

[As approved at meeting on December 20, 2019]

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF  
PUBLIC ACCESS TO COURT RECORDS (PACR)  
Minutes of Meeting  
October 4, 2019**

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 9:05 a.m. at the Supreme Court in Montpelier. Present were Committee Chair Judge Tim Tomasi, members Justice John Dooley (Ret.), Tari Scott; Jeffery Loewer; Gaye Paquette; Judge Mary Morrissey; Marty Frank; Teri Corsones; Tanya Marshall; and Michael Tarrant. Also present were liaison Justice Beth Robinson, Court Administrator Patricia Gabel, Committee Reporter Judge Walt Morris, and Judge Kate Hayes, who chairs the working group for the Next Generation Case Management System. Absent were James Duff-Lyall; and Linda Reis (who was committed on short notice to participate in juvenile court hearings).

1. **Announcements:** The meeting began with the Chair’s welcome and introductions to the Committee’s newest member, Michael Tarrant, Esq. It was noted that committee member Marty Frank was in attendance, while awaiting the Court’s appointment of a replacement for him.

2. **Approval of Meeting Minutes:** On motion of Tari Scott, seconded by Jeff Loewer, the minutes of the April 19<sup>th</sup> meeting were approved. Reporter Morris indicated that due to the press and pace of VREF work, he had not completed the December 10, 2018 minutes, even though substantial work has been completed, and those will be provided for Committee review as soon as they are available.

3. **Report on Meeting of Legislative Committee on Judicial Rules, June 6, 2019.**

Justice Dooley appeared at the LCJR meeting at which the 2019 PACR rules (which had already been promulgated as final on May 1, 2019) were reviewed. He indicated that while there were a number of questions asked, about issues such as fees, protection of nonpublic information from unauthorized disclosure, and the Rule 7 certification procedures, and some concerns raised by LCJR members, the Committee was satisfied with the presentation and there were no objections stated to the rules as they had been promulgated by the Court.

4. **Report on Status of Draft of Proposed 2019 Rules for Electronic Filing.**

Justice Dooley serves as Chair of the Special Advisory Committee on 2019 Rules for Electronic Filing. Several members of the Public Access Committee are

also members of that Committee. Justice Dooley indicated that with promulgation of the PACR rules, the pressure shifted to the electronic filing committee, which has observed a very intense schedule of meetings, at times meeting as many as three times a week. There have been 14 meetings of the full committee since February. The Comment period following publication has closed, and the VREF Committee met on September 20<sup>th</sup> to review comments and make any necessary revisions to the proposed rules. The Committee will meet again on October 16<sup>th</sup> to adopt a final draft for transmission to the Court with recommendation for promulgation. In response to a question from Judge Hayes, Jeff Loewer indicated that current plans were to implement electronic filing in the first of the units in March-April 2020, with phasing in to other units over time. Until implementation of the new electronic filing system, the so called “eCabinet” courts would continue to employ existing practices under the existing (2010) Rules for Electronic Filing. In advance of any implementation, there will be advanced notice, and training provided in each unit as it is slated to join in electronic filing, for court staff and members of the bar. Public information and education measures would also be in place before initiation of efilings in any unit as well.

**5. Post-promulgation Issues Associated with Rules for Public Access to Court Records and Implementation of New (“Next Generation”) Electronic Case Management System (NG-CMS).**

The Committee then proceeded to discussion of a number of issues and requests that had been presented in the period following promulgation of the PACR rules on May 1, 2019.

a. **PACR Rule 6(b)(5)** (Bars access to Information and Supporting Affidavit(s) if Judicial Officer Does Not Find Probable Cause) (Inquiry of Laura LaRosa, CAO).

*H. 460 (Act No. 32; 2019 Adj.Sess.) amends the expungement and sealing statutes. Questions presented:*

*(1) 13 V.S.A. §§ 7603(a) and (e) direct specific procedures and timelines for sealing, and expungement of criminal history records related to citation or arrest if: there is no determination of probable cause or; if charges are dismissed without prejudice by the court or; upon stipulation of the state and the defendant; or if there is an acquittal. Do these amendments render the provisions of PACR 6(b)(5) no longer necessary?*

Tari Scott again provided an overview of the expungement and sealing efforts that the Court Administrator’s Office has been engaged in to implement the various recent legislative enactments facilitating, and requiring, expungement of records in a broad variety of criminal cases. Some of the statutory provisions call for automatic expungements to occur upon the passage of time in certain case categories. In others, expungement may be subject to motion, hearing and decision of the court. In others, expungement occurs simply upon stipulation of the parties. Ms. Scott indicated that there

is a great deal of devoted staff resources and effort in this area. Implementing the expungement legislation will take some time, and practices are continuing to evolve. The new case management system will have some impacts, and in some aspects, the legislation has reflected what is known about and anticipated to be system and staff abilities to manage the task. The Committee decided not to presently conclude that Rule 6(b)(5) is no longer necessary, especially in consideration of the following agenda item—whether there should be a specific amendment to the text of 6(b)(5) to address one particular provision of the expungement legislation.

