

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM 2020

Order Promulgating Amendments to Rule 6(b) of the Vermont Rules for Public Access to Court Records, Rules 4(c) and 10 of the Vermont Rules Governing Qualifications, List, Selection and Summoning of All Jurors, Rule 24(a)(2) of the Vermont Rules of Criminal Procedure, and Rule 47(a)(2) of the Vermont Rules of Civil Procedure

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

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

Rule 6. Case Records

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

* * * * *

(19) All Information provided in a potential juror’s written responses to questionnaires related to jury service other than a juror’s name and town of residence, absent a finding of good cause for disclosure of further information by the court. In assessing good cause, the court shall weigh the public interest in the release of the information sought against any harm as a result of disclosure. All information contained in a juror questionnaire shall be available to the parties in a case in which the juror is being considered for service, except for supplemental information supplied to determine whether the individual meets the mental and physical demands of jury service for any individual who has been excused based upon that information. Attorneys and self-represented parties may make record reference to information contained in a juror questionnaire in voir dire and exercise of challenges, whether in open court or in individual and segregated circumstances. Disclosure may occur in such other aspects of proceedings as authorized by the court.

Reporter’s Notes—2020 Amendment

Rule 6(b)(19) is promulgated to provide clarification as to the confidentiality of the content of responses by potential jurors to questionnaires completed in determining qualification for service, and the means by which access to this confidential information may be secured. The addition of this exception to the rules for public access accompanies contemporaneous amendment of a number of other procedural rules, including Rules 4 and 10 of the Rules Governing Qualifications, List, Selection and Summoning of All Jurors (which provide for questionnaires to potential jurors in determination of qualification and eligibility for service and circumstances of access to

Proposed Amendments to Rule 6(b) of the Vermont Rules for Public Access to Court Records, Rules 4(c) and 10 of the Vermont Rules Governing Qualifications, List, Selection and Summoning of All Jurors, Rule 24(a)(2) of the Vermont Rules of Criminal Procedure, and Rule 47(a)(2) of the Vermont Rules of Civil Procedure—FOR COMMENT

content), as well as V.R.C.P. 47(a) and V.R.Cr.P. 24(a), which primarily govern access to juror questionnaire information by parties and their attorneys for purposes of voir dire in jury selection.

The present promulgation also seeks to remedy inconsistencies among the existing rules as to the specific juror questionnaire content that is publicly accessible, and that which is not. In consequence of the contemporaneous amendments, most content of juror responses to questionnaires related to service remains accessible to attorneys and parties in the case for which the juror may be chosen to serve. However, such information is not publicly accessible, absent a judicial determination of good cause for the disclosure. Examples of such good cause are provided in cases in which a party seeks to assert a challenge to the summoning and composition of an entire venire, based upon constitutional fair trial grounds, including impermissible race or gender-based discrimination, see Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B. v. Alabama, 511 U.S. 127 (1994); and State v. Donaghy, 171 Vt. 435 (2000), or in the conduct of scholarly research or news accounts as to contemporary juror composition and selection procedures. In such cases, the court, upon a finding of good cause, may authorize disclosing the content of questionnaire responses, with redaction, or accompanied by protective orders as appropriate to prevent assignment of questionnaire content to identified individuals. As to public access, the amendment contemplates that in the assessment of good cause, the holdings of the so-called “Press-Enterprise” cases will be applied. See Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U.S. 501 (1984), and 478 U.S. 1 (1986) (balancing test applicable when First Amendment rights of public access are asserted with respect to court records and proceedings); see also Commonwealth v. Fujita, 23 N.E. 3d 882 (Mass. 2015) (holding that categorical impounding of trial jurors’ names by judge was error; only on a judicial finding of good cause, which may include a risk of harm to the jurors or to the integrity of their service, may such a list be withheld).

The amendment also clarifies that as to public access, there is no bar to disclosure of information contained in a questionnaire in the voir dire process itself, in interrogation of potential jurors and in the exercise of challenges by attorneys and self-representing parties. In such proceedings, the questions of potential jurors referencing questionnaire content in open court (or in individual and segregated voir dire) for purposes of jury selection, the responses given by potential jurors, and the record of the voir dire, are presumptively accessible to the public.

2. That Rule 4(c) of the Vermont Rules Governing Qualifications, List, Selection and Summoning of All Jurors be amended to read as follows (deleted matter struck through; new matter underlined):

Rule 4. Master Juror List

~~(c) All information other than an individual's address and date of birth contained in the "Questionnaire as to Qualification for Jury Service" received pursuant to this rule shall be public, including the name of the individual and town of residence. Public access to the supplemental information supplied to determine whether the individual meets mental and physical demands shall be prohibited. All information contained in a jury questionnaire shall be available to the parties.~~
All information provided in a potential juror's written responses to questionnaires related to jury service, requested pursuant to these Rules, other than a juror's name and town of residence, shall be excepted from public access, absent a finding of good cause for disclosure by the court. In assessing good cause, the court shall weigh the public interest in the release of the information sought against any harm as a result of disclosure.

Reporter's Notes—2020 Amendment

Rule 4(c) is amended to reconcile its provisions related to disclosure of juror responses to qualification and service questionnaires with the provisions of the related rules governing disclosure of such information to parties in civil and criminal cases for purposes of voir dire, and selection of jurors who will serve at trial. See V.R.C.P. 47(a) and V.R.Cr.P. 24(a). The amendment is contemporaneous with conforming amendments to those rules, as well as an exception in the Vermont Rules for Public Access to Court Records to preclude public access to the content of juror questionnaire responses, absent a finding of good cause the court. A purpose of the amendment is also to vest rules of public access to such juror information in the Rules for Public Access to Court records, rather than outlying in various other procedural rules. Pursuant to added V.R.P.A.C.R. 6(b)(19), the limitations upon public access do not preclude attorneys and self-represented parties from referencing information in juror questionnaires in the course of the voir dire process and exercise of challenges, since these aspects of proceedings are historically publicly accessible, with limited exception.

3. That Rule 10 of the Vermont Rules Governing Qualifications, List, Selection and Summoning of All Jurors be amended to read as follows (deleted matter struck through; new matter underlined):

Rule 10. Confidentiality of Jurors' Personal Information

~~Public access to a person's address, date of birth, social security number, telephone number and mileage to the courthouse on any court record created pursuant to these rules shall be prohibited unless the record is opened by the court for good cause shown.~~

Proposed Amendments to Rule 6(b) of the Vermont Rules for Public Access to Court Records, Rules 4(c) and 10 of the Vermont Rules Governing Qualifications, List, Selection and Summoning of All Jurors, Rule 24(a)(2) of the Vermont Rules of Criminal Procedure, and Rule 47(a)(2) of the Vermont Rules of Civil Procedure—FOR COMMENT

(a) Access by the Public. The names of potential jurors and their towns of residence shall be disclosed to the public upon request. Further information related to potential jurors shall be excepted from public disclosure, in the absence of a finding of good cause for disclosure by the court. In assessing good cause, the court shall weigh the public interest in the release of the information sought against any harm resulting from release.

(b) Access by the Parties.

(1) The parties and their attorneys shall have access to all information in juror questionnaires. However, where a court has excused an individual from service as a juror based on supplemental information provided as to whether the individual can meet the physical and mental demands of jury service, the parties and their attorneys shall not have access to such supplemental information. Except in preparation for, and in the conduct of voir dire, jury selection and the exercise of challenges, the parties and their attorneys must keep juror questionnaire information in confidence, and must not duplicate, distribute, or publish the information.

(2) Notwithstanding the provisions of subdivision (a), attorneys and self-represented parties may make record reference to information contained in a jury questionnaire in voir dire and exercise of challenges, whether in open court or in individual and segregated circumstances. Disclosure may occur in such other aspects of proceedings as authorized by the court.

(3) Copies of completed juror questionnaires and information contained therein shall be made available to the parties and their attorneys in nonelectronic form only. The court may make such additional orders as appropriate to protect against unauthorized distribution of copies provided, either to attorneys or self-represented parties.

