

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2018

**Order Abrogating and Replacing Rule 79.2 of the Vermont Rules of Civil Procedure,
Rule 53 of the Vermont Rules of Criminal Procedure, and
Rule 79.2 of the Vermont Rules of Probate Procedure, and
Abrogating Vermont Supreme Court Administrative Directive No. 28**

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 RECORDING AND TRANSMITTING
DEVICES**

(a) **Scope.** This rule governs the possession and use of 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 a device to one or more specified individual recipients.

(2) *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.

(3) *Courtroom* means a room in a courthouse or other building where judicial proceedings are being conducted.

(4) *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.

(5) *Juror* means a member of the jury pool or panel.

(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, except that no person may communicate with, or record or transmit images and sound of, a witness who has been sequestered anywhere in a courthouse.

(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 public 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 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 with the Court Administrator as provided by Administrative Order No. 46 of the Supreme Court.

(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 automatically be delayed pending application and any review.

(C) **Authorization of Individuals.** An individual not authorized under an existing permanent or one-time media registration may apply to act temporarily under the authority of a registration certificate by seeking permission as provided in Administrative Order No. 46.

(D) Location and Pooling. In every division of the superior court, the presiding judge and the Court Administrator in consultation with representatives of regularly appearing media, will specify the area or areas of each courtroom from which media representatives may operate video and still photographic devices. If more than one media registrant seeks to record or transmit under this paragraph (2) 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 listed in subparagraph (b)(4) 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 presiding judge may prohibit the use of a specific device in a particular location in the courtroom if the judge finds that the use will disrupt the conduct of the proceeding.

(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.

(4) *Nonparticipants.* A nonparticipant may possess devices in a courtroom.

(A) Prohibited Use. During evidentiary proceedings and any time a jury or jury pool is present, including during voir dire, nonparticipants may not use devices inside a courtroom and all devices must be turned off or in silent mode.

(B) Limited Use. During nonevidentiary proceedings when a jury or jury pool is not present, nonparticipants may use devices in a nondisruptive manner, subject to the limits provided in paragraph (d)(1) and subdivision (e), but may not transmit or record audio or visual images.

(C) The presiding judge may prohibit the use of a specific device in a particular location in the courtroom if the judge finds that the use will disrupt the conduct of the proceeding.

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

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

(1) Bench conferences, conferences between co-counsel 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. Conferences between counsel and client may be recorded with visual still images, but may not be recorded or

transmitted by video or audio.

(2) Activities of the jury and images of 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, except that visual recording of trial participants that will necessarily include the seated jury may be permitted by the court on terms that will protect the identity of jurors.

(3) 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 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 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.

(4) A person seeking an order under this 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.

(f) **Waiver.** The court may waive specific limitations of this rule on request for good cause prior to the proceeding for which waiver is sought. Good cause may include the fact that there is a particularized public interest in the proceeding. 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—2018

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 the video and still cameras and audio equipment common at that time 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 possession.

The rule was developed by a special committee composed of judges, court administrators, members of the Supreme Court's procedural rules committees, and representatives of the media. The special committee's draft was sent out for public comment, discussed 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. The Supreme Court made further alterations and again sent the proposals out for comment. V.R.A.P. 35 is concurrently abrogated and replaced with provisions similar to revised V.R.C.P. 79.2. A simultaneous amendment abrogates current rules V.R.Cr.P. 53 and V.R.P.P. 79.2 and replaces those rules with a statement making the civil rule applicable to proceedings in the criminal and probate divisions. No change is made to V.R.F.P. 4.0(a)(2) or V.R.E.C.P. 3 so V.R.C.P. 79.2 continues to apply to public proceedings in the family and environmental divisions.

Rule 79.2(a) establishes the scope of the rule as governing both possession and use of recording and transmitting devices—terms which are defined in Rule 79.2(b)(4), (9), and (10).

Rule 79.2(b) defines terms that are essential to the operation of the rule. "Courtroom" is broadly defined in paragraph (b)(3) to include spaces outside a courthouse, such as the location of a site visit that is in fact a proceeding on the record. Subparagraph (b)(4) makes clear that the rule covers any recording, transmitting, or receiving device. The term includes professional video or still cameras as well as personal electronic devices, with or without camera capability, including laptops, notebooks, or other personal computers (PC); webcams; personal digital assistants (PDA) or other electronic calendars or organizers; cellular telephones; smartphones, or other camera phones; and camcorders, or other audio or video recorders.

