue here does not lead to "grandstanding," or otherwise threaten the "dignity and decorum" of the court process in any way.

Courts Permit Electronic Courtroom Transmissions Without Incident

Pennsylvania courts have allowed the press to provide live-blogging and "tweets"[5] from criminal proceedings without incident. For example:

- In the ongoing case against former Penn State coach Gerald Sandusky on child molestation charges, Senior Judge John M. Cleland initially entered a Decorum Order barring reporters from using handheld devices and prohibited them from sending email or otherwise transmitting text during the preliminary hearing. In December, 2011, after considering a motion filed by the media, Judge Cleland reversed that decision and entered an Order permitting credentialed reporters to email, text message, and tweet from laptops and handheld devices during Mr. Sandusky's preliminary hearing. In that order, Judge Cleland found that permitting reporters to send emails, text messages, and tweets during the preliminary hearing would not disrupt the hearing, and would "enhance the news gathering capabilities of reporters, which is in the public interest." Dec. 12, 2011 Order.

- In Dauphin County, Judge Todd A. Hoover revised a similar Decorum Order, and allowed credentialed members of the media to email, text message, and tweet from laptops and handheld devices during the preliminary hearings of Timothy Curley and Gary Schultz. In both instances, the courts ruled that Rule 112 of the Pennsylvania Rules of Criminal Procedure *does not* prohibit the electronic transmission of text. Dec. 15, 2011 Order.

- In the "Bonusgate" trial of former State Rep. Mike Veon held in Dauphin County in 2010, Judge Richard A. Lewis permitted reporters to "tweet" from the courtroom. *Judge won't restrict Twitter updates during Bonusgate trial*, Post-Gazette.com, Jan. 26, 2010, http://old.post-gazette.com/pg/10026/1031037-454.stm.

- In February 2012, Dauphin County Judge Jeannine Turgeon issued an order regarding the guidelines in her court to allow use of electronic devices to "quietly transmit[] or receiv[e] texts, tweets, e-mails, and other similar electronic transmissions or quietly take notes." *In re Possession and Use of Electronic Devices in Judge Turgeon's Courtroom* (Dauphin Cty. C.C.P. Feb. 14, 2012).

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[5] In addition to the in-court uses described below, it is worth noting that the Pennsylvania Supreme Court announced in October 2011 that it would launch its own Twitter feed to instantly communicate opinions, rulings, and other relevant information. *See* http://twitter.com/SupremeCtofPA.

These mechanisms for up-to-the moment reporting have similarly been embraced by courts around the country. For example:

- In the murder trial of the two intruders accused of killing the wife and daughters of Dr. William A. Petit Jr. in Cheshire, Connecticut, trial Judge Jon C. Blue permitted reporters seated in the courtroom to use their iPads, smartphones and laptops to access Twitter to report on the proceedings. *Judge Allows Twitter In Home Invasion Trial*, HuffingtonPost.com, Feb. 22, 2011, http://www.huffingtonpost.com/2011/02/23/joshua-komisarjevsky-trial-twitter_n_826907.html.

- A New York state court recently allowed a local newspaper, the *Daily Freeman*, to post live Twitter updates from inside the courtroom during a murder trial. Paul Kirby, *Murder Trial: Live Tweeting Adds New Dimension to Newspaper's Trial Coverage*, Daily Freeman, Apr. 14, 2011, *available at* http://www.freemanonline.com/articles/2011/04/14/news/doc4da659b109fa7267934313.txt.

- In the Superior Court of Alameda County California, Judge Larry Goodman allowed members of the media to file online updates from the courtroom in the murder trial of Hans Reiser. Henry K. Lee, *Hans Reiser Trial: Day One*, S.F. Chron., Nov. 5,2011, *available at* http://blog.sfgate.com/localnews/2007/11/05/hans-reiser-trial-day-one/.

- Now-retired Boulder, Colorado District Judge Lael Montgomery allowed live-blogging and Tweeting in the child abuse trial of Alex Midyette. Judge Montgomery noted at the time, "I think there are other manageable options and less restrictive options than shutting down the flow of information during the trial." Ernest Loving, *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.

- U.S. District Judge Mark Bennett of Sioux City, Iowa allowed reporters to blog during a federal criminal trial in response to a request by the *Cedar Rapids Gazette*. Debra Cassens Weiss, *Judge Explains Why He Allowed Reporter to Live Blog Federal Criminal Trial*, A.B.A. J., Jan. 16, 2009, *available at* http://www.abajournal.com/news/article/bloggers_cover_us_trials_of_accused_terrorists_cheney_aide_and_iowa_landlor/.

- U.S. District Judge Thomas Marten in Wichita, Kansas allowed a reporter from the *Wichita Eagle* to use Twitter to provide updates from the racketeering trial of six Crips gang defendants. *As Witnesses Sing, Journo's Twitter Tweets*, CBSNews.com, Mar. 6, 2009, http://www.cbsnews.com/stories/2009/03/06/tech/main4847895.shtml?source=related_story.

- One of the busiest courtrooms in Massachusetts, Quincy District Court, recently began a pilot "OpenCourt" program of streaming its proceedings live over the Internet. The courtroom, which previously did not allow reporters to use even computers, began permitting laptops, iPads and smartphones, and encouraged live blogging and tweeting. Recently, ruling on two challenges to the program, the Massachusetts Supreme Judicial Court held that that any order restricting live video streaming from the courtroom is a form of prior restraint, and can only be upheld if it is the least restrictive, reasonable measure necessary to protect a compelling government interest. Ambrogi, http://medialaw.legaline.com/.

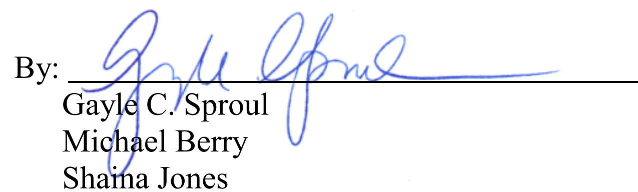
This trend extends to Europe. In the United Kingdom, for example, the Lord Chief Justice of England and Wales recently issued new guidance on the use of "text based" media, allowing journalists and legal commentators in England and Wales to tweet, text and email from court without first asking permission. In explaining his reasoning, the Lord Chief Justice said, "A fundamental aspect of the proper administration of justice is the principle of open justice. Fair and accurate reporting of court proceedings forms part of that principle." Lord Judge, Private Guidance: The Use Of Live Text-Based Forms Of Communication (Including *Twitter*) From Court For The Purposes Of Fair And Accurate Reporting, Dec. 14, 2011, http://www.judiciary.gov.uk/NR/rdonlyres/A5D39665-E7D8-491D-BC33-4CACF8724D95/0/ltbcguidancedec2011.pdf.

The Coalition respectfully notes that the Committee's attempt to close the channels of communication when they are being opened all around us does not serve the interests of the judicial process or the public. For all of the reasons discussed above, the Coalition requests that the Committee reconsider the Proposed Amendment and the accompanying sanction, and that it consider clarifying Rules 103 and 112 as suggested herein.

We appreciate the opportunity to comment and welcome the opportunity to serve as a resource to the Committee on this issue. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, LLP



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