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New England First Amendment Coalition

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SENT VIA EMAIL TO JOHN.DOOLEY@VERMONT.GOV

Hon. John A. Dooley, Chairman
Special Committee on Video and Electronics in the Courtroom
Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0801

**RE: Proposed Rules on Possession and Use of Conventional
and Electronic Recording and Transmitting Devices**

September 18, 2017

Dear Chairman Dooley,

I'm writing on behalf of the New England First Amendment Coalition, a regional non-profit organization that advocates for freedom of the press and government transparency. Our coalition includes members of the media, First Amendment attorneys, academics and other proponents of the public's right to know. NEFAC is concerned with several aspects of the recently proposed Rules on Possession and Use of Conventional and Electronic Recording and Transmitting Devices ("Rules").

In summary, we believe the public has a right to audio and video record what occurs during open court proceedings. Citizens — media and non-media alike — should be allowed to record so long as that recording isn't disruptive or outweighed by substantial interests. In addition, we believe such recording should be allowed without burdensome registration requirements and without the threat of equipment confiscation by the court.

The right to witness courtroom proceedings is a tenet of our democracy. This freedom allows communities to obtain information about their judicial system and enables citizens to engage with others based on what they see and hear. The ability to record and share images from a legal proceeding can often be needed to effectively communicate what is witnessed. Visual images, specifically, provide a depth to that expression that mere audio cannot. Rule 79.2(d)(3), however, unnecessarily bans individuals not defined as "media" from recording what can be seen with their own eyes and it robs them of an opportunity to utilize their First Amendment freedom of speech.

The Rule also discourages the sharing of news and opinions to citizens who cannot personally attend proceedings. What can be seen and heard by those in the courtroom should not be limited to those physically present. That information — the sights and sounds of an open court — is public and should be available to all. Technology now provides a way for everyone to virtually have a seat in the gallery and witness what would otherwise only be seen by those physically present. Smartphones and similar recording devices are essentially their eyes and ears. This rule acts as a blindfold and earplugs.

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The Rules do, with exceptions, provide the right to record to members of the “media,” as defined by the committee. But this distinction between media and non-media is a concern. The technology these Rules intend to address allow all citizens to play the role of journalist and gather news for public consumption. It’s not clear from the Rules, however, whether posting images to Facebook would be considered “reporting to the public” or collecting information for a personal blog would meet the committee’s definition of “news gathering.” Even if these ambiguities could be cleared, this is a distinction that still should not be made. What’s presented in an open court is public information and journalists have no more right to that information than any other citizens.

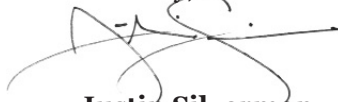
The Media Registration policies outlined in Order No. 46 should also be reconsidered as they unnecessarily burden those defined as “media.” As a general matter, the First Amendment has little tolerance for registration and licensing requirements for journalists. The ability of the press to cover news of public interest should not hinge on the sensibilities of government officials and the possibility of prior restraint. Order No. 46 provides few if any safeguards against this danger. Under the order, the freedom of journalists to do their job is at the whim of the court. This is a system vulnerable to abuse and it allows little recourse. While an aggrieved journalist may receive “expeditious review” of a denial, the opportunity to cover a proceeding may have passed before any remedy is granted.

Lastly, though no less important, is Rule 79.2(c)(2) which allows the confiscation of a recording device anywhere within the courthouse if for “good cause.” This ambiguous standard is likely to chill the First Amendment freedoms of journalists and non-journalists alike. Citizens will be less willing to use their devices if there is a constant threat of confiscation for reasons not explicit in the Rules. This will certainly discourage newsgathering and individual expression if not also trigger Fourth Amendment challenges given the search and seizure implications.

It has been reported that the Rules are an attempt to address witness intimidation. While we recognize the need to protect the court’s integrity, any measures taken to do so must be in harmony with the First Amendment and the public’s right to know. It should also be noted that until recently the public’s access to courts — and, consequently, its understanding of them — has been limited to the number of seats in a respective gallery. The prevalence of smartphones and personal recording devices provides an opportunity for everyone to bear witness to proceedings, even if via a live stream or recording. This technology should be embraced as a boon to civic engagement and the public’s understanding of their courts.

Thank you for the opportunity to share our concerns. We would be happy to discuss them in further detail as your committee finalizes the Rules.

Sincerely,



Justin Silverman
Executive Director



New England
First Amendment Coalition