[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
June 29, 2018

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 9:04 a.m. at the Supreme Court in Montpelier. Present were Chair Judge Tim Tomasi; members Justice John Dooley (Ret.), Teri Corsones, Jeff Loewer, Gaye Paquette, State Archivist Tanya Marshall and Tari Scott; Supreme Court liaison Justice Marilyn Skoglund, and Committee Reporter Judge Walt Morris. Committee members Marty Frank, Sarah London, Mary Morrissey 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. Brief discussion ensued, as at the May 25th meeting, as to the Committee's composition under its Charge and Designation document, and identification of nominees to replace Katherine ("Katie") Pohl on the Committee. Reporter Morris again indicated that A.O. 40 requires that the Committee have two Superior Court judges; a VBA representative; a media representative; and the State Archivist or designee. Beyond that there are six "at large members" to be approved by the Court. After discussion, Committee consensus was that while Ms. Pohl's position requires no specific legal "lineage" or specialty, and that familiarity with technology related to law practice would be a plus, given the interest expressed by a subcommittee of the Advisory Committee on Family Rules for some form of engagement in the work of PACR and NG-CMS, an attorney with significant experience working in the Family Division would make a good addition to the Committee. Teri Corsones was asked, and agreed, to communicate with Jodi Racht of the Family Rules committee for suggestions as to suitable nominees who might be recommended for appointment. Teri to report at next Committee meeting. (See minutes entries, below, as to Morris-Racht meeting on June 20, 2018 to discuss Family Rules engagement in PACR NG-CMS process).

2. Minutes of May 25, 2018 Meeting.

On motion of Tari Scott, seconded by Teri Corsones, the minutes of the Committee meeting held on May 25, 2018 were unanimously approved.

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

Reporter Morris stated that his effort to convene a meeting with the Committee Chairs of Civil and Criminal Rules Committees and the Reporter for Civil Rules had been unsuccessful due to conflicting schedules, but that a continuing effort will be made to convene and conduct this meeting 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). This item will be kept on the Committee's agenda for reporting and further action. Tari Scott indicated that 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. Teri Corsones indicated that she would be willing to help in this effort.

4. **Meeting/Communications with Subcommittee of Advisory Committee on Rules of Family Procedure.**

Reporter Morris indicated that on June 20th, he met with Jodi Racht, former Family Rules Chair, and member of a subcommittee of the Family Rules Committee to establish to establish communications as to consideration of rules that would be of particular significance to procedure and practice in the Family Division. Ms. Racht articulated the subcommittee's concerns. In particular, the subject of proposed rules that would serve to close Family Division proceedings and records not presently subject to confidentiality by law was discussed. Morris reported that in the discussions, he indicated that it was highly unlikely that the PACR Committee would recommend, or the Court adopt, rules that would seal proceedings and records not presently subject to lawful confidentiality at least in the absence of legislation, but that the PACR Committee was closely examining Rule 6(b) exceptions for currency and inclusion of certain provisions related to family proceedings, that may not be presently included, but should be. That in addition, the PACR Committee was most mindful of the need for maintenance of confidentiality in the new NG-CMS, including as to family proceedings and records that are subject to lawful confidentiality, and certainly intended to have that concern reflected in the Rules. Morris indicated that he and Racht agreed to remain in communication, and that Racht would report the discussions back to the Family Rules subcommittee and committee. (See Agenda Item # 1, referencing PACR Committee decision to seek appointment of an attorney with family practice experience to join the Committee).

4. Review of Proposed Amendments to Rules 5, 6 and 7 of the Rules Governing Dissemination of Electronic Case Records (ECR) approved at meeting on May 25th.

