



Delaware
C o u r t s

**REPORT OF THE COMMITTEE
TO REVIEW THE PROHIBITION ON
PERSONAL ELECTRONIC DEVICES
INSIDE STATE COURTHOUSES**

Introduction

Current Delaware State Court policy, which was established in 2005, generally prohibits the public from bringing personal electronic devices (PEDs) into state courthouses. This policy was largely created in recognition of the risks such devices could pose to security, safety, and decorum. However, since the policy's inception, there has been a seismic shift in the role these devices play in people's lives and the corresponding dependence people have on them.¹ Given this shift, by Order dated December 7, 2020, the Delaware Supreme Court established a Committee to critically review the prohibition on PEDs inside state courthouses and to recommend any modifications to the existing policy.² The Committee includes representatives from each of Delaware's state trial courts, the Department of Justice, the Office of Defense Services, the Delaware State Bar Association, Delaware Community Legal Aid Society, Inc., and Capitol Police.³

In its Order, the Supreme Court recognized that “the prohibition on personal electronic devices presents a barrier for self-represented litigants who need to present evidence, schedule court events, access legal resources, and contact family, employers, and child care providers while present in judicial facilities.”⁴ The Supreme Court further recognized the national efforts of the American Bar Association, the Conference of Chief Justices, and the Council of State Court Administrators, all of which have encouraged courts “to review their cell phone policies so as to

¹ The ubiquitous nature of cell phones has been acknowledged by the United States Supreme Court, which has stated that “cell phones and the services they provide are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable to participation in modern society.” *Carpenter v. U.S.*, 138 S. Ct. 2206, 2220 (2018) (quoting *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)).

² Delaware Supreme Court, *Order Establishing a Committee to Review the Prohibition on Personal Electronic Devices Inside State Courthouses* (Dec. 7, 2020).

³ By Supreme Court Order, members of the Committee include: Chair, The Honorable Michael K. Newell, Chief Judge of Family Court; The Honorable Paul A. Fioravanti, Jr., Vice Chancellor; The Honorable Vivian L. Medinilla, Judge of Superior Court; The Honorable Monica A. Horton, Judge of the Court of Common Pleas; Michael Iglie, Chief of Uniformed Services for the Justice of the Peace Court; Timothy Maguire, Esq., Department of Justice; Stephanie Volturo, Esq., Office of Conflict Counsel; Major Michael Downs, Capitol Police; Sonia Augusthy, Esq., Delaware State Bar Association; Elmer Setting, Administrative Office of the Courts. Because of his experience with the needs of low income litigants, Daniel Atkins, Esq., Executive Director of Delaware Community Legal Aid Society, Inc., was also appointed to the Committee by the Chair.

⁴ Delaware Supreme Court, *Order Establishing a Committee to Review the Prohibition on Personal Electronic Devices Inside State Courthouses* (Dec. 7, 2020).

balance security and decorum concerns with the legitimate needs of litigants to ensure meaningful access to our judicial system, especially for those who are self-represented.”⁵ With this as a backdrop, the Committee began its work.

⁵ *Id.* See also, American Bar Association, *Resolution 116*, <https://www.americanbar.org/content/dam/aba/images/news/2019/08/am-hod-resolutions/116.pdf>. The Conference of Chief Justices and the Conference of State Court Administrators, *Resolution Seven: In Support of a Review of Courthouse Cell Phone Policies*, National Center for State Courts (2018), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/08222018-Review-Courthouse-Cell-Phone-Policies.ashx>.

Current Delaware PED Policies

In 2005, the Delaware Judiciary adopted policies in each county that broadly prohibit PED possession and use by the public.⁶ The press release announcing the New Castle County Courthouse policy identified specific security concerns. These concerns included that cell phones could be used to intimidate witnesses, to take pictures inside the courthouse which could aid in escape efforts or other security breaches, and that cell phones could be tampered with to become weapons. The policies are reflections of the time in which they were written. Along with cellular phones, Blackberries, Sidekicks, pagers, and PDAs are listed as prohibited devices while newer electronics, such as smart watches, go unaddressed.⁷

The policies establish categories of persons exempted from the ban. These categories include judicial officers, courthouse employees, state employees on official business, attorneys, law enforcement personnel, and other persons on official court business, such as repair people or vendors. The policies also include an exception for litigants who have been granted an exemption by a judicial order.

Preliminary Considerations

Even before its first meeting, recognizing that the work of the Committee would be focused on addressing the competing interests of promoting access to justice and maintaining security, safety, and decorum, the Committee began reviewing relevant policies from other courts and legal organizations.

⁶ Current Delaware Court PED policies can be found on the webpage for each courthouse. *See, Security: Prohibition on Cellular Telephones and other Personal Communication Devices in the New Castle County Courthouse*, DELAWARE COURTS (September 23, 2005), <https://courts.delaware.gov/forms/download.aspx?id=103868>; *Kent County Courthouse Cellular Phone Policy*, DELAWARE COURTS (February 1, 2007), <https://courts.delaware.gov/forms/download.aspx?id=103908>; *Security: Prohibition on Cellular Telephones and other Personal Communication Devices in the Sussex County Courthouse*, DELAWARE COURTS (October 28, 2005), <https://courts.delaware.gov/forms/download.aspx?id=84228>.

⁷ That smart watches are not restricted evidences that the ban is in fact not a complete PED ban, but is instead a selective ban that permits newer and, typically, more expensive devices. This is problematic as such devices pose similar security risks as cell phones pose, but are largely inaccessible to people from lower socioeconomic classes, who are also more likely to be self-represented.

Given its location within the state, the policy of the United States District Court for the District of Delaware was particularly interesting. The District Court’s policy permits cell phones, other personal electronic devices, and laptop computers within its courthouse. The policy provides that “[u]se of a Device while in the courtroom in any way that detracts, or could be construed as detracting, from the integrity of a proceeding may, at the discretion of the presiding judge, result in confiscation of the Device, as well as other appropriate action.”⁸

Additionally, the Committee reviewed rules or policies adopted by the courts in Michigan,⁹ Georgia,¹⁰ and Virginia.¹¹ Each of these states reviewed its policies or rules relative to security concerns and applied slightly different restrictions to PED possession and use in striking an appropriate balance short of a complete ban.¹² More permissive rules like those established by the Supreme Court of Georgia allow for broader use of PEDs by parties to proceedings, including within the courtroom for recording and other purposes directly related to the proceedings.¹³ Other states, however, allow PEDs in the building, but require that they be turned off in the courtroom unless permission has been given by the Hearing Officer.¹⁴ Many states have found a balance by allowing PEDs to be used for lawful purposes in and out of the courtroom with restrictions on photography, audio, or video recording and some transmission under threat of contempt.¹⁵ Some rules and policies enable a Hearing Officer to determine on a case-by-case basis that a hearing is

⁸ Policy available at <https://www.ded.uscourts.gov/sites/ded/files/Cell-Phones-Permitted.pdf> (last visited March 10, 2021).

⁹ Amended Rule 8.115 of the Michigan Court Rules adopted by January 8, 2020 Order of the Michigan Supreme Court. Attached as Exhibit A.

¹⁰ Amended Georgia Uniform Superior Court Rule 22 adopted by February 6, 2018 Order of the Supreme Court of Georgia. Attached as Exhibit B.

¹¹ Virginia Supreme Court, *The Supreme Court of Virginia Approves and Recommends Model Policy for the Use of Portable Electronic Devices in Courthouses and Courtrooms* (December 14, 2018), http://www.vacourts.gov/news/items/2018_1214_scv_press_release_electronic_devices.pdf, Attached as Exhibit C.

¹² See Court Leader’s Advantage Podcast, *Is it Time for a Fresh Look at Cell Phones and Courts?*, NATIONAL ASSOCIATION FOR COURT MANAGEMENT, at 12:35 – 16:21 (Feb. 20, 2020), <https://nacmnet.org/resources/podcasts/>.

¹³ Ga. Unif. Super. Ct. R. 22(D).

¹⁴ ME R ADMIN ORDERS Order JB-05-16; Virginia Supreme Court, *the Supreme Court of Virginia Approves and Recommends Model Policy for the Use of Portable Electronic Devices in Courthouses and Courtrooms* (December 14, 2018), http://www.vacourts.gov/news/items/2018_1214_scv_press_release_electronic_devices.pdf.

¹⁵ MD R CTS J AND ATTYS Rule 16-208; See e.g., AZ ST S CT Rule 122.1; UT R J ADMIN CODE Rule 4-401.02.

sensitive in nature and that PEDs will not be permitted in the courtroom at all.¹⁶ In specific courtrooms with higher security needs locking neoprene pouches have been utilized to allow an individual to retain his or her cell phone while not allowing it to be used.¹⁷

The Committee also reviewed Resolutions adopted by the American Bar Association and the Conference of Chief Justices and Conference of State Court Administrators. Resolution Seven adopted jointly by the Conference of Chief Justices and Conference of State Court Administrators encourages state courts to “review and assess” their cell phone policies in favor of removing barriers for litigants and permitting cell phones as public safety permits.¹⁸ Resolution Seven specifically recognizes that:

restrictions on cell phone use in courthouses may impose additional burdens on litigants, particularly those who are self-represented, by preventing them from:

- Accessing and presenting evidence stored on cell phones;
- Gathering information and conducting legal research on the Internet;

¹⁶ Massachusetts Access to Justice Commission, *Report of the Working Group on Possession and Use of Cell Phones and Similar Devices in the Courts of Massachusetts*, STATE OF MASSACHUSETTS, April 30, 2019, at 18, <https://www.mass.gov/doc/massachusetts-access-to-justice-commission-working-group-report-on-possession-and-use-of-cell/download>. Attached as Exhibit D.

¹⁷*Id.* at 19-20. See also Court Leader’s Advantage Podcast, *Is it Time for a Fresh Look at Cell Phones and Courts?*, NATIONAL ASSOCIATION FOR COURT MANAGEMENT, at 22:23 – 31:30 (Feb. 20, 2020), <https://nacmnet.org/resources/podcasts/> (discussing the use of neoprene pouches in courts in Pennsylvania, Maryland, the District of Columbia, and Massachusetts).

