[As approved at meeting on October 4, 2019]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting April 19, 2019

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 1:32 p.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; and Committee Reporter Judge Walt Morris. Also present were Court Administrator Patricia Gabel, and Emily Wetherell, Deputy Clerk of the Supreme Court. Absent were James Duff-Lyall; Marty Frank; Teri Corsones; Tanya Marshall; Linda Reis; Sarah London;[1] and Supreme Court liaison Justice Marilyn Skoglund.

1. Announcements: The meeting began with a brief update on the efforts of the Special Advisory Committee on Rules for Electronic Filing, provided by Justice Dooley (who serves as Chair of that Committee). Justice Dooley indicated that that Committee (whose members include a number of the members of the Public Access Committee) was engaged in an intense period of work to complete a draft of proposed 2019 VREF amendments for publication and comment. The VREF Committee will keep the Public Access Committee apprised of drafts, timelines and other aspects of the work of the VREF Committee. Reporter Morris also indicated a need for recommendations to the Court for appointments to replace members Sarah London, Esq. and Marty Frank (who has retired and requests a replacement member), and requested that members provide suggestions to Chair Tomasi.

2. Approval of Meeting Minutes: On motion of Judge Morrissey, seconded by Gaye Paquette, the minutes of the February 22nd 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, and those will be provided for Committee review as soon as they are available.

3. Report of Conduct of Public Hearing on Proposed PACR Rules Amendments, March 11, 2019.

Most if not all of the Committee members were in attendance at the public hearing held pursuant to Administrative Order No. 11, § 8 in Montpelier on March 11th. All of the members of the Supreme Court were in attendance as well. Reporter Morris briefly indicated that no members of the public attended or offered any comment as to the proposed rules amendments. Andy Stone of the CAO Next Generation Electronic Case Management project was in attendance and offered one

[1] Ms. London has communicated her resignation from Committee service, due to her appointment to serve as the Deputy Attorney General.

minor typographical correction. Jeff Wallin, of the Vermont Criminal Information Center, was also in attendance.

4. Review of Public Comments Received in Response to Publication of Proposed Rules Abrogating and Replacing VRPACR and Abrogating the Rules Governing Dissemination of Electronic Case Records.

Reporter Morris indicated that the proposed Amendments to the Vermont Rules for Public Access were published on or about February 12, 2019. The comment period closed on April 12, 2019. In response to the publication, comments were submitted on behalf of WCAX (Roger Garrity), Vermont Journalism Trust/VT Digger (Alan Keays), Helen Toor/Civil Division Oversight ("CDO") Committee, and Vermont Legal Aid Elder Law Unit (Michael Benvenuto)/Disability Rights Vermont (AJ Ruben), in addition to a letter dated September 25, 2018 from counsel for Courthouse News Services, addressed to the Committee Chair. All of these comments had been distributed to Committee members in advance of the meeting.

The principal item of business at the meeting--review, discussion and recommendations related to the comments received--ensued.

The Committee discussions and decisions are represented in the written summary that was prepared of the comments received, with reference to the proposed rules amendments in numeric order, with the responses, and actions if any, taken by the Committee as to each comment at the meeting. Complete copies of the comments received were included in the record of promulgation transmitted to the Supreme Court for its consideration.

There were also number of helpful edits, restyling, and errors suggested by commenters that were incorporated into the final draft recommended by the Committee for promulgation, without discussion.

At the meeting, the Committee addressed each pertinent rule section, and comments received, as follows:

Rule 1.

Comment: Existing text provides that the rules "…must be liberally construed to implement these policies (of complementary responsibilities to provide public access yet protect privacy interests) WCAX: recommendation--substitute The rules "shall be construed to favor public access" for the former phrase.

Committee response: After discussion the Committee concluded that the existing language serves to provide a correct statement of the fundamental commitment to public access, while addressing responsibility for protection of lawful privacy interests. No change was made.

Rule 2. Definitions.