For context, Reporter Morris provided a brief review of the Committee's adoption of revisions to Dissemination of Electronic Case Records (ECR) Rules 5, 6 and 7 at the meeting on May 25th. These deal with public access to case record reports (5); data dissemination contracts (6) and procedures-for requesting such access, determination of requests, and appeals (7). One remaining issue is the designation of "Records Custodian" for purposes of Rules 5, 6 and 7. The Committee decided that the Director of Trial Court Administration would serve as the records custodian for the Case Management System, with appeals of decisions subject to ECR Rules 5, 6 and 7 going to

the Court Administrator. Existing PACR Rule 7(c) provides that appeals from determinations made by the Court administrator as to public access are to be made to the Supreme Court. It was noted that there may be other, and better approaches to the designation and function of the records custodian(s) in the revised rules, the responsibilities of each, and appellate recourse. Tanya Marshall repeated an observation made previously, that based upon Vermont State Archives and Records Administration's experience with public records, it is better to speak to the function—what treatment is made of a particular record and request for access—rather than the official making the decision (authority for which could be delegated administratively, under general authority of the Court administrator). Committee members indicated that even so, the means of request and event of denial must be made clear in the rules. Ultimately, the Committee decided that use of the term "record custodian" and particular authority may be a matter revisited as a comprehensive body of new rules comes together, but at least at this juncture the above referenced definition of "Records Custodian" would be employed.[1] The Committee briefly revisited the issue in the context of discussion of a Rule 6(b) exception for Probate Division Records (see below), which diverted into the question of whether the judiciary, or state archives, is the "custodian" of records that have been transferred to and are in the physical possession of archives. Tanya Marshall undertook to explain this issue in greater depth, and volunteered to provide some language for drafting that might prove helpful. Jeff Loewer was of the view that regardless of the status of physical case records held in archives, and certainly as to electronic case records in a judiciary case management system, the judiciary would be considered the "Records Custodian" of them.

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

Marilyn Skoglund and Tari Scott lead a discussion of the work of this subcommittee in reviewing Rule 6 exceptions. Justice Skoglund indicated the subcommittee was continuing with the approach previously endorsed by the Committee to expressly reference in Rule 6(b) those exceptions that are the product of court rule or policy, including some statutory exceptions of particular significance to judicial proceedings, while placing the bulk of exceptions, whether by statute or judiciary policy in an Appendix, which would be maintained in the Clerks' offices, and available as well on the NG-CMS access and filing portals for ready reference of both filers and those seeking access. The list would be linked and incorporated into the certifications step for authorized filers engaging in the electronic filing process. The subcommittee has also made an effort to arrange the various exceptions that would be stated in 6(b) in a topical manner, for reasonable access. Justice Skoglund reported that as a result of its work, the subcommittee had managed to reduce the number of exceptions set forth in Rule 6(b) from 35 to approximately 23, with prospect of reducing the number further.

Discussion of particular exceptions and their status, including redrafting needs, followed:

[1] Note that ECR Rules 5-7 and the PACR Rules identically numbered will be recaptioned in the comprehensive draft, to eliminate any confusion.

--6(b)(18) (renumbered as (b)(5)—Department of Corrections reports related to furlough programming. The wording of this section was seen as at least unclear, if not problematic. Existing language provides that the "public shall have access to a summary of the contents of the report and the recommendation of the department." Further, "where the DOC has not included a summary and recommendation in a separate section of with the report, the report shall be subject to public access." It was noted that the DOC has moved to place sentenced individuals in community based intermediate sanctions programs, such as pre-approved furlough, in significant numbers, and that an Intermediate Sanction Report is routinely prepared for these cases. It is assumed that these would be covered by this exception, but DOC practices do not necessarily fit with the language of the Rule. Tanya Marshall noted that State Archives has been working with DOC related to perceived issues with DOC claiming exemptions that are not authorized by law. Tari Scott indicated that she has also communicated with Mark Bevins of the DOC as well. There may need to be further clarification/amendment of proposed (b)(5) (former 18), as part of the subcommittee's ongoing review.

--6(b)(26) (renumbered as (b)(10)—Complaint and affidavit in Relief From Abuse/Orders of Protection Proceedings. The existing rule exempts the complaint and affidavit from public access "but not a temporary order, until the defendant has an opportunity for a hearing" per statute. Committee members noted that the language is somewhat ambiguous, but subject to a construction that after opportunity for hearing, the complaint and affidavit are subject to access. Question arose as to the purpose of disclosure of the temporary order, and whether this subsection should be amended to broaden its scope. For example, to include exemption of the complaint and affidavit from public access in the event that a request for temporary order was denied by the court and the complaint withdrawn by the Plaintiff. The 6(b) subcommittee will examine this issue and report further to the Committee.

--6(b)(8) (renumbered as (b)((17)--Records containing a description or analysis of the DNA of a person if filed in connection with a family court proceeding. The discussion here was whether the existing rule should be expanded to be of application in other proceedings as well. Justice Skoglund indicated that the Court could consider expanding the scope of the DNA exception as a matter of policy. As to DNA information and family proceedings, the Committee also noted that there may be implications presented by provisions of the recently enacted Parentage Bill (H. 562/Act 162) and the precedent decision of *Sinnott v. Peck*, 2017 VT 115. Tanya Marshall indicated that there were existing provisions referenced in the Public Records Act at 1 V.S.A. § 317(c) that might provide guidance for expansion of the scope of existing PACR 6(b)(8).[2] The Subcommittee will examine these issues in consideration of its final proposals of amendment.

[2] 1 V.S.A. § 317(c), in its appendix(No. 174), references 18 V.S.A. § 9333(c), a part of Title 18 Chapter 217 which places broad limits upon genetic testing, its purposes and disclosure of genetic testing information. One other provision of the Public Records Act addresses DNA—DNA Samples Provided to the Department of Public Safety Laboratory. Appendix, No. 185, 20 V.S.A. § 1941.

--6(b)(28)—(renumbered as 14 in draft)—Social Security Numbers. There is a present statute, 9 V.S.A. § 2440 (the Social Security Protection Act). As indicated by John Dooley, the Committee previously approved of a proposed amendment to the 6(b) exceptions that would consolidate into one category a list of personal identifiers not subject to public disclosure, including Social Security numbers, passport, taxpayer identification, financial account numbers, and the name of a child victim of a crime.[3] The substance of this amendment was briefly reviewed, and will be included in the final list of exceptions.

--6(b)(17)--(to be renumbered)--Health/Medical Records. The Committee spent considerable time at its prior meetings in discussion of this exception, including whether there should be a "derivative use" exception that would permit reference, and public access, to such records to the extent that they are referred to in the course of judicial proceedings, including reference to discovery materials such as depositions in the course of proceedings.[4] The 6(b) Subcommittee has been working with Justice Dooley in refining this exception. He lead the Committee in review of a revised Health/Medical record exception, indicating that the text borrows from Minnesota and Maryland provisions that had been previously considered and approved of by the Committee. The redraft also includes a "derivative use" exception.[5] The proposal differs from the current exception in that it speaks more specifically to the records excepted.[6] While the proposal makes the entire record exempt from disclosure, it also contains a redaction provision, for guidance in providing access to portions of the record that are and should be publicly accessible. There was no objection expressed to the text of the redraft of the "Health/Medical" record exception as presented.[7]

"**Status of Exhibit" Discussion.** Consideration of the "Derivative Use" exception then lead the Committee to discuss at length when and to what extent an exhibit filed with the Court, introduced in whole or in part, or referred to but never moved for admission in the course of a witness' testimony, or in argument, becomes publicly accessible information. This query would apply not only to the health records exception, but to other Rule 6(b) records exceptions, such as for mental health competency and hospitalization evaluations, Presentence Investigation Reports, and

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[3] See minutes of April 27, 2018 meeting, pp. 6-7; May 25, 2018 meeting, p. 7. As to the name of a child victim of a crime, Justice Dooley remarked that consistent with prior Committee decision, provision would be included that "In lieu of the name of a child victim, the filer may include the initials of the first and last name of the child."

[4] See minutes of May 25, 2018 meeting, p. 4.

[5] The proposed language: "This exception does not extend to statements by a party, lawyer or witness made in open court or in an otherwise publicly accessible document where such statements are necessary and relevant to particular issues or legal argument being addressed in the proceeding."

[6] "A record created by a health or mental health professional that contains *results* of an examination or evaluation of the health or mental health of an individual, a *diagnosis*, of the health or mental health of an individual, or a *description of a course of medical or psychological treatment or recommended course of treatment* of an individual," in contrast to the existing exception, "Records created as a result of treatment, diagnosis, or examination of a patient by a physician, dentist, nurse or mental health professional." (Emphais added).

[7] However, there was no formal motion or committee vote of approval of this item.

records produced in discovery, such as responses to interrogatories and depositions (see existing PACR 6(b)(9)). The question being whether the derivative use exception should be broadened to include all information otherwise excepted from public access under 6(b). This in turn lead the Committee to consider generally the current variations in practice as to treatment of exhibits filed, or even admitted in evidence, their custody and access after conclusion of proceedings and pending appeals. Various scenarios were posited, including a paternity case with genetic testing evidence admitted in which a putative father agrees "to settle/stipulate" prior to an adjudication. Chair Tomasi opined that once an exhibit is admitted in a public trial, it is considered publicly accessible. Another test would be whether, admitted or not, a judge relies upon the content of a document in making a decision. It was noted that there are many circumstances in which under lawful authorization, a judge relies upon information in a case that is not publicly accessible yet is available to the parties in the case (ex. PSIs; competency evaluations; reports in juvenile cases). Gaye Paquette and Tari Scott indicated that if a filed exhibit is not admitted in evidence, the general practice is to return it to the party filing it. Justice Dooley indicated that there are instances in which a trial exhibit pertinent to an appeal has been returned to a party, necessitating its return to the record. Ultimately, the Committee concluded that the status of exhibits involved broader policy issues, beyond the reach of the NG-CMS rules promulgation that should be the subject of recommendation for policy and administrative procedures changes. And that circumstances of filing, admission, and/or reference to content of exhibits may be so fact-specific as to require resolution of any access dispute by the presiding judge in the context of the specific case.

The Committee returned to, and concluded its consideration of the proposed 6(b) exceptions with two more—records of Judicial Conduct Board proceedings; and records in Probate Division proceedings.

--6(b)(20)—(to be renumbered)—JCB Proceedings. The existing exception is for JCB records "prior to the filing of formal charges". The subcommittee query was as to the status of Deferred Discipline agreements authorized under the Rules for Judicial Disciplinary Proceedings. Unanimous Committee conclusion: such would be included within the exception.

--6(b)(22)(23)—(to be renumbered)--Probate Division guardianship proceedings in which the court finds that respondent is not mentally disabled; also, evaluations by mental health professionals in adult guardianship proceedings. The present exceptions are quite limited. The Committee considered whether the exception for Probate Division proceedings should be expanded to include guardianship proceedings generally, including both adult and minor. This, in consequence of the significant number of minor guardianships now in probate as a result of parental impairment due to substance abuse. And, whether and to what extent an exception for probate estate proceedings, including required inventories and accountings, should be considered. It was noted that the probate courts in certain units had experienced requests for research of estate records for commercial purposes. The consensus of the Committee was not to propose any general exception for estate related proceedings in the Probate Division, noting the variety of

other personal information exceptions already provided by law and in 6(b). The Committee did not reach any conclusion as to a new "minor guardianships" exception. Further recommendation would be a matter for subcommittee consideration.

The subcommittee on "Rule 6 Exceptions" will continue its work with the objective of presenting a final draft of proposed amendments for the Committee's consideration at its next meeting.

5. Review and Redrafting of PACR Rules 2(a) and (b) (access to non-public information by officers or members of the Executive or Legislative branches under authority of statute, judicial rule or other source of law), and 7 (Requests for sealing and for access to, sealed or closed documents and proceedings).

Following discussions at the May 2018 meeting,[8] the Committee requested that Justice Dooley and Reporter Morris provide a draft of proposed amendments to these rules, which presently only generally address the issues of special access by law and court discretion in sealing.

Rule 2 Redraft.

