[As approved at Committee Meeting on May 25, 2018]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting
April 27, 2018

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 9:00 a.m. at the Supreme Court in Montpelier. Present were Chair Judge Tim Tomasi; members Teri Corsones, Esq., Justice John Dooley (Ret.), Marty Frank, Jeff Loewer, Sarah London, Esq., James Duff-Lyall, Esq., Judge Mary Morrissey, Gaye Paquette, and Tari Scott; Supreme Court liaison Justice Marilyn Skoglund, and Committee Reporter Judge Walt Morris. Committee members Katherine Pohl, Esq. and State Archivist Tanya Marshall were absent. Also attending the meeting was Judge Kate Hayes, who serves as Chair of the Next Generation Case Management Services (NG-CMS) Configuration Architecture Task Force.

1. Chair Tomasi announced committee transitions, noting that Katherine ("Katie") Pohl has communicated her resignation from the Committee and that a new appointee will be sought. On motion of Marty Frank, seconded by Teri Corsones, the minutes of the Committee meeting held on February 28, 2018 were unanimously approved.

2. Reporter Morris provided a brief overview for the Committee of the provisions of Administrative Order 40 (2000) and its mandate to the Committee.[1]

3. Proposed Amendment of Rules 4(c) and 10 of the Rules Governing Qualification, List, Selection and Summoning of All Jurors concerning confidentiality of juror information.

Reporter Morris indicated that a redraft of a proposal of amendment of Rule 10, consistent with the report of the Subcommittee that had examined amendment of Rule 4(c) and related rules to further address issues of confidentiality of juror information was proving more complex than anticipated, in view of the apparent conflict with the provisions of V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2). He indicated that it would be prudent to have the opportunity to conduct additional research into the reach of the opinion in of the Massachusetts Supreme Judicial Court in *Commonwealth v. Fujita,* __A.3d__, 470 Mass. 484 (2015), and whether there has been any other appellate treatment of the issue of confidentiality of juror information.

The Committee reviewed the content of the existing juror questionnaire form employed by the Court Administrator's Office's jury administration office, which is now

[1] A.O. 40 was subsequently amended by the Court per Entry Order given on April 30, 2018. The amended A.O. officially adds State Archivist or designee to the Committee, and updates provision for per diem and expense reimbursement for Committee service.

centralized in Burlington. Part 1 calls for basic identity, address, date of birth and other contact information. Jurors are noticed on the form that this information is available to attorneys and case parties, but not to the general public. Part 2 request information about lawful juror qualification standards, such as English language proficiency and literacy, residence, prior jury service within two years, any felony conviction involving any imprisonment, and mental or physical conditions which might preclude service. The notice informs potential jurors that this information *is* available to the general public, excepting as to mental or physical conditions. Part 3 inquires in detail as to jurors' family members, jurors' education, employment and duties, other occupations including military service, spouses' occupations, and juror party or witness status in criminal or civil cases. Jurors are noticed on the form that this information is available to attorneys and case parties, but not to the general public. Teri Corsones indicated that, since the notice as to Part 3 information disclosure is not correct in view of the disclosure provisions of V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2), CAO would be well advised to presently amend the language of the notices on the juror questionnaires.[2] Under the terms of the reference criminal and civil rules, attorneys and parties are required to keep juror questionnaire information to which they are privy in confidence.

On the issue of access to juror information, Marty Frank indicated that in his view, the media would generally be more interested in access to "aggregate" or generic information as to juror characteristics and panel composition, as opposed to accessing and linking specific questionnaire responses to individual jurors. He did indicate that in a high profile case, media would certainly wish to reserve the opportunity to inquire of jurors post-verdict on a consensual basis. The rules under consideration to not address post verdict contact and inquiries of jurors. Teri Corsones noted that attorneys are generally bound by their ethical codes as to the scope and nature interactions with jurors post-verdict. She brought to the Committee's attention a law review article on point.[3]

Gaye Paquette asked whether the jury administration/qualification system would be integrated wholly into "Odyssey", the operational component of NG-CMS. Jeff Loewer indicated that work toward that objective had not begun, but would certainly be addressed going forward.

After discussion, the consensus of the Committee was that the Reporter should continue efforts to research and provide a redraft of proposed amendments addressing confidentiality/disclosure of juror questionnaire information, in consultation with the Chairs and Reporter for the Advisory Committees on Rules of Criminal and Civil Procedure, in an effort to promulgate rules that are consistent, and of general application in the summoning, qualification and ultimate selection of jurors. The Reporter will provide periodic updates as to these efforts; the Trial Court Administrator will be asked

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[2] For purposes of discussion, the Committee recognized that case-specific juror questionnaires, often generated by attorneys subject to court approval in complex or more serious felony cases, are distinct from the "standard" CAO questionnaire.

[3] J. Vincent Aprile, II, ABA Criminal Justice Magazine, Spring 2004, V. 19 No. 1, "Post-Verdict Contact with Jurors: Ethical Dimensions."

to address the issue of the correct notifications of jurors as to confidentiality (or not) of the information provided in the three parts of the qualification questionnaire.

4. Report of Subcommittee on "Gatekeeping"/Management of Access to Public/Nonpublic Electronically-Filed Content; Feasibility of Redaction Software and Alternative Measures for Managing Workload; List of "Personal Identifiers" (Corsones, Dooley, Loewer, Tomasi).

The Committee continued the wide-ranging discussions of the issues associated with movement to the NG-CMS, as reflected in the minutes of the February 28th meeting, first taking up discussion of two drafts of proposed amendments addressing allocation of responsibility with regard to electronic filings and protection against public filing of non-public information. These proposals would serve to amend existing Rule 3 of the Rules for Dissemination of Electronic Case Records, Access to Electronic Case Records.

The first draft, authored by John Dooley, followed the discussions of the subcommittee at its meeting on April 13, 2018. Mr. Dooley indicated that the draft, consisting of three pages, amounted to a beginning of a merger of the Rules of Public Access to Court Records and Rules for Dissemination of Electronic Case Records. This draft assigns primary responsibility to the filer to determine whether all or part of the record of information being filed is non-public. The filer must certify that this determination has been made, that the filing specifies the non-public information and protects this information from disclosure to the public. Additional responsibilities are assigned to the filer as to separation and identification of content that is non-public. The filer must identify in the certification what measures have been taken to protect non-public information from disclosure. (Proposed Rule 3(c)(1) and (2)). **This proposal also assigns certain responsibilities to judiciary staff to review each filing, in a manner prescribed by the rules, to determine whether the filing complies with the rules.** Judiciary staff would have no obligation to review any exhibits or attachments that accompany the filing. If filing in violation of the rules is found, staff is authorized to take certain responsive actions. These would include, as provided in the draft, correction of the filing to comply; or rejection of the filing until it is corrected to comply, specifying a time deadline by which correction must occur. The filing issue may also be referred to an assigned judge who would be authorized to impose certain sanctions for violation of the filing rules. As to court-generated records, judiciary staff would be responsible for assuring that non-public information is omitted or redacted prior to placement in public access status. (See Proposed Rule 3(c)(3) and (4)).

Another draft, presented by Judge Tomasi, also assigns primary responsibility for protecting against public disclosure of non-public records and information upon the filer. However, **in contrast to the first proposal, this alternative provides that judiciary staff would provide only a "basic review" of each filing to determine whether the filing has been filed in an appropriate public or non-public category of case.** Staff shall also assure that the filing meets the other basic filing requirements of the rules, e.g. that the filing is signed and accompanied by a fee, if required. **Staff would have no obligation to review each page of a filing to determine whether the filer has failed to**

meet the filer's responsibility to redact or omit personal identifiers or other information made non-public by the rule. In addition, Judge Tomasi's proposal contains a subsection (f) imposing an obligation on other parties and non-parties to seek correction/redaction of non-public information discovered to be in public status. But for these distinctions, this proposal is in all other respects identical to the first proposal.

The essentials of each proposal were presented. John Dooley provided further background as to the origins, objectives and content of the Rules of Public Access, dating back to 2001. He mentioned that after initiation of E-Cabinet and electronic filing in civil cases there, the concept and use of personal identifiers took hold, altering some of the premises and content of the original public access rules. Committee discussion ensued, focusing on security measures, rules that might be addressed to them, management of filings and sanctions for violation of rules governing filings.

As an initial matter, it was noted that a distinction might be drawn between "identified" PIDs, those that might be expected to appear in a particular pleading or required court filing, and "unanticipated" PIDs, those that would appear at random in an exhibit or attachment accompanying a prescribed filing. In the former case, entry gatekeeping would be able to more readily identify and keep PIDs in non-public status, or change the information to non-public status. In the latter, case, there is no practicable way to provide page by page review upon filing to assure that prohibited PIDs are not filed in public status. As concerns risks of public disclosure via "hacking" or "data mining", John Dooley indicated that in his assessment, the rules can and do prevent data mining. Even if they could avert established system security measures, "hackers" would be looking for data in "the usual" or expected places. That is, primarily in required or rules-prescribed filings in particular cases. Data mining would not easily yield PID information placed at random in an exhibit or filing accompanying an attachment. In addition, any system of access would have measures to preclude "robotic" mining access at the point of sign-in. Pursuant to statute, in criminal or family division cases, other than access by registered filers to authorized information specific to their case, electronic case record information can only be provided at kiosks at each Courthouse, and not via the internet. See, 12 V.S.A. § 5(a).[4]

There was broad ranging discussion of the case circumstances and information, including PIDs and other non-public information, that might be electronically filed in error public status and measures to address the problem. Tari Scott indicated that a constructive approach might be to recognize three modes of filing submissions: (1) "Guided filing" (filer fills out e-forms which suggest, but do not mandate particular entries); (2) "File and Serve"/Form Fillable pages which specify each component of information content, providing limited space for information beyond that which is necessary; and (3) Filer created documents, without content guidance or limitation. Under either mode, a filer would have leave to file additional content upon specific

[4] Jeff Loewer indicated that "screen scraping", essentially taking a snapshot of publicly accessible judiciary data such as court schedules, was an issue. As an example, access to data by screen scraping mostly comes into play in criminal cases which are later dismissed, or result in acquittal, and are subject to expungement. See also, *State v. F.M.*, 2011 VT 100, 190 Vt. 617 (a case of "imperfect" expungement).

request. With this approach reviewing focus by court staff at point of filing would be facilitated by system effort to screen out non-public information by "mode" of filing, with most filers using the first two options, filer-created documents being smaller in number.[5]

In all electronic filings, the Committee was of the unanimous view that clear warnings against public filing of non-public information, and the means by which a document sought to be held as non-public or redacted could be filed, must be provided as a part of e-filing process in each case. In addition, all filers would be required to register and comply with conditions of registration. Each filing would be accompanied by a filing-specific ("active") certification that the filer has reviewed the filing content and certifies that non-public information has been redacted, or filed as non-public in accord with the rules. Sanctions as provided in both of the drafts under consideration would be available to address violations.[6]

Mary Morrissey inquired about the ability of self-representing litigants to avail themselves of the e-filing system, and how easy or difficult it would be for these litigants to both file, and later make any corrections necessary—what will be the "user-friendliness" and accessibility of NG-CMS? Judge Hayes raised concerns as to imposing substantial additional obligations upon already-burdened court staff in implementation of the e-filing process. She noted that lots of e-forms would be produced to assist users in filing, which should help in reducing instance of erroneous filing of non-public information as public. The modes of e-filing, allocation of screening responsibility, and centralized or local screening, would have impact upon these concerns.

Given the lengthy discussions, there remained **several unresolved issues**. While thorough and lengthy discussion occurred as to potential processes and rules provisions, the Committee did not reach consensus on the fundamental issue of allocation of responsibility for screening of filings for correct filing of non-public information and allocation of responsibilities between filers and court staff for filing and corrective measures. Other issues: whether court staff screening of e-filings should be centralized, rather than courthouse-based; what level of assistance, if any, would be provided to self-representing litigants in e-filing at courthouse premises; whether it is possible, or advisable, to restrict e-filing to attorneys; how sanctions would work with respect to a self-representing litigant.

Justice Skoglund asked whether the proposed subsection (f) of the Tomasi draft (requiring other parties and non-parties to provide notice and seek correction of erroneously filed non-public information) would present ethical issues, such as in a case where an opponent party's attorney, discovering an error in the opponent's filing, might seek to "sit on", rather than cure, the opponent's error, consistent with obligation to

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[5] Newly-proposed rules for electronic filing in civil cases in New Hampshire adopt this approach, the categories being "System-generated" documents, "Court-created" forms and "Party-created" documents. See, proposed NH Supplemental Rules for Electronic Filing in Specified Civil Cases, Rule 7(a), p. 10.

[6] Teri Corsones noted that in practice, law office assistants rather than attorneys would be making the filings, even though the attorney would be responsible to the court for the actions of the assistant.

client. While the example presented had to do with a soon-to-lapse statute of limitation, not directly related to preservation of information as non-public, there was insufficient time to conclusively address this concern at the meeting.

On related issues of access, Tari Scott and Jeff Loewer brought forward concerns as to the currency and need for review of the Rules Governing Electronic Dissemination of Case Records, Rules 4, 5, 6 and 7 (Access to Electronic Case Record Compilations; Reports; Data Dissemination Contracts; and Procedure). There are various data dissemination contracts, and not infrequent requests for electronic case record reports. The Committee determined Ms. Scott, Mr. Loewer, Justice Dooley and Judge Morris would meet to discuss review and redraft of these sections, reporting back to the Committee at next meeting.

VRPACR 6(b)(28)--Approach to "Personal Identifiers" and Recommendations:

The subcommittee was also charged with review of the list of "Personal Identifiers" that would be a component of the CMS and precluded from public disclosure. The recommendation is that the list be amended to the following: social security number; passport number; taxpayer identification number; a financial account number, including a credit or debit card number; and the name of a child alleged to be the victim of a crime. John Dooley pointed out that in the federal system, personal identifiers are similarly limited, referencing specific types of account numbers, rather than broad categories of documents that might contain such numbers. He indicated that the "child victim" exception would warrant further specificity to clarify its application (i.e. would this require actual filing of a criminal charge and an adjudication of a defendant's guilt? Or that a DCF finding have resulted? Or simply reference in a document to an allegation?).

After extensive Committee discussion, consensus was to approve of the recommended list of personal identifiers, and to modify the "child victim" exception to provide "The name of a <u>minor</u> alleged to be a victim <u>in a criminal case</u>." The Committee considered how redaction of minor's names would routinely occur in criminal filings, recognizing that the "generators" of this information, and thus those who would redact, would for the most part by investigating law enforcement officers preparing affidavits of probable cause, and State's Attorneys reviewing such prior to filing of an information. Outreach to this constituency of filers, education and training, are considered advisable.

Principal "Takeaways" from the Committee's "Gatekeeping" discussions:

--Reduction of the number of personal identifying numbers makes the task of screening for non-public information somewhat easier.

--Limiting personal identifying information to the quantifiable (i.e., numeric

rather than "word" based assists in the task as well (e.g. a specific account number vs. "personal identifiers issued by a governmental/non-governmental agency". Quantifiable personal identifiers also better lend themselves to computer scanning and identification.

--It is not possible to reduce all non-public information to the quantifiable; a review/revision of PACR Rule 6(b) is necessary to better describe certain categories of exempt information. Redefinition of Rule 6(b)(17)(medical/dental/mental health records) is especially important given likely prevalence in certain case filings.

--Allocation of responsibility for assuring that non-public information is not incorrectly filed as public presents complexities; consensus is that primary obligation for screening is to be on the filer; division of views is presented as to whether court staff should have responsibility beyond "basic" review of filings to assure that they meet minimum requirements of filing as to format and fees if any.

--Under either alternative being considered, court staff would have no obligation to review exhibits or attachments filed to screen for public filing of non-public information in error.

--Filers will have responsibility to take action to correct filing of non-public information filed as public in error.

--Imposing an obligation on <u>all</u> parties in a case to take corrective action presents some ethical issues (would a party opponent observing a significant jurisdictional error ordinarily have an obligation to bring their opponent's error to attention, thus permitting the opponent to cure it in time? (e.g. statute of limitations due to soon expire).

4. Report of Committee to Review Rule 6(b) Exceptions.

Rule 6(b) presently lists 35 exceptions from public access. Of these, approximately 8 address the record of court proceedings themselves. Of the remaining 27, 26 pertain to various documents that are filed with a court in proceedings, whether ultimately admitted in evidence or not. A residual exception—(35)—deals with "Any other record to which public access is prohibited by statute." Tari Scott presented a report of the work of this subcommittee, which met on March 22nd.

Committee discussion particularly focused upon exception 6(b)(17)—a health record exception—in that these records feature in a broad variety of cases, mostly in the Family Division, but in Civil and Criminal as well.[7] John Dooley noted that the scope of this exception varies among the states; that Minnesota made a conscious determination to keep it health record exception quite broad.

[7] VRPACR 6(b)(17) "Records created as a result of treatment, diagnosis, or examination of a patient by a physician, dentist, nurse or mental health professional."

Ms. Scott indicated that several subsections, including but not limited to (10) financial affidavit in support of request for assignment of counsel in criminal cases; (11) (same for in forma pauperis applications); (18) Department of Corrections reports re: furlough; (23) evaluations in adult guardianship proceedings in probate; probate provisions as to certain wills (25) were in need of review and revision. For example, subsection (18) exempts from disclosure the DOC report, except where it "has not included a summary and recommendation in a separate section of the report", in which case, the report is subject to public access. Ms. Scott noted that these documents often include a risk assessment which might be considered to be non-public information. Judge Hayes noted that the Rule does not appear to address minor guardianships in probate with any specificity.

Reporter Morris indicated that there were two bills related to sealing and expungement of criminal and delinquency case records that were likely to be passed in the current session that would have impact upon the Rule 6(b) exceptions listing as well.

Committee members agreed that certain of the Rule 6(b) exceptions could be "bunched" and at least reorganized in the rule by case types or subject categories. It was also noted that among the exceptions, certain of them were subject to "shifting" from public or non-public to the opposite status and back, depending upon contingencies occurring external to court process. These, and other statutes pertaining to expungement, sealing and confidentiality should be identified and examined as to impact and potential inclusion in Rule 6(b). At the least, it is advisable that a process for treatment of such "shifting" status information be included in the Rules.

Ms. Scott indicated that the "Rule 6" Subcommittee will continue to meet; the Committee requested that John Dooley and Reporter Morris work with the Subcommittee on necessary research and redrafting.

Principal "Takeaways" from Committee's Rule 6 discussions:

--Rule 6(b) is in need of substantial revision; some of the current subsections may be deleted (ex. sterilization proceedings); other provisions need to be added, especially as to Family Division proceedings and the reserved subsection (b)(7).

--Rule 6(b)(17) (Health Records exception) needs revision; research should be conducted as to other jurisdictions' equivalent provisions, and a revised proposal presented to the Committee for discussion (Dooley and Morris, in consultation with the subcommittee).

--To assure that the revised Rule effectively incorporates all "external" statutes, rules, decisions establishing non-public information, a review of the statutes should be conducted to draw in any provisions not otherwise addressed in Rule 6.

6. Action Steps Going Forward:

The two subcommittees will continue to meet, and provide reports at the next scheduled full Committee Meeting:

--Rule 6 Review Subcommittee (to continue examine the current list of 35 exemptions from public access set forth in PACR Rule 6(b); to examine current statutes, rules, relevant court decisions as to exceptions that are **not** referenced in Rule 6(b) at this time; to consider and to provide recommendations for amendment/deletion/retention-(assistance in drafting provided by Morris, Dooley) (Members: Frank; Scott; Skoglund).

--"Gatekeeping"/Management of Non-Public/Public Status of Electronically-Filed Content; Feasibility of Redaction Software and Alternative measures; List of Personal Identifiers) (to continue work on drafts of proposed procedural rules amendments, including PACR Rules 5 (Case Record Reports), 6 (Data Dissemination Contracts) and 7 (Procedure), and the Rules Governing Dissemination of Electronic Case Records-Access (Members: Corsones; Dooley; Loewer; Tomasi).

7. Issues yet to be addressed:

--Expungement and Sealing; Confidentiality (numerous statutes prescribe status and processes in various types of cases; review of PACR Rules 6 and 7 in context of these is required) (Morris; Dooley).

--Progress of development of "Odyssey", the line component of the CMS, in relation to the rules work of the Committee (ongoing) (Scott; Loewer).

8. Report on Governance Committees for NG-CMS Initiative:

As indicated, Judge Kate Hayes attended and participated in the meeting. At the conclusion of the meeting, she presented an overview of the structure of the "Governance Committees" and their functions for the new case management initiative. A revised Charge and Designation for these Committees was approved by the Supreme Court on April 3, 2018. The project Steering Board includes our Committee members Jeff Loewer and Tari Scott; the project Working Board includes Superior Judges Durkin, Carlson and Fenster; and Court Clerks Joanne Charbonneau and Chris Brock.

9. Reporter Morris indicated that he had received communications from Reporter Kinvin Wroth on behalf of the Advisory Committee on Rules of Family Procedure, requesting opportunity for some degree of participation or input into the process of amendment of the Rules of Public Access and Dissemination of Electronic Case Records. He indicated that Mr. Wroth would be forwarding the names of Family Rules members who would be willing to serve in at least a liaison capacity to that Committee, and to regularly communicate with a representative or representatives of our Committee in this process. Reporter Morris will advise the Committee of any developments with respect to this request, for discussion at the next scheduled meeting.

10. Next full Committee Meeting date:

The next full Committee Meeting will be held on Friday May 25, 2018 at 1:00 p.m., Supreme Court Building, Montpelier.

11. Adjournment: The meeting was adjourned at approximately 12:00 p.m.

Respectfully submitted,

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