VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF PUBLIC ACCESS TO COURT RECORDS

MINUTES OF MEETING, JULY 31st, 2020

[Approved on 10-6-20]

The meeting of the Public Access to Court Records (PACR) Advisory Committee commenced at approximately 9:32 a.m. via video conference. Present were Committee Chair Judge Tim Tomasi, and members Justice John Dooley (Ret.); Tari Scott; Jeffery Loewer; Judge Mary Morrissey; Teri Corsones; Tanya Marshall; Michael Tarrant; and new member Tracy Shriver. Also present were Court liaison Justice Beth Robinson; Court Administrator Pat Gabel, outgoing Reporter Judge Walter Morris, and incoming Reporter Judge Dennis Pearson. Absent were members Gaye Paquette; James Duff-Lyall; and Alan Keays.[1] Invitee and "regular" participant Judge Kate Hayes was also unable to attend.

Numbered paragraphs below correspond to the July 31st Agenda.

1. **Meeting Opening; Announcements:** Chair Tomasi opened the meeting by announcing that Tracy Shriver (Windham States Attorney) had been appointed to replace Linda Reis as a Committee member, and that Judge Dennis Pearson had been appointed to replace Judge Walt Morris as Committee reporter. He welcomed Ms. Shriver and Judge Pearson to service on the Committee.[2]

2. Approval of Meeting Minutes: On motion of Tari Scott, seconded by Mary Morrissey, the minutes of the May 8, 2020 meeting were approved, with minor non-substantive revisions to be made by Judge Morris.

3. Status Report on Implementation of 2020 Vermont Rules for Electronic Filing Promulgation: Tari Scott provided a brief report on the "roll out" of electronic filing in the Windham, Orange and Windsor Units, including an issue that had arisen as to registration of "service contacts" on the part of attorneys with large numbers of pending criminal cases, and efforts to provide a transition solution. In the course of the discussion, Justice Dooley noted that in the "roll out", it would be very important to have useful information about the extent of compliance, or noncompliance by filers with both the PACR and electronic filing rules, to allow the Committee to consider whether further rule revisions were needed. Ms. Scott indicated that the next phase for expansion of electronic case management and filing would be in the "BRACE" Units in September (case management) and October (e-filing). Training, and trouble-shooting, taking into account the initial WOW experience, were proceeding in advance of the BRACE roll-out.

4. Emergency Amendments of 2020 VREF 3 and 4(b), effective July 15, 2020: Outgoing Reporter Morris briefly described these emergency amendments promulgated by the Court on July 15th, with a comment period closing on 9/15/20. The amendments go to: clarification of required e-filing by non-attorney governmental staff required or authorized to file documents with the Court;

[1] Alan Keays made efforts to connect and participate in the meeting via telephone, but he was unable to do so, as reported during the meeting by Teri Corsones. Justice Robinson noted that she would try to follow up with Mr. Keays to see if he was still able and willing to serve on the Committee, and Judge Tomasi indicated he would do the same with Mr. Duff-Lyall (the ACLU representative).

[2] Judge Pearson noted that he had previously served as member and Committee Chair, following its original composition in the early 2000s.

required election of either independent or "firm" user in registration to e-file; authorization for non-electronic filing of "courthouse stipulations"; and required judiciary "portal" registration and authorization for a party to *view* case documents, in addition to Odyssey e-filing registration. Ms. Scott noted that judges and staff are still working out how to deal with issues such as required redactions in e-filed documents, stipulations or revisions to previously e-filed documents that occur during hearings, and e-filers with multiple routine filings. Ms. Scott further noted that most of these issues could likely be addressed administratively within Odyssey, rather than requiring further rule changes.

OLD BUSINESS/PRIORITY ITEMS

5. <u>PACR Rule 9 Sealing Process; PACR Rule 6(b) Exceptions</u> to Avert Need for Unnecessary Recourse to Formal Rule 9 Sealing Process. Recap of May 8, 2020 Meeting with Judge Helen Toor and further Committee discussion.[3] Following the May 8th meeting with Judge Toor, the Committee agreed to consider a number of revisions to the text of Rule 9 as promulgated, to address issues such as stipulations for sealing; deleting the categorical requirement of scheduling a hearing prior to sealing (yet preserving the right to a hearing upon motion of a party in interest); and retaining the discretion of the court to direct that a hearing be held, even in event of a stipulation to seal. These were included in a draft prepared by Reporter Morris and Chair Tomasi, circulated to members in advance of the meeting on July 31st, with the principal revisions set forth in a proposed subsection 9(b).