¹⁸ The Conference of Chief Justices and the Conference of State Court Administrators, *Resolution Seven: In Support of a Review of Courthouse Cell Phone Policies*, NATIONAL CENTER FOR STATE COURTS (2018), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/08222018-Review-Courthouse-Cell-Phone-Policies.ashx>. Attached as Exhibit E. See also, The Conference of Chief Justices and the Conference of State Court Administrators, *Resolution Three: Admission of Evidence from Cell Phones and Other Personal Electronic Devices*, NATIONAL CENTER FOR STATE COURTS (2019), https://www.ncsc.org/_data/assets/pdf_file/0019/23644/07312019-admission-of-evidence-cell-phones-other-personal-electronic-devices.pdf (recognizing the important role cell phones and personal electronic devices play in presentation of evidence); National Association for Court Management, *Original Resolution No. 4 of 2019: Balancing Admission of Evidence from Cell Phones and Other Personal Electronic Devices with Courthouse Safety and Security*, NATIONAL ASSOCIATION FOR COURT MANAGEMENT (2019) <https://nacmnet.org/wp-content/uploads/Resolution-No.-4-Balancing-Cell-Phones-and-PEDs-with-Safety-Security-11-25-2019.pdf>.

- Communicating with individuals outside of the courthouse, for example, to coordinate appearances of “on-call” witnesses, childcare, eldercare, or transportation; or
- Using cell phones to overcome language or accessibility barriers, for example, accessing translation services or hearing assistance applications.¹⁹

The Committee also reviewed the American Bar Association resolution that encourages all court systems to review their cell phone policies, “so as to balance the security risks posed by cellphone use with the needs of litigants to ensure meaningful access to our judicial system, especially to those who are self-represented.” The resolution further stated that the ABA opposes policies that place undue burdens on litigants – including those “that force litigants to leave their cellphones in unsecure locations outside the courthouse or to pay a fee for storage at a location outside the courthouse.”²⁰

Finally, the Committee reviewed the Massachusetts Access to Justice Commission’s Report of the Working Group on Possession and Use of Cell Phones and Similar Devices in the Courts of Massachusetts. As will be discussed in greater detail later, the Massachusetts Working Group conducted a comprehensive review, including analyzing more than 90 PED policies from jurisdictions around the country. The report voiced support for removing cell phone bans that broadly prohibit possession in favor of those that regulate cell phone use in courthouses.

¹⁹ The Conference of Chief Justices and the Conference of State Court Administrators, *Resolution Seven: In Support of a Review of Courthouse Cell Phone Policies*, NATIONAL CENTER FOR STATE COURTS (2018), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/08222018-Review-Courthouse-Cell-Phone-Policies.ashx>. Attached as Exhibit E.

²⁰ American Bar Association, *Resolution 116*, <https://www.americanbar.org/content/dam/aba/images/news/2019/08/am-hod-resolutions/116.pdf>. Attached as Exhibit F.

Work of the Committee

In order to review the burden on those impacted by the PED prohibition, the Committee conducted a series of meetings to discuss access to justice concerns, identify security concerns related to a possible change in policy, review recommendations and best practices from other jurisdictions, and consider logistical issues associated with changes to the current policy.

The Inaugural Meeting

The Committee first met on December 18, 2020.²¹ At this inaugural meeting, having reviewed the preliminary materials, the Committee members provided their first impressions. Many members acknowledged that there are access to justice issues faced by litigants and members of the public when they are unable to possess cell phones within the courthouses. Given the high percentage of civil litigants who represent themselves, these issues were deemed serious.²² The Committee noted that these litigants may need cell phones for evidentiary issues, scheduling, communication with their employers or childcare providers, and to avoid the stress of being disconnected from their devices.²³ The Committee recognized that allowing this population to have cell phones would help to alleviate the apparent inequity that results when attorneys have their devices, but the self-represented litigant does not. Members of the public who enter the courthouse for jury duty or to access court resources face similar issues when prohibited from bringing cell phones into the courthouse. The Committee also discussed the problems that litigants and the public face when there is no storage on site, as is the case in some of the Justice of the Peace locations. In those locations, cell phones have been found hidden in the bushes because of

²¹ Full minutes of the December 18, 2021 meeting are attached as Exhibit G.

²² The Self-Represented Litigation Network found that nationally 75% or more of cases related to family, housing, or consumer matters had at least one self-represented party present. They further estimated that, including traffic cases, 3 out of 5 civil litigants appear without an attorney. SELF-REPRESENTED LITIGATION NETWORK, <https://www.srln.org/node/21/aboutsrln#:~:text=An%20estimated%2046%20million%20people,least%20one%20self%20represented%20litigant> (last visited March 15, 2021). Family Court's data bears this out as it reported that approximately 80% of its civil litigants are self-represented. Justice of the Peace Court reported that in their 2019 civil court appearances, 62.64% of Plaintiffs appeared pro se and 97.33% of Defendants appeared pro se. They further noted that, with the exception of DUI cases, most criminal defendants appear without an attorney.

