

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES FOR PUBLIC
ACCESS TO COURT RECORDS

Minutes of Meeting, September 26, 2023

The meeting of the Advisory Committee on the Rules for Public Access to Court Records commenced at approximately 9 a.m. via videoconference. Present were Committee Chair Judge Timothy Tomasi and members Justice (Ret.) John Dooley, Judge Mary Morrissey, Teri Corsones, Tracy Shriver, Mike Tarrant, Amanda Stites, Bob Paolini, Laura LaRosa, Marcia Schels, Tanya Marshall, and Petra Halsema.

1. Chair Tomasi: Meeting Opening

2. Approval of Minutes from the May 2023 meeting.

Teri Corsones noted a typo in item 3. Bob Paolini noted that the meeting date was later changed. Petra Halsema noted that item 4 should refer to the case of Phillips v. Phillips, 22-AP-249, and not A.B. v. S.U., 22-AP-200. On motion by Marcia Schels, seconded by Mike Tarrant, the Committee unanimously moved to adopt the minutes as amended.

3. Possible Amendments to Rules 7(a)(3) and 7(a)(4)(B)

Following Courthouse News case, civil filings are made public without court review. These Rules address post hoc efforts to correct/redact records that should not have been made publicly accessible. Rule 7(a)(3) seems to require Court Administrator action and the other Rule seems to cabin judicial action to limited circumstances and limited relief. Courthouse News case is on appeal to the Second Circuit and the committee decided at 7/22/22 meeting to wait until appeal is decided before making changes. The case was argued in April 2023. Teri Corsones spoke to AAG David Boyd, who reports that there has not yet been a decision.

4. Update re Proposed Amendments to Rules 2, 5, 6, 7, and 9

The proposed amendments approved by the Committee at the last meeting were transmitted to the Court and sent out for comment. The comment period closed on August 7, 2023.

Judge Tomasi did not receive any comments. Petra Halsema noted that a decision in Phillips v. Phillips, No. 22-AP-249, 2023 VT 44, issued in July and is consistent with the Committee's clarification of the RFA exception in Rule 6. She will add a note to the Reporter's Note to reflect that decision. On motion by Mike Tarrant, seconded by Marcia Schels, the Committee unanimously voted to recommend that the Court promulgate the proposed amendments.

5. Recommendation to Standardize Effective Dates of New Rules

Teri Corsones reported that the Court circulated a proposed amendment to A.O. 11 in June. Proposed new § 9 states that “Ordinarily, when the Supreme Court promulgates a rule, the effective date will be at least 60 days from the date of promulgation and with an effective date of January 1 or July 1.” Comments were due to Emily Wetherell by August 7, 2023. The matter is set to be discussed by the Court at its October administrative meeting.

6. Ex Parte/In Camera Motions

J. Tomasi received a question prior to the last meeting regarding whether ex parte/in camera motions should be visible to the opposing party or others in the electronic filing system. Teri Corsones explained that under the current practice, if someone files an ex parte motion and doesn’t serve the other side, it is typically not visible to the opposing party and would not show up on docket entries. Laura LaRosa stated that a question had arisen about the confidentiality of an ex parte motion filed by a state’s attorney in a criminal case to interview a witness in jail—should opposing counsel be able to see the motion, or the fact that one was filed? The Committee decided to keep this item on the agenda for next time so that our media representative has an opportunity to weigh in.

7. Public-Access Status of Inquests, Subpoenas Duces Tecum, and Nontestimonial Orders

Laura LaRosa requested at last meeting that the Committee add this to the agenda for discussion. Tracy Shriver explained that currently, applications for search warrants, inquests, subpoenas duces tecum, and nontestimonial orders are filed as “investigative requests.” They are designated with case number “IR”. If they ultimately lead to a case being filed, they get matched up with the case. IR cases are currently confidential and can only be seen by SAs and court staff.

Laura LaRosa added that it is not possible to effectively search for these types of records. The statute provides guidance as to search warrants but it is not clear what to do with inquests, etc. Should the Committee add a provision to the rules to conform with current practice?

The Committee discussed the process for inquests and other orders, and debated whether to address the issue of confidentiality in absence of clear guidance from the Legislature. 13 V.S.A. § 5134 only addresses the confidentiality of testimony, but not other records connected to an inquest proceeding. The Court’s decisions in In re VSP-TK / 1-16-18 Shooting, 2019 VT 47, ¶ 6, 210 Vt. 435, and other cases may provide some guidance. A subcommittee of J. Morrissey, J. Tomasi, Tracy Shriver, Laura LaRosa, and Petra Halsema was formed to research the issue and discuss with J. Cohen, the

Committee's liaison to the Court, about whether the Committee should take any action and if so, what that should be. Petra will prepare a memorandum regarding the applicable law for the subcommittee to consider. The Committee also agreed that there should be a reference to the inquest statute added to the Rule 6 appendix in the next revision.

8. Criminal Rule 5(c) and PACR Rule 6(b)(5)

J. Tomasi received a question prior to the last meeting about the connection between Criminal Rule 5(c), which says a criminal information and affidavit is filed by the judge after completing arraignment, and PACR Rule 6(b)(5), which says it is a public record once probable cause is found. Related to this are the statutes that make information and affidavits confidential if the person is referred to Diversion after probable cause is found.

J. Dooley noted that the language of Criminal Rule 5(c) does not address public access at all. The Committee agreed.

As for the diversion piece, Tracy Shriver stated that in her office, if a case is filed with a diversion referral, no one ever sees it except for the state's attorneys and court staff. If after arraignment the case goes to diversion, it becomes confidential after that acceptance. J. Tomasi asked if we want to address the public-access status of a case between filing and acceptance of diversion. The Committee did not feel any change was necessary, and agreed to remove this item from the agenda.

9. Any New Business.

10. Set Next Meeting.

The next meeting was scheduled for December 15, 2023, at 9:00 a.m.