Comment: p. 4. The term "presiding judge" needs clarification. Does this mean the judge presiding in the specific case, or the judge with administrative responsibilities for the unit? Recommendation: add the word, "division". (i.e., "…judge assigned to the court division.") See also use in rule 6(h). (Toor/CDO)

Committee response: The existing language in the definition contemplates as it states, that the presiding judge is the judge assigned to the court, and, if more than one such judge is assigned to the court, the judge designated as presiding by the Chief Superior Judge. The Committee felt it advisable that public records decisions be decided by a single judge in each county/unit. No change is recommended, including addition of the word "division".

Rule 3(b).

Comment--Existing text: "the rules recognize…responsibility of both filers and the judiciary to protect confidentiality and privacy where public access is restricted by these requirements." WCAX: "requirements" is vague; substitute "by statute or rule".

Committee response: A minor change: substitute "such" for "these".

Rule 4(b).

Comment--Existing text: "Public access to electronic case records is provided on a case-by-case basis at display terminals located in courthouses and judiciary offices as determined by the Court Administrator" WCAX: language "case by case basis" is unclear. Rule gives full discretion to the Court Administrator, without threshold standards or criteria for access. Substitute "Public access to electronic records shall be provided at display terminals located in courthouses and Judiciary offices."

Committee response: The text was changed to substitute "for individual cases" for "case by case basis". Content was added to Reporter's Notes to state: (1) use of "case-by-case"/"for individual cases" description is intended to clarify that "bulk access" or "data mining" is not authorized; and (2) while developments in technology, coupled with statutory amendments may serve in future to authorize broader remote access, at present such is constrained by 12 V.S.A. Section 5.

Rule 4(b)(2).

Comments--Existing text: "…remote access may be provided by the Court Administrator. WCAX: change "may" to "shall". Same; change "may" to "shall". (VJT/VTDigger).

Also: Existing text: "…remote access may not be provided to records of the criminal, family, or probated divisions, except as authorized by statute."
WCAX: change language to remote access "shall be provided to all court records that are accessible to the public in the form of physical records, except where prohibited by statute."

Committee response: see above.

Comment: As currently written, 4(b)(2) does not provide guidance to CA in exercising her/his discretion in determining whether to provide remote access. (VJT/VTDigger). (Same comment, WCAX)

Committee response: see above; statutory constraints provide sufficient guidance.

Rule 4(c). (Administrative Records)

Comment: No standards are provided in the proposed rule for exercise of Court Administrator's discretion. Amend text as follows: "The Court Administrator will determine the method of access to judicial-branch paper and electronic administrative records in a manner meant to uniformly facilitate public access." (WCAX).

Committee response: The Committee substituted the word "means" for "method" in the text, and added content to Reporter's Notes to clarify that electronic access to administrative records is not a current component of the judiciary's electronic case management system. Technological development of the judiciary's electronic case management system may enable such access in the future. Access is accorded to paper administrative records under the existing rules, and the proposed rule would authorize the Court Administrator to accord access to electronic administrative records in the future. The system capabilities and thus means of access to such records are not able to be determined at this time.

Rule 4. Fees.

Comment: "Fees for access to records is a critical issue for news organizations and the general public. Currently, the rule does not address whether fees may be charged for either remote access or public terminal access."

Committee response: Fees are in fact specifically addressed in Rule 6(f). No fees are contemplated for public "viewing only" of accessible electronic records.

Comment: "No fees should be charged for obtaining copies of electronic records." (VJT/VTDigger).

Committee response: This particular issue (but not in context of judicial case/administrative records) is presently before the Court for decision and invokes

provisions of the Public Records Act. See, *Doyle v. City of Burlington Police Department,* 2018-342, argued 4/17/19. Any such amendment to the rules should await appellate resolution.[2]

Rule 4. Public Access Terminal Functionality.

Comment: "Rutland Civil terminal is a good model for access; allows users to email documents to themselves. Other terminals (Rutland Criminal, Burlington Criminal, Civil) do not. (The public access terminals need to have uniform, efficient means of access.) (VJTVTDigger).

