[As approved at Committee Meeting on July 31, 2020]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting -- May 8, 2020

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 1:32 p.m. via video conference. Present were Committee Chair Judge Tim Tomasi, members Justice John Dooley (Ret.), Tari Scott; Jeffery Loewer; Gaye Paquette; Judge Mary Morrissey; Teri Corsones; Tanya Marshall; Michael Tarrant and Linda Reis (phone). Also present were liaison Justice Beth Robinson; Court Administrator Pat Gabel, Judge Kate Hayes and Reporter Judge Walt Morris. Absent were members James Duff-Lyall; and Alan Keays.[1]

1. **Meeting Opening; Announcements:** Chair Tomasi announced that Linda Reis has indicated that she is no longer able to serve on the Committee, and suggestions for a replacement member would be appreciated. He also noted that the main business for today was the Committee's meeting with Judge Toor as to her recommendations of amendment; that there was a "trailing agenda" of business items from the February 21st meeting that would be deferred to the Committee's consideration at the next following meeting.

2. **Approval of Meeting Minutes:** On motion of Michael Tarrant, seconded by Tari Scott, the minutes of the February 21, 2020 meeting were approved.

3. **Meeting with Judge Helen Toor as to Proposed PACR Revisions**

The principal item of business at this meeting consisted of a review, with Judge Helen Toor of the various post-promulgation revisions of the public access rules that she has suggested in prior memoranda to the Committee and a "redlined" version of PACR Rule 9.[2] Before engaging in discussion about her specific textual amendments to Rule 9, Judge Toor provided background as to the reasons for her recommendations. She indicated that while in her assessment, provision of public access to court records is certainly important, as to application of certain specific rules, there are major differences between Civil Division practices and needs and those of the other divisions of the Superior Court. In her view, the default assumption that "everything should start from availability" is not necessarily reasonable, especially in cases involving disputes over proprietary business information and processes, and financial information the public revelation of which would cause significant damage to economic or professional practice interests. In the discovery process, parties certainly wish to engage in case development and resolution, but they do not want to see subject matter that is private publicly revealed, even though the information may not be expressly protected by recognized privilege or other provision of law. The situation is different in criminal proceedings and related filings, which are historically (and constitutionally, as to trial) open public matters. In addition, as she sees it,

[1] Alan Keays made repeated efforts to connect and participate in the meeting, he connected briefly but was unable to continue to do so.

[2] Judge Toor serves as Chair of the Court's Civil Division Oversight Committee and is a member of the Advisory Committee on Rules of Civil Procedure. The comments that she had submitted consisted of two memoranda, dated October and December 2019, as well as the "redlined" redraft of Rule 9 (January 29, 2020) that she had prepared in response to the Committee's request. The suggestions in the memoranda had been previously considered by the Committee at its February 21st meeting, and some of them adopted for redraft. See 2/21/20 minutes, pp. 7-10.

there is very little public interest in civil proceedings and documents, and in the rare case in which there is, there are means by which requests for public access can be appropriately addressed.

As Judge Toor indicated, in the Civil Division, it is very common for parties to share and file documents, particularly in discovery and motion practice, with agreement and expectation that the content will remain under seal. Judge Toor related that she receives numerous such filings, and that sealing or issuance of protective orders by agreement of the parties routinely occurs. Without such assurances, discovery and early motion practice in these cases either would not occur or become extraordinarily burdensome to both parties and the court. This is why in her assessment, the perceived requirement of PACR Rule 9 that a hearing be scheduled on every request to seal is considered quite burdensome, and with rare exception, unnecessary.[3]

Justice Dooley replied by providing his perspective of the history and intent of present Rule 9, which was to provide limited authority to seal documents and content of documents (redaction) that were considered to be publicly accessible; and also to provide a means of granting access to documents and content that had been subject to sealing. As the present and former rules provide, if a statute governs the right of public access and does not provide for judicial discretion to allow or prevent public access to the record, Rule 9 just does not apply, so no hearing on the issue is required. Dooley agreed that there were distinctions between the operation of public access and confidentiality rules and practices in the Civil Division, as distinct from the other divisions. He cited examples of types of "civil" documents and parts of proceedings that have been considered confidential, either by statute, case or practice.[4] He agreed that it is rare that parties to a case seek access to court records (that are not already provided to them); those seeking access are third parties, frequently the press.