At this meeting on July 31 the Committee began discussion of the overall redraft of Rule 9 with consideration of judges' current practices in treating motions to seal, whether temporary orders are given or not pending hearing, and whether stipulations to seal are ever accepted and ordered without the actual scheduling or conduct of a hearing. Justice Dooley then suggested that instead of first considering the proposed amendment of the Rule 9 sealing procedures and the requirement of a hearing prior to any sealing, the Committee might review the proposed amendments to Rule 6(b) as provided in the Reporter's most recent draft. These changes would except from public access the type of records that were primarily the subject of Judge Toor and Civil Rules' concern about "unnecessary motion practice and hearings," either altogether, or with durational "triggers" that would serve to move the protected information from non-public to public status. His point being that if the litigation information sought to be protected from public disclosure was categorically excepted from public access under Rule 6(b), there would not be any need in most such cases to have recourse to the Rule 9 sealing procedures.

The Reporter's Rule 6(b) draft, provided to the Committee in advance of the meeting, had four specific exceptions addressed to this issue, each dealing with a category of case record that would warrant non-public status, or would not be subject to public access under certain conditions, or for a specified "case duration". These were:

6(b)(16), an amendment to the existing exception from public access to discovery material, to include "the content of documents filed by parties with an agreed motion to seal or for protective orders, until issuance of and in accordance with the court's decision on the motion."

6(b)(20), an exception for ex parte and in camera filings

6(b)(21), records containing trade secret information which is not subject to public access pursuant to 9 V.S.A. § 4605

[3] The primary revision suggested, at least for civil filings, in order to protect the confidentiality of proprietary business information, trade secrets, school and health records, and discovery matters disclosure of which is routinely subject to protective order stipulations of parties, would be to *remove the categorical requirement of a scheduled hearing prior to court approval of all such sealings.* At the May 8th meeting, the Committee requested draft Rule 6(b) exceptions from public access that might avert the need for invoking the Rule 9 sealing process in every case.

6(b)(22), Records of Confidential Business Information filed by parties with agreed motion to seal or for protective orders, until issuance of and in accordance with the court's decision on the motion.

There was little discussion about amending 6(b)(16) to encompass agreed motions to seal or for stipulated protective orders, which would be durationally limited.[4] The Committee appeared to be in general agreement on this proposed amendment, which is to add the last clause as previously suggested by Chair Tomasi.

As to proposed 6(b)(20), the Committee agreed that an exception should be provided for ex parte and in camera filings "until issuance of and in accordance with the court's decision" (either on the relief requested or the non-public status of the document). The draft text was approved, subject to deletion of the reference to "in limine determination of admissibility in evidence by the court", the Committee being of the view that in limine determinations typically go to matters that are related to trial strategy, and usually address records and information that are clearly, and already publicly accessible. In the course of the discussion of the durational limits of the proposed Rule 6(b)(20) and (22) exceptions[5], Chair Tomasi again suggested, and it was agreed, that a similar provision be added at the end of the draft of Rule 9(a)(1): "Until the court's ruling, the content of the document shall remain in non-public status."

There was then extensive discussion of proposed subsections 6(b)(21) and (22). It was readily agreed that the statutory provision addressed to disclosure of trade secrets in proceedings under 9 V.S.A. § 4605 should be incorporated, either as an express exception, or combined with the proposed 6(b)(22), or added to the appendix of statutes incorporated into the 6(b) exceptions by reference. The Committee discussed at some length the text of the "sensitive business records" exception of the proposed rule, its relationship to the equivalent definition in the Public Records Act, 1 V.S.A. § 317(c)(9), and how this differs (if it does) from "trade secrets" in the proposed 6(b)(21) exception. While "equivalent", the text of the proposed (b)(22) does not simply adopt the related statute. Tanya Marshall noted that the PRA definition of "trade secret" is sometimes difficult for the Executive Branch to apply, and that this was perhaps an opportunity for the Judiciary to define the concept more precisely. Chair Tomasi wondered whether there are maybe useful definitions of "trade secret" in case law from other states.