Reporter's Notes—2020 Amendment

Rule 10 is amended to reconcile its provisions related to disclosure of juror responses to qualification and service questionnaires with the provisions of the related rules governing disclosure of such information to parties in civil and criminal cases for purposes of voir dire, and selection of jurors who will serve at trial. See V.R.C.P. 47(a) and V.R.Cr.P. 24(a). The amendment is contemporaneous with conforming amendment of those rules, as well as an exception in the Vermont Rules for Public Access to Court Records to preclude public access to the content of juror questionnaire responses, absent a finding of good cause given by a judge. See V.R.P.A.C.R. 6(b)(19).

As to access to juror questionnaire information by parties and attorneys, the present amendments to Rule 10 also clarify that access to supplemental information supplied to determine whether an individual meets the physical and mental demands for jury service (typically, privileged health diagnosis and care information) is not permitted, unless an individual's request for excuse from service due

to health conditions is denied, in which case access to that information must be provided to assure full and fair voir dire as to that juror's service in the given case. Party and attorney access may otherwise be sought under the provision for good cause of subdivision (a) and V.R.P.A.C.R. 6(b)(19).

Pursuant to paragraph 10(b)(2) and new V.R.P.A.C.R. 6(b)(19), the limitations upon public access do not preclude attorneys and self-represented parties from referencing information in juror questionnaires in the course of the voir dire process and exercise of challenges since these aspects of proceedings are historically publicly accessible, with limited exception. In any event, attorneys and parties have broad rights of access to all information in juror questionnaires, subject only to limited exception with respect to information submitted by or on behalf of jurors, which is generally privileged in nature, for jurors who have been excused by the court from service based on an inability to meet mental or physical capability requirements. See 4 V.S.A. § 962(a)(4).

Finally, the amendments clarify that copies of completed juror questionnaires are to be provided to attorneys and self-represented parties, but in nonelectronic form only, which may be conditioned upon protective orders entered by the court to assure maintenance of confidentiality of the content.

4. That Rule 24(a)(2) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 24. TRIAL JURORS

(a) Examination of Jurors.

(1) The court at any time may direct the clerk to distribute to prospective jurors written questionnaires to assist the voir dire examination. The voir dire questionnaire shall be prepared by the court administrator and shall solicit relevant information with only such questions as are necessary to empanel fair and impartial jurors. The court may direct the clerk to distribute a more detailed questionnaire in a particular case.

(2) A record of the information provided in response to a written questionnaire distributed pursuant to this rule shall be open to the parties to the proceeding, excepting supplemental information supplied to determine whether the individual meets the mental and physical demands of jury service for any individual who has been excused based upon that supplemental information. ~~A physical record of the information shall be open to public inspection after the name and address of the person responding have been redacted. Any electronic record of the information shall not be open to public inspection.~~ Public inspection of the content of any completed juror questionnaire shall be as provided in the Vermont Rules for Public Access to Court Records.

(3) The clerk, or some other indifferent person designated by the court, shall draw the names of twelve prospective jurors who shall be seated in the jury box and examined. The parties or their attorneys shall conduct the examination under the supervision of the court, and the court may ask additional questions to supplement the inquiry, or, upon agreement of the parties, may conduct the examination.

Reporter's Notes—2020 Amendment

V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2) are concurrently amended, to delete reference to the circumstances in which juror responses to written questionnaires, and the specific content thereof, may be disclosed to the public.

Public access to information contained in juror responses to written voir dire questionnaires may implicate lawful privacy interests or result in disclosure of information that is not subject to public access by law. For example, information subject to patient privilege that is divulged by a potential juror in the context of a request for excuse from service, as pertains to the requirement that a juror must meet “the mental and physical demands of jury service.” See 4 V.S.A. § 962(a)(4). Note that the amendments to paragraph (a)(2) in both rules preclude party and attorney access to such information, which is typically in the form of health care provider information subject to patient privilege for jurors who have been excused from the venire in advance of voir dire by reason of mental or physical inability to serve. This preclusion has been a feature of Juror Qualification Rule 4(c) as to public access since 2001; the present amendment extends the preclusion to parties and attorneys as well. However, the amendment serves to clarify that parties and attorneys are to be accorded access to this supplemental information for jurors who have not been excused upon request after submitting such information, to enable full and fair voir dire as to that potential juror's service in a given case. Party and attorney access to supplemental information may otherwise be sought subject to a judicial finding of good cause pursuant to Vermont Rules for Public Access to Court Records 6(b)(19).

