Accessing Vermont Courts and Court Records, Pt. 2 – Specific Proceedings and Records

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Agenda

- What are the specific rules for accessing court hearings and what is the press allowed to record?
- What are the specific rules for accessing court records?
- Can records be sealed? How can I contest sealing?
- What should you do if you're denied access to a hearing or a record?
- Questions?

Sources for Courtroom Rules of Access

- Court Rules of Procedure
  - Civil: V.R.C.P
  - Criminal: V.R.Cr.P.

- Statutes
  - Exceptions for specific proceedings
  - NOT Vermont's Open Meeting Law, *see* 1 V.S.A. § 312(e)

- Case law

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Qualified Right of Access

- The public and the press have a *qualified* right of access to court proceedings

- Vermont court proceedings are presumptively open to the public, "closure being the exception rather than the rule."
  - *State v. Tallman,* 148 Vt. 465, 472, 537 A.2d 422, 427-28 (Vt. 1987)

- Criminal proceeding test:
  - (1) "the place and process have historically been open to the press and general public," and
  - (2) "public access plays a significant positive role in the functioning of the particular process in question."
    - *State v. LaBounty*, 167 Vt. 25, 29, 702 A.2d 82, 85 (Vt. 1997)

Exceptions

Grand jury proceedings

V.R.Cr.P. 6(d);
12 V.S.A. § 5802

Juvenile proceedings

33 V.S.A. § 5110;
33 V.S.A. § 5281

Party's request

Case law
(next slide)

Party's Request to Close the Courtroom

- "To rebut the presumption of openness, the party seeking closure must demonstrate 'that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"
  - *State v. Tallman*, 148 Vt. 465, 474, 537 A.2d 422, 427-28 (Vt. 1987) (citation omitted)

- "[A]ny pretrial closure order imposed in this jurisdiction must be based on a clear necessity for the protection of the defendant's fair trial rights and must be limited in scope by its justification".
  - *Herald Ass'n v. Ellison*, 138 Vt. 529, 534, 419 A.2d 323, 326 (Vt. 1980)

- In criminal proceedings, closure is constitutionally permissible *only* where:
  - "(1) closure serves a compelling interest;
  - (2) there is a 'substantial probability' that, in the absence of closure, that compelling interest would be harmed; and
  - (3) there are no alternatives to closure that would adequately protect that compelling interest."
    - *State v. Densmore*, 160 Vt. 131, 138, 624 A.2d 1138, 1142 (Vt. 1993)

Rule Limits on Disclosure

Attorneys Vt. Prof. Cond. Rule 3.6	Judges Vt. A.O. 10 Canon 3(B)(9)
• An attorney shall not make "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."	• "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."
• "[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."	• A judge may "mak[e] public statements in the course of their official duties or . . . explain[] for public information the procedures of the court."

Registered Media

- V.R.C.P. 79.2(d)(2) Registered Media
  - **(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 apply as provided by Administrative Order No. 46. Proceedings will not automatically be delayed pending application and any review.
  - **(C) Authorization of Additional Persons Representing Registered Media**. A person 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.

Recording in the *Courthouse*

V.R.C.P. 79.2(c)

Any person may possess and use a device in public areas non-disruptively

Participants

- Cannot record or transmit image or sound of an individual outside a courtroom without their consent

Non-Participants

- Cannot record or transmit image or sound of an individual outside a courtroom without their consent

Registered Media

- May generally *orally and visually* record, but not:
  - Sequestered witnesses
  - Confidential proceedings
  - Jury, except when seated as necessary
- May *visually* record:
  - Bench conferences
  - Conferences between co-counsel
  - Activity during recess

Recording in the *Courtroom*

V.R.C.P. 79.2(d)

No one may use a device to orally communicate or use a device with a distracting sound

Participants

- May orally record but not visually record or transmit, with some exceptions

Non-Participants

- Whenever the jury is present, must turn off devices or place them in silent mode and may not use them

Registered Media

- "Media with a permanent or one-time registration certificate may orally and visually 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 limits related to sequestered witnesses in subdivision (c), the general limits on use in paragraph (d)(1), the pooling in subparagraph (d)(2)(D), and the excluded items in subdivision (e)."

Limiting Recordings
V.R.C.P. 79.(e)(3)

- If the court is considering whether to "prohibit, terminate, limit, or postpone" recording or transmitting, the court must provide notice and weigh:
  - "* 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."

Accessing Video Recordings

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- **V.R.C.P. 79.3. Use of Video Recording Equipment in Trial Court Proceedings**
  - (b) Official Record. * * * Each docket entry shall indicate whether the proceeding was video recorded.
  - (f) Video Recording is a Public Record. Video recordings of public proceedings are public records, unless otherwise protected from disclosure by law or by order of the court. Duplicated copies may be ordered at the conclusion of a trial, or at any time by a party. Use of a video recording by a nonparty shall not be inconsistent with the provisions of V.R.C.P. 79.2.

