

[As Approved at Committee Meeting on April 27, 2018]

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting
February 28, 2018**

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 1:07 p.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., Gaye Paquette, and Tari Scott; Supreme Court liaison Justice Marilyn Skoglund, and Committee Reporter Judge Walt Morris. Committee members Judge Mary Morrissey and Katherine Pohl, Esq. were absent.

1. Chair Tomasi announced committee transitions and appointments, and welcomed Teri Corsones, James Lyall and Justice Skoglund to their first committee meeting.

2. On motion of Gaye Paquette, seconded by Tari Scott, the minutes of the Committee meeting held on December 16, 2015 were unanimously approved.

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

4. 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 presented 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 (London; Frank; Paquette). These rules fall within the purview and authority of the Court Administrator. The redraft divided into two categories juror information that is subject to disclosure: that which is to be disclosed to the public upon request, and that which is disclosable only to the parties in a case. Under the proposal, the names of potential jurors and their towns of residence shall be disclosed to the public upon request. However, further information related to potential jurors is exempt from public disclosure, except upon a finding of good cause for release by a judge. In assessing good cause, the judge must weigh the public interest in the release of the information sought against any harm as a result of release. The parties to a case and their attorneys would have access to all information in juror questionnaires other than detailed information regarding a potential juror's disqualification from jury service, such as a response to an initial qualification questionnaire disclosing criminal conviction resulting in categorical

disqualification under state law. The parties and their attorneys are required to keep juror questionnaire information to which they are privy in confidence.

Discussion ensued about current practices among the various Clerks' offices with respect to disclosure of juror qualification and questionnaire information. Some Committee members were of the view that current practice is inconsistent from unit to unit. In addition, it was noted that the subcommittee work may be affected by the decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. Fujita*, ___A.3d___, 470 Mass. 484 (2015), as previously brought to the Committee's attention by Ms. London.

After discussion of the proposal and current practice, it became apparent that the proposed amendment actually invokes provisions of V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2), which both provide that

A record of the information provided in response to a written questionnaire distributed (by the clerk in summoning and qualification of trial jurors--including supplemental questionnaires directed by the judge) in accordance with this rule shall be open to the parties to the proceeding. A physical record of the information shall be open to public inspection after the name and address of the person responding have been redacted. Any electronic record of the information shall not be open to public inspection. (parenthetical matter added).

Existing Juror Rule 4(c) provides that

(c) All information other than an individual's address and date of birth contained in the "Questionnaire as to Qualification for Jury Service" received pursuant to this rule shall be public, including the name of the individual and town of residence. Public access to the supplemental information supplied to determine whether the individual meets mental and physical demands shall be prohibited. All information contained in a jury questionnaire shall be available to the parties.

The *Fujita* opinion holds that as a matter of Constitutional and Massachusetts common law, the names of jurors are public information which may not be withheld or sealed absent case-specific finding of necessity, employing the balancing test of *Press Enterprise v. Superior Court* ("Press Enterprise II"), 478 U.S. 1 (1986).

The Committee also discussed the content and use of the current general jury questionnaire employed by the clerks in summoning jurors, and in provision of basic biographical information for litigants' use in voir dire.¹ The questionnaire is divided into three parts, ranging from basic identity and contact information (Part 1) to lawful qualification information (citizen? English language fluency? imprisonment for felony? physical/mental disability? town of Residence?-Part 2) , to more detailed personal information not open to the public (former names, children and names, schools attended and level of education, occupation(s) and responsibilities, prior litigant status, spouse name and occupation, names and occupations of other household residents—Part 3) and identifies for each category

¹ Jury Administration Form 40 (6/17 revision).

of information provided that which will be accessible to attorneys and litigants; that which will be confidential and not publicly accessible even though reviewed by attorneys and litigants. Amendment of procedural rules pertinent to confidentiality of juror information would require review and amendment of the Juror Qualification and Selection Rules as well.

The proposed amendment of Juror Rule 10 before the Committee (as well as the existing Juror Rule 4(c)) would appear to be inconsistent with the existing provisions of the referenced criminal and civil rules. In consequence, the Committee requested the Reporter to examine proposals of amendment reconciling provisions of the three rules, and to present a draft of such proposals for further consideration. The Committee also concluded that the process of any amendment of the existing rules related to confidentiality of juror information would necessarily include a public hearing to receive comment.

5. Demonstration of Next-Generation Electronic Case Management System (NGECMS)

Chasity Stoots-Fonberg of the Court Administrator's Office provided a video demonstration to assist Committee members in understanding the current state of development and implementation of the NGECMS. The presentation showed what an electronic case file would look like; the levels of case information that would be maintained and available to the user; the process and substance of docket entries; and documents and functions of the system that could be made available to authorized personnel, as well as to attorneys and litigants who would be authorized to have access to system information, associated with electronic filing responsibilities. An attorney portal would be made available for access that would provide notifications as to new filings in a case, court scheduling orders and entry orders. Ms. Stoots-Fonberg made clear that while the exact form of the electronic "desktop" was still in development, especial care had been taken in working with the project vendor to assure that software compatible with Court terms, functions and forms would be provided. This is addressed through use of voluminous (thousands of) "code tables". The implementation team has not yet worked on coding of the electronic filing and service functions of the new system. Periodic updates will be provided to the Committee, through members Loewer and Scott.

6. Committee Approaches to Rule Making Associated with Electronic Case Management.

Committee Chair Tomasi lead a wide-ranging Committee discussion of rule making needs associated with the new Case Management System, focusing upon a "Key Decision Points" document that had been circulated to members in advance of the meeting. The issues to be addressed included, but were not limited to:

--The nature and scope of personal identifying information that would need to be screened and kept from publicly accessible presence in the CMS, and what means would exist to "gate-keep" or sort, such information into non-public locations;

--How to account for/change the status of documents containing personal identifying information that are subsequently admitted into evidence, presenting the further issue of documents and content that move from nonpublic to public and back to nonpublic status in the course of a proceeding;

--Allocation of responsibility for “Gatekeeping”/sorting/protection of confidential status of information contained in electronically filed documents: clerks, or litigants?

--Measures to reduce gatekeeping/file audit labor for electronic records, including whether “**redaction software**” exists which could address this need at reasonable cost; and

--Issues of access to electronic case records, and applicability of rules of access to all dockets, or of limited applicability in certain (ex. family division) dockets.

Extensive discussion ensued as to all of these issues. Particular focus was placed upon the necessity for review of the list of Personal Identifiers that would be required to be maintained in nonpublic status for purposes of electronic filing and access; as well as the necessity for review of the list of 35 exemptions from public access to court records set forth in PACR Rule 6(b).

As to personal identifiers (“PIDs” or “PINs”), Jeff Loewer noted that the legislature is considering H. 764, a “Data Brokers” regulation bill, in which there is a list of PIDs that the Committee should have reference to in its work, even if that list is not one that may be pertinent to the electronic case management system, its purposes and capacities. Committee consensus was to the effect that key to effective management and protection against improper filing of, or access to, such confidential information would be limitation of the number of personal identifiers to those that are reasonably necessary, and “quantitative” (ex. numeric), and thus more readily screened and sorted to nonpublic status. Tari Scott noted that prior to 2002 changes in law and policy, individual social security numbers were prevalent in many document filings. John Dooley offered his assessment that the major continuing risk factors as to disclosure of personal identifying information were in filings in the Criminal Division, with similar risks of disclosure of financial account information in the Family Division.

Apart from personal identifiers, the Committee noted the large body of other case information that is deemed by law to be confidential or privileged from public disclosure (as reflected in the many exemptions from public disclosure in PACR Rule 6(b)) that is not subject to ready identification or screening upon filing, that may either be categorically non-public (juvenile proceedings records) or subject to filing with redactions made by the filer, or after judicial redaction after review *in camera*. Screening and sorting “Rule 6(b)” material presents particular challenges in electronic filing