The former last sentence of (a)(2) is deleted, in recognition that the determination of whether juror questionnaire information is subject to public access, and the process and standards for such determination, are properly within purview of the Rules for Public Access to Court Records, which are concurrently amended to address such process and standards. See V.R.P.A.C.R. 6(b)(19). These amendments are also being adopted concurrently with amendments to Rules 4 and 10 of the Rules Governing Qualification, List, Selection and Summoning of All Jurors.

Note that under the existing criminal and civil procedural rules, which do address public access to “physical records” of juror information, access to any juror information held in electronic form was not publicly accessible. This particular provision has also been applicable since 2001 amendments, which were made with the purpose of making juror questionnaires “less intrusive” than under then-prevailing practice.

5. That Rule 47(a)(2) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 47. JURORS

(a) Examination of Jurors.

(1) The court at any time may direct the clerk to distribute to prospective jurors written questionnaires to assist the voir dire examination. The voir dire questionnaire shall be prepared by the court administrator and shall solicit relevant information with only such questions as are necessary to empanel fair and impartial jurors. The court may direct the clerk to distribute a more detailed questionnaire in a particular case.

(2) A record of the information provided in response to a written questionnaire distributed pursuant to this rule shall be open to the parties to the proceeding, excepting supplemental information supplied to determine whether the individual meets the mental and physical demands of jury service for any individual who has been excused based upon that supplemental information. ~~A physical record of the information shall be open to public inspection after the name and address of the person responding have been redacted. Any electronic record of the information shall not be open to public inspection.~~ Public inspection of the content of any completed juror questionnaire shall be as provided in the Vermont Rules for Public Access to Court Records.

(3) The clerk, or some other indifferent person designated by the court, shall draw the names of twelve prospective jurors who shall be seated in the jury box and examined. The parties or their attorneys shall conduct the examination under the supervision of the court, and the court may ask additional questions to supplement the inquiry, or, upon agreement of the parties, may conduct the examination.

Reporter’s Notes—2020 Amendment

V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2) are concurrently amended, to delete reference to the circumstances in which juror responses to written questionnaires, and the specific content thereof, may be disclosed to the public.

Public access to information contained in juror responses to written voir dire questionnaires may implicate lawful privacy interests or

result in disclosure of information that is not subject to public access by law. For example, information subject to patient privilege that is divulged by a potential juror in the context of a request for excuse from service, as pertains to the requirement that a juror must meet “the mental and physical demands of jury service.” See 4 V.S.A. § 962(a)(4). Note that the amendments to paragraph (a)(2) in both rules preclude party and attorney access to such information, which is typically in the form of health care provider information subject to patient privilege for jurors who have been excused from the venire in advance of voir dire by reason of mental or physical inability to serve. This preclusion has been a feature of Juror Qualification Rule 4(c) as to public access since 2001; the present amendment extends the preclusion to parties and attorneys as well. However, the amendment serves to clarify that parties and attorneys are to be accorded access to this supplemental information for jurors who have not been excused upon request after submitting such information, to enable full and fair voir dire as to that potential juror’s service in a given case. Party and attorney access to supplemental information may otherwise be sought subject to a judicial finding of good cause pursuant to Vermont Rules for Public Access to Court Records 6(b)(19).

The former last sentence of (a)(2) is deleted, in recognition that the determination of whether juror questionnaire information is subject to public access, and the process and standards for such determination, are properly within purview of the Rules for Public Access to Court Records, which are concurrently amended to address such process and standards. See V.R.P.A.C.R. 6(b)(19). These amendments are also being adopted concurrently with amendments to Rules 4 and 10 of the Rules Governing Qualification, List, Selection and Summoning of All Jurors.

Note that under the existing criminal and civil procedural rules, which do address public access to “physical records” of juror information, access to any juror information held in electronic form was not publicly accessible. This particular provision has also been applicable since 2001 amendments, which were made with the purpose of making juror questionnaires “less intrusive” than under then-prevailing practice.

6. That these rules, as amended, are prescribed and promulgated to become effective _____ . The Reporter’s Notes are advisory.

7. 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 ____ day of _____, 2020.

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

PROPOSED