

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting
February 21, 2020**

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 1:42 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; Teri Corsones; Michael Tarrant and Linda Reis (phone). Also present were liaison Justice Beth Robinson, Court Administrator Pat Gabel and Reporter Judge Walt Morris. Absent were members James Duff-Lyall; Tanya Marshall; and Alan Keays.

1. **Meeting Opening; Announcements:** It was noted that the meeting precedes the planned “roll-out” of the Judiciary’s electronic case management system on March 2, 2020, to be followed by electronic filing in April, in the Windham-Orange-Windsor (“WOW”) Units.¹

2. **Approval of Meeting Minutes:** On motion of Michael Tarrant, seconded by Teri Corsones, the minutes of the December 20, 2019 meeting were approved.

3. **Report on Status of Implementation of Electronic Case Management and Filing System in Windham/Orange/Windsor Units; Status of March 2 “Roll-Out”.**

Tari Scott provided a report as to the current status of preparations. Testing of both the case management and electronic filing systems, and staff training and orientation to the systems continues; staff training is essentially complete, apart from the periodic “problem solving” that comes up from time to time in practice. As an example, Ms. Scott indicated that just prior to the meeting, an issue had been presented by an Information Systems staffer as to the application of redaction requirements to users employing the “Guide and File” alternative for pleadings and their filing, which they are working on. The Odyssey case management system will be implemented effective March 2nd. The planned date for launching e-filing in the WOW units is April 15th. As to anticipated e-filers, a series of webinars in basics of electronic filing will begin for attorneys on March 10th. These will be provided live by staff of Tyler Technologies, and supplement earlier Bench-Bar information sessions. “Rack Cards” (public information pamphlets) will be developed to help self-representing parties understand and use both the Public Access and Electronic Filing rules. As at the December 20th meeting, Committee members expressed the view that provision of training, policy guidance for staff, and clear and adequate public information to facilitate e-filing access for attorneys and parties needs to be a high priority; training, information, and forms must be “user friendly”. In advance of the meeting, Committee members were provided with copies of a draft “Odyssey/Vermont eFiling User Guide” prepared by Andy Stone, as well as a Powerpoint presentation given at the VBA Young Lawyers’ Mid-Winter Thaw in January, given by Judge Hayes, Michael Kennedy and Andy Stone, describing the Odyssey Case Management system for members

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

of the bar. There was no specific discussion or any suggestions, with respect to the content of these. Justice Dooley, Chair of the Special Advisory Committee on Rules for Electronic Filing, indicated that that committee planned to meet in the near period (a month or so) following launch of Odyssey case management and eFiling in the WOW units, to troubleshoot and propose solutions to any issues that may have arisen in the launch requiring post-promulgation amendment of the 2020 VREF rules. The meeting date has not yet been set.

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

The Committee returned to its December meeting discussions of the “Checkbox” certification component of eFiling.² Consistent with the prior discussions, and Andy Stone’s indication that Odyssey does have the capability of incorporating a Checkbox certification in the nature of a “stop sign”, Andy had drafted suggested a Checkbox format and text, in the form of a “Submission Agreement” copies of which were shared by Judge Morris with the Committee. The format would require the user to review certification text, then “check” a box indicating agreement and compliance.³ Apart from the text, the format provides for space for inclusion of a statement of measures taken to comply (required by Rule 7) in a section designated “Comments to Court”. A link for user access to the full text of the PACR rules for reference would be included under a “Need Help?” legend. While generally recognizing that the precise content and process for certification was for administrative action apart from the rules, there was some discussion of content and process for certification. In response to a question from Chair Tomasi, Teri Corsones indicated that in her assessment, the certification language presently employed in the eCabinet courts worked well and should be considered. Ms. Corsones shared this text, as well as an alternative in the course of the meeting via an email.⁴ Ultimately, apart from discussion, there were no specific recommendations as to certification text or format within Odyssey, but the expectation that there would be a “user friendly” process for compliance, which includes ready reference by link to the text PACR Rule 6(b) and the rest of the PACR rules. As suggested by Judge Tomasi and Justice

² 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. Provision for such a “Stop Sign” Checkbox was key to Committee approval of the final version of Rule 7.

