STATE OF VERMONT
VERMONT SUPREME COURT
FEBRUARY TERM, 2022

Order Promulgating Amendments to Rules 5(c) and (d), 6(b) and Abrogating and Replacing Rule 9 of the Vermont Rules for Public Access to Court Records

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

1. That Rule 5(c) and (d) of the Vermont Rules for Public Access to Court Records be amended to read as follows (new matter underlined):

§ 5. Specific Right to Access

(c) **Lawyers**. A lawyer who is appearing for a party has access to records in that case that are not publicly accessible unless a restriction on access specifically applies by operation of these rules. Where the party for whom the lawyer is appearing is a party for only part of a case, the lawyer's specific right of access applies to records related to the part for which. the person is a party and not for other parts of the case. This specific right of access extends to lawyers and staff in a law firm or legal organization working for the lawyer who has entered an appearance. A person who has a specific right of access pursuant to this subdivision has a right to remote access.

(d) **Guardians ad Litem**. A guardian ad litem who is participating in a case has access to records in that case that are not publicly accessible for the purpose of discharging the duties of a guardian ad litem unless a restriction on access specifically applies by operation of these rules.

Reporter's Notes—2022 Amendment

These exceptions to the specific right of access to court records that are otherwise not publicly accessible is added to Rule 5(c) and (d) to clarify that the ability to obtain or see such records is circumscribed in certain limited situations, such as (but not necessarily limited to) the exceptions to public access added by the 2022 amendments to these rules at Rule 6(b)(20), (21), and (22). The ability of the court to determine whether all or part of records containing trade secrets or other confidential information should remain sealed, even from other parties and their attorneys, or to decide motions for ex parte relief or for in camera review, would be compromised if attorneys (and in more limited situations, guardians ad litem) arguably had unrestricted access even before the court decides such matters involving confidential treatment of designated records. The "restriction on access" is then either continued, or lifted in whole or in part, also "by operation of these rules" when the court decides the motion or other application in accordance with the specific exception to public access, see, e.g., 2022 addition of

Rule 6(b)(20), (21) and (22), or more generally decides a motion for sealing or redaction of case records, see 2022 amendments to Rule 9(a) of these rules. Finally, no similar amendment is made to Rule 5(b) applicable to parties, because the rule already contains the same language, and the same concept—automatic access is suspended until the court decides the subject motion, or a request for sealing, redaction, or other confidential treatment—is already in place.

2. That Rule 6(b) of the Vermont Rules for Public Access to Court Records be amended to read as follows (new matter underlined):

§ 6. Case Records

(b) **Exceptions**. The public does not have access to the following judicial-branch case records:

* * * * * *

(20) Motions for ex parte relief, including supporting materials and attachments, until issuance of, and in accordance with, the court's decision and order on the motion. Such records become public upon the court's decision and order unless all or some portion thereof is specifically designated by the court to remain publicly inaccessible consistent with Rule 9.

(21) Records that are the subject of any motion made for purposes of seeking in camera review until issuance of, and in accordance with, the court's decision and order on the motion. Such records become public upon the court's decision and order unless all or some portion thereof is specifically designated by the court to remain publicly inaccessible consistent with Rule 9.

(22) Records containing trade secrets and other confidential business information, as defined in 1 V.S.A. § 317(c)(9) and 9 V.S.A. § 4601(3), and as required by 9 V.S.A. § 4605.

Reporter's Notes—2022 Amendment

New exceptions (20), (21), and (22) to the presumptively public nature of all court records, see V.R.P.A.C.R. 3(a), are added to ensure that a party's expectations regarding confidential or sensitive information will not be automatically and prematurely disclosed when the party is seeking certain types of court action or adjudication.

The new exception in Rule 6(b)(20) recognizes that the very nature and premise of ex parte filings is that the moving party is seeking unilateral court action—for example an ex parte request for a writ of attachment—because advance notice to the other party, either directly or through public disclosure, could allow that other party to frustrate the court's ability to effectively grant such relief, if otherwise warranted.

Exception (20) allows the court to issue a timely decision and order that does not compromise the parties' expectations in these limited circumstances, and allows the court to have the final word on whether any such matters remain shielded from public access. With respect to ex parte motions such as attachment or trustee process, the expectation is that the entire application, and the court's decision and order, will become public immediately upon issuance, since at that point service on the opposing party is required. Cf. V.R.C.P. 4.1, 4.2. Any continued exception to public access would have to be clearly delineated by the court in its order, consistent with the over-arching Press Enterprise/In re Search Warrants standard under these rules set out in V.R.P.A.C.R. 9 and its Reporter's Notes.