Committee discussion also addressed at length the issues associated with the fundamental “gatekeeping” function in electronic filing and record keeping in accurately sorting documents and information into non-public vs. public status; the responsibility of

filers, vs. clerk staff, to properly identify non-public information upon filing; and processes for correction of errors in the sorting of non-public vs. public information. The first topic of discussion was as to the availability and cost of redaction software systems to automatically screen filings for non-public vs. public content, and prevent public filing of non-public confidential information in error. Jeff Loewer and John Dooley identified some of the vendors providing this service, indicating that redaction software was still not of widespread use, and that the cost of continued use of redaction software could be prohibitive and that redaction software should be considered at best to be a supplement to filer and court staff review. Committee discussion yielded suggestions for alternative and/or combined means of managing gatekeeping. It was generally agreed that the gatekeeping function would be a combined responsibility of the filers and court staff, with primary responsibility being placed with the filers. The filing process would entail some system of registration to file electronically, a sorting of non-public information apart from public information as part of the filing process, and a certification by the filer that they had reviewed the document/information to be filed, and represent to the court that s/he has identified, sorted, and protected the non-public information from disclosure in making the electronic filing. There would likely be a “clerks’ queue” for entry of electronic filings into a case record, providing an additional opportunity for eyes on review of filing content in an effort to identify non-public information filed as public in error, and process rules would provide authorization for court staff correction of any errors.² Tari Scott noted that the use of an array of forms designed to guide the electronic filer to provision of only necessary and appropriate case information, with clear and user friendly means to sort out non-public information in filing, would be of major assistance in reducing the likelihood that non-public information would be filed as public in error. Rules could also provide that if a document or information could be filed in a redacted form, that it must be so provided (as is the case under present V.R.E.F. 3(c)(1)). The “shared responsibility” in screening electronic filings, and alternative means to limit unnecessary and unauthorized disclosure of non-public information, are essential given limited staff resources and the huge volume of electronically filed content anticipated.

Gaye Paquette asked how *in camera* review of documents by judges in conjunction with discovery disputes and admission of evidence would be handled in the new electronic filing system. It was suggested that documents that would be destined for *in camera* review would necessarily be initially filed as non-public, subject to such later review. Alternatively, a filer could file the document as non-public, along with a motion for permission to file as non-public/confidential/under seal, pending judicial review and thus notifying other parties of the nature of the filing and perceived need for *in camera* review. Any documents identified as needing potential *in camera* review could be placed in a “judges queue” for response and determination. The document filed as non-public would be retained in the court record; a redacted copy, or entry as to non-public status, would be filed by the judicial officer as with any other judicial decision.

² Cf. 9 V.S.A. § 2440(f) (authority of court clerk to remove upon written request various personal identifiers from copy of official record placed on internet website available to general public).

The Committee also discussed generally issues of access to electronic case records, by whom, and by what means? John Dooley noted that under existing state law, electronic criminal and family case information may not be made publicly available over the internet (see 12 V.S.A. § 5) but that this information would be publicly accessible via judicial intranet at courthouse kiosks. Court staff could provide assistance as necessary for self representing litigants and members of the public seeking case information. The new system does contemplate access to case information by the attorneys and self representing litigants who engage the system as authorized filers. Rules would necessarily address a process of registration/authorization, responsibilities and sanctions associated with access.

There was brief and very general discussion of rules format, and whether there should be a single body of rules governing electronic filing and access, or whether the rules might be distributed as pertinent through the procedural rules of each division of the superior court. A separate question goes to whether the Rules for Electronic Filing should be kept separate from the Rules for Public Access to Court Records, or combined.

The lengthy Committee discussion readily consumed the time allotted for the meeting.

Ultimately the Committee decided upon the following,

Action Steps Going Forward:

Two subcommittees were established, to convene as soon as possible, and in any event before the next scheduled full Committee Meeting:

--Rule 6 Review Subcommittee (to examine the current list of 35 exemptions from public access set forth in PACR Rule 6(b) and to provide recommendations for amendment/deletion/retention (Members: Frank; Scott; Skoglund).³

--“Gatekeeping”/Management of NonPublic/Public Status of Electronically-Filed Content; Feasibility of Redaction Software and Alternative measures; initial drafts of proposed procedural rules amendments (Members: Corsones; Dooley; Loewer; Tomasi).⁴

John Dooley will prepare a memorandum as to pertinent appellate treatment of civil liability for court staff in conjunction with “gatekeeping” responsibility and disclosures of electronically-filed nonpublic information, in response to a question raised by Justice Skoglund.

Next full Committee Meeting date:

³ This subcommittee met on March 22, 2018.

⁴ This subcommittee met on April 13, 2018.

The next full Committee Meeting will be held on Friday April 27, 2018 at 9:00 a.m., Supreme Court Building, Montpelier.

Adjournment: The meeting was adjourned at approximately 4:00 p.m.

Respectfully submitted,

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