³ The certification would be: “I certify that I have reviewed the contents of this filing, and that the filing specifies any nonpublic record or contents, and protects those records from disclosure to the public consistent with the Rules for Public Access to Court Records. If any record or content was separated or redacted and filed as confidential, the actions taken to comply with the rules are stated in the “Comments to Court” field.”

⁴ From eCabinet: “1) Is the document you are attaching below publicly accessible under Rule 6 of the Rules for Public Access to Court Records? Yes. No. 2) Does the document contain any redacted identifiers? Yes. No.” *If Yes, contact the Court for further instructions. If No, continue with filing. Don’t know? Click the Help link in upper right corner or call the court where you are filing. Note: It is the responsibility of the filer of a document that is otherwise publicly accessible under Rule 6 to omit or redact personal identifiers from all filed documents unless otherwise provided in the applicable rules of procedure or ordered by the court.* Teri’s alternative suggestion: “I certify that this filing does not include any non-public information under Public Access to Court Records Rule 7. If the filing included any non-public information, I have redacted the non-public information and filed it as confidential and have noted that in the “Comments to Court” field. A link to PACR Rule 7 is [HERE](#).”

Dooley, certification process and content will be subject to review at the post-promulgation meetings of the VREF Advisory Committee, and further consideration at upcoming PACR Committee meetings.

Forms. The Committee again discussed the status of forms in the portal and e-filing systems, and the issue of “authority lines” in the generation and revision of court forms. There are two issues: (1) the “governance” issue of which entity of the judiciary should have authority and responsibility for generation and maintenance of forms; and (2) specific case and litigant-type forms issues presented in the launch of electronic filing.

As to the first, an issue of principal concern of the Civil Rules committee, Pat Gabel recalled her remarks at the December Committee meeting, and indicated that there was an established “Court Documents Working Group Protocol” which serves to govern lines of authority and responsibility for forms. The purpose of the protocol is to provide for consultation, while treating forms as an administrative, rather than “rules” responsibility. Pat agreed to share this protocol with the Committee. The Committee recommended that the Reporter reach out to the Civil Rules Chair and Reporter to explore a “summit meeting” approach to clarifying the nature of the perceived issues and whether they can/should be addressed in the context of the protocol.

As to the second, the Committee briefly discussed issues as to the needs of particular constituencies, and forms revisions, in the context of electronic filing. These included prisoners and their filings, as well as self-representing individuals generally. Tari Scott indicated that rather than forms, a number of “templates” provided by the Prisoners’ Rights Office, have been historically used. In Ms. Scott’s assessment, there is a need to simplify the “standard” documents employed by prisoners in their filings, whether characterized as a form or a template (document where one checks any or all of alternative claims and or remedies requested, with little case-specific content added). Court Operations Division is working on this. Mike Tarrant indicated that the library at Vermont Law School has in his experience continued to serve as a resource to assist with prisoner access to legal materials. Chair Tomasi remarked that it appeared to be the sense of the Committee that continued attention must be paid to helping public constituencies with their understandings, and access as electronic filing rolls out.

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

Abrogation of portions 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, which at the time, had proposed amendments to the rule published for comment for consideration by the Court. Reporter Morris indicated that the Probate Advisory Committee now recommends abrogation of V.R.P.P. 77(e), it being that committee’s conclusion that its substance is adequately addressed in the language that was included in the Probate exceptions to public access in PACR Rule 6(b).⁵ A copy of the proposed amendment abrogating 77(e) (which adopts the provisions of the Public Access Rules by reference) was provided to the

⁵ See, PACR Rules, 2019 Supplement, pp. 153-4.