²³ Outside of the Committee's meetings, additional concerns were raised regarding the importance of PEDs in the lives of people, especially women and victims of crime. PEDs can play an integral part of individuals' safety plans. At best, it can be daunting and at worst it can be unsafe for people to be without their PEDs while at or traveling to/from the courthouse. Additionally, many people utilize their PEDs to assist with medical issues including the monitoring of glucose levels or to assist with the use of medical devices such as hearing aids.

a lack of storage facilities. Reference was also made to the unfair practice of litigants passing their devices to their attorneys and having the attorneys bring the devices into the courthouse.

While acknowledging the access to justice issues, the Committee also discussed safety concerns that arise largely in the context of criminal cases. The concerns expressed included videotaping witnesses or jurors, witness intimidation, the capturing of intimate information not intended for public consumption, retaliation, and insufficient courtroom resources. Concerns were also raised regarding jurors' use of PEDs to access case related information during trial.

The Committee discussed a number of potential solutions. First, whether some differentiation could be made in the treatment of litigants versus the public. There was discussion that managing litigants' possession and use of PEDs would be easier than managing a large criminal courtroom filled with people with PEDs. However, it was noted that employing a policy based upon this distinction could make the initial screening process more difficult as Capitol would need to determine which individuals were litigants. Questions were raised about the number of people who enter the courthouses daily. The Committee felt this information was necessary to understand more fully the impact policy changes could make on the initial screening process. This information was not immediately available. The Committee also acknowledged that even with screening for litigants the possibility would exist that a litigant could bring in a PED for a non-litigant.

Second, there was a suggestion that the Committee consider inverting the current presumption. In this way, the Judiciary would have a presumption in favor of the public's ability to bring PEDs into the courthouses while allowing for the exclusion of PEDs from trials or specific spaces where safety risks had been identified. While some members favored such a shift, others felt that additional information needed to be gathered and considered before making such a recommendation. Third, the Committee briefly discussed the possibility of utilizing locking neoprene pouches in situations in which PEDs should not be accessible. These are magnetic locking pouches that allow members of the public to retain their cell phones while not being able to use them within the building. Questions were raised about the efficacy of and cost associated with the pouches, commonly referred to as "Yondr pouches," denoting the name of the leading vendor.

With these possible solutions and questions in mind, the Committee established two workgroups. The first was focused on security concerns while the second was focused on solutions to include best practices.

Focus on Security Concerns

The Committee gathered for a second meeting on January 19, 2021.²⁴ In response to inquiries from the prior meeting, Major Downs and Family Court provided entry numbers for each courthouse. In 2019, 588,319 people entered the Leonard L. Williams Justice Center, 36,979 people entered the Kent County Courthouse, 100,278 people entered the Sussex County Courthouse, 13,439 people entered the Sussex Court of Chancery Courthouse, 117,625 people entered the Kent County Family Court, and 116,220 people entered the Sussex County Family Court. These numbers include Court staff and attorneys. The numbers also include initial entries along with subsequent entries for those individuals who leave the courthouse and return in the same day.

The Security Concerns Workgroup presented its perspective regarding potential security challenges and possible solutions. The group discussed how PEDs could be used for the intimidation of jurors, witnesses, undercover police officers, and victims, especially in matters involving alleged gang activity. The group also identified related concerns in sexual assault cases. The group specifically identified the risk of individuals posting to social media in real time, which could expose identities of witnesses and be used to summon associates to the courthouse. The group further expressed misgivings that, despite specific judicial policies limiting cell phones in a given courtroom, bad actors could nonetheless conceal cell phones, and court security would not have the capacity to discover every PED. Finally, the group shared concerns related to courtroom decorum, and noted that cell phones could be a distraction or interrupt the proceeding.

The group also foresaw logistical challenges in implementing a liberal PED access policy. The group noted that a change in policy could create time consuming confrontations with Capitol Police should a person defy a bailiff thereby requiring the engagement of Capitol Police. Similarly, the logistics of a policy that allows litigants to have PEDs while restricting the public would require

²⁴ Full minutes of the January 19, 2021 meeting are attached as Exhibit H.

Capitol Police to determine at the initial screening who can have a cell phone, which could result in delays at the entrance.

In response to these concerns, the group proposed as a solution the use of free lockers for the public outside of the secure area of each courthouse. The group stated that this would allow litigants with judicial permission easier access to their PEDs while avoiding the largescale possession of PEDs in the courthouse. Parties who obtain permission to retrieve their PED from the storage area would be required to re-enter the building and go through security again. The group believed that 250 lockers would be sufficient for this purpose in the Leonard L. Williams Justice Center.

Members of the Committee raised concerns with the proposal. Specifically, members questioned the low number of lockers proposed and the potential liability associated with such storage on courthouse property. Additionally, it was noted that the proposal would result in many individuals remaining unable to bring in a cell phone. Members noted that individuals visiting the self-help center, law library, or other court office may still have legitimate reasons for needing the cell phone, but would be unable to access an order allowing them to bring it in.

