

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2017

Order Abrogating and Replacing Rule 79.2 of the Vermont Rules of Civil Procedure

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

1. That Rule 79.2 of the Vermont Rules of Civil Procedure, as amended and made permanent effective March 12, 1992, is abrogated and replaced to read as follows:

RULE 79.2. 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 a courthouse or courtroom.

(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 Judiciary 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.

(5) *Electronic device* means any device that can record or 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, a member of a jury pool or panel, 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.

(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 non-disruptive 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) *Registered Media.* Media registered in accordance with this paragraph may record and transmit by conventional or electronic devices any proceeding or associated activity in a courtroom, or the actions of a person while engaged in that proceeding or activity, subject to the limitations of subparagraph (F).

(A) *Pre-registration.* Media intending to record or transmit court proceedings or associated activity on a regular or frequent basis may register with the Court Administrator as provided in Administrative Order of the Supreme Court and will be granted permission to do so in any courthouse in the state, subject to the requirements of Administrative Order of the Supreme Court. If the Court Administrator denies permission under this subparagraph, the requesting party may seek expeditious review of the denial by the Supreme Court.

(B) *One-time Registration.* Media that have not registered and that wish to record or transmit court proceedings or associated activity for a single day or for the course of a single proceeding must apply for permission by filing a request with the clerk of the court as provided by Administrative Order of the Supreme Court. Subject to the requirements of Administrative Order of the Supreme Court, the presiding judge will act on the application as expeditiously as possible. If the presiding judge denies permission under this subparagraph, the requesting party may seek expeditious review of the denial by the Chief Superior Judge. Proceedings will not automatically be delayed pending this review.

(C) Authorization of Individuals. Permission granted under subparagraph (A) or (B) will designate the names and positions of the individuals authorized to act under the media registration. An individual not designated may act temporarily under the authority of a designated individual if, as provided in the Administrative Order of the Supreme Court, he or she presents to the clerk identification and a communication from the designated individual stating that the nondesignated individual is authorized to act under this subparagraph, and the clerk grants permission as expeditiously as possible. If the clerk denies permission under this subparagraph, the requesting party may seek expeditious review of the denial by the presiding judge.

(D) Scope of Use. Subject to applicable limitations of subparagraph (F), individuals designated or authorized under subparagraph (C) may possess and use personal electronic devices to record proceedings orally or visually and to communicate and receive written messages and visual images to or from specific individuals inside or outside the courthouse but may not use an electronic device for oral communication or oral or visual self-recording.

(E) Location and Pooling. In every division of the Superior Court, the presiding judge, in consultation with the court administrator and representatives of regularly appearing media, will specify the area or areas of each courtroom from which media representatives may operate. If more than one media individual or organization seeks to record or transmit under this rule 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.

(F) Limitations. Recording and transmission by media registered in accordance with paragraph (d)(1) are subject to the following limitations:

(i) Bench conferences and conferences 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. Unless permitted by the judge, proceedings in chambers may not be recorded or transmitted by any device or method.

(ii) Activities of the jury and close-up images of individual jurors or prospective jurors in the courtroom and areas immediately adjacent thereto, or of sequestered jurors, may not be recorded or transmitted by any device or method. In courtrooms where recording of trial participants is impossible without including the jury as part of the background, a visual recording may be made with permission of the court.

(iii) The 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

trial;

- whether the private nature of testimony outweighs its public value;
- the likelihood that physical, emotional, economic, or proprietary injury may be caused to a witness, a party, the alleged victim, or other person or entity;
- the age, mental condition, and medical condition of the party, witness, or alleged victim;
- whether sequestration of the jury, a delay in transmitting until a verdict has been rendered (if agreed upon by the media or person seeking to transmit), or some other means short of prohibition would protect the interests of the parties, witnesses, or other persons;
- other good cause.

A person seeking an order under this subparagraph (F) 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.

(2) *Participants.*

(A) Except as provided in subparagraph (2)(B), a participant may possess and use conventional or electronic devices in a courtroom for the purposes and subject to the limitations provided for media individuals in subparagraphs (1)(D) and (F), except that, item (1)(F)(i) notwithstanding, lawyers or self-represented parties participating in bench conferences and conferences between members of the court, between co-counsel, or between counsel and client other than in chambers may record those proceedings for their own use.

(B) During juror selection and trial, prospective, seated, and alternate jurors may not use an electronic device while in the courtroom. Jurors must not possess an electronic device while deliberating.

(C) This rule is not intended to prevent or limit the presentation of evidence or argument by a lawyer or self-represented party during a trial or hearing.

(3) *Nonparticipants.* A nonparticipant may possess and use an electronic device in a courtroom for the purposes provided for media individuals in subparagraph (1)(D), subject to the limitations provided in that subparagraph and subparagraph (1)(F) and the further limitation that a non-participant may not use conventional or electronic devices to record proceedings visually or to communicate visual images to any person inside or outside the courthouse.