Justice Dooley suggested that the "modern" way of looking at the issue if there is a perceived problem might be to provide a Rule 6(b) exception from public access for these types of civil litigation filings. Identification of the types of litigation documents subject to exception would need to be clear; and standards provided as to duration of sealing or "triggering" case events that would lead to change in public access status. As to authority, Justice Dooley shared his view that about one third of all of the Rule 6(b) exceptions are the product of policy decisions by the Court, the rest being required by statute or other express provision of law.

Judge Toor replied that as to structured settlements, the judge rarely sees the document itself, as it is simply identified in a brief stipulation of settlement and for dismissal or entry of judgment. The content is never filed as part of the case record. And, as to particular documents of the type that are filed, statutes frequently govern confidentiality and public access. Further, Judge Toor emphasized that she did not foresee that judges would seal case documents that were already subject to public access without caution and reference to appropriate process under Rule 9.

Judge Toor pointed out that while an added Rule 6(b) exception from public access for the litigation document filings that she is addressing was worth consideration, her Rule 9 redraft

[3] The amended PACR Rule 9(a)(3)(requiring that a hearing be scheduled on requests for sealing of publicly accessible documents, or for access to sealed documents) is based upon former Rule 7(a). A hearing has actually been a requirement of the rules since their initial promulgation in 2000. Both the former and amended rules do provide that temporary sealing can be ordered without notice and hearing, until a hearing can be held.

[4] Ex., Discovery in wrongful termination and other tort cases; structured settlement agreements and the like.

provision of confidential filings by agreement would provide ample protections via process that could be invoked to guarantee a hearing upon request by a party in interests, either to seek access to a document filed in confidential status, or to prevent the public disclosure of a document (or content thereof) that is in confidential (sealed) status. The draft would include a "good cause" standard for court assessment of stipulations of parties for confidential filings. [5]

Chair Tomasi was of the view that he did not see the need for a court hearing in every case to address the confidential filing of these types of litigation documents by agreement of the parties; that there were less rigorous means for judicial oversight of stipulated confidential filings to assure that an exception permitting such filings would not be abused. One example would the requirement of a motion to seal, that would require case by case review by a judge, who could claim the matter for hearing in the particular circumstances, while no hearing would generally be required. Michael Tarrant agreed with a practice of permitting specific confidential filings, noting that such confidential filings were routinely permitted in Public Utility Commissin proceedings, where business economic, financial and proprietary information could be highly sensitive in nature. Chair Tomasi indicated that whatever the provision for limiting public access to the type of litigation information being discussed, the applicable standards should be the same for all divisions, to the extent possible.

The Committee turned to more detailed discussion, with Judge Toor, of the three principal "process" questions: (1) should Rule 9(a)(3) be amended to remove the current requirement that a hearing must be scheduled for any motion to seal (or for access)(with Judge Toor's provisos for hearing upon request)? (2) should Rule 9b) be amended to expressly provide for party stipulations sealing case documents by agreement (authorizing court approval for "good cause"—but without mandatory scheduling of a hearing)? and (3) should Rule 6(b) be amended to add an exception from public access for litigation documents bearing particular confidentiality needs (specifying the particular documents and standards for change in public access status)(Such an exception from public access, according to the terms of the exception, would not require a hearing under Rule 9 "sealing" or it could "coexist" with the 6(b) exception and be invoked as necessary).

The Committee first pursued in greater detail the *third* issue--a proposed 6(b) exception: should the amendment identify the records as going to "proprietary"; "business"; "trade secrets"; "business processes"; or "personal sensitive" information? Justice Dooley remarked that the latter was so vague as to be no standard. There was further discussion about the duration of the confidential status of such filings, and case events that would trigger change in public access status. The example of search warrant application documents was mentioned as analogous, and

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[5] The text of Judge Toor's PACR 9(a)(3) amendment deletes the requirement of a scheduled hearing, but provides that: "Anyone, including a party or non-party, may request a hearing on a motion to seal. If a hearing is requested, the court must schedule a hearing for as soon as practicable after full briefing on the motion will be concluded."