New V.R.P.A.C.R. 6(b)(21) is most likely to arise in discovery practice in all types of cases, but there may be other situations where in camera review is sought. Regarding discovery-related motions, a party may be willing to comply with all (or some) of another party's discovery request involving documents or information the disclosing party deems privileged, confidential, or otherwise sensitive, but only after (a) the court decides such matters must be disclosed, and/or (b) the court issues a protective order limiting disclosure and use of the documents or information.

Exception (21) allows the court to issue a timely decision and order that does not compromise the parties' expectations in these limited circumstances, and allows the court to have the final word on whether any such matters remain shielded from public access. The court's decision and order might deny the request entirely, agree with it entirely, or grant it in part and deny it in part. If denied wholly or in part, the subject documents (and their content) become public as to any or all parts deemed nonconfidential by the court. However, the court could in its order allow for some lapse of time before the matters become public to allow an opportunity to apply for a collateral final order appeal, and it could order that a redacted version of any filings be submitted (after excising any items the court decided should remain publicly inaccessible), to facilitate public scrutiny of the court's action on the request. If entirely granted, the subject materials would remain sealed. However, the underlying documents and information—again, mostly arising in the context of discovery motion practice—may ultimately never become court records at all (and thus not subject to public access) unless actually filed or used in connection with some other court proceeding. See V.R.C.P. 5(d); V.R.P.A.C.R. 6(c); Herald Assoc. v. Judicial Conduct Bd., 149 Vt. 233 (1988). In all events, the court's

decision and order must itself explain the court's rationale for any continued sealing of court records, and it will be public to the greatest extent required by the Press Enterprise/In re Search Warrants standard under these rules set out in Rule 9 and its Reporter's Notes.

New V.R.P.A.C.R. 6(b)(22) makes trade secrets and confidential business information a categorical exception so that, at least initially and when uncontested, the court may approve a stipulated protective order (pursuant to V.R.C.P. 26(c)) as to such matters if agreed to by the parties, without the hearing and order with specific findings otherwise required by V.R.P.A.C.R. 9(a). Also, a party may initially make a filing unilaterally designating such items as confidential, subject to a motion pursuant to V.R.P.A.C.R. 9(c), made by any other party or any member of the public, to unseal the record.

However, if any part of the trade secret/confidential business information issue is contested—e.g., whether a particular item qualifies as a trade secret or confidential business information, whether the party is entitled to protective-order relief under the circumstances, or the scope of the protective order requested—then the contested motion and hearing procedures required by V.R.P.A.C.R. 9(a) must be followed, including a court decision and order with specific findings as to any documents or information that the court determines should not be publicly accessible. See V.R.P.A.C.R. 9(a) and Reporter's Notes. But, as noted elsewhere, the underlying documents or information may never become court records at all (and thus not subject to public access) unless actually filed or used in connection with some other court proceeding. See V.R.C.P. 5(d); Herald Assoc. v. Judicial Conduct Bd., 149 Vt. 233, 544 A.2d 596 (1988).

Exception (22) does not itself define trade secret or other confidential business information entitled to protection, leaving that to existing and future development by case law (in Vermont and by other jurisdictions), or as more specifically delineated by statute. Consistency with the definition set out in the Public Records Act, at 1 V.S.A. § 7(c)(9), although not binding on the Judiciary and also arguably ambiguous and/or incomplete, is—unless the particular circumstances indicate otherwise—a stated goal of this exception. 9 V.S.A. § 4605 does require courts to protect such information, without definitively resolving the foundational question of what qualifies for protection.

3. That Rule 9 of the Vermont Rules for Public Access to Court Records be abrogated, and replaced to read as follows:

§ 9. Limiting or Granting Access to Court Records

(a) **Motion to Seal or Redact Case Records; Temporary Sealing; Procedure and Findings by Court.**

(1) *Power of Court to Seal or Redact.* As provided in this rule, the court may in a particular case seal from public access an otherwise public court record, or may redact information from or seal a portion of a public record.

(2) *Motion to Seal or Redact.* A motion to seal or redact a new court filing and materials associated therewith, whether made by a party or initiated by the court, and any responsive filings thereto, shall not be publicly accessible until the court issues its decision and order on the motion. Existing court records already publicly accessible shall remain so until the court's ruling on any motion to seal or redact such a record, unless a temporary sealing order is issued. The court may issue a temporary order to seal or redact information from a filing or other court record prior to issuing a ruling on a motion to seal or redact.

(3) *Procedure.* A motion to seal or redact a new court filing and materials associated therewith, or an existing public case record, or information contained within the filing or in the public case record, may be made by a party to a case, an individual about whom information is present in the case record, or the court on its own motion. The motion 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.

(4) *Hearing.* Any person, including a party or nonparty, may request a hearing on a motion to seal or redact a case record. If a hearing is requested, or otherwise ordered by the court, the court must schedule a hearing as soon as practicable after the motion has been fully briefed.

(A) 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 in accordance with Rule 9(a)(3)(B) above.

(B) 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.