PACR Committee in advance of the meeting. After brief discussion, the unanimous decision of the Committee was to endorse the proposed redaction.⁶

6. 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 the final redraft of the proposed amendment, incorporating edits agreed upon by the Committee at the October 4th and December 19th meetings. 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)⁷ and *In re: Affidavit of Probable Cause*, 2019 VT 43. After brief discussion, the text of the final revised draft was approved by the Committee and is to be submitted to the Court for publication and comment.

7. 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.

At its October 4th meeting, the Committee was provided with an overview of the issues associated with the proposed amendment to the various existing rules governing confidentiality of information provided by prospective jurors. At the December 21st, meeting, the Committee engaged in extensive discussion the draft of a subcommittee's proposed amendments of the referenced rules governing access to information contained in prospective juror's responses to questionnaires associated with jury service.⁸ The focus was upon the existing rules, the conflict between them, and a draft approach to reconciling all of the rules. Key to such reconciliation would be the adoption of a new PACR 6(b) exception to public access for information contained in juror questionnaires. The Committee turned to detailed discussion of the subcommittee proposal 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 proposed PACR exception would not apply to parties and their counsel, who have presumptive access to the content of questionnaire responses. The proposal explicitly references this right of access. At the conclusion of its December 21st discussions, the Committee approved of the proposed group of amendments, including an added PACR Rule 6(b)(19) subject to certain revisions.⁹ These revisions were incorporated into a final draft presented and considered at the February 21st meeting.

In discussion of the latest redraft, Justice Dooley indicated that in view of the significant changes in public access contemplated, the Committee should recommend that a public hearing be held as part of the comment process for any proposed amendments. Judge Tomasi remarked that consideration of amendments should start from the premise that Judicial Branch records are

⁶ The Probate Rules Chair (Judge Kilgore) and Reporter (Wroth) were advised of the PACR Committee's recommendation on February 23, 2020. The proposed abrogation amendment has been published for comment, with comment period closing on May 11, 2020.

⁷ "Until *all charges* on a docket are (expunged, or sealed as the case may be) the case file shall remain publicly accessible." (emphasis, and parenthetical matter added). H. 460(Act No. 32; 2019 Adj.Sess.)

⁸ The subcommittee on access to juror questionnaire responses: Corsones; Scott; Morris.

⁹ See Minutes, 12/20/2019, pp. 4-6.

accessible. As to “practical” process and electronic access issues, Jeff Loewer indicated that at this juncture, there has not been consideration of how the existing jury management system, and data access will function in the electronic case management environment.¹⁰

Reporter Morris indicated that the Advisory Committee on Criminal Rules had just considered the proposed amendments at its meeting on February 14, 2020. One issue had been identified as to proposed Juror Qualification Rule 10(b). This rule addresses access by parties and provides that parties and attorneys do *not* have access to “supplemental information supplied to determine whether the individual meets mental and physical demands of jury service.” This information typically consists of privileged information from health care providers submitted with requests for excuse from jury service to document the juror’s request. While no problem is presented if a juror is in fact excused in consequence of the confidential information, consistent with fair trial rights, parties should have access to the information if a juror has *not* been excused, to permit further party inquiry as to whether a juror should be excused for cause, or stricken on a peremptory challenge. Committee discussion turned to the process of requests for excuse from jury service, which court officials review and decide requests, and what documentation is typically required. Gay Paquette indicated that in her experience, clerks require that “everything”, that is, the request itself, and professional documentation if necessary, be submitted in writing for review. Further, that unless the circumstance warranting excuse is obvious, clerks consult judges for final determination of excuse. Reporter Morris indicated that the Criminal Rules recommends that this exception from access of Juror Rule 10(b) (and related provisions in V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2)) be modified to permit access to this particular supplemental information in the event that the juror’s request for access is *denied* and they remain in the venire subject to voir dire and challenge.

Following discussion of this issue, the Committee determined that a redraft, containing text addressing the issue, is to be presented by the subcommittee for consideration at the next meeting. If possible, the subcommittee is requested to report on the views of the Civil and Criminal Rules Committees as to the latest redraft of amendments as well.¹¹

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 Rule 4(b)(2) (Remote/Portal Access to Civil Case Records) (How to Handle Access to Limit Access to Protected Information that Appears Routinely in Certain Filings, Such as Dates of Birth in Traffic Complaints in Judicial Bureau Cases—Should remote access be to certain basic case information, with full viewing of actual case documents requiring either specific access under PACR Rule 5 or trip to the courthouse?) (Inquiry of Andy Stone, via Judge Hayes)

The issue of remote access to civil case records has been brought forward in the initial roll-out of the electronic case management system in the WOW units. Since this is paired with Judicial

¹⁰ Electronic records of juror questionnaire information are not publicly accessible under the *existing* V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2)(as amended, 2001).

¹¹ One minor, typographic issue was identified in the existing references to juror information in the Rule 6(b) Appendix, 2019 Cumulative Supp. at 156: reference in the Rules Governing Qualification of Jurors in the Citation box should be to Rule 10, rather than Rule 11, to correct for interim renumbering.

Bureau roll-out, the Project Team has identified concerns with providing remote access to those records as well, even though remote access is permissible (that is, not prohibited) by 12 V.S.A. § 5.¹² The Project Team has taken the position that, at least in the initial roll-out in the WOW units, remote access would not be provided even to civil case records. Of course, access to all records, unless excepted by PACR Rule 6(b) will be available at kiosks/terminals at court locations. In Committee discussion, Justice Dooley inquired as to whether the issue was equivalent to that presented with the request of Courthouse News Services for immediate access to court filings, even prior to service. Justice Robinson indicated that she did not see the issues as necessarily coextensive, since the question was not one of access *at all*, but the particular mode of access. Justice Dooley further indicated that greater attention should be paid to the particular impact of public access and electronic filing rules upon actual practice in the Judicial Bureau, given the unique aspects of that docket. Judge Tomasi expressed his view that in the articulation of the PACR rules, the rules gave authority to the Court Administrator to determine whether and in what circumstances remote access might be accorded to court records.¹³ Pat Gabel indicated that the roll-out has been considered to be a pilot project, subject to administrative revisions based upon experience. There have been concerns that in this initial phase, data mining (searches for individual private data) will occur, contrary to rule and policy. The principle is for protection of private (nonpublic) information, while making it clear that a requestor can secure full access to public case records at courthouse premises. Looking forward, Jeff Loewer indicated that present systems are capable of managing and presenting “structured” data (such as that which has been available in VT Courts OnLine), but that access to “unstructured” data is not yet reasonably available on line. It is available at courthouse locations. Justice Robinson expressed the view that the goal should be provision of complete access to publicly accessible court records in civil cases on line. Pat Gabel indicated that in her assessment, the present technology is inadequate to reasonably protect against data mining; of course, the ultimate objective is provision of remote access; and that as the experience-base develops, there will likely be proposals to the Supreme Court as to the policy issues presented in providing remote access, and the directions to be established by the Court. There were no Committee recommendations following from this discussion.

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).

On February 21st, the Committee returned to discussion of 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 also be made *in camera* pursuant to a Court order that the parties *are* aware of (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.¹⁴ At the Committee’s December 20th meeting, Andy Stone indicated that in Odyssey, the

¹² 12 V.S.A. § 5(b) provides that the statute is not to be construed to prohibit electronic access to court schedules, or *opinions* of the Criminal Division of the Superior Court.

¹³ PACR Rule 4 addresses the issue of modes of access to court records; per Rule 4(a)(2), remote access may be provided by the Court Administrator to publicly accessible case records in cases from the civil and environmental divisions, but remote access is not required.

¹⁴ Such as under Civil Rules 4.1 (attachment), 4.2 (trustee process), 64 (replevin) and 65 (injunctions). The Committee has previously noted that search warrants and inquests are with rare exception *ex parte* proceedings as well, and they present the same concerns as to untimely/unauthorized disclosure.

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.

In the resumed Committee discussions of the issue, Jeff Loewer stated that in his view, given the capabilities of Odyssey to address the concerns expressed, the resolution lies in business processes, and not in any added rules provision. The Committee discussed various potential PACR rules amendments to address the concerns. These included amendments of: (1) Rule 6(b) to create an exception, or “carve out” from public access for identified categories of *ex parte* and *in camera* filings; (2) Rule 5 to add provisions clarifying who would have access to these categories of filings, and when; or (3) Rule 7, to address when, on review of filings by court staff, such filings would be treated as “accepted” and designated as “not public” or “not to be served”. The remarks of Committee members generally acknowledged that some clarification of the status of these types of filings might be helpful, even accepting that Odyssey has the capability of safeguarding against unauthorized or untimely disclosures.

Ultimately, on the particular issue of preservation of authorized *ex parte* and *in camera* filings from improper disclosure to other parties or the public at the juncture of filing and pending court determination of the request/issue (in contrast to *sealing* under PACR Rule 9), the Committee determined to take two approaches: (1) the Reporter will provide a “concept” discussion draft of a new Rule 6(b) exception for *ex parte* and *in camera* filings, clarifying when these would move from nonpublic to public status, and what would trigger that change in status;¹⁵ and (2) to monitor Odyssey treatment of this issue under the “business process”/ administrative management approach suggested by Andy Stone and Jeff Loewer (i.e., can Odyssey’s features as implemented adequately address the perceived problem without a rule change?)

The Committee also revisited a final issue related to Rule 7 presented in the October 2019 Civil Rules memo. This is as to Rule 7 § 4(a)(i)(*Actions When a Filing is Noncompliant with Rules*), which authorizes a clerk to change the public access status of a document from public to nonpublic, or nonpublic to public status (or redact the filing, to comply with the PACR rules). The concern expressed in the memo 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. As Judge Tomasi pointed out, staff treatment of noncompliant filings of nonpublic information as public, or erroneous filing of a document as nonpublic, and curative measures, are also addressed in Rule 7(a)(3).¹⁶

¹⁵ Such as judicial determination of the motion/issue presented. Or, timeline controlling disclosure established by statute or rule. One example of a model for discussion is PACR 6(b)(2)’s treatment of records of issuance of search warrants, which are not public, “...until the date of return on the warrant, unless sealed by order of court; and records of denial of a search warrant, unless opened by order of the court.”

¹⁶ “If staff determine that a filing does not fully comply with these rules, including with respect to one or more personal identifiers, staff must take an action specified in paragraph (4). If a court staff person or judicial officer discovers that a case record that is publicly accessible may be in that status in violation of these rules, the staff or officer must act to temporarily restrict public access to the record and notify the Court Administrator (who then directs a curative action)” (parenthetical matter added).

The Committee consensus at its December 20th meeting 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. In further discussion on February 21, the Committee conclusion was that there should be no staff discretion to move documents filed with indication that they are to be treated as *ex parte* or *in camera*, without judicial direction or order. A discussion draft of an amendment to Rule 7(a)(4)(A)(i) to provide such a limitation is to be prepared by the Reporter for consideration at next meeting.¹⁷

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.¹⁸ The comments and suggestions in Judge Toor’s December memo were discussed at length at the Committee’s December 20th meeting.¹⁹ A request was made of Judge Toor to provide the Committee with a suggested redraft of Rule 9, incorporating her concerns and requests. On January 29th, Judge Toor provided a marked up, or “redlined” redraft of Rule 9, for the Committee’s consideration. The redraft was circulated to Committee members in advance of the meeting. Due to the running of time, the Committee was unable to discuss Judge Toor’s proposed redraft at all. Judge Toor will be invited to attend the next Committee meeting, as that was felt to be a more effective approach for focus, consideration, and consensus, as to any proposed amendments of Rule 9.

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

9. Adjournment: The meeting was adjourned at approximately 4:18 p.m.

Respectfully submitted,

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

¹⁷ The amended discussion provision would read: “(i) Change the public-access status or redact the filing to comply with these rules, unless the filing is under seal, ex parte, or for in camera review.”

¹⁸ 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.

¹⁹ See Minutes, 12/20/19, at 7-9.