Justices Robinson and Dooley discussed different policies underlying judicial vs. administrative and executive public access provisions. Justice Dooley pointed out that there are at least twenty provisions of the PRA that are of no application to judicial proceedings or records. Justice Robinson acknowledged that there are many reasons why judiciary policy for access to records would differ from those enacted for purposes of access to administrative or general governmental records. However, for purposes of adjudication – the judicial function – some consistency with other established law is advisable. In most instances, the analysis, whether under PRA or PACR rules, should in practice usually achieve the same result. In focusing on the "target" of the proposed "sensitive business records" exception of (b)(22), Mike Tarrant suggested that the Committee look to the decision in *Springfield Terminal Railway v. A.O.T. et.al.*[6]

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[4] That is, "until issuance of and in accordance with the court's decision on the motion."

[5] See fn. 4 above.

[6] 174 Vt. 341 (2002), construing 1 V.S.A. § 317(c)(9), the PRA exception for trade secrets, which encompasses "information which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it."

After much discussion, the Committee appeared to coalesce around the idea that "trade secret" protection should be automatic and subject to motions to unseal, with a proposal to consider a redraft which (a) combines 6(b)(21) and (22) into a single exception, and (b) either references or incorporates the PRA § 317(c)(9) exception, even though the text of (22) as currently proposed differs from the exact language of the Act. This approach would also appear to be more consistent with actual Odyssey procedures, where the filer unilaterally designates documents as public or non-public.

Further discussion of the details of revisions to Rules 9 and 6(b)(21)-(22) was then deferred after Chair Tomasi suggested that the Committee move to consideration of the Jury Questionnaire Confidentiality amendments (Agenda Item # 8), given the limited meeting time remaining. The redraft of the Rule 9 amendments will be prepared and presented for consideration at the next meeting.

6. PACR 6(b)(20): Exception for Ex Parte and In Camera Filings. See above. The Committee discussed and approved of this added exception, with the deletion of the reference noted to in limine proceedings.

7. PACR 7(a)(4)(A)(i): Actions When Filing is Noncompliant. (Draft amendment to preclude staff changes to public access status, or redaction to comply with rules, if the filing is "under seal, ex parte, or for in camera review."). The Committee briefly returned to and discussed this amendment, after completing its consideration of Agenda Items 8 and 9. Pat Gabel indicated (and Tari Scott concurred) that caution should be taken with respect to any additional burdens placed upon court staff, who are generally very aware of the need to protect against unauthorized disclosure of confidential filing content. It was decided to defer consideration of this proposed amendment, initially suggested by Judge Toor, until further and more detailed review of the proposed amendments to PACR Rule 9.

8. Proposed PACR 6(b)(19); Confidentiality of Juror Questionnaire Responses; Consolidated Amendments reconciling provisions of Rules 4(c) and 10 of the Rules Governing Qualification, List, Selection and Summoning of All Jurors with VRCP 47(a)(2) and VRCrP 24(a)(2). Reporter Morris reviewed a final draft document of these amendments with the Committee. He indicated that in advance of the July 31st meeting, he and Chair Tomasi had exchanged some email comments about the latest draft circulated, and he pointed out the changes that had been adopted, largely for consistency of terms, in the draft.

Committee discussion then ensued, highlighting both substantive policy issues and technical language concerns. As context Judge Morrissey noted that these amendments were of particular importance at this time, with the anticipated resumption of jury trials, in that jurors seeking excuse from service on health grounds, or health issues of family members, would be particularly concerned about unauthorized public disclosure of private information related to jury service or excuse, and at the same time there may be heightened public (and media) interest in why and how jurors are being excused. The current draft of 6(b)(19) incorporates, and continues the distinction between public access to information other than juror name and town of residence, which could occur only after a finding of "good cause" by the court, and party access in a particular case, which would be essentially automatic (but, as always, subject to motion in that case) as to any potential juror in the larger panel from which a case-specific jury is to be drawn, except for medical or other information (employment conflicts, etc.) disclosed by a potential juror in making a request to the court to be excused from jury service if that request has been granted (and the person is thus not present at jury draw).

There was further discussion of, and distinction made between (a) the written requests to be excused from jury service that are sent in by prospective jurors after first being summoned for jury duty;[7] (b) the general, standard questionnaire sent out by Jury Administration to all persons summoned for jury duty; and (c) case-specific, and supplemental questionnaires that are sent to prospective jurors – typically upon request or motion and after court involvement and approval – in a particular case. As to (a), the requests to be excused, it was the Committee consensus that these forms (and the information disclosed) would not be available, even to parties, if the individual's request to be excused is granted by the court and the person is therefore not present in the larger panel[8] from which a case-specific jury is to be selected.[9] However, such information, and the form request to be excused, will be available to parties if the request is denied and the person remains in the larger panel for jury selection, but subject to further non-disclosure and confidentiality protection. Accordingly, the first option in the draft proposal for Juror Qualification & Selection Rule 10(b)[10] – see pg. 4 of the July 2020 Discussion Draft – was preferred.

With regard to all juror questionnaires and the information they contain, both types (b) (the initial standard questionnaire) and (c) (any case-specific "supplemental" questionnaire) as noted above, the Committee was in agreement that no distinction need be made in the applicable Rules, and that the focus should be on "all information" provided by prospective jurors at any step in the selection process. Therefore, it was agreed to delete from Rule 4(c) of the Juror Qualification & Selection Rules a reference to "including supplemental questionnaires," and add "All" before "information" at the beginning of Rule 4(c).

With these changes made to the July 2020 Discussion Draft, on motion of Mike Tarrant, seconded by Teri Corsones, the Committee unanimously approved the Jury Questionnaire package, to be transmitted to the Court for publication and comment.[11] The Committee also discussed, and unanimously agreed that a public hearing should be scheduled and held on these proposed amendments during the comment period. At that time, and after receiving further comments and input, the Committee will in a future meeting be able to revisit all issues related to jury questionnaires, before final

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[7] Chair Tomasi suggested that the juror excuse request forms should probably be updated. Tari Scott noted that it is anticipated that even with Odyssey, these forms will continue to be paper documents; current policy is to retain all such materials for 4 years. It was generally agreed that revisions to the "request to be excused from jury service" form should occur, probably administratively rather than by specific Rule change, after final promulgation and adoption of the Jury Questionnaire amendment package.

[8] Judge Morris suggested, and the Committee concurred, that a reference to the jury "venire [or panel]" in the proposed amendments to PACR Rule 6(b)(19), and in VRCrP 24(a)(2) and VRCP 47(a)(2), should be deleted as unnecessary, because the focus is on the information provided by the prospective juror regardless of what stage in the jury selection process it occurs.

[9] Vermont Supreme Court case law on juror selection is clear that parties have only a right to exclude potential jurors from a case-specific jury, for cause and in exercising any peremptory challenges, and no right to inclusion of any particular individual. Therefore information regarding any individual who has been excused and is not present in the larger panel on jury draw day, is irrelevant and immaterial.

[10] Justice Dooley noted that Rule 10 may be duplicative. However, the Committee consensus was that even so, keeping it in the Juror Qualification & Selection Rules was still necessary and appropriate.

[11] While the Public Access Committee serves as the main proponent of these jury questionnaire amendments, per A.O. 11 and 40 the Advisory Committees on Rules of Criminal and Civil Procedure (as Committees who also share jurisdictional interest) have been regularly advised of the status of the drafts of the proposed rules, and have had opportunity to comment and be involved in the process.

promulgation and recommendation to the Court. Arrangements for the public hearing will be made by Reporter Morris, consulting with Emily Wetherell, Deputy Clerk of the Supreme Court.[12]

