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Litigation in Twitter Nation: When You Can and Can't Tweet in #Court

By L. David Russell, Christopher C. Chiou and Sean D. Nelson

On June 28, 2006, Judge William Shubb of the Eastern District of California was presiding over a complicated tax case. Just as a lawyer launched into his argument, the courtroom was filled with a familiar sound: a cell phone ringtone. Many of us can understand what the judge did next. "[H]is robes just flying in the wind," he descended from the bench, seized the offending phone and hurled it out the door.[1]

Cell phones obviously have tremendous potential to frustrate court proceedings. But thanks to mass communications platforms like Twitter and WordPress, they—and similar devices like iPads and Chromebooks—can also inform thousands of followers simultaneously about the legal process and the latest substantive developments in cases of interest. Surprisingly, court rules about the permissibility of Tweeting in court differ greatly, even within the same state or county. These differences come from a lack of clarity about how old rules of "media coverage" translate to the Twitter Age and a narrow (and arguably outdated) view of what cell phones can or should be used for. But they also reflect the enduring conflict between the public's right to know and the obtrusiveness of newsgathering in the courtroom.

"Broadcasting" and Twitter

Nearly every court in California prohibits "broadcasting" in the courtroom. California Rule of Court 1.150 forbids media coverage—including broadcasting—without special court permission in all state courts. Likewise, Federal Rule of Criminal Procedure 53 bars "the broadcasting of judicial proceedings from the courtroom." And local rules in the federal Northern, Southern, and Eastern Districts of California extend the broadcasting ban to the civil side. But all of this raises the fundamental question: What is "broadcasting"?

"Broadcasting" almost certainly doesn't cover Tweeting in state court. The California Rules of Court define the term as "a visual or aural transmission or signal … of the court proceedings." Thus, the broadcasting proscription is aimed at things like television coverage, which can be distracting and intimidating to participants. Tweets that are merely text are not covered by this definition, although Tweets containing videos are probably banned. Note that because "media coverage" is defined by the California Rules in terms of *activities* (i.e., photographing, taping or broadcasting), rather than *affiliation* (e.g., ABC, *New York Times*), professional journalists do not need special permission to Tweet.

Because the term "broadcasting" is not defined in Rule 53, there is more ambiguity at the federal level. In fact, two courts have already faced the question of Tweeting during proceedings, coming to opposite conclusions on different bases. In *United States v. Shelnutt*, No. 4:09-CR-14 (CDL), 2009 WL 3681827 (M.D. Ga. Nov. 2, 2009), a district court judge in Georgia held that broadcasting is not limited to aural and visual representations and includes textual Tweets. On the other hand, a Kansas district court had no issue with a Tweeting reporter, basing its decision on Federal Rule of Criminal Procedure 57(b), which gives the district court judge discretion to run his courtroom in the absence of controlling Rules or law.[2]

Some federal judges have taken a more ad hoc route in responding to Twitter use. In 2009, Iowa district court judge Mark Bennett allowed tweeting from the courtroom at the request of a reporter covering a tax fraud trial, emphasizing the public's "right to know" and transparency concerns.[3] Others have moved to limit courtroom cell phone use on their own. South Carolina district court judge David C. Norton signed an order banning all wireless communication devices in 2011.[4]

Shelnutt notwithstanding, there is a strong chance that future courts analyzing Rule 53 would find that it does not encompass Tweeting. The rule originally proscribed "radio broadcasts," but a non-substantive edit in 2002 deleted "radio" to reflect court decisions that had expanded the prohibition to TV broadcasts and tape recordings. Broadcasting, then, does not necessarily refer to the timing of the transmission, because tape recordings are prohibited. Instead, it appears to address perfect recordings of the proceedings. This reading of Rule 53 would bar livestreaming a criminal trial, but not Tweeting about it—which is the same result achieved by California state-court rules. And because the federal local civil rules, outside the Central District of California, all use the term "broadcasting," the same result should apply for civil trials.