Judge Toor's proposed PACR 9(b) amendment would provide that: "If all parties to a case stipulate to the sealing of a document or documents, either by filing a joint motion, by the non-movant(s) filing no opposition to the motion to seal, or by the non-movant(s) responding that they have no opposition, the court may for good cause seal the document. The sealing shall be subject to reconsideration de novo if any future motions of parties or non-parties to unseal are filed pursuant to subsection (c) below. A ruling on any such motion shall be subject to the standards in subsection (a)(4) above." In the discussion, Michael Tarrant asked whether 9(a)(4) was a reference to *Press Enterprise* standards, and whether those would apply even if the record in issue was not in a criminal case. The Reporter's response was that it was intended that *Press-Enterprise* standards apply to the assessment of sealing (or public disclosure), regardless of case type.

that there may be other existing Rule 6(b) exceptions with duration conditions as well.[6] Judge Toor had earlier suggested in the meeting that an articulation might be to the effect that "during the discovery process, parties' confidentiality stipulations" were an exception from public access. It was noted that there may be a pertinent exception in the Public Records Act that could be used as a model.[7] Michael Tarrant indicated that it would be helpful to have media comment on the establishment of this as a new 6(b) exception, to inform a Committee decision.[8]

While there was general consensus that a Rule 6(b) exception for these litigation documents should be considered, only concepts had been discussed, so the Committee was unable to respond to specific text of any proposed amendment. The Committee Reporter will provide a concept/discussion draft of a 6(b) exception addressing this type of records for consideration at the next meeting.

As to the *first issue* (removal of mandatory scheduling of hearing), there was general consensus with the proposed amendment of 9(a)(3) to eliminate the requirement that a hearing "must" be scheduled and to provide process for anyone to request a hearing on a motion to seal, following which there must be opportunity for hearing given, that the court should retain discretion over whether a hearing would be required, and could require one.[9]

As to the *second* issue (stipulations for sealing-amendment of 9(b)) there was again consensus in favor of considering an amendment to address this particular category of litigation filings, by agreement of parties, with approval of court for "good cause" and provision for reconsideration de novo on a future challenge by a party in interest. In the context of discussion of filing of stipulations for sealing, Justice Dooley stated his expectation that any filing would be accompanied by a motion to seal, to trigger entry of the case event and the court's response.

Even though specific text of the 9(a)(3) and 9(b) proposals was available and discussed, the Committee reached no final conclusions, and no votes were taken as to adoption or modification of them. Action on the proposed amendments will be taken up at the next Committee meeting, with a "cleaned up" version of the Rule 9 proposals of amendment to be prepared by the Reporter.

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[6] Under PACR 6(b)(2), records of the issuance of a search warrant (and the warrant) are not publicly accessible "until the date of return on the warrant, unless sealed by order of court", as are records of denial of a warrant "unless opened by order of the court".

[7] 1 V.S.A. § 317 does provide exemptions from public access for (9) Trade secrets—specified confidential business records or information; (11) Student records; (14) Records relevant to litigation to which a public agency is a party, unless ruled discoverable by the court, but in any event "upon termination of the litigation"; and (23) Any data, records or information produced…by or on behalf of state university or college faculty…or students in conduct of study, research, or creative effort…until published or otherwise publicly released.

[8] As noted, Alan Keays, Committee "media representative" made unsuccessful efforts to participate in the meeting and was unable to contribute to the discussions had.

