

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2018

Order Abrogating and Replacing Rule 35 of the Vermont Rules of Appellate Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 35 of the Vermont Rules of Appellate Procedure, as amended, is abrogated and replaced to read as follows:

RULE 35. POSSESSION AND USE OF RECORDING AND TRANSMITTING DEVICES

(a) **Scope.** This rule governs the possession and use of recording and transmitting devices in a courthouse or courtroom where the Supreme Court is presiding.

(b) **Definitions.** In this rule, the following terms have the indicated meaning:

(1) *Chief Justice* means the Chief Justice of the Supreme Court or any other Justice who is acting as Chief Justice in a proceeding in the Court.

(2) *Communicate* means to send a written, oral, or visual message from a device to one or more specified individual recipients.

(3) *Courthouse* means a structure, or that portion of a structure, that is under the control of the Supreme Court in which judicial proceedings are or may be conducted.

(4) *Courtroom* means a room in a courthouse or any other room or place where judicial proceedings are being conducted. It includes a room or place where a master, appointed by the Vermont Supreme Court, is conducting a proceeding.

(5) *Device* means any device that can record or transmit or receive transmissions of data, images, or sounds, or can access the internet, including

(A) a film (analog) or electronic (digital) still or video camera, whether operated electronically or mechanically or both; and

(B) a personal electronic device including a pager, laptop/notebook/personal computer (PC), PDA, audio or video recorder, wireless device, cellular telephone, smartphone, or electronic calendar.

(6) *Media* means any individual or organization engaging in news gathering or reporting to the public, including any free-lance reporter, newspaper, radio or television station or network, news service, magazine, trade paper, in-house publication, professional journal, or other news-reporting or news-gathering agency, and any individual employed by such an organization.

(7) *Nonparticipant* means a member of the public who is neither a designated media representative nor a participant.

(8) *Participant* means a lawyer participating in a proceeding, a person acting under the direction of that lawyer, a party, and an authorized representative of a party.

(9) *Record* means to use any device to orally or visually preserve any proceeding or associated activity occurring in a courthouse or courtroom, or the actions of a person while engaged in that proceeding or activity.

(10) *Transmit* means to send by any method, including broadcasting or live-streaming, an oral or visual transmission or signal of any proceedings or other activities occurring in a courthouse or courtroom, or the actions of a person while engaged in that proceeding or activity.

(c) **Possession and Use of Devices in a Courthouse.** Subject to subdivision (d), any person may possess any device listed in paragraph (b)(4) in a courthouse, without registration or specific authorization of the Court, and may make any nondisruptive use of it.

(d) **Possession and Use of Devices in a Courtroom.**

(1) *In General.* Except as otherwise provided in this or other court rules, within a courtroom, (A) no person other than court staff may use a device to communicate orally with another person, (B) no person may use a device for oral or visual self-recording, and (C) no device may be operated in a manner that emits a distracting sound.

(2) *Registered Media.* Media with a permanent or one-time registration certificate may record and transmit by any device any proceeding or associated activity in a courtroom subject to the limitations of subdivision (c), paragraph (d)(1), subparagraph (d)(2)(D, and subdivision (e).

(A) *Permanent Registration.* Media intending to record or transmit court proceedings or associated activity on a regular or frequent basis may apply for a registration certificate from the Court Administrator as provided in Supreme Court Administrative Order No. 46.

(B) *One-time Registration.* Media that do not have a registration certificate and wish to record or transmit court proceedings or associated activity for a single day or a single proceeding must submit an application as provided by Administrative Order No. 46. Proceedings will not be automatically delayed pending application and any review.

(C) *Authorized Individuals.* An individual not authorized to act under an existing permanent or one-time medial registration may apply to act temporarily by seeking permission as provided in Administrative Order No. 46.

(D) *Location and Pooling.* The Chief Justice and the Court Administrator, in consultation with representatives of regularly appearing media, will specify the area or areas of the courtroom from which media representatives may operate video and still photographic devices and from which nonparticipants may operate video and still photographic devices. If more than one media registrant or nonparticipant seeks to record or transmit in a specific proceeding at the same time, the Court may require those individuals or organizations to agree among themselves on an arrangement for pooled coverage.

(3) *Participants.*

(A) Except as provided in subparagraph (B), a participant may possess and use any device in a courtroom, including recording and transmitting audio and video images, subject to the limitations provided in paragraph (d)(1) and subdivision (e). The Court may preclude or limit use of a device by a participant as set forth in paragraph (e)(3).

(B) The Chief Justice may prohibit the use of a specific device in a particular location in the courtroom if the Justice finds that the use will disrupt the conduct of the proceeding.

(4) *Nonparticipants.* A nonparticipant may possess and use any device in a courtroom, subject to the limitations provided in paragraph (d)(1) and subdivision (e). Nonparticipants seeking to record or transmit video or still images must comply with the placement designations and number limits made pursuant to (d)(2)(D).

(e) **Limitations.** Recording and transmission are subject to the limitations in subdivisions (c) and (d) and the following further limitations:

(1) Devices may not be used to record or transmit during a recess or between hearings. During hearings, conferences between counsel and client may be recorded with visual still images, but may not be recorded or transmitted by video or audio.

(2) The Supreme Court may prohibit, terminate, limit, or postpone the recording or transmitting of all or any part of a proceeding, and the use of any device, in the courtroom and areas immediately adjacent thereto on the Court's own motion or on the request of a party or witness in the proceeding. Upon notice to the parties, to the person requesting the order, to any person or entity designated by the media to be notified on behalf of all potentially interested members of the media, and to any person who has filed a request to be heard on this particular motion, the court must hold a prompt hearing on the motion. In acting under this provision, the Court will consider the following factors:

- the impact of recording or transmitting on the rights of the parties to a fair hearing;
- whether the private nature of the proceeding outweighs its public value;
- the likelihood that physical, emotional, economic, or proprietary injury may be caused to a party or other person or entity;
- other good cause.

(3) A person seeking an order under subdivision (e) has the burden of persuading the Court by a preponderance of the evidence or probabilities that the Court should permit, prohibit, terminate, limit, or postpone the recording or transmission.

Reporter's Notes—2018

Rule 35 is abrogated and replaced consistent with the simultaneous amendment to V.R.C.P. 79.2. See Reporter's Notes to V.R.C.P. 79.2.

Rule 35(b) provides definitions for terms used throughout the rule. These definitions are the same as those provided in V.R.C.P. 79.2(b) except that there is an added definition for “Chief Justice” and no definition for “juror.”

Under Rule 35(c) any person is authorized to possess any device in a courthouse and use it in a nondisruptive manner.

Rule 35(d) addresses use inside a courtroom. The rule allows registered media, participants, and nonparticipants to possess and use devices in the courtroom, subject to general prohibitions in (d)(1), limits on number and position of devices for video recording and transmission, and the limitations in (e). This is broader than the use allowed in the superior court based on the fact that there are no witnesses or juries present at the Supreme Court.

Rule 35(e) sets limits on recording and transmission. Under (e)(1), there are limits on video and audio recording to ensure confidentiality of communications between members of the Court, between co-counsel, and between attorney and client. The Court is authorized in (e)(2) to prohibit, terminate, limit, or postpone recording or transmitting of a proceeding based on several factors.

2. This amendment shall become effective on _____.

3. That the Chief Justice is authorized to report this amendment to the General Assembly in accordance with the provisions of 12 V.S.A. §1, as amended.

Done in chambers at Montpelier, Vermont this _____ day of _____.

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice