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## New England First Amendment Coalition

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*SENT VIA EMAIL TO EMILY.WETHERELL@VERMONT.GOV*

January 14, 2019

Vermont Supreme Court  
c/o Emily Wetherell, Deputy Clerk  
109 State Street  
Montpelier, VT 05609-0801

### **RE: Orders Abrogating and Replacing Rules Pertaining to Media Registration and Use of Recording Devices in Courtrooms**

Dear Deputy Clerk Wetherell,

We're writing on behalf of the New England First Amendment Coalition, the region's leading advocate for press freedom and open government, and the Caledonian Record.

NEFAC, a non-partisan non-profit organization, is led by some of the most esteemed attorneys, journalists and publishers in New England. Its Board of Directors includes Michael Donoghue, former reporter for the Burlington Free Press; Lia Ernst, attorney for the ACLU of Vermont; and Todd Smith, publisher of the Caledonian Record. The coalition also works closely with representatives from the Vermont Press Association, the VT Digger, New England Newspapers (Bennington Banner, Brattleboro Reformer and Manchester Journal), and the Stowe Reporter Group.

The following comments are in response to proposed rule changes affecting media presence in Vermont court rooms and the public's ability to use recording devices to document judicial proceedings. They include Rule 79.2 of the Vermont Rules of Civil Procedure, Rule 35 of the Vermont Rules of Appellate Procedure and the media registration requirements outlined in Administrative Order No. 46.

In summary, we believe these changes are unnecessary as state courts already have adequate tools at their disposal to protect the privacy interests of witnesses and jurors. We are also uncomfortable with the court enforcing a registration process for journalists and defining who is and is not a member of the professional media — a definition that is drawn too narrowly and neglects the interests of academics, students and other researchers.

Registration requirements for journalists are a dangerous proposition. They resemble mandatory licensing schemes and unconstitutional attempts by the government to control the independent press. While the registration process proposed in Order No. 46 may be a distant cousin to required licensing, the concerns of both are still closely related. Like with licensing, a government entity is responsible for administering the registration, a process that can be easily abused and utilized to discourage certain reporting in violation of the First Amendment.

Order No. 46 does allow for an "expeditious review" of a registration denial, but this neither protects the initial application review nor assures journalists and those relying on them timely access to the court system pending the appeal. There's simply too much risk to the First Amendment and the public's right to know under this registration system.

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#### MAJOR SUPPORTERS INCLUDE



If the purpose of these rule changes is to better protect jurors and witnesses, the Court can accomplish this goal without burdening the work of journalists or the public's right to document the judicial system. This can be done by allowing *all* members of the public to use recording devices, *subject* to proposed Rule 79.2(3) which would memorialize the discretion already given to the Court to decide when such devices can be used. By focusing on Rule 79.2(3) and excising the remaining proposed changes, the Court can adequately protect the interests of jurors and witnesses without wading into the challenging — if not impossible — task of determining who qualifies as a journalist.

In the event the Court decides to proceed with the remaining changes despite our strong objection to doing so, we would like the concerns below to be addressed.

**Vt. R. Civ. Pro. 79.2 (b)(6) and Vt. R. of App. Pro. 35 (b)(6)** While we again emphasize our general concern with defining who is and is not a member of the media, this particular definition does not include academics, students and other researchers who gather information but who do not work for a news outlet and who may not report to the public. If the Court insists on giving recording rights to only a portion of the general public, we ask that the interests of the latter parties and those engaged in similar pursuits also be authorized to use recording devices.

**Vt. R. Civ. Pro. 79.2 (c)** This provision should be changed to protect those who inadvertently record or transmit images of witnesses while using recording devices in the courthouse, which includes hallways and areas outside courtrooms. This can be accomplished by making the following edit: “. . . except that no person may *knowingly* communicate with, or record or transmit . . .”

**Vt. R. Civ. Pro. 79.2 (d)(1)** Clarification is needed on what constitutes a distracting sound and who is the ultimate arbiter of whether the sound is a distraction. As written, this provision fails to give proper notice to the public on what would constitute a violation of this rule.

**Vt. R. of App. Pro. 35 (d)(1)(B)** Clarification is needed for the term “visual self-recording.” It's not apparent what this term means but it could prohibit the on-camera style of reporting used by many broadcast journalists. If so, the term should be clarified in a way that allows those journalists to record images of themselves while at the courthouse.

**Order No. 46** Even if the definition of “media” is expanded, the registration process should still allow those outside that definition to apply for permission to record judicial proceedings. The ability to document the court system should not be as a rule limited to journalists. There may be other public interests well-served by the ability to record within the courthouse.

Lastly, Order No. 46 §2 states that when drafting courtroom policies on equipment and personnel, “representatives of the media regularly appearing in courts” will be consulted. We respectfully request that our organizations are also consulted. We welcome the opportunity to provide additional guidance on how to best protect witnesses and jurors while also providing an open and transparent judicial system.

Thank you for the opportunity to submit these comments.

Sincerely,

**Justin Silverman**  
Executive Director, NEFAC

**Todd Smith**  
Publisher, Caledonian Record