Committee response: It is contemplated that the access terminals will have uniform capabilities. These may or may not be the same as capabilities under the E-Cabinet system. Jeff Loewer agreed to examine the question of whether the system would enable a user to email documents to themselves, for Committee information and consideration at a later date as the NG-CMS is rolled out.

Rule 5. (Specific Rights of Access).

Comment: Articulate and include a specific Crime Victims Right of Access to all case records on the part of a victim in a criminal case, akin to full party status. (VLA/DRVt).

Committee response: This request goes beyond existing statutory authority. Any change should be the product of legislative enactment.

Rule 5(b).

Comment: Add a last sentence as follows: "When a document is filed under seal, no one other than a judge may access it without the written approval of a judge." (Toor/CDO)

Committee response: While the purpose of this change is understood, it could have unintended consequence of unduly restricting authorized access to sealed documents by court staff. As to unauthorized staff access, the Judiciary Employees Code of Conduct and disciplinary system can address this issue in the event it occurs.

Comment: Request to add a Crime Victim Right of Access to all records in case in which they are alleged victim. Cf. victims' rights statute (13 V.S.A. § 5301 et. seq.)(Which does not explicitly create a right to access court documents for victims). (VLA/DRVt)[3]

[2] **Note:** a decision was issued in the *Doyle* case on September 13, 2019. See opinion, 2019 VT 66.
[3] Reporter's Comment: In responding to this comment, Cf. also, *State v. Gonyaw,* 146 Vt. 559 (1985)(victim has standing/right to be heard as to admissibility of rape-shield evidence).

Committee response: see above; this request goes beyond existing statutory authority. Under cited statutes, prosecuting attorneys have certain duties to victims of notice and advisement prescribed by legislature.

Comment: What is the rationale for restricting access by persons under 18 years of age (unless court orders access)? (Minors can sue in their own right, ex. RFAs.) (VLA/DRVt)

Committee response: This section of the rule specifically contemplates that a judge may accord access to a minor in given cases, but that such be essentially determined to be in the minor's interests. The existing Reporter's Note provides example of an instance in which the minor *should* have access—"…where a minor is self-represented and conducting the litigation." The judge has discretion to accord access in other circumstances as well. In active cases, a minor would likely also have either guardian ad litem or counsel, or both, who would have access and be in position to further disclose any record content to the minor, consistent with their responsibilities. No change was made to the draft rule.

Rule 5(c).

Comment: Broaden lawyer access to case records to include lawyer requesting access on behalf of a party, without necessity for appearance in the case. Many self-representing persons need lawyer's help just to navigate the system, that should not require formal appearance in a case. (VLA/DRVt)

Committee response: Such a provision would create a risk of unauthorized access to case records upon assertion that a status of representation exists. Limited appearance of counsel is presently authorized, as well as provision of "unbundled" legal services, and these measures could be employed to address the issue. V.R.C.P. 79.1(h), V.R.P.P. 79.1(h); also, V.R.F.P. 15(h).

Rule 6(b).

Comment: Generally. Judge Toor/CDO see no need to limit the categories of records access to which is contingent upon admission in evidence, or to arguably limit Court's ability to admit into evidence. See Rule 6(c).

Committee response: The specific exemptions cited in 6(c)--(6)(b)(2), (4), (5), (8), (10) and (13) are the product of extensive consideration by the Committee. Other exemptions have specific provisions of law applicable to records status, whether or not admitted into evidence. The exemptions do not in and of themselves serve to restrict a judge's authority or responsibilities as to admission of evidence in a given case; they are intended to address issues of public access. No change was recommended here.

Rule 6(b)(2). (Search Warrant Documents)

Comment: Amend (b)(2) to delete "until the date of return on the warrant". Replace with "until the execution of the warrant and completion of the search." "The default status of a record should be public when no statute or rule exempts it". (Citing *In re: Essex Search Warrants* (2012) and *In re: Sealed Documents* (2001)). See V.R.Cr.P. 41(e)—returns must be made no later than 5 days after execution unless "good cause" extension is given.

