

[As Approved by Committee at October 5, 2018 Meeting]

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting
August 10, 2018**

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 9:31 a.m. at the Supreme Court in Montpelier. Present were Chair Judge Tim Tomasi; members Justice John Dooley (Ret.), Judge Mary Morrissey, Teri Corsones, Jeff Loewer, Gaye Paquette, Sarah London, State Archivist Tanya Marshall and Tari Scott; and Committee Reporter Judge Walt Morris. Supreme Court liaison Justice Marilyn Skoglund and Committee members Marty Frank, and James Duff-Lyall, Esq. were absent. Judge Kate Hayes, who serves as Chair of the Next Generation Case Management Services (NG-CMS) Configuration Architecture Task Force, was also present.

1. Chair Tomasi opened the Committee meeting. The minutes of the June 29, 2018 meeting were not completed in time for Committee review. Reporter Morris indicated that they would be circulated to the Committee via email; he proceeded to provide an oral report of the activity, and decisions of the Committee made, at the June 29th meeting. The minutes will be subject to review and approval at the next duly scheduled Committee meeting.

2. **Committee Membership and Recommendations for Replacement Member.** At the June 29th meeting, the Committee decided to recommend that the Court appoint a new member familiar with Family Division practice to take the place of Katie Pohl, Esq. Teri Corsones reported that she had followed up with communications with three attorneys who had been identified as family practitioners and members of the Family Rules Committee, who had all indicated willingness to serve on the PACR Committee, if the Court were to approve of their appointment. On motion of Gaye Paquette, seconded by Tari Scott, the Committee requested that Chair Tomasi communicate this information to the Court, with a recommendation that the Court consider a new appointee to the PACR Committee as soon as possible. Justice Dooley reported on his communications with Marty Frank, who has long served as a Committee member but wishes to transition out from service. Justice Dooley indicated that due to his involvement to date, he felt that Marty would be willing to continue through final preparation of a comprehensive draft of the new electronic case management system rules, provided that occurred this Fall.

3. **Discussion of Rules preparation time line.**

The discussion of Marty Frank's tenure on the Committee prompted a general

discussion of timelines for completion of the work on drafting a new set of rules. Kate Hayes indicated that the goal was to have a comprehensive set of rules promulgated by April, 2019 if at all possible, to coincide with initiation of the NG-CMS in the Judicial Bureau and the Windham/Windsor/Orange units at that time. John Dooley urged movement to closure on a comprehensive set of rules, given all of the work that has been completed to date. He mentioned that in his assessment, the principal work left was to reach agreement on the Rule 6 redraft, especially the list of exceptions, and Rule 7, dealing with sealing, and requests for access to case records that are sealed or otherwise not subject to public access. John highlighted proposed rules V.R.C.P. 79.2/V.R.Cr.P. 53 (Recording Devices in Court) and their promulgation track as an examples of rules such as those the Committee is working on that require long process, including public hearing, to conclusion. He suggested that the Court be requested to hold public hearings on the new rules for NG-CMS as part of promulgation process. Jeff Loewer stated that in his assessment, NG-CMS could go forward if necessary with the existing rules (PACR; V.R.E.F. and Dissemination of Electronic Case Records) still in place. Kate Hayes indicated that it was anticipated that NG-CMS would be operational by next Summer, and that April 2019 should be the target date established for promulgation of new rules. Chair Tomasi raised concern as to the Committee's jurisdiction, indicating that he would want to make sure that the PACR committee is authorized to propose rules as to the electronic *filing* aspects of the project, as well as provisions related to public access. The Committee consensus was that there is a need for clarity of authority. Tari Scott indicated that she would examine this issue, seek and propose any necessary clarifications, whether administrative or in the form of an amended charge and designation. The focus turned to discussion of a reasonable target date for completion of a comprehensive draft proposal. The Committee consensus was to look to mid-October 2018 as the target for completion of a comprehensive draft, to be reflected in the establishment of future meeting dates.¹

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

Tari Scott lead a discussion of the work of this subcommittee in reviewing Rule 6(b) exceptions. Justice Skoglund was absent, but via email had provided a redraft of the exceptions as then reworked by the subcommittee, reflecting the consensus approach to format, which reduces the number of exceptions stated in the Rule itself and references an appendix of public access exceptions created by statute or court rule.²

Ms. Scott indicated that the "Health/Mental Health" record exception had been redrafted in accordance with the Committee's direction at the June 29, 2018 meeting. There was no further discussion of that exception. She then reviewed certain of the

¹ In the course of this discussion, Tanya Marshall raised a suggestion that to the extent possible, the format of the comprehensive draft be made "format agnostic"—that is, reflecting no differences in reference to either paper or e-format documents. John Dooley indicated that in his assessment, he had attempted to do that in the drafting that he had worked on to date, but that if there were any suggestions for edits

² At the time of the meeting, most Committee members had not had opportunity to review the most recent draft; its provisions were summarized by Ms. Scott in the course of the discussion.

exceptions that had either reached subcommittee resolution, or that had not been the subject of prior committee discussions:

--Personal identifiers. Ms. Scott reported that the subcommittee had included a redraft of the exception for personal identifiers, with the five categories of information that had been previously agreed upon by the Committee (SSNs; Passport ID nos.; taxpayer ID no.; financial account nos., incl. credit/debit; names of minor victims of crimes) As to minor victims Ms. Scott reported that Len Swyer of the CAO had conducted some preliminary research indicating that a number of jurisdictions provide such exceptions, whether generally, or in cases of sex offenses. Excepting general confidentiality accorded in juvenile proceedings, and a reference in the public records act, 1 V.S.A. § 317(c)(5)(D), Mr. Swyer found no statutory provision expressly prohibiting disclosure of this information in his preliminary research.³

--Probate Records.

There are a number of existing exceptions pertinent to probate case records, including Adoptions under Article 6, Title 15A; Adult guardianship proceedings under 14 V.S.A. § 3068 (“...if the court finds that the respondent is not mentally disabled”; Evaluations submitted by mental health professionals in such proceedings; and wills deposited with the probate court for safekeeping. There appear to be no express exceptions for probate proceedings for guardianship of minors, or permanent guardianship of minors, although in the latter case, the permanent guardianship would be generated as part of, and in consequence of confidential CHINs proceedings. The subcommittee will examine whether the scope of a “probate exception” should be expanded to cover such proceedings in preparing its final draft.⁴ As to trusts and estates records, after the discussion the preliminary consensus of the Committee was that any further public access exceptions should be the product of legislation. In the course of the discussion of the scope of probate exceptions, the Committee briefly discussed whether probate records would be considered civil or family for purposes of internet access or access via kiosk, for purposes of 12 V.S.A. § 5. It was noted that a distinction might be recognized for these purposes based upon the relationship the probate proceeding bore to family division proceedings, or not. The issue was noted for further consideration in the context of those portions of the rules governing access.

--Mental Health Records.

Ms. Scott indicated that the subcommittee was continuing to consider a rewrite of the existing mental health records exception, and would report at next meeting on that.

--Department of Corrections reports related to furlough (existing 6(b)(18); proposed (5).

³ V.R.Cr.P. 16(d)(3), based upon 13 V.S.A. § 5310, prohibits a prosecutor’s disclosure in discovery of a victim’s address or place of employment, absent court order.

⁴ Confidentiality of certain probate records and proceedings is also addressed in V.R.P.P. 77(e). The rule additionally covers “A written relinquishment or surrender of a minor child and papers pertaining thereto.”

Question arose as to whether “Home Confinement” reports,⁵ whether for consideration of pre-trial release or sentence would be covered. The subcommittee will examine this issue, for next meeting.

--Exhibits—These would be covered under existing exception (9)(records or information produced in discovery), unless used at trial or in a request for action by the court. (There was also a brief related discussion of the practices of the clerks retaining exhibits filed in a case, including those not introduced in evidence at least for duration of appeal. There were no committee conclusions or further action proposed as to this issue.)

--Records of the Criminal Division Oversight Committee (Oversight Committees).

Chair Tomasi inquired as to whether there should be an exception recognized for records of the Criminal Division Oversight Committee (invoking question of exception for other Oversight committees as well-Chair Tomasi indicated that if not, there should be efforts to discuss document retention with those Committees). Justice Dooley indicated that in his assessment, these would be considered administrative records of the court subject to disclosure under the pertinent rules. He noted as well that subject to the Court’s own rules and policies which do provide for and govern public notification, commentary and access, the judiciary is exempted from the Public Meeting Law.

The subcommittee on “Rule 6 Exceptions” will meet again, with Justice Dooley’s participation, to prepare a final draft of proposed 6(b) amendments for the Committee’s consideration at its next meeting. Sarah London mentioned that the work of Helena Gardner of the Legislative Council’s office in establishing the appendix of Public Record Act exemptions was very helpful in providing a format model for the Committee’s approach to amendment of Rule 6(b).

5. Amendment of PACR Rules 6(c), (d), (f), (g) and (h)—(Maintenance of Physical and Electronic Case Records; Segregation of Non-Public Case Information; Procedures for Inspection and Copying; Denial of Access and Grievance Process).

The Committee discussion then turned to issues of access to (inspection and copying of) case records, whether in paper or electronic form, under the NG-CMS. Existing PACR rules 6(c), (d), and (f)-(h), which prescribe procedures for maintenance, inspection and copying of both paper and electronic records, and grievance process for denial of access, were reviewed. Tari Scott mentioned that scanning of paper records, and their later transmission electronically is a practice commonly engaged in by some people in the course of their inspection of court records. No paper copy is provided by the clerk, presenting the issue of what constitutes a “copy”. Tanya Marshall indicated that given the variety of the format of case records in State Archives, different parameters

⁵ See 13 V.S.A. § 7554b.

have been established as to manner of download, or other mode of provision, of copies upon request. Tari Scott replied that this issue appears to be one for the NG-CMS technological team. For context, Tari indicated that the CAO constantly receives requests for records inspection and copying, some quite voluminous and time consuming, warranting clear standards. John Dooley observed that as more and more records are held in electronic form, capacity to provide access, and standards for that, should become less burdensome.

Upon review of these subsections of Rule 6, the Committee requested that a subcommittee consisting of Tari Scott, Tanya Marshall, and Reporter Morris meet and provide a redraft to include any necessary updates and revisions at the next meeting.

6. Amendment of PACR Rule 7 (Procedures for Sealing of Case Records; Requests for Access to Such; Denial of Access; Judicial Review and Hearing Process).⁶

At the June 29th meeting, a subcommittee (of Judges Morrissey and Morris) was comprised to review and present draft amendments to Rule 7 incorporating revisions of the draft that had been presented by Morris at that meeting. Morrissey and Morris lead a Committee discussion of the Rule 7 re-write, and its pertinent provisions. The Committee determined to restore, a general standard of “good cause and exceptional circumstances” to the rule.⁷ The “laundry lists” of specific criteria in the original Morris draft, which had included listing of types of case records that might be considered sensitive and subject to sealing; criteria for a judge’s constitutional and common law “balancing of interests” in disclosure, and factors that would be “least restrictive means” in sealing decisions were pared down. In lieu of the “laundry list” approach, the redraft included a general provision that in addressing issues of sealing or access, the judge must be guided by “applicable constitutional, common law, or statutory authority”. In addition, the following specific changes were made to the redraft of Rule 7:

--Motion to Seal and Its Contents (Proposed 7(b)(2)(E). In addition to the contents prescribed for a motion to seal, a requirement of a certificate of service upon all parties, other individuals or organizations with standing, and persons about whom information is present in the case record.

--Sealing; Standard of Proof (Proposed 7(b)(3). Moving party bears a burden of clear and convincing proof for sealing or redaction.

--“Least Restrictive Means” in Sealing Decision (Proposed 7(b)(4). Language summarizing the constitutional and common law standards is employed, rather than a list of criteria constituting least restrictive means.

⁶ Note: In the comprehensive redrafts of the PACR rules, Rule 7 is renumbered as Rule 9.

⁷ This language would now appear at subsection 7(b)(4) of the draft.

--No sealing by mere stipulation of parties (Proposed 7(c)). The court retains discretion to review circumstances of sealing, and reject such a proposal, notwithstanding a stipulation of the parties.

--Applicability of Rule 7 Procedures (Proposed 7(e)). The redraft continues the existing provision that the court need not hold a hearing on sealing or redaction if a statute governs the right of public access, establishing the record or content as confidential, and does not authorize judicial discretion in determining to open or to seal.

With these changes to be made by the Reporter and included in the final comprehensive draft, on Motion of Tari Scott seconded by Teri Corsones, the Committee unanimously approved of the redraft of PACR Rule 7.

7. Preliminary Review/Consideration of Comprehensive Body of Rules.

Justice Dooley lead an “overview” discussion of his work on a comprehensive set of procedural rules for NG-CMS, including sections representing the work product of the Committee to date. As the overview proceeded, Committee discussion was renewed as to certain rules provisions that had been previously discussed in the meeting, especially with respect to procedures for access, and the identity of officials who would be responsible for decision making as to access, and for ultimate recourse in event of an appeal from access denial.

Dooley outlined the status of proposed rules in their numeric order, beginning with scope and purpose and definitions. There was little discussion of these provisions, except the notation to carefully consider definitions that may be needed but not included, and the “symmetry” of the definitions with those in the related rules (For Dissemination of Electronic Court Records-“ECR” and for Electronic Filing VREF). A new section 3(c), defining the term “records custodian” for various types of court records, prompted brief discussion of how and whether each would relate to the later-stated rules, especially with respect to grievances and appeals. Justice Dooley observed that Court Administrator responsibilities as records custodian could be delegated, such as to the Chief of Trial Court Operations. The consensus was to provide clarity and consistency between references to “records custodian” and officials responsible for determining appeals from denial of access to records. Apart from the earlier discussion of whether probate records should be treated as civil or family for purposes of access only at court kiosks, there was little concern expressed as to redrafted sections for means of access to paper or electronic records (Proposed Rule 4). None with respect to Specific Rights of Access (Proposed Rule 5). No additional discussion as to the proposed Rule 6(b) exceptions, or the following subsections 6 (c-h), which were to be the subject of further subcommittee review.

As to Proposed Rule 7--Filing; Filer and Judiciary Responsibility, it was noted that the Committee had not conclusively decided on the allocation of filer vs. court staff responsibility for screening of electronic filing content for non-public information. An earlier competing draft provided by Chair Tomasi had placed primary responsibility for

screening upon the filer, with protective preventive measures and warnings to the filer prior to submissions, and only limited responsibility upon court staff. Justice Dooley suggested an alternative under which the Court Administrator would establish the procedures for staff review of filings to discharge the record and information custodian's responsibility to provide public and special access to records, and implement the exceptions provided by the rules and statutes. In previous meetings' discussions, the Committee noted that much of the content of the competing versions is identical, if not readily reconcilable. However, the issue of manner of allocation of screening responsibility remains to be resolved in committee process and consensus.

No comment or concerns were expressed as to the remaining proposed rules in the redraft.⁸

Given the course of the discussion, and the questions that had been presented, the Committee consensus was that a final comprehensive redraft of the proposed PACR amendments should be presented at the next meeting, including all provisions approved to date, as well as any existing provisions that had not been addressed, and proposed amendments that had not been subject to Committee consensus or agreement. This, to enable review and approval of a final comprehensive proposal of amendment that can be transmitted to the Court with a request for publication to enable receipt of public comment, to move promulgation forward.

8. Action Steps Going Forward:

--Rule 6(b) Review Subcommittee will meet to prepare a final draft of exceptions, and the content of exceptions to be accessed in an "Appendix" to the basic rule.

--A Rule 6(c)-(h) Review Subcommittee (Scott; Marshall; Morris) will meet and prepare proposed amendments to these subsections of Rule 6 (Maintenance of paper and electronic records; access for inspection and copying; grievances) for the next meeting.

--A Comprehensive Draft of proposed rules for promulgation, reflecting all Committee work to date, will be prepared and reviewed at the next Committee meeting.

--A final promulgation timetable, including provision for public hearing(s) as part of public notice and comment process, must be discussed and established, in coordination with the Configuration Architecture Task Force (NG-CMS Administrative and Tech team).

9. Agenda Items not reached at meeting on August 10th.

Proposed Amendment of Rules 4(c) and 10 of the Rules Governing

⁸ These are: Proposed Rules 8 (Administrative Records); 9 (Sealing, approved at present meeting); and 10 (Electronic Case Record Compilations), 11 (Electronic Case Record Reports), 12 (Electronic Data Dissemination Contracts), and 13 (Procedure for Rules 10-12), all previously approved by the Committee.

Qualification, List, Selection and Summoning of All Jurors concerning confidentiality of juror information.

Reporter Morris informed the Committee at the June 29th meeting of his efforts to convene a meeting with the Committee Chairs of Civil and Criminal Rules Committees and the Reporter for Civil Rules in an effort to resolve the apparent conflict between the juror rules and the provisions of V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2).⁹ In the interim, the three component parts of the existing juror questionnaire will be reviewed to provide accurate advisement to potential jurors as to public or non public status of information they may provide in response to each section. [Members Scott and Corsones, with Reporter Morris will work on the questionnaire issue]

“Gatekeeping” Review of E-Filings; Allocation of Responsibility. As noted, the Committee did not revisit its discussions of April 27, 2018 as to competing versions of allocation of responsibilities for “gatekeeping”/review and redaction of electronic filings reflected in the proposed Rule 7. (Remaining issue being scope of review of filings by court staff beyond “basics” to assure minimum requirements of filing, and whether any review would extend beyond pleadings themselves, to any attachments or exhibits, to assure non-public filing of required content.)¹⁰

10. Next full Committee Meeting date:

The next full Committee Meeting will be held on Friday October 5, 2018 at 1:30 p.m., Supreme Court Building, Montpelier. A “back-up”, second October meeting date was established for Friday, October 26th at 1:30 p.m., if necessary to complete work on a comprehensive rules draft.

11. Adjournment: The meeting was adjourned at approximately 12:28 p.m.

Respectfully submitted,

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

10/6/18

⁹ See Minutes of PACR Committee meeting, 6/29/18, p. 2.

¹⁰ See Minutes of PACR Committee meeting, 4/27/18, pp. 3-6.