*(2) §§ 7606(c) and 7607(d) provide that “until all charges on a docket are expunged, or sealed as the case may be) the case file shall remain publicly accessible.” (parenthetical matter added). How are these provisions to be interpreted where some of the charges initiated have no pc found; or are dismissed; or result in acquittal, but others in the same docket are not?*

The Committee engaged in a lengthy discussion of this issue, in context of current practices for paper filings, and as anticipated in context of new case management system and accompanying rules for electronic filing. The basic problem goes to the apparent inconsistency between the statutory reference “until all charges on a docket are expunged, or sealed” and the text of Rule 6(b)(5) stating that access is not given to “the information and affidavits...if the judicial officer does not find probable cause.” The Committee recognized that the statute in issue is part of a broader enactment dealing with expungements and sealing of criminal records. Historically, for paper filings, an information containing counts with a no probable cause finding would be physically redacted, with a marking out of the subject count(s). The new electronic case management system will have the capability of simply not displaying counts as to which no probable cause has been found. Judge Hayes indicated that in her experience, upon a finding of no probable cause, the State’s Attorney will file an amended information referencing only counts for which probable cause is found. However, this is not a uniform practice. She made the suggestion that as to structure of a criminal information, separation of counts, and content of affidavits of probable cause following no probable cause findings, referral should be made to the Advisory Committee on Rules of Criminal Procedure. While this proposal was neither accepted nor rejected, Judge Hayes suggested and the Committee agreed that any such practice-specific changes should be revisited with the benefit of a period of seeing how electronic filing and case management is working in practice. Chair Tomasi initially proposed that there be an amendment which simply incorporated the statutes by reference in the rule, adding the language, “except as provided in 13 V.S.A. §§ 7606 and 7607”. However, as the discussion progressed, he, and Justice Dooley both noted that any amendment needed to clear guidance for court staff, and that the incorporation by reference approach would not do that. Justice Robinson added that in her view, such an approach would not provide “granular guidance” for the non-lawyer, either. At the conclusion of the discussion, on motion of Tari Scott, seconded by Gaye Paquette, the Committee decided to propose amendment of Rule 6(b)(5) to adopt the new statutory language, adapting the text of the statute itself. Thus, in “multi-count” cases, if there is a finding of probable cause for any one of multiple counts, but not for others, the entire record of the initially filed information and

accompanying affidavit(s) will be publicly accessible, even if there is a finding of no probable cause on some counts. The Committee Reporter will prepare a draft of the proposed amendment for further consideration at the next meeting.

*(3) Do the referenced provisions of Act 32 mean that parties can stipulate to sealing and/or expungement, even without Court approval and even when PACR Rule 9(b) provides that parties cannot seal all or a portion of a case record by mere stipulation? (A court order is required.)*

The Committee agreed that under 13 V.S.A. § 7603(a)(2) the parties (State and Defendant) may stipulate to *sealing* of a record at any time, where there is no conviction due to no probable cause or dismissal without prejudice prior to trial. In addition, § 7603(g) provides for a petition requesting sealing or expungement in such cases, upon court finding that such is in the interests of justice, or upon stipulation. There was discussion of the relationship of these statutes to Public Access Rule 9 (which provides court authority to either seal, or grant access to sealed records) and its 9(d) (which directs that if a statute governing right of public access does not provide for judicial discretion to allow or prevent access to a record, Rule 9 does not apply). The Committee determined not to consider any amendment to either PACR Rule 9 or 6(b)(5) to address stipulations to seal or expunge under the statute, but on motion of Michael Tarrant, seconded by Tari Scott, directed that a reference to Act 32 and stipulations for sealing and expungement be included in the Reporters Notes to the proposed amendment of 6(b)(5).

**b. PACR Rule 6(b)(7)** (Financial Information in Application to Waive Filing and Service Fees *not* Including Affidavit Contents)—(*Inquiry of VLA, Erik Avildsen, Esq. as to Ambiguity of this Amended Rule and Its Intent*). *Seeking clarification—does the new language “filing and service fees” mean any change in non-public status of financial information covered in former Rule 6(b)(11), which referenced “application to proceed in forma pauperis”?* *His assumption is that no change was intended.*