This meeting also gave members an opportunity to bring feedback from the constituencies they represented. Based on security concerns discussed above, Superior Court judicial officers relayed that they wanted to reach a resolution to allow PEDs, but also wanted to consider different resolutions to reach this goal. For instance, they suggested limiting PED possession to parties in specific types of proceedings through the use of judicial orders. The Department of Justice and the Justice of the Peace Court echoed the aforementioned security concerns. The Justice of the Peace Court also highlighted its additional security concern given the lack of bailiffs in its courtrooms. Although the Court of Chancery does not have the same direct security concerns as other courts given the lack of criminal jurisdiction and the high number of attorney-represented cases, it shared in the general concern regarding overall security in the courthouse. The Court of Common Pleas expressed support for allowing PEDs in the courthouse recognizing that it would benefit their significant self-represented population. The DSBA recognized the security concerns while acknowledging that in those courts that have a higher number of pro se litigants, it may be more important for litigants to have access to their cell phones. The Office of Defense Services

supported allowing cell phones as much as possible with appropriate restrictions to address security concerns. CLASI continued to support inverting the presumption in favor of allowing PEDs with specifically excluded trials or areas.

Recognizing that the security concerns articulated by members were not unique to Delaware, a suggestion was made that the Committee hear from a state that had reviewed PED bans and made a change. This would allow the Committee to see how another jurisdiction addressed in policy and practice similar security concerns.

Best Practices Presentation

Following the January 2021 meeting, Committee members contacted several jurisdictions with liberal PED policies to discuss their policies and practices. In so doing, Chief Judge Newell connected with the Working Group on Possession and Use of Cell Phones and Similar Devices in the Courts of Massachusetts (“Working Group”). The Working Group was established to review the trial courts’ policies and practices regarding the use of PEDs in the state courthouses and to make conclusions and recommendations. The Working Group was comprised of Judge Paul A. Chernoff (ret.), Judge Cynthia J. Cohen (ret.), and Jeffrey Catalano, Esq., former Massachusetts Bar Association President. Jeffrey Morrow, Director of Security for Massachusetts Courts, extensively assisted with the Working Group’s efforts. The Working Group graciously offered to meet with the Committee during its February meeting to present on its work and results.²⁵

In furtherance of its review, the Working Group visited state courthouses with different policies, spoke to judicial officers, and travelled to Washington D.C., Maryland, and Pennsylvania (all of which had liberal PED policies). Judge Chernoff explained that at the time the report was drafted approximately half of the nearly 100 courthouses in the state of Massachusetts had PED bans. Judge Cohen explained that the Working Group had looked at 90 court systems throughout the country and found fewer than 20 had a cell phone ban. She noted that the trend for PED policies was moving away from bans and referenced the likely influence of Resolution Seven from the Conference of Chief Justices and the Conference of State Court Administrators.

²⁵ Full minutes of the Working Group’s presentation, including a Question and Answer session with the presenters, are attached as Exhibit I.

Judge Cohen explained that ultimately the Working Group concluded that PED bans were an unacceptable impediment to justice and that it was unfair to deny certain people this essential tool when attorneys were able to utilize them. Despite this conclusion, the Working Group acknowledged that there were serious security concerns to consider. The Working Group also agreed that there were measures short of a ban which could be implemented to address security concerns in high-risk courtrooms or courthouses and that any restriction must be tailored to the specific needs of the courtroom/courthouse. In its report, the Working Group provided detailed recommendations that courts could take to address security issues while not prohibiting people from bringing cell phones into the courthouse.

Mr. Morrow explained that after the Working Group's recommendations were issued, he reviewed the existing bans to determine which of them were primarily directed at decorum-related concerns and which were security measures. He applied criteria that included the amount of security staff, number of public visitors coming to the courthouse, criminal case filings, and a study of gang activity across the state, in addition to other factors, to determine if a ban was necessary from a security perspective. Using this process, Mr. Morrow evaluated the 40 remaining PED bans in Massachusetts and immediately eliminated 19 of them. The remaining 21 bans appeared to address security concerns and alternative means of addressing PED access were being considered.

Mr. Morrow shared that courthouses permitting PEDs contained signage to explain appropriate use of devices and that such devices could be confiscated, or a person could be removed from the courthouse for improper use. He shared that there is also a warning that improper use could result in criminal charges.

Mr. Morrow also discussed a Yondr pouch pilot program they instituted after seeing the system used in Philadelphia Criminal Courts, Washington D.C., and Maryland Courts. He explained that the Working Group had initially considered additional PED storage facilities, but that it was not feasible given the physical space constraints. The first Yondr pouch pilot took place in the Framingham, Massachusetts courthouse, which he explained does a "moderate" amount of criminal cases. This pilot was successful and the feedback was primarily positive. Mr. Morrow noted that the process of placing a phone in the pouch took about fifteen seconds, and security

officers experienced less conflict with the public about their cell phones than when they were banned. An additional security officer was posted to address the line and instruct the public to shut off their phones and place them in a Yondr pouch before they reached the metal detector. Unlocking devices were placed throughout the courthouse including in courtrooms, probation offices, and clerk's offices should the phone need to be removed from the pouch for a specified purpose.