(4) *Waiver.* The 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 Amendment

Rule 79.2, adopted as a temporary rule in 1988 and made permanent with a minor amendment in 1992, is abrogated and replaced. The original rule focused primarily on the recording of court proceedings by news media using conventional cameras and audio equipment for broadcasting or publication. The new rule reflects extensive advances in technology that place the ability to record and transmit images and sound in the hands of any person in a courthouse or courtroom with a smartphone or other portable electronic device in his or her pocket.

The rule was developed by a special committee composed of judges, court administrators, members of all of the Supreme Court's procedural rules committees, and representatives of the media. The special committee's draft was sent out for public comment, reviewed by each of the procedural rules committees, and considered at a public hearing, before a final version was recommended to the Supreme Court for promulgation. Virtually identical rules will replace present V.R.Cr.P. 53, V.R.P.P. 79.2, and V.R.A.P. 35. The present rule will be incorporated in the Family and Environmental Court rules by reference.

Rule 79.2(a) establishes the scope of the rule as governing possession and use of both conventional and electronic devices—terms which are defined in subdivision (b).

Rule 79.2(b) defines terms that are essential to the operation of the rule. Note that “courtroom” is broadly defined to include spaces outside a courthouse, such as the location of a site visit that is in fact a proceeding on the record.

Rule 79.2(c) broadly provides that conventional or electronic devices may be used nondisruptively anywhere in a courthouse, defined in subdivision (b) as a structure, or portion thereof, controlled by the Judiciary in which judicial proceedings may be conducted. That use does not require initial registration or specific authorization, but is subject to the limitations on use in a courtroom provided by subdivision (d), and, to prevent unauthorized or inappropriate use, the devices are subject to screening and may be confiscated by court order. Note that devices brought into a courthouse are routinely examined by a court officer with other items on entry to determine if they are hazardous in nature. If a device or its use is unauthorized or inappropriate, paragraph (c)(2) provides that the court may order it temporarily confiscated.

Rule 79.2(d) provides separate provisions for courtroom use of conventional or electronic devices by media, broadly defined in (b)(6) as news-gathering and reporting organizations and individuals; participants, defined in (b)(8) as lawyers in the proceeding, parties, their employees or representatives, jurors, or witnesses; and nonparticipants, defined in (b)(7) as other members of the public. The rule does not address courtroom use by judges or court personnel.

Rule 79.2(d)(1)(A)-(C), which the Court has supplemented with Administrative Order No. 46, lays out a scheme for registration of media and their representatives, which entitles them to record and transmit—as defined in subdivision (b)—courtroom proceedings and associated proceedings or actions, subject to limitations spelled out in subparagraph (F). Subparagraph (D) also allows registered media individuals to make limited use of personal electronic devices but expressly prohibits use of these devices for oral communication or oral or visual self-recording—e.g., dictation or taking a “selfie.” The purpose is to avoid the disturbance of court proceedings by talking or gesturing. Note that this provision applies only to communication by, or other use of, electronic devices. Regulation of other conduct—e.g., direct conversation between individuals may be regulated by the court as a matter of inherent power or under other rules or Administrative Orders—e.g., a rule or Administrative Order regulating video appearance.

Rule 79.2(d)(1)(E) provides that at the outset of practice under the new rule, the presiding judge of each superior court division, in consultation with the Court Administrator and representatives of the regularly appearing media, as defined in paragraph (b)(6), is to regulate the location and operation of media within a courtroom, including a requirement that media organizations agree on pooling of coverage in a specific proceeding where the news value of the matter draws larger than usual media interest.

Rule 79.2(d)(1)(F) sets forth limitations governing media use largely drawn from prior Rules 79.2(b) and (c) and designed both to protect the decorum of courtroom proceedings and the necessary confidentiality of certain aspects of them and to make clear the court’s power to balance the public benefit of media access against its potential impact on the interests of individuals who may be affected by it. The final sentence of (F) makes clear that the burden is on the person seeking to invoke an extension or

limitation of the rule—in effect a presumption favoring media access in accordance with the rule.

Rule 79.2(d)(2) provides that participants may make the same use of electronic devices provided for media individuals in subparagraphs (d)(1)(D) and (F), with an additional exception to permit lawyers and self-represented parties to record bench and other conferences for use in preparing objections or arguments. Further exceptions for jurors are designed to protect the integrity of the jury’s deliberations.

Rule 79.2(d)(3) provides for similar uses by nonparticipants, with the further limitation, intended to prevent abusive use, that nonparticipants may not record or communicate visual images.

Rule 79.2(d)(4) makes clear that the court may waive any of the limitations imposed by the rule on request for good cause and subject to any necessary or appropriate restrictions.

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.

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