No court has yet fleshed out the distinction between text and video/aural transmissions. The justifications for distinguishing them, however, make sense:

- The ban on broadcasting protects the privacy of witnesses—a concern that might be especially pressing in criminal cases, where testifying could put a witness in physical danger. Text generally should not present the same risks as video or audio recordings of witnesses.
- There is little basis to distinguish between: (a) Tweeting about legal proceedings; and (b) taking notes and then walking outside the room and posting a blog.
- A Tweet is inherently editorial: Even if she is merely summarizing the proceedings, the author frames the discussion with her word choice and her decisions on what to focus on in her 140 characters.

No Cell Phones Allowed

Several California courts take a different tack, simply banning cell phones in court. Rule 3.42 of the Los Angeles Superior Court local rules bars "us[ing] a cell phone, while court is in session." The Second District of the California Court of Appeal, which includes Los Angeles County, is even stricter, prohibiting laptops and tablets in court unless they're being used by counsel, and excluding non-counsel cell phones "and other electronic devices" from the courtroom at all times.[5] The Central District of California has a similar rule, prohibiting all "cell phones that have video or sound recording or photographic capabilities … in all court spaces."[6]

These prohibitions appear to have more to do with the distracting nature of cell phones than worries about the privacy of witnesses. Banning cell phones outright made sense when all they were good for was phone calls, but these rules seem outdated in the era of the smartphone. Tweeting takes little motion and makes no noise; indeed, it may even be less distracting than someone taking handwritten notes. And anyone live-Tweeting a trial has a strong incentive to make sure her phone is on silent, as her job depends on not being ejected from the courtroom or having her phone seized.

Until these rules are brought up to date, however, intrepid reporters could likely attack their applicability on textual grounds. Is Tweeting "us[ing]" a cell phone within the meaning of the Los Angeles Superior Court local rules? While cell phones must be turned off in the Central District, does that go for iPads and Chromebooks? The California Court of Appeal's rule, however, appears to have closed any loopholes.

The Outlier: The Ninth Circuit

The Ninth Circuit lives up to its billing as Silicon Valley's court of appeals, going further than any other court in California. In the Ninth Circuit, cell phones are not banned in court and the court livestreams all oral arguments via its website. Thus, even if phones were banned, a commentator could still live-Tweet from her home. With public briefs and without witnesses, appellate practice is especially well-suited to livestreaming. But it is worth pondering whether the Ninth Circuit has found a better path, or just a different one.

Livestreaming minimizes the potential for distractions like the one that opened this article. And it gives the audience a true choice: watch a perfect representation of the proceedings or have a Tweeting commentator filtering and explaining what is happening (or watch the argument and follow Twitter at the same time). The circuit court's broadcasts have not caused a collapse in public faith in the courts. And perhaps most importantly, they have created a visual record of momentous oral arguments like *Perry v. Hollingsworth*. But despite its virtues, livestreaming remains unique to the Ninth Circuit; elsewhere, interested parties will have to settle for live Tweets. As for the Tweeters: just make sure your phone is on silent.

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[1] This account comes from Cosmo Garvin, "*Short Fuse*," Sacramento News & R. (July 6, 2006), https://www.newsreview.com/sacramento/short-fuse/content?oid=69205.

[2] *As Witnesses Sing, Journo's Twitter Tweets*, CBS News (March 6, 2009), http://www.cbsnews.com/news/as-witnesses-sing-journos-twitter-tweets/. For an in-depth discussion of Rule 53 and these cases, see Jacob E. Dean, Comment, "*To Tweet or Not to Tweet: Twitter, "Broadcasting," and Federal Rule of Criminal Procedure 53*," 79 U. Cin. L. Rev. 769 (2010).

[3] Nicole Lozare, "*More reporters tweeting from courtroom*," Reporters Committee (Fall 2011), https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2011/more-reporters-tweeting-court.

[4] *Id*.

[5] http://www.courts.ca.gov/11603.htm.

[6] https://www.cacd.uscourts.gov/news/cell-phones-courthouse.