A second pilot was set to occur when the COVID-19 pandemic began. This was rendered moot in July 2020 when the Honorable Paula M. Carey, Chief Justice of the Trial Court of Massachusetts, entered an order eliminating all PED bans statewide.²⁶ Mr. Morrow explained that the bans were repealed because of the increased need for people to have their cell phones along with a decreased number of people in the courthouses in the midst of the pandemic. He noted that this situation essentially created a testing opportunity for those courthouses affected by the repeal. Mr. Morrow shared that there have been no significant security issues related to PEDs since the bans were removed statewide while acknowledging that there is reduced in person traffic in the courthouse. Nonetheless, he found the lack of issues encouraging and noted that there is consideration of permanently eliminating all PED bans.

After the meeting, Judge Chernoff arranged for Yondr to send the Committee sample Yondr pouches in two different sizes and an unlocking mechanism. Committee members were invited to test the pouches.

²⁶ *Trial Court Emergency Administrative Order 20-10 Order Concerning Trial Court Policy on Possession & Use of Cell Phones & Personal Electronic Devices* (Issued June 24, 2020; Effective July 13, 2020). The Order provides that "Court visitors may use cell phones and other PEDs in the public areas of the courthouse, as long as the activity does not disrupt or disturb court business or proceedings. No cell phone, PED or camera may be used to take photographs or video in a courtroom, or anywhere else inside a courthouse, with the following exceptions: (1) news media in accordance with existing policy; or (2) photographing or recording of court documents with permission of a judge, clerk, register, chief probation officer, or their designee. Cell phones, PEDs or cameras belonging to members of the public must be turned off or set to silent mode and stowed away prior to entering a courtroom. Counsel, court staff, and others conducting business before the court may use cell phones and PEDs in a courtroom with the consent of the presiding justice." Attached as Exhibit J.

Identified Concerns

Based on its work, the Committee generally agreed on the access to justice and security issues raised by PEDs (or the lack thereof) in courthouses. Throughout its meetings, the Committee echoed the sentiments expressed by those courts and legal organizations which have recognized that courthouse PED bans raise significant access to justice issues for litigants and the public. At the same time, the Committee was sensitive to the legitimate safety concerns that PEDs may pose in high-risk situations.

The Committee acknowledged that in high-risk criminal cases individuals could use PEDs improperly to intimidate jurors, witnesses, or victims; to identify undercover police officers; or to summon associates to the courthouse for retaliation purposes. The Committee also identified the possibility that an individual improperly using a PED could post information to social media, including live streaming the proceeding. The Committee also noted that PEDs are not limited to cell phones. Current devices, including smart watches, have capabilities similar to those of a cell phone and pose similar threats. Staff vigilance would be necessary to monitor PED possession and usage during such proceedings. Although not a security risk, the Committee also recognized that a liberal PED policy could create a greater possibility for disruptions during court proceedings. This would necessitate actively educating the public on acceptable PED possession and usage, which could be done through signage, announcements, and instructions from the bench. The Committee also acknowledged the need to address juror possession of PEDs, specifically noting the possibility that jurors could use them to access information related to the case or parties.

Accompanying these concerns were implementation considerations. The Committee was sensitive to the fiscal impact that potential changes in policy could have. Depending on the finalized policy, the Committee noted that costs could include installation of new storage facilities and signage, leasing of Yondr pouches, or increase in (or reallocation of) staff. The Committee also noted that additional wireless access points may be necessary to accommodate the increased public usage.²⁷ The Committee further recognized that some recommendations could have

²⁷ Ken Kelemen, Deputy State Court Administrator – Information Systems Manager at the Judicial Information Center, attended the January 19, 2021 Committee meeting to discuss possible implications of a policy change. Mr. Kelemen explained that the public could use the existing guest net access and that he did not have concerns about cyber security of such access. He did however note that there may be challenges with having a large number of people with devices pulling on the courthouse bandwidth.

unintended consequences. For example, if additional groups of persons were added to the exempt classification, courthouses could see longer lines at the initial screening point as Capitol Police sort the public into those allowed to have PEDs and those that are not.

When considering the barriers that PED bans create, the Committee acknowledged that cell phones have become not a luxury, but a necessary part of our lives. Prohibiting litigants and the public from having their cell phones results in their inability to communicate with those outside the courthouse including their witnesses, employers, childcare or eldercare providers, or transportation. The Committee recognized that a ban also hampers an individual's ability to self-advocate whether in the courtroom or when attempting to access court services. Without a PED, an individual is unable to gather information that may be necessary to fill out court forms, to access and present evidence stored on the device, to schedule court events, or to access online legal resources.

The Committee noted that, in the best of circumstances, the current cell phone ban requires litigants and the public to store their cell phones in on-site storage facilities, which have a cost to the individual. However, not all courthouses have on-site storage. At courthouses that do not have on-site storage, litigants have been forced to hide cell phones outside or be denied entry to the courthouse. The Committee also recognized the inherent unfairness of an attorney being able to bring in a cell phone while the self-represented litigant cannot. The resulting perception that the parties are not being treated equally is detrimental to the judiciary's sacred mission of administering justice fairly and impartially.