(5) *Findings; Orders*. If any party or nonparty has requested a hearing or opposes sealing or redaction of any filing or court record, a decision and order by the court sealing or redacting any filing or court record may be issued only upon specific findings, by clear and convincing evidence, that good cause and exceptional circumstances exist for the restriction of public access to, or the sealing or redaction of the subject record(s), in accordance with applicable constitutional, common law, or statutory authority. Motions must be resolved as soon as practicable.

(A) Any decision and order sealing a new filing or case record over objection of a party or nonparty must not only include such specific findings, given on the record or in writing, but 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 or redaction of the filing or case record.

(B) Once the court seals all or a portion of a filing or case record, the record remains under seal for the duration of the sealing order, or until a subsequent order grants access and unseals the record.

(b) **Sealing or Redaction by Stipulation or Agreement.** If all parties to a case stipulate to the sealing or redaction of a document or documents—by filing a joint motion, by the nonmovant(s) filing no opposition to the motion to seal or redact, or by the nonmovant(s) responding that they have no opposition to the motion—the court may for good cause shown grant the motion without hearing and seal or redact the designated case record or document(s). A finding of good cause includes the court's own determination that the subject documents or information should not be publicly accessible, and that sealing or redaction is necessary and consistent with applicable authority.

(1) *Hearing*. If the court is unable to make the required determination of good cause upon filing of the motion, the court shall give notice thereof and the motion shall be set for hearing in accordance with subsections (a)(4)-(5) above, notwithstanding the parties' agreement, unless the motion is then withdrawn.

(2) *Reconsideration*. Any stipulated order for sealing or redaction shall be subject to reconsideration de novo if thereafter any motion to unseal or for access, by any party or nonparty, is filed pursuant to Rule 9(c). A ruling on any such motion for reconsideration shall be subject to the requirements and standards set forth in Rule 9(a)(4)-(5).

(3) *Protective Orders*. This subdivision also applies to applications to the court for a protective order with respect to any document or information which is, or is claimed should be, exempt from public access.

(c) **Motion for Access to Case Records That Are Not Publicly Accessible.** As provided in this rule, the court may grant access to all or part of a record that is not publicly accessible. A motion seeking such relief may be filed by any party, or a person or entity not otherwise entitled to access. The 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.

(1) Following notice to all parties and to any person who must also be served under Rule 9(a)(3)(E) above, proof of service of the motion upon any such person and all parties, and opportunity for hearing, the court shall issue its decision and order granting or denying the motion for access, in whole or in part, subject to the requirements and standards set forth in Rule 9(a)(4)-(5).

(2) This procedure for access to records shall also apply after the case is no longer pending and is itself closed.

(d) **Applicability**. If a statute governs the right of public access and does not provide for judicial discretion to allow or prevent public access to the record, this rule does not apply.

(e) **Appeals from Superior Court Orders.** A party; a person or entity filing or opposing a motion under this rule; or any person required to be served under subparagraph (a)(3)(E) in the superior court, may request permission to appeal to the Supreme Court from any superior court decision and order under this rule pursuant to V.R.A.P. 5.1.

(f) **Motions to Limit or Grant Access to Records in Supreme Court**. A motion to seal, redact, or obtain access to records in the Supreme Court filed under Rule 9(a)-(d) is governed by the process provided in V.R.A.P. 27.

Reporter's Notes—2022 Amendments

Rule 9 is comprehensively amended, by substitution of a substantially revised rule, in response to issues presented during implementation of the 2019 revisions of these Rules for Public

Access to Court Records, and to update and clarify the procedures for motions to seal or redact a new court filing, or an existing case record, and for motions seeking access to records that are not publicly accessible. The substantive requirements, and applicable standards applicable to such motions—the so-called Press Enterprise standard and the requirements of In re Sealed Documents, 172 Vt. 152, 772 A.2d 518 (2001), as discussed in prior Reporter's Notes—have not changed, although they may be altered by future case law and/or statutory enactments.

Paragraph (a)(1) and subdivision (c) are revised to remove reference to "presiding judge" and clarify that a judge (i.e., "the court" as defined in V.S.A. Title 4) need not have the additional administrative responsibilities of a presiding judge to determine matters of sealing or redacting a court record or providing access to sealed documents. The former reference in this paragraph to a right to notice and hearing is deleted, and replaced by paragraph (a)(4), which mandates a hearing upon request or objection to sealing or redaction. The court retains discretion to direct that a motion to seal or redact be scheduled for hearing, even in the absence of a hearing request or objection to the motion.

Subparagraph (a)(3)(D) clarifies that it is optional to file both a redacted and unredacted copy of a document for which only partial sealing is requested, that is, there may be cases in which the entire document is sought to be sealed, and there may be other circumstances in which a partially redacted version need not be accompanied by an unredacted version. Under In re Sealed Documents, 172 Vt. 152, 772 A.2d 518 (2001), and related case law, and to implement the general command of V.R.P.A.C.R. 3(a), both movants and the court itself are required to consider redaction of case records rather than wholesale sealing if the identified privacy interests can be adequately protected. Filers must also comply with V.R.P.A.C.R. 7(a)(1)(C).

