

[As approved on June 29, 2018]

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting
May 25, 2018**

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 1:05 p.m. at the Supreme Court in Montpelier. Present were Chair Judge Tim Tomasi; members Justice John Dooley (Ret.), Marty Frank, Jeff Loewer, Sarah London, Esq., Judge Mary Morrissey, Gaye Paquette, State Archivist Tanya Marshall and Tari Scott; Supreme Court liaison Justice Marilyn Skoglund, and Committee Reporter Judge Walt Morris. Court Administrator Pat Gabel was also present. Committee members Teri Corsones 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, indicated that she would be unable to, and did not attend.

1. Chair Tomasi opened the Committee meeting. It was noted that Katherine (“Katie”) Pohl’s position on the Committee remains vacant. She had apparently served as a Committee member during her tenure in the Attorney General’s office. Reporter Morris 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. So, consensus was that Committee members should provide their recommendations for a suitable attorney member replacement to the Chair, having in mind the Committee’s charge and responsibilities. With a suitable nominee or nominees, a request can then be made to the Court. On motion of Tari Scott, seconded by Sara London, the minutes of the Committee meeting held on April 27, 2018 were unanimously approved.

2. 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 indicated that in his assessment, the task of redrafting the proposal of amendment of Rule 10 to achieve the original subcommittee’s goals and to resolve the apparent conflict with the provisions of V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a)(2), would require a joint effort with the civil and criminal rules committees. He indicated that as to procedural rules of mutual impact, “summit” meetings of the respective Committee chairs and reporters have proven successful in producing effective joint proposals. The Reporter will communicate with the Chairs (Judge Zonay for criminal; Allan Keyes, Esq. for civil and civil reporter Kinvin Wroth to establish a meeting to address interrelationship and reconciliation of these rules. Tari Scott indicated that in the interim, 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 each of the three parts of the questionnaire.

3. Discussion of Proposed Amendments to Rules 5, 6 and 7 of the Rules Governing Dissemination of Electronic Case Records (ECR).

At the Committee's meeting on April 27th, John Dooley and Reporter Morris were tasked to meet with Tari Scott and Jeff Loewer to consider proposed revisions to ECR Rules 5, 6 and 7. 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). Proposed amendments of each were presented and discussed. As to all of the rules, references to "VTADS2", "data warehouse" and "ECabinet" were eliminated in favor of the term "Court Case Management System" to describe the case management system going forward. There was unanimous agreement as to this change. Unanimous agreement as well to delete existing Rule 5(d)(designation of content of standard reports), as not necessary or applicable given capabilities of the new system and authority and responsibilities of the Court Administrator and designees. No other substantive change was recommended or made as to existing Rule 5. As to Rules 4 and 5 generally, members of the Committee mentioned the different types of case records and data requests made by individuals, entities including other government agencies, and media. It is evident that some requests are easily addressed through access to routinely kept case records reports; others are not. John Dooley mentioned as a reminder that Rule 4 generally prohibits granting access to ECR *compilations*, unless of a type made publicly available under Rule 5 as a standardized report. Non-standardized reports may be made available in the discretion of the Court Administrator, provided that the criteria of Rule 5(b) are met. Jeff Loewer indicated that they system's ability to create more standardized reports would expand as time passes by, with experience in the new system's capabilities.

The Committee noted that no amendment has been proposed or recommended as to existing Rule 4 (Access to Electronic Case Compilations) in that in present form, the rule already fully addresses compilations requests, no changes necessary with implementation of NG-CMS.

Existing rule 6 (data dissemination contracts-public purpose agencies) provides criteria to be employed by the Court Administrator in responding to public purpose agency requests for access to electronic case record information that is not otherwise accessible to the public, either on an *ad hoc* basis, or pursuant to contract. In the redraft, there was no substantive change to these, even though they were recaptioned in conjunction with a reorganization of the rule into subsections. Proposed amendments add specific criteria as to DD contracts, including a requirement of fixed duration, subject to review and renewal, and restriction of agency employee access to their terms (duration as well as authorizations) of employment. Tari Scott indicated that there are many Memoranda of Understanding with agencies that serve as DD contracts, the largest number being with Agency of Human Services, and that ongoing efforts are made to catalogue and provide review of these. A rules requirement of fixed duration of DD contracts would be helpful.

Finally, proposed amendment of Rule 7 would provide that initial appeals as to denial of access to electronic case records would be addressed by the Director of Trial Court Administration with appeal to the Court Administrator. The discussion of appeal authority raised questions as to who is considered to be the lawful records custodian of case records and administrative records. PACR Rule 3(f) contains a definition of “records custodian” which, “in absence of designation to the contrary”, turns upon the location and type of record. This rule would authorize designation of the Director of Trial Court Administration, either by amendment of Rule 7, or administrative order and appointment, as records custodian.¹ The sense of the Committee was that this issue warranted further research and discussion before final approval. With this exception, the Committee approved of all of the proposed amendments to ECR Rules 5, 6 and 7.