Rule 79.2(c) broadly provides that a device defined in paragraph (b)(4) may be used nondisruptively anywhere in a courthouse, defined in paragraph (b)(2) 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 a further prohibition against any coverage of a sequestered witness, who will necessarily be located outside the courtroom. Unauthorized or

inappropriate use will be dealt with by the presiding judge and court officers on a case-by-case basis.

Rule 79.2(d)(1) contains provisions applicable to anyone possessing or using a device in a courtroom. The rule does not otherwise address courtroom use by judges or court personnel. Rule 79.2(d)(2) provides for courtroom use of devices defined in paragraph (b)(4) by registered media, broadly defined in paragraph (b)(6) as news-gathering and reporting organizations and individuals.

Rule 79.2(d)(2)(A)-(C), supplemented by Administrative Order No. 46, lays out a scheme for registration of media and their representatives that entitles them to use devices defined in paragraph (b)(4) to record and transmit—as defined in subdivision (b)—courtroom proceedings and associated proceedings or actions, subject to limitations spelled out in paragraph (d)(1), subparagraph (d)(2)(E), and subdivision (e).

Rule 79.2(d)(2)(D) provides that at the outset of practice under the new rule, the presiding judge of each superior court division and the Court Administrator in consultation with representatives of the regularly appearing media, as defined in paragraph (b)(6), will regulate the location and operation of media within a courtroom. Rather than the one-size-fits-all approach of the former rule, this approach allows flexibility for the various facilities in the state, as well as the opportunity to modify the local policy in light of the continuous evolution of devices. The rule makes clear that local policies must provide locations for both video and still cameras. As did the former rule, this rule includes 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 and more than one media representative seeks to use substantially the same device for the same purpose.

Rule 79.2(d)(3)(A) provides that participants, defined in paragraph (b)(8) as lawyers in the proceeding, parties, their employees or representatives, may make the same use of the devices listed in subparagraph (b)(4) subject to the limitations of paragraph (d)(1) and subdivision (e). Since participants may be seated at counsel tables or in courtroom public seating, subparagraph (d)(3)(C) allows the judge to prohibit the use of a device with characteristics such as size and noise of operation that will disrupt proceedings.

Rule 79(d)(4) addresses nonparticipants, defined in paragraph (b)(7) as other members of the public, and allows them to possess devices in the courtroom, but to use them only in limited

circumstances. Devices must be turned off or in silent mode except during nonevidentiary hearings when the jury or jury pool is not present. At those times, nonparticipants may use devices in a nondisruptive manner, but may not transmit or record audio or visual images. This limitation is based on reports from trial judges and lawyers, especially in family proceedings, that persons in the courtroom who are neither media representatives nor participants are using devices to record or transmit visual images of witnesses in a way that is intimidating and affects their appearance and testimony.

Rule 79(d)(5) addresses use by jurors, as defined in paragraph (b)(5).

Rule 79.2(e) sets forth limitations on 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 subdivision (e) provides 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(f) 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. That Rule 53 of the Vermont Rules of Criminal Procedure is abrogated and replaced to read as follows:

RULE 53. POSSESSION AND USE OF RECORDING AND TRANSMITTING DEVICES

Rule 79.2 of the Vermont Rules of Civil Procedure applies to proceedings governed by the Vermont Rules of Criminal Procedure.

Reporter's Notes—2018

Rule 53, previously titled “Recording Court Proceedings” is abrogated and replaced. For consistency and uniformity throughout units of the superior court, simultaneously amended V.R.C.P. 79.2 regarding possession and use of recording and transmitting devices now governs proceedings in the criminal division. See Reporter's Notes to V.R.C.P. 79.2.

3. That Rule 79.2 of the Vermont Rules of Probate Procedure is abrogated and replaced to read as follows:

RULE 79.2. POSSESSION AND USE OF RECORDING AND TRANSMITTING DEVICES

Rule 79.2 of the Vermont Rules of Civil Procedure applies to proceedings governed by the Vermont Rules of Probate Procedure.

Reporter’s Notes—2018

Rule 79.2, previously titled “Recording Court Proceedings” is abrogated and replaced. For consistency and uniformity throughout units of the superior court, simultaneously amended V.R.C.P. 79.2 regarding possession and use of recording and transmitting devices now governs proceedings in the criminal division. See Reporter’s Notes to V.R.C.P. 79.2.

- 4. That Vermont Supreme Court Administrative Directive No. 28 is abrogated.
- 5. This rule as revised and replaced shall become effective on _____.
- 6. That the Chief Justice is authorized to report this rule 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