

[As approved at Committee Meeting on February 22, 2019]

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
PUBLIC ACCESS TO COURT RECORDS (PACR)
Minutes of Meeting
January 11, 2019**

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 1:30 p.m. at the Supreme Court in Montpelier. Present were Committee members Justice John Dooley (Ret.), Tari Scott; James Duff-Lyall; Supreme Court liaison Justice Marilyn Skoglund, and Committee Reporter Judge Walt Morris. Participating in the meeting via telephone were members Gaye Paquette; Tanya Marshall; Teri Corsones, and Linda Reis. Also present were Judge Kate Hayes, who serves as Chair of the Next Generation Case Management Services (NG-CMS) Configuration Architecture Task Force, and Emily Wetherell, Esq., Deputy Clerk of the Supreme Court. Absent were members Marty Frank, Judge Mary Morrissey, Jeff Loewer, and Sarah London. Committee Chair Judge Tim Tomasi was absent due to a hearing conflict; Justice Dooley chaired the meeting at Chair Tomasi's request.

1. Justice Dooley opened the Committee meeting. Reporter Morris indicated that the minutes of the December 10, 2018 meeting had not been completed, but would be promptly circulated for Committee review, and for approval at the next scheduled meeting. Justice Dooley reminded the Committee that in the interim period since the December 10th meeting, he, Morris and Ms. Wetherell had completed substantial close editing and formatting work on the comprehensive proposal of amendment of the PACR rules that was submitted to the Court and considered at the Court's January 7th administrative meeting.

2. Status of Proposals of Amendment; Anticipated Publication for Comment; Comment Period; Scheduling and Conduct of Public Hearing on Proposal of Amendment.

Ms. Wetherell and Justice Dooley reported that after initial discussion of the proposals of amendment of the Public Access rules, the Court determined to continue its consideration at its next administrative meeting (January 24th) to permit further time for the justices to more closely consider the proposed amendments.¹ The Committee discussed the notice and comment process, assuming that the Court would authorize publication of the proposals of amendment upon next consideration. A.O. 11 prescribes the process for proposals of amendment of judicial rules by the various advisory committees. A.O. 11, § 8 details the procedures for conduct of a public hearing.

¹ The document submitted to the Court on behalf of the Committee consisted of approximately 39 pages.

In recognition that the publication would likely provide at least 60 days for submission of comments, the Committee consensus was to recommend the scheduling of a public hearing on the proposals of amendment for Monday, March 11th. Proposed time: 5:00 p.m. Location: the Pavilion Auditorium in Montpelier, provided that it is available. The Committee discussed very generally the format of the public hearing. It would be recommended that the Justices attend. At the outset, consistent with A.O. 11, § 8, representatives of the Committee would provide a brief overview of the proposed amendments, and the process of their development. Public comment would then be received, initially based upon a sign up list, and then from any others attending who had not signed up to speak in advance. More detail as to the conduct of the public hearing will be established at the next scheduled Committee meeting.

3. Two Substantive Amendments to be made to Comprehensive Proposal of Amendment Prior to Publication.

a. Proposed Rule 4(b)(2)—Means of Access--status of case records upon appeals to Supreme Court

Ms. Wetherell and Justice Dooley reported that in consideration of the Committee's draft, an issue had arisen as to the scope of remote access to case records in cases on appeal before the Supreme Court. With focus upon 12 V.S.A. § 5(a), the language of the draft had provided limited remote access to cases on appeal, either to records in appeals from administrative agencies, or records of trial tribunals, which are publicly accessible via internet (thus excluding criminal and family case records from remote access on appeal). While 12 V.S.A. § 5(a) prohibits the Court from providing public access via the Internet to criminal or family case records, § 5(b)(3) authorizes the Court to provide electronic access to "decisions, recording of oral arguments, briefs, and *printed cases* of the Supreme Court." The particular issue presented goes to the content of printed cases on appeal, which may contain case records that at the trial level, are not accessible via Internet access.

The Committee discussion began with recognition that per VRPACR 6(b), numerous case records are exempted from public disclosure altogether, apart from the criminal and family case records that are not accessible by Internet, but publicly accessible via intranet terminal on court premises. Ms. Wetherell indicated that while printed cases on appeal may contain information that is not publicly accessible per Rule 6(b), many cases do not contain such information, and there are good reasons why the bar to Internet access should not apply once trial proceedings are concluded and a case is on appeal.