John Dooley reviewed for the Committee proposals to redraft existing Rule 2, which addresses access general and special rights of access provided by law. The redraft carries forward a general rule for public access, but adds provisions specifying means of access to case records (remote access vs. access at courthouse-based terminals), entrusting the Court Administrator with responsibility for determining means of access to judiciary administrative records. In a following subsection, the draft addresses special rights of access based upon the role/status of the accessing party. The proposal would prescribe separate categories of parties with special rights of access (with rights of disclosure, or prohibition of disclosure), including: Litigants; Lawyers appearing for litigant in a case; Criminal justice agencies (for criminal justice purposes); State agencies per data dissemination contracts; and to the general public. In describing a person's general right of access, the proposal would also incorporate by reference the various statutes which accord special rights of access to case and administrative records of the judiciary. Chair Tomasi questioned whether the latter provision, and reference to statutes authorizing/prescribing special rights of access was necessary. Justice Dooley indicated that it has in effect long been included in the existing rule and as with the Rule 6(b) exceptions, an appendix of statutes providing special rights of access would prove very helpful in implementing the new electronic case management system. Ultimately, the Committee approved of the Dooley redraft of the provisions of existing Rule 2, for inclusion in a comprehensive draft of rules going forward.[9]

Rule 7 Redraft.

[8] See minutes of 5/25/18, pp. 5-6.

[9] However, there was no formal motion or committee vote of approval of this item.

Given time constraints, Reporter Morris provided a very general overview of proposed amendments to PACR Rule 7, which governs sealing. A draft had been provided to Committee members in advance of the meeting. The existing rule is quite broad, and does not include specific standards for the exercise of a judge's discretion in granting or denying requests to seal, or to grant access to a case record or proceeding which is in sealed status. As Morris explained, the draft before the Committee provided options ranging from sealing rules that are highly detailed--with definitions and lists of criteria to be employed by the judge in considering which types of records would be considered sensitive, what specific criteria the judge must balance, and what specific findings must be made to sustain sealing--to rules which specify process to be provided generally, incorporating by reference constitutional and common law standards established by case law. Morris provided examples from promulgations from the federal Northern District of New York, Florida, Idaho, North Dakota and Ohio as part of the draft alternatives.

After considering the formats provided in the draft, the Committee unanimously agreed that the revised rule should contain the additional sections recommended outlining more specific process, but should avoid "laundry lists" of criteria that are not considered necessary in view of judge and lawyer familiarity with constitutional and common law criteria for balancing public rights of access against lawful and significant privacy interests. The Committee also determined to include reference to a standard of "Good cause and exceptional circumstances", which is included in the present rule, in the revised draft. A Subcommittee consisting of Reporter Morris and Judge Morrissey was appointed to consider and provide a revised final draft for the Committee's next meeting. As part of the discussion of Rule 7 amendments, the subject of whether the rules should also address expungement process was briefly considered. The Committee concluded that expungement process should be addressed, if at all, in rules *other* than those governing process in the new NG-CMS system.[10]

6. Action Steps Going Forward:

--The Rule 6(b) Exceptions Review Subcommittee will continue to refine the draft of exemptions, addressing some new exceptions still under consideration, and producing a final draft for Committee consideration at the next meeting.

--Rule 7 (Sealing) Redraft—a subcommittee of Morrissey and Morris will prepare a redraft of Rule 7 (Sealing and Access) reflecting the decisions and consensus of the Committee, for consideration at the next scheduled meeting.

--At its next meetings, the Committee will work to identify all proposed amendments not already addressed, with a view of timely production of a final comprehensive draft of NG-ECM rules that will be published for comment, and subject of an anticipated public hearing. A back-dated calendar identifying tentative system "on line" target dates and rules promulgation process will be produced.

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[10] As opposed to expungement *process*, the non-public status of expunged records can be referenced in the 6(b) Appendix of statutes, as pertinent.

9. Next full Committee Meeting date:

The next full Committee Meeting will be held on Friday August 10, 2018 at 9:30 a.m., Supreme Court Building, Montpelier.

10. Adjournment: The meeting was adjourned at approximately 12:24 p.m.

Respectfully submitted,

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

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