Recommendations

In an attempt to balance the competing concerns of safety and ensuring access to justice, the Committee has crafted a number of proposed recommendations. The following recommendations reflect the proposals made by members throughout its meetings as well as best practices emphasized by the Massachusetts Working Group in its presentation and report. Given a lack of unanimity, there are a range of options included.

Each of the recommendations below is built upon a foundation of judicial discretion, which would allow a judicial officer to restrict PED access in a specific courtroom or identified hearing. The Committee stresses that these options are not intended to be mutually exclusive and many may work synergically. Finally, the Committee discussed, but did not reach agreement on, whether to recommend that a policy be crafted that would apply at every courthouse in the state or whether different policies could be applied at individual courthouses. The Committee agreed that it becomes more complicated in the shared courthouses if individual courts have individual policies.

1. Shift the PED Presumption

Delaware currently applies a uniform policy for cell phone possession and use in state courthouses in the form of a broad ban for non-exempt people. A majority of the Committee proposed a shift in the presumption. Rather than a broad exclusion, the recommendation was a policy of broad inclusion with judicial discretion to prohibit PEDs in particular cases based on identified risk.

The Superior Court expressed concern that shifting the PED presumption—without the ability to restrict or monitor usage— could lead to an increased real or perceived risk of videotaping jurors, witness/victim intimidation, identification of law enforcement, or retaliation. The Superior Court further noted its concerns that bad actors could post videos or live stream proceedings. However, so long as alternative storage options can be made available, the Superior Court agreed with the recommendation allowing for judicial officers to use discretion in relaxing restrictions of PEDs in the courtrooms.²⁸

²⁸ The Superior Court requested an opportunity to determine the efficacy of the alternative storage options before shifting the PED presumption.

2. Secondary Screening with Additional Storage or Yondr Pouches for High-Risk Courtrooms or Areas of the Courthouse

Shared courthouses pose a unique challenge regarding the possession and use of PEDs. In addition to removing barriers for self-represented litigants, there are important concerns regarding witness and juror intimidation, real-time social media posting, and the summoning of gang associates. However, these concerns may be more prevalent in specific proceedings or courts. As suggested by the Massachusetts Working Group, instead of using these security concerns to justify a broad PED ban, targeted security measures could be employed to protect public safety while promoting access to justice. In order to ensure safety when such risks have been identified, secondary screenings could be employed at high-risk courtrooms or high-risk areas of a courthouse.

This could be accomplished in shared courthouses by creating PED restricted courtrooms or floors. For example, the eighth floor of the Leonard L. Williams Justice Center houses the large criminal courtrooms. There is one set of elevators, which the public uses to access those courtrooms. A secondary security screening could occur before admission onto the floor, and non-exempt parties would be required to place PEDs in a storage locker or Yondr pouch to prevent use in the courtroom. This would allow self-represented litigants, witnesses, members of the public, and others with business in the courthouse to retain their cell phone for approved purposes throughout the rest of the courthouse while addressing identified security concerns. This targeted use of the Yondr pouch or additional storage reduces the burden on security staff at the main entrance and in the courtrooms, would be more efficient, and would decrease the overall expense. A similar targeted approach could be applied to individual courtrooms in which a judicial officer could determine that for particular calendars or trials everyone entering the courtroom would be required to turn off their phones and place them in a pouch.

However, it is the position of Capitol Police that it would be most effective if Yondr pouches were used for every person entering the courthouse rather than in specific courtrooms or proceedings. Capitol Police expressed its general opposition to the public being able to use their PEDs throughout the courthouse. Capitol Police proposed that prior to the security screening, all non-exempt persons place their cell phones in a Yonder pouch. They further suggested the

placement of a self-service unlocking station at the exit of the courthouse. This option would ensure that people could keep, but not use, their cell phones until such use was deemed necessary by a judicial officer or other court employee. Capitol Police noted that this would decrease risks within the courthouse and would alleviate the need for secondary screening outside of high-risk hearings. It was noted that while this may require less staff resources, there would be an increased cost associated with the purchase of sufficient pouches and additional unlocking units to have with staff throughout the courthouse. This recommendation could also result in differences in how and when judicial officers and court staff deem it appropriate to open the pouches.

3. **PED Permission for Jurors**

Allowing potential jurors to bring PEDs into the courthouses would alleviate the challenges experienced by potential jurors who were previously separated from them. Juror specific restrictions can be applied to ensure appropriate behavior during the proceedings without applying a complete ban and easing entry screening concerns at the discretion of the judicial officer or Jury Services. For example, at the discretion of the judicial officer or Jury Services, potential jurors could be permitted to retain their PED unless they were selected to serve at which time the juror would be required to place the PED in a storage locker or pouch for the duration of the trial.

4. **PED Permission for All Self-Represented Litigants**

The Massachusetts Working Group recommended as a possible interim step a policy that self-represented litigants be permitted to bring their PEDs into the courthouse in the same way an attorney can. This interim measure admittedly leaves many issues unaddressed. Nevertheless, it does promote access to justice for those who choose to represent themselves or cannot afford counsel. While currently a judicial officer can issue an order granting a litigant permission to bring a cell phone into the courthouse, this type of interim measure would remove the burden on judicial officers to individually grant permission while simultaneously alleviating the need for self-represented litigants to request such permission. The Working Group suggested the development of a screening and authorization process with consultation from security staff and judges to support this interim measure.

Allowing only litigants to bring in PEDs could add a significant burden to Capitol Police's initial screening as they would need to differentiate litigants from nonlitigants. This could result in long lines and delays in entering the courthouse. Additionally, this step would maintain the PED ban for a large percentage of courthouse visitors. Individuals visiting the self-help center, court offices, or observing hearings would not be permitted to bring in PEDs.

5. **Yondr Pouch Pilot**

Many courthouses, including the Philadelphia Criminal Court, Prince George's County, Maryland Court, and Washington D.C. Courts, rely on the use of Yondr pouches. In Massachusetts, a pilot program using Yondr pouches was recommended as a way to address security concerns in high-risk courthouses without broadly banning PEDs. The pilot began in the Framingham District Court, and all non-exempt people who entered the building were required to place their phone in a Yondr pouch. A security officer was posted at the line to instruct members of the public to power off their phones and place them in the sealed pouch before going through the metal detectors. Openers were placed in courtrooms, probation offices, and other locations where staff could remove a PED from the pouch if it was deemed necessary. This pilot was successful and was set to expand to a larger criminal court before Massachusetts eliminated the remaining PED bans.

Delaware may benefit from a similar pilot program to determine the efficacy of using locked pouches for PEDs. Justice of the Peace Court 7 attempted a pilot in 2019 with magnetic locking bags. Litigants without vehicles appreciated having a way to store their phones without hiding them in the bushes, but there were challenges that led the pilot to end. Specifically, bags were lost, not returned, or damaged, all of which resulted in cost to replace the bags. Given the COVID -19 pandemic, there are also concerns about sanitizing the bags for court users. Recognizing the difficulties that the Justice of the Peace Court encountered during its pilot program with the Yondr Pouch, any pilot program would need to be specifically tailored and monitored. To the extent the use of the Yondr Pouch was limited to specific courtrooms or specific floors, staff would be better able to maintain control over the pouches and ensure that pouches are returned when individuals leave the restricted area.

6. Clearly Posting Rules and Consequences for Cell Phone and Personal Electronic Use in the Courthouse

In order to properly inform the public and to increase compliance with a PED policy, the rules for PED possession and usage should be clearly posted throughout the Courthouse and on the Courts' website.²⁹ The notice should be at an appropriate reading level and clearly inform the public of consequences for improper PED usage. The use of infographics would be helpful for those unable to read or for whom English is not their primary language. The use of auditory announcements in the Courts' main security screening area could also be used to better inform the public.

7. Additional External Storage for Personal Electronics and Cell Phones

In order to prevent any security concerns related to PED use or possession in state courthouses, members of the Committee suggested storage in the building, outside of the secure area. Although this would continue the restrictive PED policy, it would allow self-represented litigants to retrieve their phone and go back through security if they were given permission to do so by a judicial officer. It would also allow the public to keep their phones closer should they need to access them during their time at the courthouse. Finally, implementing this recommendation would address current issues related to individuals having to hide phones near courthouses that have no storage and would alleviate problems for those who are unable to pay for existing storage. This recommendation was less favored than the use of Yondr pouches.

²⁹ Massachusetts' PED public notice is attached as Exhibit K.

EXHIBIT A

Supreme Court of Michigan’s Amendment to Rule 8.115 of the Michigan Court Rules – Issued
January 8, 2020

EXHIBIT B

Supreme Court of Georgia’s approval of Georgia’s Uniform Superior Court Rule 22 – Effective
May 1, 2018

EXHIBIT C

Supreme Court of Virginia’s Model Policy for the Use of Portable Electronic Devices in
Courthouses and Courtrooms – Approved December 5, 2018

EXHIBIT D

Massachusetts’ Report of the Working Group [of the Massachusetts Access to Justice
Commission] on Possession and Use of Cell Phones and Similar Devices in the Courts of
Massachusetts – Dated April 30, 2019

EXHIBIT E

Joint Resolution of the Conference of Chief Justices and the Conference of State Court
Administrators – Adopted August 2018

EXHIBIT F

American Bar Association Resolution 116

EXHIBIT G

Minutes of the December 18, 2020 meeting of the Committee to Review the Prohibition on Personal Electronic Devices Inside State Courthouses

EXHIBIT H

Minutes of the January 19, 2021 meeting of the Committee to Review the Prohibition on Personal Electronic Devices Inside State Courthouses

EXHIBIT I

Minutes of the February 22, 2021 meeting of the Committee to Review the Prohibition on Personal Electronic Devices Inside State Courthouses

EXHIBIT J

Massachusetts Trial Court's Emergency Administrative Order 20-10 Order Concerning Trial Court Policy on Possession & Use of Cell Phones & Personal Electronic Devices (Issued June 24, 2020; Effective July 13, 2020)

EXHIBIT K

Massachusetts Trial Court's Public Notice regarding the use of cellphones and PEDs in courthouses