After discussion, committee consensus was to recommend amended language that would recognize the Court's authority to provide remote access to the case records specified in 12 V.S.A. § 5(b) (including printed cases under 5(b)(3)), thus clarifying the provision of this rule as to remote access to case records on appeal.² A clarifying

² The amended language, and the proposal as published for comment, now reads as follows: "*Remote Access*. Remote access may be provided by the Court Administrator to publicly accessible case

Reporter's Note is also to be provided in the draft, referencing the operative provisions of 12 V.S.A. § 5, and indicating that remote access may be provided by the Supreme Court to case records in appeals, per § 5(b)(3) even if remote access to the underlying trial court case would be prohibited by § 5(a).

b. Proposed Rule 6(b) exemptions—Criminal History Records (“Record Checks”)

Tari Scott brought forward an issue as to public access to criminal history records (“rap sheets”) contained in case records in the criminal division. Historically, these have been routinely filed by State’s Attorneys in new criminal cases, and are referenced in the arraignment process, as well as for purposes of sentencing. The Committee’s current draft of the Rule 6(b) exemptions, and accompanying index, makes no reference to public access to criminal history records.

In response to certain provisions of both state and federal law governing disclosure of criminal history records (which are not new), the Court Administrator’s office has been implementing a policy which serves to restrict criminal history record information that is both filed with the Court by prosecuting attorneys, and then made publicly accessible. The particular provisions of law are the state statutes governing the Vermont Crime Information Center (VCIC), 20 V.S.A. §§ 2056a and 2056c, the former authorizing release and restricting use of criminal history records by specified law enforcement agencies, the latter authorizing release of criminal *conviction* records to the public. In addition, federal regulations purport to restrict access to and use of criminal history records provided by the database of the FBI’s National Crime Information Center. See, 28 C.F.R. § 20.33.

While there was no dispute articulated as to whether criminal *conviction* records should remain publicly accessible, some Committee members expressed concern as to the accuracy and reliability of other criminal history record content, especially that originating from other jurisdictions and derived from the NCIC database. Justice Dooley noted growing reexamination, at least in scholarly commentary, of the circumstances in which criminal history record (“rap sheet”) content other than convictions, should be subject to public access, given issues of inaccuracy and unreliability.³ Ms. Scott indicated that as the CAO was undertaking to address access to criminal history record information, court staff were engaging in substantial efforts to implement the comprehensive expungement legislation passed during the 2017 and other recent

records in cases from the civil and environmental divisions, the judicial bureau, and judiciary adjudicative bodies other than courts. Remote access may also be provided to publicly accessible case records in cases in the Supreme Court. Remote access may not be provided to records of the criminal, family, or probate divisions, except as authorized by statute.”

³ See, 60 Howard L.J. 1 (Fall 2016), Alessandro Corda, “*More Justice and Less Harm: Reinventing Access to Criminal History Records*”.

sessions.⁴ Reporter Morris noted as well the legislature's apparent focus upon this issue area in the passage of the Uniform Collateral Consequences of Conviction Act in 2013.⁵

After discussion the Committee unanimously decided (on motion of James Lyall, seconded by Tari Scott) to add reference in the proposed Rule 6(b) Appendix to both the state statutes governing VCIC and the federal regulation governing the NCIC database, to carry forward consideration of whether criminal history record information (other than convictions) should be publicly accessible, and to facilitate comment as to such an exemption from public access. Justice Dooley and Reporter Morris will prepare the Appendix reference and an accompanying Reporter's Note.

4. Action Steps Going Forward:

--Justice Dooley and Reporter Morris will incorporate the amendments coming from this meeting into the comprehensive final draft proposal, and work with Ms. Wetherell in final editing and formatting prior to further consideration by the Court, and publication for comment.

--At the next scheduled meeting, the Committee will consider the specific plans and procedures for conduct of the public hearing to be scheduled; including Court and Committee member attendance, and assignment of responsibilities for presentation and moderation of the hearing.

--Tari Scott will communicate with Jeff Wallin, Director of the Vermont Crime Information Center, to request that he attend the next Committee meeting to provide more information as to VCIC's treatment of criminal history record information, and to carry forward the Committee's consideration of issues of public access to criminal history record information.

5. Agenda Item not reached at meeting on January 11, 2019.

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, Tari Scott, and Teri Corsones will continue efforts to convene a meeting with the Committee Chairs of Civil and Criminal Rules Committees and the Reporter for Civil Rules 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).⁶ In the interim, the three component parts of the existing juror questionnaire have been reviewed to provide accurate advisement to potential jurors as to public or non-public status of information

⁴ See, 13 V.S.A. Ch. 230; Act No. 178 (2017 Adj. Sess.); Act. No 133 (2015 Adj. Sess.); Act No. 131 (2011 Adj. Sess.).

⁵ See, 13 V.S.A. Ch. 231; Act No. 181 (2013 Adj. Sess., eff. Jan 1, 2016).

⁶ See Minutes of PACR Committee meeting, 6/29/18, p. 2; 8/10/18, p. 7-8.

they may provide in response to each section. The members of this subcommittee will provide further report to the Committee.

6. Next full Committee Meeting date:

The next full Committee Meeting was scheduled for Friday February 22nd, 2019 at 9:30 a.m., Supreme Court Building, Montpelier.

7. Adjournment: The meeting was adjourned at approximately 2:32 p.m.

Respectfully submitted,

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

Final revised-2/21/19