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Death by a Thousand Views: Keeping Deposition Videos Off the Internet

By L. David Russell, Christopher C. Chiou and Sean D. Nelson

YouTube has changed what we view as entertainment. Before the advent of YouTube, few people would have predicted the enormous popularity of cat videos. Yet videos of cats and kittens chasing red laser pointers, tumbling off of bookshelves, and slowly falling asleep are among the most popular and shared videos on the Internet.

Likewise, deposition videos have become a new form of entertainment. In May 2010, a search of YouTube for "deposition" yielded 2,700 videos. (Katherine A. Lauer, Jennifer L. Barry, and L. David Russell, *Was That a Yes or a No?: Depositions in the YouTube Era*, The Practical Litigator, Nov. 2010, at 10.) Today, that same search will yield more than 200,000 clips and videos.

Celebrity and high-profile clients generate the largest share of views. A video of rapper Lil Wayne's deposition from June 2012 has generated more than 4 million views. One of pop star Justin Bieber's deposition taken in March 2014 bested that number with more than 8 million views, and a parody of his deposition has gathered an additional 3.2 million views. Even an older deposition of Microsoft founder Bill Gates from 1998 has received more than 150,000 views. Other popular videos involve lawyers and deponents threatening each other, belittling each other, and generally embarrassing themselves.

Potential embarrassment and the disclosure of personal information are at the forefront of deponents' minds when the public release of deposition videos is threatened. For public figures, the distribution of embarrassing depositions can create reputational problems and damage their brands. (Consider Justin Bieber's now infamous statement in his deposition: "I think that I was detrimental to my own career.") For persons not in the public eye, the release of videos may still bring unwanted attention. Further, the public release of deposition videos can lead to other significant harms, including the public exposure of trade secrets, confidential material, and other sensitive information.

Given the potential harms associated with the public release of deposition videos, lawyers should consider the various ways to keep those videos from being released publicly. This article discusses several ways that a lawyer can help prevent his or her client's deposition video from becoming the next hit on YouTube.

The Public's Right of Access to Deposition Materials

If a deposition transcript or video has been filed with the court and thus made into a public record, then the public is generally allowed access to it for copying. *See Nixon v. Warner Commc'ns.*, 435 U.S. 589, 597 (1978). Such access, however, is not absolute, and courts have denied it "where court files might have become a vehicle for improper purposes," such as being used "to gratify private spite or promote public scandal." *Id.* at 598.

When the deposition material has not been filed with the court, the likelihood that the public has a right to access it goes down substantially, although different federal circuit courts employ slightly different standards. For the Third Circuit, the public right of access depends on whether "a document is physically on file with the court," *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994), or if not filed, whether a court "interprets or enforces the terms of that document, or requires that it be submitted to the court under seal," *In re Cendant*, 260 F.3d 183, 192 (3d Cir. 2001).

The Third Circuit's technical rule contrasts with the more holistic rule of the First Circuit, which presumes a right of access to extend to "materials on which a court relies in determining the litigants' substantive rights," whether at trial or in most pretrial proceedings (such as summary judgment). *In re Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002). The Second and Seventh Circuits' tests are similar to the First Circuit's. *See Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

In every circuit, however, the right of access does not extend to tangential documents and material merely brought to light through discovery without relevance to a

non-discovery judicial decision. *See, e.g.*, *Anderson v. Cryovac*, 805 F.2d 1, 11 (1st Cir. 1986) ("We think it is clear and hold that there is no right of public access to documents considered in civil discovery motions."). Individual state laws also vary. California's, for example, is similar to that of the federal circuit courts. *See* Cal. Rules of Court, Rule 2.550(a) (sealing rules "do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings").

Preventing Parties From Releasing Deposition Materials

Obtaining a stipulation or protective order limiting the disclosure of discoverable material is the best way to prevent parties from publicly releasing deposition depositions. The level of protection provided by the stipulation or protective order can be tailored for each particular case. For example, in a case involving a celebrity deponent or extremely sensitive information, the parties could agree to leave deposition videos in the possession of the court reporter, who then would notify the parties when anyone requested access to them. This arrangement would allow the parties to determine when, to whom, and under what circumstances to release the videos, if at all.

In those instances where the other party is recalcitrant, counsel may use the potential for "annoyance, embarrassment, oppression, or undue burden or expense" to convince a court to issue a protective order. *See* Fed. R. Civ. P. 26(c). While a stipulation or protective order may not be enough to prevent third parties from acquiring materials allowed through common law right of access principles, they at least provide a means of relief if the other party violates the stipulation or order.

The "Trump University" case provides a recent example of a party preventing the dissemination of a video deposition with a protective order. In that case, Donald Trump moved to amend a stipulated protective order to prohibit the public filing or dissemination of any videotaped depositions, while media intervenors filed a related motion asking for an order releasing the videotape of Mr. Trump's deposition. *See Low v. Trump Univ.*, No. 3:13-cv-02519-GPC-WVG, 2016 WL 4098195, at *3 (S.D. Cal. Aug. 2, 2016). After substantial analysis, the court determined that the deposition videos should not be released, and amended the protective order accordingly. *Id.* at *8. The court reasoned that the public's interest in the deposition videos was not substantial, particularly because transcripts of those depositions had already been released. *Id.* Additionally, the court concluded that releasing the videos "would impair judicial efficiency" by making it more difficult to empanel an impartial jury. *Id.*

What to Do After a Deposition Video Is Publicly Released

Particularly for high-profile clients, counsel should search Google and YouTube to determine whether any deposition videos have been posted. If those videos have been posted by the opposing party against a stipulation or protective order, counsel should inform YouTube (or other video-hosting service), the opposing party, and the court of the violation. If a third party has shared the videos, and the material is under a protective order and not part of the judicial record, or is sealed, counsel should do the same.

Even if a deponent's counsel did not obtain a protective order or stipulation prior to the opposing party's dissemination of a deposition video, a court might still be able to issue a protective order requiring the opposing party to remove the video, if the video was not a public record. A North Carolina federal magistrate judge recently ruled that a plaintiff had improperly released on YouTube a deposition video—edited along with plaintiff's highly critical commentary—a year and a half after the original case had been dismissed, and ordered the plaintiff to remove the video. *Springs v. Ally Fin., Inc.*, No. 3:10-CV-311-MOC-DCK, 2014 WL 7778947, at *3 (W.D.N.C. Dec. 2, 2014). The judge agreed with the defendants that FRCP 26(c) did not impose "any deadline for when a protective order may issue" and that the video was never filed "or otherwise made public during the litigation." *Id.* at *6–7.

Citing authorities from the Second Circuit and United States Supreme Court, the *Springs* court explained that the "liberality" of the discovery process creates a "significant potential for abuse" and reminded the parties that the purpose of discovery is "to facilitate orderly preparation for trial, not to educate or titillate the public." *Id.* at *5 (quoting *Seattle Times v. Rhinehart*, 467 U.S. 20, 34–35 (1984); *Joy v. North*, 692 F.2d at 893). Thus, "courts must be vigilant to ensure that their processes are not used improperly for purposes unrelated to their role." *Springs*, 2014 WL 7778947, at *3. This ruling is currently pending appeal in the Fourth Circuit. If the ruling is upheld, this sort of "clawback" protective order could be a very useful tool if a protective order has not been issued in advance.

> Deponent's counsel should also examine the guidelines of the video sharing website on which the deposition video is posted. For example, YouTube will consider removal of a video for violation of privacy if the complainant is "uniquely identifiable by image, voice, full name, Social Security number, bank account number or contact information." *YouTube Privacy Guidelines*, YouTube (last visited Jan. 20, 2017), https://www.youtube.com/static?template=privacy_guidelines. At the same time, the more high profile the deponent, the less likely YouTube will remove the video because it also takes into account "public interest, newsworthiness, and consent … when determining if content should be removed for a privacy violation." *Id.* Due to the vagueness of YouTube's "balancing test," deponent's counsel should not rely on YouTube to remove videos for privacy reasons.

Conclusion

In this era of viral videos, YouTube has become a means of transforming deposition videos into a form of mass entertainment and a weapon to be used against opposing parties outside of court. Taking simple steps, like obtaining stipulations and protective orders limiting the disclosure of discoverable material, can effectively mitigate these potential harms.

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