

Report of Advisory Committee on the Rules of Public Access to Court Records To the Vermont Supreme Court

April 28, 2001

** The Supreme Court, on April 30, 2001, adopted the sanctions proposal as an emergency rule, but did not adopt the family court proposal.*

The Committee met four times prior to preparation of this report in 2001. Copies of the minutes of meetings held in January, February, March and April are enclosed with this report and will reflect the deliberations of the Committee with respect to the matters referred to us by the Supreme Court.

The Committee is recommending that the Supreme Court adopt a limited exception for Department of Corrections reports used by the court in sentencing an offender to a community-based program. The Committee also recommends that the Supreme Court adopt an exception providing a limited exception for all financial information in family court records and an absolute exception for numbers of financial accounts and numbers which identify a party. The latter would be used in place of the Study Committee proposal for 6(b)(7) rejected by the court. The court could use currently reserved section 6(b)(18) for the proposed rule for DOC reports.

The major portion of this report will be devoted to discussion of the Committee's treatment of the three topics which it believed had been identified by the Vermont Supreme Court as priorities for the Committee.

DEFERRED WILLS. The reporter contacted the Probate Judge for the District of Addison to obtain information with regard to the practice of that court with regard to wills of a deceased person that had been filed with the court but were not subject of a probate proceeding. (This was the court which followed the practice which caused the supreme court to refer the issue to the Committee.) Judge Douglas responded with a letter explaining the practice of "deferring" probate "until such time as it appears necessary to prove same to allow administration of any property found to be in the name of the decedent at his or her death." The practice of the court was to deny access to the will in cases where all of decedent's property passed through joint ownership and the will was essentially redundant. The reporter was instructed to contact the chair of the Probate Judges' Association, Judge Fitzpatrick, to determine the position of the probate judges with respect to the issue of whether there should be public access to "deferred wills." At a meeting of the probate judges in February at which nine judges were present, all but one judge "were of the opinion that a will which was filed but not presented is a public document." In light of the recommendation of the judges, the fact that a document filed with the court is presumptively accessible to the public and the possible substantial interest of members of public in the disposition of decedent's estate, the Committee voted unanimously at its February meeting not to recommend an exception for deferred wills.

INTERMEDIATE SANCTIONS REPORTS. The Committee devoted considerable time at its first three meetings to this topic and reconsidered its recommendation at the fourth meeting. We reviewed redacted copies of the reports and heard from judges and clerks familiar with use of the reports. The Committee sought guidance from the Department of Corrections, the Defender General and the Director of the States' Attorneys' and Sheriffs' Department, all of which opposed access to the report. While the Committee was mindful of the analogy to presentence reports and the claim by the DOC that its files were

confidential, there was considerable concern that the reports were neither authorized or protected from access by statute and were filed with the court to justify the Department's recommendation that the offender be furloughed. At our second meeting, the Committee suggested a compromise position to balance the privacy, access and accountability interests. The reporter was asked to seek the reactions of the three agencies to a proposal which would prevent access to the body of the report, but allow access to a short summary of the information in the report and the Department's recommendation. The Committee received no response from the Defender General or the States' Attorneys to this proposal, but received a response from the DOC too late for consideration at its third meeting. (Power outages on the working day prior to the meeting affected fax and e-mail delivery.) The Department reiterated its position that its records are protected by statute and regulations of the Department and further noted that the proposal "would necessitate a change in departmental practice and policy" which "would be resource intensive as well as amenable to some level of individual discretionary determinations throughout the department." (The Committee had heard from members who indicated that content of the reports varied widely by region and author.)

Without benefit of the second memo from the Department, the Committee voted at its March meeting (6-4) to recommend a proposal which would protect the body of the report and make only the short separate summary and recommendation section accessible to the public. If the report contained no such separate section, the entire report would be accessible. Prior to voting to recommend the provision to the supreme court, the Committee reconsidered alternatives as reflected in the minutes of March 26. The Committee did not believe that providing a separate summary which did disclose sensitive information would pose a great burden on the Department.

The proposal which we submit does not utilize the "intermediate sanctions report" language because the Department generates other reports in conjunction with its community-based programs and may well generate reports with new titles for additional programs, all of which raise similar if not identical access issues. Copies of the delayed correspondence from the DOC were distributed and considered by the Committee at the April meeting. The Committee reconsidered the proposal and concluded that it would be more disruptive for the courts and Department if no exception was adopted since the current practice is to protect the entire report. The Committee affirmed its recommendation by a 7-2 vote.

The reporter's notes to the proposed rule sets forth the balance the Committee attempted to strike between the policies that must be considered in formulating exceptions to public access. The committee considered inviting the legislature to consider whether presentence reports and other reports generated by the DOC in connection with sentencing decisions should be completely excepted from public disclosure in light of the competing policy considerations involved in making such determinations, but declined to do so for reasons reflected in the minutes.

FAMILY COURT RECORDS. This issue required the greatest expenditure of time and effort by the Committee. As the minutes of the March 26 and April 25 meetings reflect, the Committee will revisit the issue of whether there should be an exception to access to family court records for unsubstantiated allegations that a party had engaged in deviant or other seriously improper or illegal behavior. Proposed (b)(7) as submitted by the Committee is thus not necessarily our final proposed solution to the problems posed by access to family court records.

The Committee considered a range of alternatives to protect information relating to party finance and identification numbers at its March 26 meeting. The notes of that meeting

reflect the four basic alternatives and the variations on the alternatives. The Committee quickly agreed (10-0) that financial account and personal identification numbers should be excepted. It then considered, inter alia, whether financial information generally should be excepted unless the information were utilized by a party at a hearing or as part of a request for action by the court. The Committee voted 6-4 in favor of this proposal to provide broader protection for financial information subject to the "use by a party" provision. The Committee's proposed (b)(7) represents a recommendation which combines the results of the affirmative votes on two of the proposals we considered.

Drafting a provision to except financial information and sensitive party identification numbers from access and maintaining consistency with the myriad exceptions which were relevant to family court records was problematic. The reporter's note makes reference to overlap and consistency issues. The note also explains why, at least at this point, the Committee decided to resort to the very general language of the proposed exception (although we did add examples of party identification and financial account information to the reporter's note at our April meeting). Finally, the note attempts to explain the balancing undertaken by the Committee in creating the proposed exception and attempts to distinguish the relatively greater need to protect financial and identity information in the family court context. Given the time constraints we were operating under, we did not attempt to enumerate the particular types of family court proceedings which should be protected from access. The Committee did note that Study Committee proposed (b)(7) was under- inclusive with regard to at least one category of proceedings (civil unions dissolution) and with respect to protection for the type of information this Committee thought merited protection. The minutes of the March 26 meeting reflect that the Committee revisited and rejected proposing Study Committee proposed (b)(7) with the electronic-paper distinction eliminated.

REPORTER'S NOTE TO RULE 3(i). Concerns that parties were being and may be denied access to information such as a spouse's social security number were raised at the April meeting. While the Committee believed that the public access rules could not be reasonably interpreted to deny a party or their counsel access to court records, the Committee voted to recommend adding a clarifying sentence to the notes to Rule 3(i) primarily for the benefit of clerks' offices' staff. The proposed language is: "These rules do not prevent the disclosure of information from court records to parties or their counsel unless prohibited by the court."

RELATED CONCERNS. The Committee was aware that probate court records raised the concerns reflected in our proposed exemption for family court. The Committee will consider a possible probate court exception in the near future unless advised not to do so, but was unable to make a proposal at this time due to time constraints. The Committee will also be examining two sections of Rule 6(b). Committee members have identified problems with (b)(17) (medical information) and (b)(27) (complaints and affidavits in relief from abuse proceedings) and have submitted proposed language to eliminate the problems.

While the Committee is mindful that the court must determine the appropriate procedure for implementing its recommendations, if the court agrees with the proposals, the Committee believes it would be appropriate to promulgate the proposals as emergency rules and request that comments on the exceptions as proposed final rule exceptions be directed to the Committee. We await the advice of the court with respect to whether any further action by the Committee is required to add the sentence to the Reporter's Notes to Rule 3(i). Respectfully submitted,

Judge Alan Cook, Chairman