(In Committee discussion Gaye Paquette inquired as to how electronically filed applications for search warrants would be handled in NG-CMS. It was suggested that these would be filed with a motion to seal, as a non-public document until further action was taken by the court.)

Committee response: This request goes beyond existing authority. 2013 amendments to V.R.Cr.P. 41 are intended to improve accountability and timeliness in filing of search warrant returns. Timely provision of returns is an ongoing issue in the various units. Any amendments to the effect requested are best addressed by the Advisory Committee on Rules of Criminal Procedure.

Rule 6(b)(5).

Comment: All court records pertinent to arraignment should be accessible by the victim of the crime. (13 V.S.A. § 5308) (VLA/DRVt).

Committee response: See above.

Rule 6(b)(9)

In response to a comment from VLA/DRVt, the Committee added 33 V.S.A. Section 6931—Proceedings for vulnerable/exploited adults—to the list of proceedings subject to this exemption.

Rule 6(h).

Comment: This section is ambiguous as to whether only a denial of a request (for access) may be appealed, or whether any decision, including *granting* of a request, may be appealed.
Grants of request for access should not be appealable, as prolonged delay on appeals may impermissibly serve to bar timely access. (VJT/VTDigger)

Committee response: Provide clarification by substituting the word "decision" for the word "denial". The Committee was of the view that appeals from orders *granting* access could not be rendered unappealable. Other remedies addressed to relief from any stay may be sought.

Comment: 6(h) creates appeal rights of "persons aggrieved", yet it is unclear how the court would have current contact information to notify aggrieved persons of decision on access, resulting in further delay.

Committee response: The language is in the *current* rule. There was Committee discussion of further clarification as to who would be provided notice, and by what means, and whether there would be any difference between a case in active vs. closed status as respects any provision of notice. The Committee did agree that this issue should be addressed in subsequent meetings, but not necessarily treated in the current promulgation. 6(h) does provide that notice to "other interested persons" (beyond the grievant) is discretionary (the court "may" provide notice to other interested parties).

Comment: Coupled with 6(i) (records on appeal have same access status as in court below), records as to which access has been granted could be withheld from access long after the trial court decision, until conclusion of Supreme Court appeal.

Request: Amend (h) and (i) for consistency with Public Records Act; the rules should not allow for any stay, waiting period, or appeal following the grant of a public records request. (VJT/VTDigger).

Committee response: see above; this particular issue may warrant reexamination in future meetings in consideration of appellate practice and subsequent proposals/promulgation of Rules for Electronic Filing and attendant amendment of procedural rules, included the appellate rules.

A Related Issue of Delay in Access when Case File is "under review" or currently before a judge:

Comment: Amend 6(f) to clarify that when a record requested is part of a case under review or currently before a judge, it should be considered in "active status" and the custodian shall follow the procedures set forth in 1 V.S.A. §318(b)(1). (VJT/VTDigger).

Committee response: Existing law and practice serve to address this issue. Note that the issue is largely resolved by electronic records that can be viewed by one or more persons at the same time. There is no provision in the rule that an electronic record otherwise publicly accessible becomes inaccessible to the public when otherwise being viewed by a judge.

<u>Rule 7(4)(A)(ii). (Actions when Filing is Noncompliant)</u>

Comment: Judge Toor/CDO—There should be more explicit provision for recording, and relation back of the filing to attempted first filing. Add to subsection, <u>"In such a case, the clerk shall enter a record of the document attempted to be filed and the date of the attempted filing and the nature of the noncompliance."</u>

Committee response: This is an issue to be addressed by the Committee in future meetings, in the broader context of provisions of other applicable procedural rules (including anticipated amendments of the Rules for Electronic Filing) and treatment of litigant attempts to complete filings. The concluded that the issue is one that should be addressed, but not in the present promulgation.

Rule 9(a)(2)(E). Persons Entitled to Notice of Hearing on Sealing or Access Request.

Comment: Judge Toor/CDO—Question: If a person is not a party, or individual the records are about, how could they have standing?

Committee response: The Committee concluded that the proposed rule adequately addresses identification of persons in interest with respect to motions for sealing or access (to sealed records).

Rule 9(a)(3). Hearing.

Comment: Judge Toor—Amend existing first sentence: "The court must schedule a hearing for as soon as practicable but no later than 14 days after ~~the filing of a motion under this rule~~ the motion is fully briefed under Rule 78." Comment: "Why would we take away the usual rights to respond to, and reply to, a motion?"

Committee response: Public access disputes have traditionally, and should continue to be, addressed on an expedited basis. An amendment has been added to make clear that this rule supercedes any other rule that might provide more time. Content will be added to the Reporter's Note to clarify that briefing, reply and responsive memoranda are contemplated on an expedited basis, on a schedule to be established by the court, yet consistent with due process. And, that the court retains authority to request/order supplemental or post-hearing briefing.

Rule 9(a)(4). Hearing; Findings.

Comment: Judge Toor/CDO—Add to end of subsection: "A sealed record may be accessed only by a judge or by written order of a judge."

Committee response: See the Committee's response as to the 5(b) comment, above.

Rule 9(b). No Sealing by Mere Agreement.

Comment: Judge Toor/CDO—Add, "A court order is required."

Committee response: Agreed. This phrase was added to the draft.

Rule 9(d). Applicability.

Comment: Judge Toor—Move this subsection to the beginning of the rule.

Committee response: In this particular rule, the subsection should be kept where it is.

Rule 9(e). Administrative Records.

Comment: Judge Toor—Court Administrator will hold a hearing? It seems that a slightly less formal process is needed for Court Administrator hearing, as opposed to hearing before judge on sealing/access.

Committee response: The Committee decided to remove this subsection, in recognition that the issue is covered in Rule 8.

Rule 10. (Compilations).

Comment: Why does the rule prohibit compilations? Compilations should not be prohibited, especially if they are returned in searches on the computer terminals. Even if 12 V.S.A. § 5 restricts access to criminal and family records remotely, there should be no problem with compilations in civil cases. (WCAX). (Perhaps this confuses an individual's preparation of a compilation based upon records search with court-generated compilations upon request?)

Committee response: The existing rule does, and the amended rule should, continue to prohibit compilations. In particular circumstances, the Court Administrator may waive the provisions of Rule 10, and enter into Data Dissemination Contracts governed by Rule 12.

At the conclusion of the Committee's consideration of the public comments received, and decisions made as to modifications and edits to the draft, the Committee directed that Justice Dooley and Reporter Morris, working with Committee Chair Judge Tomasi, would prepare a final recommended promulgation draft, for circulation for final Committee approval and transmission to the Court, with recommendation for final promulgation.

The April 19th Committee meeting was adjourned, with unanimous consent, at approximately 4:15 p.m.[4]

[4] **Post Meeting Notes:** (1) The final draft of the proposed rules was circulated to the Committee, and was approved by Committee poll. The proposed rules were transmitted to the Court with recommendation for final promulgation by Chair Tomasi on April 26, 2019. The Court promulgated the proposed rules as final on May 1, 2019, effective July 1, 2019.

Respectfully submitted,

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

(2) In view of comments received from Judge Jeffrey Kilgore on behalf of Advisory Committee on Rules of Probate Procedure in the afternoon of April 26th, indicating that that Committee had published proposed amendments of V.R.P.P. 77(e) addressed to confidentiality of will indices and wills filed, and requesting that the component of the promulgation that would have abrogated V.R.P.P. 77(e) not be adopted at this time, abrogation of that rule was not included in the Court's final promulgation order. The issue of status of V.R.P.P. 77(e) will be the subject of communications between the respective Committee Chairs and Reporters, and further consideration by both Committees.