In the course of considering revisions to the PACR rules, a subcommittee, and the full committee discussed this issue on a number of occasions. Contrary to the view expressed by Mr. Avildsen, the Committee was of the view that both the current and former rule do not preclude public access to financial information provided in affidavits given in applications to waive filing and service fees. Both rules contain the language “not including the affidavit submitted in support of the application”, meaning that the affidavit is not excepted from public access. The consensus was that if supplemental information, apart from an affidavit, such as a bank document or a credit report, were provided in addition to the court-form affidavit, such supplemental records would be excepted from public access, but not the standard form affidavits required with applications for waiver of fees and service costs. The Committee Reporter will communicate this consensus view to Mr. Avildsen.

c. **PACR Rule 6(b)(1) Appendix** (Criminal History Records)—Current Issues; Treatment; Status of Efforts to Clarify Public or Non-Public Status.<sup>1</sup> (Report by Justice Dooley; Court Administrator Gabel)

The Committee has previously considered the issue of public access to criminal history records, including a meeting with Jeff Wallin, Director of the Vermont Criminal Justice Information Center. Justice Dooley and Ms. Gabel reported that efforts were underway at the national level that would hopefully serve to clarify both the relationships of state and national criminal history databases, and the issue of provision of public access to criminal history records--whether records of convictions, or of all charges, or other criminal history data which finds itself housed in criminal history records, such as arrest/custody information prepared for bail purposes, and police interactions with identified persons or addresses associated with them. In discussing the broader issue of public access to Vermont criminal history records, the Committee has noted that both federal rules and state statutes purport to place restrictions on public access to criminal history data other than records of convictions of criminal offenses. Ms. Gabel indicated that there are discussions underway between state court administrators and the Department of Justice-FBI in an effort to clarify these issues of public access. She believes that there will be resolution, in that the federal rule was driven by FBI security concerns as to those who would have direct access to *their* database, and that it would be prudent for the Committee to follow these efforts as it continues consideration of amendments to the existing provisions of the Public Access Rules.<sup>2</sup> In the meantime, public access to convictions and other criminal history records is addressed in the statute, and as referenced in the Appendix to PACR Rule 6(b). The Committee agreed with this approach and will have status reports on any developments at future meetings.

d. **Abrogation of V.R.P.P. 77(e)(Confidentiality of Probate Records, including wills filed and indices of wills)**

Abrogation of this rule was included in the PACR promulgation package, but not ultimately included in the final promulgation due to request of the Advisory Committee on Rules of Probate Procedure. The Probate Advisory Committee had published for comment its own proposed amendments to this rule at the time, and the amendments have not been promulgated by the Court, upon notice of our Committee's view that inclusion of the content of these amendments in the PACR rules is for consideration by the PACR Committee, working with the Probate Advisory Committee. Reporter Morris indicated that a meeting had not yet been held with Jeff Kilgore, who chairs the Probate Rules committee, to finalize what is anticipated to be an agreed resolution of the issue. A report of any developments will follow.

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<sup>1</sup> See also, 20 V.S.A. § 2056a(c); 20 C.F.R. § 20.33(b); and proposed 2019 VREF Rule 5(g) and accompanying Reporters Notes.

<sup>2</sup> Ms. Gabel is a member of the committee of court administrators working on these issues.

6. **CAO Implementation of Sealing/Expungement Legislation.**

The Committee briefly returned to a status report from Tari Scott as to the dimensions of the CAO efforts to implement the sealing/expungement legislation referenced earlier in these minutes. Ms. Scott provided the committee with a snapshot as to the numbers and types of cases involved, indicating that there were thousands of case records, and that five expungement specialists had been focusing on the effort. One issue being examined is the relationship of PACR Rule 5, which accords special or “elevated” rights of access to certain case records, to the phases of sealing and expungement implementation.<sup>3</sup> While there was brief discussion of this issue, no further action was taken. On a separate issue mentioned, technically, how is special or “elevated” access given in the electronic filing system, Tari Scott indicated that the process was not complicated, and is addressed in the Odyssey efile system.

7. **Recent Public Records Act Court Decisions.**

Reporter Morris briefly noted for information only, recent decisions construing provisions of the Public Records Act for the Committee’s reference, including *Oblak v. UVM Police Services*, 2019 VT 56 (8/23/19) and *Doyle v. City of Burlington Police Department*, 2019 VT 66 (9/13/19). While these do not deal as such with judiciary-held records, they address issues which may be presented in the separate context of pertinent judicial rules.

8. **Next Steps; Next Meeting Date:** The next meeting date was set for Friday, December 20<sup>th</sup>, beginning at 9:00 a.m., at the Supreme Court Building in Montpelier.

9. **Adjournment:** The meeting was adjourned at approximately 12:07 p.m.

Respectfully submitted,

Walter M. Morris, Jr.  
Superior Court Judge (Ret.)  
Committee Reporter

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<sup>3</sup> Numerous provisions of law accord such special access, commonly associated with official responsibilities, to records not publicly accessible, including certain records that are subject to expungement and sealing process. See Appendix to Rule 5.