9. Amendment of PACR Rule 6(b)(5): (Bars access to Information and Supporting Affidavit(s) if Judicial Officer Does Not Find Probable Cause). The redraft amends this rule to state there is no public access only if judge finds no probable cause for all counts in the Information as presented/filed, for consistency with 13 V.S.A. §§ 7606(c) and 7607(d)[13] and *In re: Affidavit of Probable Cause*, 2019 VT 43. In other words, if PC is found on some charges but not on others, the entire Information (including counts dismissed for lack of probable cause, see VRCrP 5(c)) remains publicly accessible until "all charges on [that] docket are (expunged, or sealed as the case may be)." Reporter Morris provided a brief summary of this proposed amendment, approved by the Committee at its February 21st meeting. Chair Tomasi indicated that the Comment period closed on July 6, 2020, with no comments received. The unanimous decision of the Committee was to transmit the proposed amendment to the Court with recommendation for promulgation as final. Reporter Morris noted that the proposal would also be considered by the Legislative Committee on Judicial Rules on August 3rd, and any pertinent comments would be reported back to the Committee.[14]

OTHER OLD BUSINESS:

12. PACR 6(b)(Appendix)[15] Public Access to Criminal History Records Obtained through NCIC; Public Access to Such Records from VCIC; Status of "Sorting" Requirement in E-Filing of 2020 VREF 5(g). VREF 5(g) requires that criminal history information be separately e-filed in three categories: (1) convictions, felony or misdemeanor, in Vermont courts and resulting sentences; (2) convictions, felony or misdemeanor, in courts of other jurisdictions, including federal, and resulting sentences; and (3) any other criminal history information (arrest/custody reports and bail information; criminal charge information and law enforcement incident reports from Vermont and other jurisdictions). There was a report on such filings during the e-filing roll out in Windham, Orange, and Windsor Criminal Divisions, and problems that have been experienced by the State's Attorneys in complying with Rule 5(g)'s "sorting" requirement. Apparently, in WOW, all criminal history record filings accompanying Informations and PC affidavits at arraignment are being filed as non-public. Part of the difficulty stems from incompatibility of Odyssey and States Attorneys' software programs. Jeff Loewer (and Tari Scott) indicated a commitment on the part of CAO to a proposed "work around" to facilitate States attorneys' compliance prior to BRACE e-filing roll out. The discussion of this issue was very brief, and no actions were taken.

Items 10 and 11 on the July 31 Agenda were not reached due to lack of time.

NEW BUSINESS

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[12] That public hearing (by video) on the proposed jury questionnaire amendments is now scheduled for October 28th, at 3:00 p.m. See Item # 7 on the Agenda for the October 6th Committee meeting.

[13] "Until all charges on a docket are (expunged, or sealed as the case may be) the case file shall remain publicly accessible." (parenthetical matter added) (H. 460, Act No. 32 (2019 Adj. Sess.)) Formerly, the rule was read to preclude public access to *any* of multiple counts for which no probable cause had been found.

[14] There were no adverse comments at the LCJR meeting. The Court subsequently promulgated this amendment as final on September 16th, effective November 16th. See Items 5 and 6 on Agenda for October 6th meeting.

[15] See 2019-20 pocket part, p. 155.

13. PACR 6(b)(9) and 5(c): "Opponent" attorney access to complaint and affidavit in RFA (and possibly other family docket) cases where request for immediate relief has been *denied* by the court and no hearing is requested by the plaintiff. Is amendment of 6(b)(9) necessary to clarify "no access" if in fact that is Committee's substantive recommendation? (Prompted by inquiry from Judge Schoonover). Justice Dooley noted that this is another issue where there is a policy difference between party and public access. Tari Scott noted that any Rule would need to be consistent with actual practice under Odyssey, under which public or non-public status may follow "automatically." However, there was insufficient time to reach or consider this item, which was passed to the next meeting agenda.

After call by Chair Tomasi, no other "new business" or issues requiring immediate discussion by the Committee were identified.

14. Next Meeting Date. The next meeting was scheduled for Tuesday, October 6th at 1:30 p.m. Tari Scott will send a Teams Meeting invitation and link.

The July 31st meeting of the PACR Advisory Committee was then adjourned.

Respectfully submitted,

Dennis R. Pearson
Superior Court Judge (Ret.)
Committee Reporter

wm9/30/20; drp10/2/20