[9] One issue presented in Judge Toor's redraft of 9(a)(3), only briefly addressed in the Committee discussion, was the elimination of the existing requirement that "The court must schedule a hearing for as soon as practicable but no later than 14 days after the filing of a motion notwithstanding other general rules of procedure". The Toor amendment would delete the "no later than 14 days …notwithstanding other general rules of procedure" clause, and substitute as well "after full briefing on the motion will be concluded". Observance of V.R.C.P. 78(b) as to timing of responsive memoranda could significantly extend the time before a hearing is held. The Reporter noted that the existing provision was the subject of extensive prior consideration by the Committee in light of the experience with media requests for access in criminal cases, and that there had been significant media comment of concern during the promulgation process as to the timing adopted, and preserving the rights of prompt access and prohibiting Prior Restraint. See, meeting minutes of 4/19/19, p.9. Thus, this proposed amendment will be the subject of further Committee discussion and response.

The discussions of Judge Toor's proposed Rule 9 amendments did serve to identify the need for clarity of the distinctions between *Rule 9* (which has historically governed "sealing" of documents that are already publicly accessible, and access to documents in "sealed" status), and *Rule 7(a)* (dealing with "gatekeeping" filing, and a filer's obligations to identify and separate filings containing information that is not publicly accessible in the filing process, whether that be via electronic, or nonelectronic filing).[10]

4. Report on Status of Implementation of Electronic Case Management and Filing System in Windham/Orange/Windsor Units; Status of "Roll-Out".

At the conclusion of the meeting, Tari Scott provided a brief report as to the current status of the initiation of electronic filing in the WOW units on April 20th. She indicated that staff and efilers were working through adjusting to use of the new system; that revelation of "unforeseen" issues had been expected, and are being resolved, mostly related to education and training for users and staff, but in some instances relating to system capabilities and the need for "work arounds", to enable systems to function with each other. Teri Corsones remarked that the general Odyssey tutorial/webinar information provided by Tyler was not very useful—too generic. To address this issue, Vermont-specific user manuals have been provided and are being updated; Project Team video tutorials are anticipated to provide more "hands on" direction with respect to user issues with Vermont's efiling system that have been identified. Judge Hayes reported that the judiciary's Public Portal, which operates separately from the Odyssey system (but is essential to electronic case record access) has been functioning without any issues that have not been able to be resolved. The Committee on Rules for Electronic Filing will be meeting again in the near future to address any post-promulgation issues that may require further amendments of the 2020 VREF.

Fees for System Use-VREF 10.

In the context of the efiling status report, the Committee briefly discussed current issues with respect to fees assessed for system use, and the volume of data permitted within a single filing ("envelope"), and thus the frequency filings (and charges) where large volume filings are involved. The judiciary, legislature and bar and engaged in efforts to address the issues presented. The Committee consensus was that the fee issue did not invoke a need for rules amendment but was best suited to the referenced combined efforts.

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

Certain provisions of the existing probate rule 77(e) as to confidentiality would be abrogated in favor of the provisions of PACR 6(b) which fully address the former probate rules. The proposal, recommended now for promulgation, was before the Court for its action with no promulgation order at this time. (This was a "hold-over" issue from the PACR comprehensive rules promulgation).

[10] In the electronic filing system, the filer must "sort" non-public from public content and provide certification of compliance with PACR 7(a)(1) in doing so, and measures taken to "sort". A separate filing designated "confidential document" is required. See, V.R.E.F. 5(b)(5) and (6). Judge Hayes indicated that there are specific instructions describing this process in detail in the general Odyssey user manual.

7. **<u>Communication from Ted Hobson, Esq., AG's Public Protection Division</u>**

At Teri Corsones' request, the Committee briefly discussed a communication that she had received from Ted Hobson expressing concern that the office continues to receive complaints from individuals who say that their Social Security numbers are still appearing on documents that have been filed with the Court. The Committee agreed that at least through efiling, this should no longer be an issue. As to existing (paper) documents, aggrieved individuals should contact their local court to secure proper redaction of this information. Teri will share that information with Mr. Hobson.

8. **Next Steps; Next Meeting Date:** The next meeting date was set for Friday, July 31, 2020 beginning at 9:30 p.m., via Teams video Conference.

9. **Adjournment:** The meeting was adjourned at approximately 3:14 p.m.

Respectfully submitted,

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