Recording in the Vermont Supreme Court

- "The news media may record proceedings of the Supreme Court, unless the Chief Justice directs otherwise." V.R.A.P. 35.

- Audio recordings of oral arguments from the past two years are also available at: https://www.vermontjudiciary.org/supreme-court/audio-recordings-oral-arguments.

http://www.courthouses.co/us-states/v-z/vermont/vermont-supreme-court/

Background Rules + Assumptions for Records

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- Access governed by the judicially created Vermont Rules for Public Access to Court Records, *not* the Public Records Act

- Rules for records typically track rules for proceedings: the Reporter's Notes provides that "[i]f the public has access to a proceeding, it has access to a record of the proceeding, unless that record is specifically exempted from disclosure." Vt. Pub. Acc. Ct. Rec. Rule 1 notes.

Two-Step Process:

1. Under the general rules, are these the ***kind of records*** I can presumptively access?
2. Is there an ***exemption or exception*** to that general rule?

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What Kinds of Cases Are Presumptively Public?

- Civil proceedings
- Criminal proceedings
- Probate (Contested)
- Environmental Division
- Judicial Bureau

But there are many carve-outs

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For categories of generally non-public information, consult **Rule 6(b)**. Examples include:

- Search warrants
- Furlough records
- Competency evaluations
- Risk assessments
- Tax returns
- Orders of protection
- DNA analysis
- Income affidavits
- Juvenile proceedings
- Mental health records
- Judicial work product
- Discovery records not used or consulted by the court
- Juror questionnaires
- Trade secrets and confidential business information

There are also specific exceptions

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- Even though a record may be the **kind of** record publicly accessible, specific exceptions may still apply.

- Consult the **Appendix to Rule 6** for specific exemptions. Examples include:

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Specific Exceptions:

3 V.S.A. § 164(e)(1)	Adult diversion matters, although in certain circumstances, only upon successful completion.
3 V.S.A. § 164(g)(3)(C)	A special index of criminal cases expunged after completion of diversion and records sealed under a prior version of the statute are not publicly accessible.
8 V.S.A. § 7043	Summary proceedings related to the seizure of delinquent insurers are confidential.
9 V.S.A. § 2480ff(8), (9)	In a proceeding for a transfer of structured settlement payment rights, certain documents may or must be filed under seal automatically making them nonpublic.
12 V.S.A. § 522(b)	Civil complaint alleging childhood sexual abuse sealed until answer is served or court rules on motion to dismiss. If dismissed, complaint remains sealed.
13 V.S.A. § 3255(b)	In a prosecution for a sexual assault, lewd and lascivious conduct, human trafficking, or for abuse or exploitation of a vulnerable adult, if a defendant proposes to offer evidence of prior sexual conduct, the defendant must notice of such intent, and the court determines admissibility at in camera hearing, at which all objections are raised.
14 V.S.A. § 3098(c)	Information regarding a child's immigration status related to a petition for classification as a special immigrant juvenile is confidential.
18 V.S.A. § 5112(c)	Records of a proceeding where the probate division authorizes a new birth certificate because of a change of gender are not publicly accessible.
18 V.S.A. § 9472(c)(1)(A), (c)(5)(A)	Health insurer seeking to disclose, without consent, financial and utilization information, or financial arrangements with drug manufacturers, designated confidential by a pharmacy benefit manager, in a case under the Consumer Protection Act, must file that information with the court under seal.
20 V.S.A. § 2056a(c); 28 C.F.R. § 20.33(b)	Criminal History Records obtained through the National Criminal Information Center, as provided in 20 V.S.A. § 2056a(c), are not considered publicly accessible by that agency, 28 C.F.R. § 20.33(b). Disclosure of such records may result in cancellation of access to them.
23 V.S.A. § 1098(b)	The record of certain cases in the Judicial Bureau where defendant admitted or did not contest a violation prior to January 1, 2007 are required to be sealed making them nonpublic.
32 V.S.A. § 632(b)(1)	A false claim action by a relator must be filed under seal and remain under seal for at least 60 days after being served on the attorney general rendering the complaint nonpublic.

Are there ways to get non-public records?

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- Just because a record isn't public doesn't necessarily mean that no-one can access it

- Consult **Appendix to Rule 5** for special access provisions. Examples include:

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Special Access:

3 V.S.A. § 164(g)(3)(C)	A special index of criminal cases expunged after completion of diversion is not publicly accessible except by petition of the person who is the subject of the case or permission of the Chief Superior Judge for research purposes pursuant to the Rules for Public Access to Court Records.
13 V.S.A. § 5236(f)	Financial information provided by a defendant pursuant to 13 V.S.A. § 5236(d), (e) is not publicly accessible in the trial and Supreme Court but is available for review by the person who submitted it.
14 V.S.A. § 2	A will filed with the probate division for safekeeping is not publicly accessible during the life of the testator but may be accessed by others in accordance with instructions of the testator and by the testator's duly authorized legal guardian or attorney-in-fact in the presence of the judge or register.
18 V.S.A. §§ 9306(c), 9309(b)	Records in proceedings to appoint a guardian for a person who is developmentally disabled are not publicly accessible except where the respondent or the representative of the respondent consents to access by a person.
28 V.S.A. §§ 204, 204a; V.R.Cr.P. 32(c)	Generally, presentence investigation reports, including any supervised-community-sentence plan, 28 V.S.A. § 352(c), are nonpublic, 28 V.S.A. § 204(d)(1). The court may allow inspection of the presentence investigation report or parole summary or parts thereof by other persons having a proper interest, whenever the best interest or welfare of the defendant or inmate makes that action desirable or helpful, 28 V.S.A. § 204(d)(2)(B), or by a state or federal prosecutor conducting a criminal investigation if the court finds that the records may be relevant to the investigation. Id. § 204(f).
33 V.S.A. §§ 5110, 5117, 5118, 5119, 5122	Records in juvenile proceedings are generally nonpublic, subject to an extensive list of persons who have a specific right of access to some of or all the information under circumstances described in the statutory sections.
Rules for the Disciplinary Control of Judges, Rule 6(7), (9)	Records of the Judicial Conduct Board are nonpublic unless a formal disciplinary complaint is filed against a judge. If a disciplinary matter has proceeded beyond the stage of an initial inquiry, the chair may provide information about the proceedings to officers involved in impeachment, retention or judicial appointment proceedings.

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Sealing Case Records

- Sealing is governed by Rule 9
- Party can request it, or Court can seal on its own motion
- Any sealing request must:
  - (A) Identify the particular filing, case record or portions that the movant seeks to seal or redact, with as much specificity as possible;
  - (B) Identify the particular interest(s) that are sought to be protected with as much specificity as possible;
  - (C) State any authority that supports an order for sealing or redaction, that is, the statute, administrative or court rule, court order or precedential decision providing for confidentiality with respect to the identified privacy interest(s);
  - (D) If appropriate, attach redacted and unredacted copies of the record(s) in issue that clearly identify the information which the movant seeks to exclude from public access; and
  - (E) Confirm that service has been made on all parties and on any other individual or entity, if other than the movant, who is the subject of the information contained in the filing, court record, or other documents that are the subject of the motion.

  Rule 9(a)(3).

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Sealing Case Records

- Any person, including a non-party, can request a hearing on sealing
  - Any hearing on the motion must be open to the public, except that any person may request that the court conduct all or part of the hearing in camera to protect the interests identified
  - The moving party has the burden of establishing the required grounds for sealing or redacting any new filing, or existing court record, by clear and convincing evidence.
- Court must find "by clear and convincing evidence, that good cause and exceptional circumstances exist for the restriction of public access." Rule 9(a)(5).
- If sealed over anyone's objection, must include:
  - findings of C+C E on the record or in writing; and also
  - find that no reasonable alternative to the sealing or redaction exists, and that the least restrictive means have been employed to preserve maximum public access and to protect the specific interests found to justify sealing. Rule 9(a)(5)(A).
- Lower burdens if the parties agree or stipulate to sealing—but must be revisited if there are later objections.

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What happens if I think these rules aren't being followed?

How do I challenge a limit on access?

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- **Prior restraint ("gag orders") are presumptively unconstitutional**

- **The media has standing to challenge limits to access**
  - Direct intervention at the trial court
    - *State v. Tallman*, 148 Vt. 465, 468, 537 A.2d 422, 424 (Vt. 1987)
  - Once the media intervenes, they have standing to appeal to the Vermont Supreme Court
    - *State v. Schaefer*, 157 Vt. 339, 344, 599 A.2d 337, 342 (Vt. 1991)

How do I contest or access a withheld record?

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- Did a judge previously **rule that the record should be sealed? File a motion under Rule 9(c)**
  - Any person, including a non-party or person who is not otherwise entitled to access, can move to access a record not publicly accessible.
  - Motion must "specify the case, by caption and docket number if known, state with specificity the record or records to which access is sought, and explain why access should be allowed."
  - If denied by trial court, must request permission to appeal to SCOV.
  - If Supreme Court case, treated like any other motion under V.R.A.P. 27.
  - Important: procedure applies only to **discretionary** decisions.

How do I contest or access a withheld record? (continued)

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- Did a custodian deny you the record? **Appeal under Rule 6(h)**
  - If the records custodian denies you a record in whole or in part, must notify you within same limits as PRA (typically 3 business days, but 10 in unusual circumstances)
- If denied whole or part, you have 7 days to appeal to presiding judge of the court in which case was filed.
  - Custodian is required to tell you the procedure to appeal.
  - If dissatisfied with presiding judge's decision, that decision can be appealed to SCOV within 30 days.

Questions?

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