

STATE OF VERMONT  
VERMONT SUPREME COURT  
\_\_\_\_\_ TERM, 2017

**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 CONVENTIONAL AND ELECTRONIC RECORDING AND TRANSMITTING DEVICES**

(a) **Scope.** This rule governs the possession and use of conventional and electronic recording and transmitting devices in the Supreme Court.

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

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

(2) *Conventional device* means any device, including a still or movie camera or audio tape recorder, that can record images or sounds but has no capacity to transmit or receive transmissions of images or sounds or to access the internet.

(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 in which judicial proceedings may be conducted 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) *Electronic device* means any device that can record, transmit, or receive transmissions of data, images, or sounds, or can access the internet, including a pager, laptop/notebook/personal computer (PC), handheld PC, 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, an authorized representative of a party, and a witness while testifying.

(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.

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

**(c) Possession and Use of Conventional and Electronic Devices in a Courthouse.**

(1) Subject to paragraph (2) and to subdivision (d) concerning courtroom use, any person may possess a conventional or electronic device in a courthouse without registration or specific authorization of the court, and may make any nondisruptive use of it that is permitted by this rule.

(2) The Court may for good cause order that any conventional or electronic device be temporarily confiscated anywhere within a courthouse or courtroom.

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

(1) V.R.C.P. 79.2(d)(1)(A)-(D) applies to the Supreme Court. For purposes of V.R.C.P. 79.2(d)(1)(B), permission must be requested from the Chief Justice and, if denied, from the Supreme Court. For purposes of V.R.C.P. 79.2(d)(1)(C), permission must be sought from the Deputy Clerk of the Supreme Court and, if denied, from the Supreme Court.

(2) V.R.C.P. 79.2(d)(1)(E) applies to the Supreme Court. For purposes of this rule, the Chief Justice has the role of the presiding judge of the superior court.

(3) *Limitations*. Recording and transmission by media registered in accordance with subparagraph (1) are subject to the following limitations:

(A) Interactions between members of the Court, between co-counsel, or between counsel and client, and activity during a recess, may be recorded or transmitted visually, but not orally.

(B) 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 electronic 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. 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.

A person seeking an order under this subparagraph 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.

(4) *Participants*. V.R.C.P. 79.2(d)(2) applies to participants in the Supreme Court.

(5) *Non-participants*. V.R.C.P. 79.2(d)(3) applies to nonparticipants in the Supreme Court.

(6) *Waiver*. The Supreme Court may waive specific limitations of this rule on request for good cause prior to the proceeding for which waiver is sought. If the court grants a participant or nonparticipant a waiver it may impose on that person any of the restrictions applicable to the media, including restrictions on the placement and operation of equipment and personnel.

### **Reporter's Notes—2017**

Rule 35 is abrogated and replaced consistent with the simultaneous amendment to V.R.C.P. 79.2. Rule 35 incorporates the policies and language of V.R.C.P. 79.2 except where the Supreme Court structure and proceedings are different from those in the superior court.

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 \_\_\_\_\_, 2017.

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

PROPOSED