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 a consensus to approach amendment of Rule 6 by stating general policy in one or two paragraphs, then referencing the various exceptions to access themselves 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 could be linked and incorporated into the certifications step for authorized filers engaging in the electronic filing process. Tanya Marshall and Sarah London both indicated that a comprehensive list of approximately 250 statutory Public Records Act (1 V.S.A. § 317 et. seq.) exceptions is maintained on the State Legislative website under the heading “Reports and Research”, and that this might provide some guidance as to an “appendix” or “index” approach to Rule 6 revision.²

Justice Skoglund indicated that regardless of an “appendix” approach, the subcommittee’s efforts have focused upon a topical organization or “batching” of like exemptions, for ease of reference. The “batching” in most cases would be in types of proceedings, or if not proceeding-specific, types of records and their content. There is a need for substantive revision of a number of the existing exceptions as well, beyond updating statutory references. The Committee discussion turned to specific exceptions among the 35 in the present Rule 6(b).

John Dooley indicated that among the exceptions, two were deserving of particular focus, exception (17) (medical/health records) and whether a specific exception for Family Division case records and proceedings needs to be added, or whether the numerous other specific exceptions already in 6(b) applicable to the Family Division suffice. Tari Scott indicated that exception (7) “Reserved,” has been considered a placeholder for such a specific exception, in the event that one was promulgated.

¹ The Rules for Dissemination of Electronic Case Records do not have a definition of the term “records custodian”.

² In the course of this discussion, Ms. Marshall indicated for general context that judicial branch records comprise approximately 35% of the records in State Archives, the bulk of these not in electronic form.

As to (17), medical/health records, the Committee engaged in an extensive discussion of the alternative articulations of other jurisdictions. Among these were provisions of Minnesota and Maryland rules.³ The Committee was not presented with a particular recommended version, nor was there a decision as to a particular articulation. The subcommittee with Justice Dooley's help will continue to examine alternatives, in order to provide a recommendation for an amended 6(b)(17) exception to the entire Committee.

A related issue presented was whether amendment of 6(b)(17) should include reference permitting "derivative use" of information secured as a result of access to medical/health records in judicial proceedings. After discussion the Committee unanimously agreed to addition of a "derivative use" provision in any amendment of the existing 6(b)(17) exception, similar to that of Minnesota Rule 4(s)(Subd. 4).⁴

The Committee discussion then turned to whether a specific "family proceeding records" exception for the "Reserved" (7) should be articulated, or whether the various related exceptions already in Rule 6(b) (approximately 14 such exceptions) are sufficient to address issues of access to records pertinent to family proceedings. The need for some additions, such as for records of minor guardianships in probate, and expungements of juvenile delinquency records per recently enacted S. 234, was noted. There was brief discussion of alternative approaches generally taken by jurisdictions to records of family proceedings. One view articulated was that while the Court had recognized numerous specific exceptions to access generally dictated by statute, it would be unlikely to close or restrict access to records and proceedings, including in the family division, that had historically been open, subject to court sealing or exclusion upon specific grounds and findings in a particular case. The Committee reached no conclusion on this issue,

³ **Present Rule 6(b)(17)** excepts "Records created as a result of treatment, diagnosis, or examination of a patient by a physician, dentist, nurse or mental health professional." **Maryland Rule 16-006(j)** excepts "A case record, other than an autopsy report of a medical examiner, that (A) consists of a medical or psychological report or record from a hospital, physician, psychologist, or other professional health care provider, and (B) contains medical or psychological information about an individual," as well as 5 types of public purpose evaluations (HIV; child fatality review, infectious disease, evaluations for developmental disability and civil commitment proceedings confidential by statute). **Minnesota Rule 4(1)(f)** excepts "Records that are from medical, health care, or scientific professions (including but not limited to reports and affidavits)" that are in two categories: those created in course of diagnosis and treatment of an individual, "including any other records designated by the presiding judge as medical records", and records on genetic information.

⁴ "Generally, a rule or law precluding public access to an entire document such as a report or medical record shall not preclude the parties or the court from mentioning the contents of the document in open court or in otherwise publicly accessible pleadings or documents such as motions, affidavits, memoranda of law where such discussion is necessary and relevant to the particular issues or legal argument being addressed in the proceeding. Except as otherwise authorized by the presiding judge in a particular case, this rule permitting mention of otherwise non-public information shall not apply to:" (restricted identifiers and data elements; identity of minor victim of sexual assault, except by initials/dob; and records sealed, except otherwise directed by the judge issuing the sealing order) (parenthetical matter summarizes the next following provision of the rule).

requesting that the subcommittee consider it and provide a recommendation at a following meeting.

The subcommittee on “Rule 6 Exceptions” will again meet with objective of presenting a discussion draft of proposed amendments for the Committee’s consideration at its next meeting.

5. Report of Subcommittee on “Gatekeeping”/Management of Access/Redaction; List of “Personal Identifiers” (Dooley, Loewer, Tomasi).

The Committee began with resumption of a general discussion of what the NG-CMS system for electronic filing and access might “look like” in its implementation. Jeff Loewer briefly described the “building” work that is in progress with Tyler Technologies to establish “Odyssey”, the line component of the CMS. Jeff indicated that as to access, the system would have capability of managing a number of “portals” with conditions of access and varying scope of access, depending upon the user—as examples, judges and court staff; attorneys and litigants accessing their case information; and members of the public seeking access not related to personal litigant status or case standing. Per 12 V.S.A. § 5(a), in criminal and family division cases, access other than by registered filers authorized information specific to their case can only be provided by kiosks at each courthouse, and not via the internet. There were a number of questions: Will the system be able to sort out status of exhibits, when multiple are filed electronically, but only some actually admitted in evidence? When filing a juvenile case record in a non-juvenile matter, must the filing be accompanied by a motion to seal, or simply filed as non-public with a notation of that filing and a general description? When a case record has a status subject to “shifting” from non-public to public dependent upon occurrence of a condition, such as movement to and from diversion status, how will or can that happen? On the subject of sealing of records or portions thereof, Mr. Loewer indicated that Odyssey would likely move sealed matter to a “Data Unavailable” location, with such an indication provided to the requestor upon query. Mr. Loewer indicated that the project Steering Board and staff are working deliberatively, and in great detail, with Tyler staff to address as many eventualities and needs as possible well in advance of system implementation.

The precedent discussion lead to consideration of the subjects of sealing and expungement. John Dooley indicated that there were a variety of approaches among the jurisdictions to sealing, the process and criteria, and types of information that may be subject to sealing, including no regulation of sealing at all, and sealing in the sole discretion of the particular judge, or parties by stipulation. In advance of the meeting, Justice Dooley circulated a memo and excerpts from the pertinent rules of several states, including Florida, Idaho, Indiana, Maryland, Minnesota and Ohio.

Justice Dooley indicated that existing PACR Rule 7 provides very general authorization and guidance as to both sealing of records, and granting of public access to case records that are otherwise closed. The standard requires only a showing of “good cause specific to the case...and exceptional circumstances.” The existing rule does not

address process or standards in any detail, or types of information that may be considered for sealing, whether on an exclusive basis, or as part of a non-inclusive list. Another rule related to access is PACR Rule 2(a), which addresses 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. Justice Dooley indicated that he and Reporter Morris would be willing to undertake review of these two rules, providing drafts with suggested amendments for Committee consideration. The Committee requested that such work be done, for presentation at the next scheduled meeting.

The Committee briefly took up the subject of expungement, the process for which is not addressed in either the PACR rules, or the Rules Governing Dissemination of Electronic Case Records. There are many statutes, including recent enactments, that address the subject and process of expungement, including limited access to records that have been subject to expungement or sealing. These are primarily, although not exclusively, related to criminal proceedings (See, e.g., 13 V.S.A. §7606-Effect of Expungement (criminal case records) and § 7609 (expungement of criminal hx records of 18-21 year olds)). The process of “expungement” of case records in an electronic case management system also presents unique issues, of definition, and ultimate and categorical “removal” of information contained in judicial case records.⁵

The Committee recognized that expungement capabilities and process must be addressed in the NG-CMS, both in the technology, and in accompanying rules. Expungement will be taken up in future meetings, with Justice Dooley and Reporter Morris providing research and drafting support in consultation with Jeff Loewer and technology team members.

6. Action Steps Going Forward:

The two subcommittees will continue to meet, and provide reports at the next scheduled full Committee Meeting:

--Rule 6 Review Subcommittee (to prepare a discussion draft of Rule 6 revisions for Committee consideration)

--“Gatekeeping”/Management of Access/Redaction; List of Personal Identifiers) Subcommittee (to prepare discussion drafts of proposed amendments of Rules 2 and 7 for Committee consideration)

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

Reporter Morris indicated that at its May 4, 2018 meeting the Advisory Committee on Rules of Family Procedure, had requested that a member or members of their previously appointed subcommittee on public access reach out to this Committee to

⁵ See, e.g., *State v. F.M.*, 2011 VT 100, 190 Vt. 617.

establish communications as to consideration of rules that would be of particular significance to procedure and practice in the Family Division. Reporter Morris was authorized to communicate or meet with representatives of the Family Rules subcommittee as to any concerns, and means of communications as to rules proposals going forward. Reporter Morris will report on these efforts at next PACR Committee meeting.

8. Agenda Items not reached at meeting on June 25th.

Beyond brief reference, and extensive discussion of proposed amendment of the “medical/health records” exception in Rule 6, the Committee engaged in no further substantive discussion of the list of Personal Identifiers that had been unanimously approved at its meeting on April 27th.

The Committee also did not revisit its discussions of April 27, 2018 as to competing versions of allocation of responsibilities for “gatekeeping”/review and redaction of electronic filings reflected in the proposed amendments of Electronic Case Records Rule 3. (Remaining issue being scope of review of filings by court staff beyond “basics” to assure minimum requirements of filing, and whether any review would extend beyond pleadings themselves, to any attachments or exhibits, to assure non-public filing of required content.)⁶

9. Next full Committee Meeting date:

The next full Committee Meeting will be held on Friday June 29, 2018 at 9:30 a.m., Supreme Court Building, Montpelier.

10. Adjournment: The meeting was adjourned at approximately 3:11 p.m.

Respectfully submitted,

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

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