Revised subparagraph (a)(3)(E) deletes reference to standing, in favor of a practical description of persons other than parties who are entitled to notice.

Paragraph (a)(4) does not categorically require that a hearing be scheduled on a motion to seal or redact a new filing or case record, unless any person—party or nonparty—objects or requests a hearing. In that event, the court must schedule a hearing on the motion to seal. The amendment also specifies that the court retains discretion to order that a hearing be scheduled and held, regardless of whether there is objection or a request for hearing. Note also that,

even though a motion to seal or redact a new court filing is itself not publicly accessible until the court's decision on the motion, see paragraph (a)(2), it is presumed that the public (and media) will at least have constructive notice of the existence of the motion by means of a minimally descriptive docket or calendar entry.

Paragraph (a)(4) deletes the former provision requiring that a hearing must be scheduled no later than 14 days after the filing of a motion to seal or redact, while retaining the requirement that the hearing be held as soon as practicable. The former text which provided that a hearing be set "notwithstanding other general rules of procedure" (as to filing of motions and responsive memoranda) is deleted, and replaced with the provision that the hearing be held as soon as practicable "after the motion has been fully briefed." Finally, while any hearing on such a motion is presumptively open to the public, it may itself be closed upon specific application to the court and a separate decision by the court that a closed hearing is constitutionally appropriate, indeed necessary; this rule, dealing only with sealing or redaction of and/or access to court records, does not set out the procedures or standards for closure of court hearings, which is covered in fairly extensive case law, see, e.g., State v. Tallman, 148 Vt. 465, 537 A.2d 422 (1987); Greenwood v. Wolchik, 149 Vt. 441, 544 A.2d 1156 (1988).

As to requisite findings and orders to support sealing or redaction, paragraph (a)(5) clarifies that although a hearing is not automatically required, the findings and process prescribed in the existing rule are still required: when a hearing is held upon party or nonparty request or objection; when the court itself has independently determined that a hearing should be held; or if the court issues any order sealing or redacting a court record even though no hearing was held. Paragraph (a)(5) provides that motions must be resolved as soon as practicable.

Subdivision 9(b) is substantially revised to prescribe the circumstances in which all parties to a case may stipulate to the sealing or redaction of a document or documents, in which case the court may for good cause—including its own determination that the requested sealing or redaction is permitted and appropriate—seal or redact the document(s), subject to reconsideration de novo if any future motion by parties or nonparties to unseal is filed under Rule 9(c). The amended rule also specifies that such a "stipulation" may be explicit, or it may occur by lack of opposition. If the court cannot make the required finding of "good cause," then the motion must be set for hearing in accordance with paragraphs (a)(4)-(5), unless withdrawn by the movant(s). A decision on a motion to provide

access to a sealed or redacted document or the content thereof is then also subject to the procedures and standards set out in paragraphs (a)(4)-(5).

Former Rule 9(b) provided that parties could not seal all or a portion of a case record by mere stipulation, contemplating that the court would always need to set such matters for hearing. See Reporter's Notes, 2019 Amendments. More recent experience, and comments received about the rule, demonstrated that such an approach was too cumbersome and unnecessary, especially in situations such as civil actions involving trade secrets and confidential business information where protective orders are common and often agreed to, and sealing or redaction is appropriate, indeed now automatic given the addition of V.R.P.A.C.R. 6(b)(22) exempting such matters from public access. Thus revised Rule 9(b)(3) explicitly makes the rule applicable to stipulated motions for protective orders. However, the court always retains ultimate discretion to approve or deny stipulations for sealing or redaction.

Rule 9(c) substitutes specific reference to paragraphs (a)(4)-(5) for the generally applicable procedures, and standards in determining a motion for access to case records that are already not publicly accessible. Such a motion may be made by any person, and not just a party to the case; may be made at any time; and may be made even after the case itself has been concluded.

Rule 9(e) provides the ability to appeal any order or decision made by the superior court under this rule, and specifies the applicable procedure, i.e., as an appeal from a collateral final order pursuant to V.R.A.P. 5.1.

Rule 9(f) addresses requests to seal that are made directly in the Supreme Court concerning Supreme Court documents. These motions follow the process outlined in V.R.A.P. 27 and are therefore determined initially by a single justice. Per V.R.P.A.C.R. 6(i) and V.R.A.P. 25, documents on appeal retain their sealed or unsealed status during the appeal.

4. That these amendments be prescribed and promulgated, effective on April 11, 2022. The Reporter's Notes are advisory.

5. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 7th day of February, 2022.

Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice