

[As Approved at Committee Meeting on February 21, 2020]

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting
December 20, 2019**

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 9:01 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 (phone); Judge Mary Morrissey (phone); Teri Corsones; Tanya Marshall; and Michael Tarrant. Also present were newly-appointed member Alan Keays (who takes the place of Marty Frank); Court Administrator Patricia Gabel, Committee; Andy Stone, and Reporter Judge Walt Morris. Absent were Liaison Justice Beth Robinson; James Duff-Lyall; and Linda Reis.

1. **Announcements:** The meeting began with the Chair’s welcome, and introductions to the Committee’s newest member, Alan Keays.

2. **Approval of Meeting Minutes:** On motion of Tari Scott, seconded by Teri Corsones, the minutes of both the December 10, 2018 and October 4, 2019 meetings were approved.

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

Justice Dooley and Judge Morris appeared at the LCJR meeting at which the 2020 Vermont Rules for Electronic Filing (VREF) (which were then under consideration for final promulgation by the Court) were reviewed. Justice Dooley indicated that while there were a number of questions asked, about issues such as attorney access to confidential filings, and when service is deemed to occur in the e filing system, 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 were then before the Court for promulgation. As reported by Justice Dooley: Representative LaLonde expressed concern as to notification of self-representing litigants as to filing of originals of important documents (VREF Rules 9 and 12 had been redrafted to address these concerns). He also inquired about the process for e filing of after-hours relief from abuse requests and issuance of orders. Justice Dooley stated that there was flexibility under the rules to permit paper filings, and that the issue would be addressed in the implementation phase. Senator Clarkson cautioned that assistance for self-representing individuals should not have the consequence of dissuading people from seeking counsel when they really should have competent legal assistance on the (mistaken) premise that the system would allow them to “do it yourself”. Justice Dooley clarified that while it was important to permit self-representing individuals to navigate and use the e filing system for access to justice, it was not intended to dissuade people who should have counsel from securing counsel.¹

4. **Report on Status of Implementation of Electronic Case Management and Filing System.**

Justice Dooley informed the Committee that the Court had promulgated the 2020 VREF rules as final, and so efforts now shift to the “roll out” of the Odyssey system for case management and

¹ The Court promulgated the 2020 Vermont Rules for Electronic Filing as final on December 10th, effective March 2, 2020.

electronic filing purposes. This is scheduled to begin first with the Judicial Bureau and the Windsor-Orange-Windham (“WOW”) units, on March 2nd. Andy Stone and Tari Scott provided updates as to the status of preparations. Testing of both the case management and electronic filing systems, and staff training and orientation to the systems continues. Andy indicated that the case management component of Odyssey was already in use in the Judicial Bureau. As related to JB practices, Andy brought forward an issue related to PACR Rule 4(b)(2) (remote access). He indicated that a policy had been adopted not to permit any remote access to JB ticket/complaint filings, in that the documents (principally the traffic complaint) routinely include personal identifiers that, at least at present, cannot be reasonably redacted, considering the high volume of documents in issue. This point was noted by Committee members, Andy indicating that public access would certainly be addressed as experience develops with Odyssey in this category of filings. Andy had also presented an inquiry as to whether the same process should be observed for Civil Division filings. The Committee did not reach any conclusions as to that subject, except to note that while the Court Administrator has discretion as to the manner and process by which public documents are to be made available, 12 V.S.A. § 5 does not prohibit remote access to civil filings. And, that PACR Rule 7 does require redaction or sealed filing of information that is not publicly accessible, and certification by the filer that this has been done.

The Committee then discussed the capacity to have necessary changes made from time to time to comport with experience in Odyssey. Andy indicated that as to portal pages and displays, these are managed by the Judiciary, and subject to ready modification. As to the internal workings of Odyssey, Tyler Technologies controls the platform, and any changes there are made by Tyler at Judiciary request.

Forms. The discussion turned to the status of forms in the portal and e-filing systems. Judge Morris reported that this issue was of especial concern to the Advisory Committee on Rules of Civil Procedure, who have requested clarification as to allocation of authority to generate new forms, either “required” for certain court proceedings, or otherwise available for the convenience of litigants (these are typically generated by Dawn Sanborn, of the Court Operations Division, often on request of one of the Court Division Oversight Committees), and a separate category of forms that have long been housed in an Appendix to the Rules of Civil Procedure. Judge Morris reported the perspective of Civil Rules that these latter forms are practice-specific, have been largely adopted by attorneys in civil practice, and that there should at least be coordination as to review and generation of forms by Court Operations with Civil Rules. Morris indicated that the Civil Rules concerns did not go to the “Guide and File” forms that will be used in the new system for common filings such as in Family Division cases including Relief from Abuse complaints. Committee members acknowledged that there was a need for clarification of authority (and responsibility) for generation and revision of forms. Pat Gabel remarked that it was “not viable to do governance” that way, meaning separate entities trying to provide uniformity of forms with overlapping, and potentially conflicting, interests. In any event, she felt that forms publication and inclusion on the Judiciary website and in other forms are not the Court’s responsibility, in contrast to rules promulgation. Justice Dooley stated his perspective on the history of forms printed in the “Green Books”, indicating that these remain housed in the Civil Rules and Rules of Probate Procedure (which are “forms heavy”). Tanya Marshall stated that in her observation, Lexis has not kept up with including forms accompanying the various procedural rules. Mike Tarrant indicated that attorneys take a variety of approaches as to forms, including use of the “standard” forms, or adoption of firm-specific forms that address particular focuses and styles of practice. Ultimately, the Committee took no specific action on the issue of forms, the consensus being that this subject might be appropriate for a “Summit Meeting” approach, with Chairs and Reporters on Civil and

Public Access Committees, as well as the Civil Division Oversight Committee, and Court Operations forms staff.

“Checkbox”-Certification of Compliance with PACR 7(a)(1) in Filing Under the 2020 Rules for Electronic Filing.

Both PACR 7(a)(1)(B) and 2020 VREF 5(b)(5) and (6) require a filer to provide certification that they have reviewed the case record, and that the filing specifies nonpublic records (or content), and protects those records from public disclosure consistent with the PACR rules. Rule 7 also requires the filer to detail any actions to comply with the rules (redaction, or filing with motion to seal, or combination thereof). Nonelectronic filings (which are also fully subject to Rule 7(a)(1)) can be screened and sorted by Court staff, to safeguard nonpublic content for further action as necessary. However, with respect to electronic filing, prior Committee discussions focused on the necessity to provide a “Stop Sign” approach, to include warning of the filer’s obligations, and to prevent further progress in the electronic filing system until a filer provides affirmative indication in a “Checkbox” of their compliance with the rules. Indeed, provision for such a “Stop Sign” Checkbox was key to approval of the final version of Rule 7. Judge Morris indicated that in the course of drafting of the 2020 VREF rules, suggested language for Checkbox content had been circulated, but the VREF Committee had not approved of final language (considering that to be an administrative matter). Andy Stone reported that the Tyler Odyssey system does have the capability of incorporating a Checkbox for certification of compliance with Rule 7(a)(1), which will also function to halt further progress in electronic filing until an affirmative response is provided by the filer as to compliance in protection of nonpublic information. The Checkbox itself has not been set up, nor its specific text established, but certainly will be before the commencement of any efilings. The objective will be not only to provide the Checkbox with “Stop Sign” function, but to include space for entry of the filer’s statement of actions taken to comply, as well as a hyperlink to the pertinent PACR rules for the filer’s reference in screening for and protecting nonpublic content in efilings. A status report on the work of the Project Team on the Checkbox, its contents and functioning, will be provided at the next Committee meeting.

Attorney Training and Public Education in Advance of “Roll Out” of Electronic Filing.

Several Committee members expressed the need for timely and effective training for anticipated users of the electronic filing system, notably attorneys. Committee members who also serve on the Project Team emphasized that they have been working hard to provide effective training to attorneys, and other judiciary partners, in the workings of the system. The need for both staff and user efilings guides and operations manuals was also mentioned. Tari Scott and Andy Stone acknowledged these needs and described the efforts that the Project Team have been, and are, engaged in. Teri Corsones suggested that the VBA mid-year meeting would provide an additional opportunity for attorney training and offered VBA assistance in promoting information about efilings to the bar.

5. Abrogation of V.R.P.P. 77(e)(Confidentiality of Probate Records, including wills filed and indices of wills)(Status Report).

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. The rule in question deals with confidentiality of certain

probate records, and most of its provisions are now covered in the PACR Rule 6 Appendix. Reporter Morris indicated that prior to PACR Committee consideration, a meeting would be held with the Probate Rules Chair (Judge Kilgore) and Reporter (Kinvin Wroth) in an effort to reach agreement for abrogation of V.R.P.P. 77(e) and addition of language for a Probate exception to public access in PACR Rule 6(b). No action was taken, but a report will be provided at the next Committee meeting.

6. Rules 4(c) and 10 of the Rules Governing Qualification, List, Selection and Summoning of All Jurors; Confidentiality of Juror Information; Reconciling with provisions with V.R.C.P. 47(a)(2) and V.R.Cr.P. 24(a)(2); Proposed Amendment to Add PACR 6(b)(19) to Clarify Content of Juror Questionnaire Responses that is Not Publicly Accessible.

The subcommittee on this issue (Corsones; Scott; Morris) met on December 18th, and provided the Committee with a revised draft of amendments to existing procedural rules, as well as a proposal of amendment for an added Rule 6(b)(19) exception, clarifying that the content of juror responses to written questionnaires related to jury service is not generally accessible to the public, absent a judge's finding of good cause for disclosure. The Committee had discussed the issues associated with juror questionnaire content at its October meeting; the text of the proposed new 6(b)(19) was reviewed by the Committee for the first time. Judge Morris, Tari Scott and Teri Corsones provided an overview of the revised draft, noting that the proposed Rule 6(b)(19) exception works in concert with Rules 4 and 10 of the Rules Governing Juror Qualification and Service, and the pertinent sections of the Civil and Criminal Rules. Tari Scott described again the three components of the current juror questionnaire forms employed by the Court Administrator's Office and compiled by court staff in comprising venires for jury selection. She specified the confidentiality accorded in practice to certain of the component pages. The proposed PACR exception does not apply to parties and their counsel, who presumably have access to the content of questionnaire responses. The proposal explicitly references this right of access.

The proposed amendments include revision of Rule 10 of the Rules for Juror Qualification as well. Proposed 10(b) excludes from access by parties and attorneys to "supplemental information supplied to determine whether the individual meets mental and physical demands of jury service." A question was raised as to the meaning and scope of this language. Judge Morris explained that this provision went principally to health-related bases for excuse presented by a summoned potential juror, *prior to* final composition of the jury venire, and resulting in excuse from service. Such pre-service requests for excuse are routinely accompanied by a health professional's letter, detailing the impairment and its affects upon a potential juror's service. They contain otherwise privileged content, as well as sensitive personal information as to juror or family member circumstances. The requests are acted upon administratively by the Clerk, the Clerk in consultation with the Presiding Judge., or ultimately, the judge. Jurors excused upon provision of sufficient health-related basis do not subsequently appear for voir dire in specific cases. Should a need arise for access to this information apart from voir dire in a specific case, the proposed new PACR 6(b)(19) provides an avenue for request and access, subject to a good cause finding by a judge for disclosure. Mike Tarrant noted that this section appears to also be consistent with the provisions of 4 V.S.A. § 962(a)(4) In order to be qualified, potential juror must be "capable, by reason of physical or mental condition, to render satisfactory jury service"); and 12 V.S.A. § 64 (disqualification from service for imprisonment for felony, or non-citizen status).

Alan Keays stated that if content of a juror’s questionnaire response was referred to on the record in the course of voir dire, that would certainly be considered to be public information. There was no disagreement with that. Justice Dooley noted that the circumstance would be similar to disclosure of any content of a Presentence Investigation Report on the record at sentencing—while the document itself would be confidential, the content stated on the record certainly was not, and would be considered public information. Mr. Keays also inquired as to whether the 6(b)(19) amendment would be construed as preventing public access to the text of the questionnaire forms themselves. Committee consensus was that the standard questionnaire forms (without juror responses on them) were certainly publicly accessible. At the conclusion of the discussion, the Committee approved of edits to the draft of 6(b)(19), with one recommended change to the proposed amendment of Juror Qualification Rule 4(c).² A final draft for Committee review and action will be presented at the next meeting.

7. Amendment of PACR Rule 6(b)(5) (Bars public access to Information and Supporting Affidavit(s) if Judicial Officer Does Not Find Probable Cause).

Judge Morris presented a redraft of the proposed amendment, incorporating edits agreed upon by the Committee at the October 4th meeting. The existing rule provides that there is no public access if judge finds no PC, without reference to multiple-count informations for which only some of the counts are subject of a no probable cause finding. The purpose of the amendment is to comport with 13 V.S.A. §§ 7606(c) and 7607(d)³ and *In re: Affidavit of Probable Cause*, 2019 VT 43. After brief discussion, the text of the revised draft was approved by the Committee. Changes to the draft Reporters Notes, to delete reference to three cases and their import to the rule. A final redraft, with these changes, will be reviewed by the Committee at next meeting, for transmittal to the Court for publication and comment.

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

8. PACR Rules 7 and 5; Access Issues for Filings Segregated with Motion to Seal; Ex Parte Filings; Preservation of Confidentiality (Civil Rules Committee/Judge Toor) (October 2019 Memorandum).

The Committee discussed a memorandum provided by Judge Toor, on behalf of the Civil Rules Committee, with concerns as to the process under PACR Rules 7 and 5 for *in camera* and *ex parte* filings (made electronically). The concern is that the rules appear to make no provision for these filings, which are not served upon, or at least until court action, made available to other parties in a case. These filings may be made *in camera* pursuant to a Court order that the parties are aware of

² The amended text of proposed PACR Rule 6(b)(19) is as follows, adding to exceptions from public access:

“(19) 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 a judge. In assessing good cause, the judge 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 jury questionnaire shall be available to the parties in a case for which the juror completing the questionnaire may be chosen to serve.” The amendment of the proposed Juror Qualification Rule 4(c) consisted in deletion of the phrase “qualification for” in the second line of the draft.

³ “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). H. 460(Act No. 32; 2019 Adj.Sess.)

(even though others are not privy to content until judicial review) but of greater frequency, filings that are made under rules authorizing *ex parte* filing and treatment, such as under Civil Rules 4.1 (attachment), 4.2 (trustee process), 64 (replevin) and 65 (injunctions). It was noted that search warrants and inquests are with rare exception *ex parte* proceedings as well. Andy Stone indicated that in Odyssey, the filer has the ability to select (or de-select) service to a particular party or parties, either initially, or in a pending case. In addition, the system has the capability of authorizing “elevated” access (or not) to categories of and particular users, consistent with the provisions of PACR Rule 5. He stated that the Project Team was aware of the issue and would work to assure that filers have the ability to file without system notice to other parties, consistent with procedural rules authorizing *ex parte* requests. Judge Tomasi suggested that an approach, in further discussion might be in amendment of the present “Specific Access” provisions of PACR Rule 5. The Committee took no specific action on this issue with a further report on Odyssey treatment of *ex parte* and *in camera* filings at next meeting.

Another issue presented in the Civil Rules memo was as to whether once sealed under PACR Rule 9, documents or sealed content would remain in that status and not available to the public. After discussion, the Committee consensus was that Rule 9 (which has been in the Public Access Rules since inception) provides a specific means to place a document or content that is otherwise public in sealed, non public status, under terms established by the judge, or to provide *access* to a document or content that is sealed, and not publicly accessible. Any member of the public (or even a party to a proceeding in issue) is required to move for access, and a process is prescribed by Rule 9 for the Court’s treatment of the request. In contrast, on initial filing under Rule 7, the filer has the obligation to protect nonpublic information from public disclosure, and the option of filing a redacted document (accompanied by a document filed as not publicly accessible) or a motion to seal with accompanying documents (filed as not publicly accessible). The court would, in normal case development, or event of challenge or request for access, provide notice to parties in the case as to its decision regarding access.

A third issue presented in the Civil Rules memo was as to the provision of Rule 7 § 4(a)(i), authorizing a clerk to change the status of a document from public to nonpublic, or nonpublic to public status. The comment was that a clerk should never be permitted to change content of a nonpublic filing to public status, this should be a judge’s decision. The Committee consensus was that court staff would not be likely at all to make such a change in nonpublic status, resulting in revelation of information such as a social security number, that is excluded from public access, and that the rule is intended to permit clerk action to *protect* against unauthorized disclosure, while permitting change in status when it is clear that the document or content was filed as nonpublic in error.

9. PACR Rule 9 (Motions to Seal; Modification of Requirement of Court Hearing Prior to Sealing) (At least for civil filings, to protect confidentiality of school, health records, trade secrets, discovery matters disclosure of which is subject to protective order stipulations of parties, remove requirement of scheduled hearing prior to approval of such sealing) (December 9, 2019 request and memo from Judge Helen Toor).

Judge Toor has suggested that the Committee revisit Rule 9 and its provisions requiring that a hearing be scheduled, prior to sealing, at least for Civil Division cases.⁴ As Judge Toor’s memorandum indicates, in contrast to Criminal and some Family Division cases, most civil cases

⁴ The rule addresses the requirement of a hearing in subsections (a)(1) and (3). The requirement of a hearing has been a feature of this Rule (formerly PACR Rule 7) since its adoption in October, 2000.

are nor of interest to the general public or the media and primarily concern private disputes between individuals and businesses. There are often documents attached to civil motions that one or both parties seek to have sealed, such as school, counseling and medical records, trade secrets and business financial statements, or other matters as to which the parties have agreed to discovery only pursuant to confidentiality agreements. The point made by Judge Toor is that it makes no sense “that we are now required to schedule a hearing on every such motion, when there may be no opposition, and it may be entirely obvious to the judge that there is good cause for the sealing “. Judge Toor’s suggestion is that Rule 9 be amended to allow for sealing based on written motions, without a requirement of a hearing, upon a judge’s finding of good cause. And that hearings be scheduled on sealing only if: (1) a party requests it when opposing the motion; (2) the judge chooses to set a hearing, or (3) a third party or media files a motion to unseal or an opposition to a motion to seal.

In Committee discussion of this issue, there was recognition that there are certain filings, especially in the Civil Division as noted by Judge Toor, which would not warrant a hearing, given either the specific purposes and needs for sealing, or the absence of harm to parties or others resulting from the particular sealing. Mike Tarrant indicated that in his experience, Motions to Seal, and sealing without a requirement of a hearing, are routinely addressed, “every day” in proceedings before the Public Utility Commission, where sensitive financial, economic and proprietary processes information often require confidential discovery disclosure or use in cases. The discussion recognized the importance of Rule 9 for protection against disclosure of information that is harmful or prejudicial, while providing for judicial determination of whether sealing is warranted as well, either on objection to sealing, or as a matter of law. One suggestion put forward was an amendment to Rule 9 that would provide for sealing “without the scheduling or conduct of a hearing, upon agreement of the parties that a hearing is not necessary”.

In context, in the drafting of the amended Rule 9, a provision 9(b) was added, that “The parties cannot seal all or a portion of a case record by mere stipulation. A court order is required.” It being the Committee’s view that parties should not be free to in effect compel the court to seal a record where such would not be warranted, depriving the court of discretion or obligation with respect to an issue of public access. The Committee spent considerable time in the redrafting of Rule 9 to address competing concerns, including First Amendment access issues, and providing more specificity as to hearing procedures and findings required for sealing.

The Committee did not complete its consideration of the issue of the requested Rule 9 revision, which will continue at the next scheduled Committee meeting. The Reporter will in the interim explore potential text of an amendment as requested, for more focused Committee consideration.

8. Next Steps; Next Meeting Date: The next meeting date was set for Friday, February 21, 2020 beginning at 1:30 p.m., at the Supreme Court Building in Montpelier.

9. Adjournment: The meeting was adjourned at approximately 12:01 p.m.

Respectfully submitted,

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