

Access Rules Implementation Committee
Final Report
August 29, 2005

Background

The Court of Appeals adopted new rules on access to court records with an effective date of October 1, 2004. The Court adopted Rules 16-1001 through 16-1011 at public hearing on February 9, 2004 and selected the October 1 implementation date recognizing that judges and court staff would need to be educated about the new requirements, and that internal procedures would need to be developed. Also, the Court anticipated that issues may arise that would need to be resolved as implementation neared.

By letter dated April 26, 2004, Chief Judge Bell appointed members to a committee whose purpose was to consider what actions needed to be taken to implement the new court rules, and develop a plan for implementation. The designated members represented the Conference of Circuit Judges, Conference of Circuit Clerks, Conference of Court Administrators, District Court administrative judges and clerks, and the Technology Oversight Board. Judge Bell designated Fifth Circuit Administrative Judge Diane O. Leasure and Baltimore City District Administrative Judge Keith E. Mathews as co-chairs.

The committee first met on June 9, 2004 and organized into three working subcommittees to study issues of technology; education; and records retention, archiving and e-filing. The mission of each subcommittee and its membership is attached. The committee agreed that the basis for decisions on the issues would be a legal analysis of what records are required to be open for inspection, what records are required to be exempt from disclosure, and what records may be exempt from disclosure and under what circumstances. Recognizing that the rules would have impact beyond the Judiciary, the committee asked that the Maryland State Bar Association (MSBA) be contacted for assistance. The MSBA responded by including articles in the *Bar Bulletin* to educate lawyers about the impact of the new rules.

After the legal analysis was provided, the three subcommittees scheduled meetings. At the July 21, 2004 meeting of the full committee, the subcommittee chairs provided reports and discussed action items from those reports. The members also reviewed documents containing legal analysis produced by David Durfee, the Executive Director of Legal Affairs for the Administrative Office of the Courts, and Bob McDonald, Chief of Opinions and Advice in the Attorney General's Office.

As a result of the meeting, the co-chairs sent notice dated July 2, 2004 to administrative judges encouraging them to discuss the new rules at bench meetings and invited their feedback.

The committee met on September 1, 2004 to get progress reports from the subcommittees. The technology subcommittee reported on the status of the remediation of all Judiciary computer systems. Judge Ricks provided copies of those reports to the Technology Oversight Board on a regular basis and kept the Board apprised of technology issues. The education subcommittee proposed a schedule of the distribution of training materials to those affected within the Judiciary and throughout the justice system. The records subcommittee reported a difference of opinion about how to approach their assignment due to potential overlap with the circuit court committee working on a record retention schedule.

On September 10, 2004, the education subcommittee began the distribution of training materials consisting of frequently asked questions (FAQs) and charts on access to four types of records according to schedule. The most current version is maintained on Judiciary's intranet site at <http://courtnet/judgescnet/index.html>.

At the September 14, 2004 meeting, the committee discussed outstanding issues and recommendations to the Court of Appeals for action after October 1 when the rules become effective. It became apparent that the outstanding items could not be resolved before October 1 so the committee identified priorities for action. One area of concern was the blocking of victim and witness information in the circuit courts' case management system, or UCS. The co-chairs sent a letter to the State's Attorneys Association's executive director to invite their input.

The discussion about the availability of victim and witness information in court records continued at the September 30 meeting. Judge Essom Ricks reported on his discussions with Russell Butler (Maryland Crime Victims) on this issue. The subcommittees provided reports on their progress. The committee discussed the ramifications of the decision to block comments in certain databases because they contained information in free form exempt from public disclosure.

Judge Leasure convened a conference call on October 19, 2004 of subcommittee members to recommend a resolution for concerns about confidentiality of the names and addresses of victims and witnesses, including notification to State's Attorneys. This recommendation was presented to the full committee at its meeting on October 21, 2004. The committee also considered what electronic access should be allowed for State's Attorneys and Public Defenders.

The November 16 meeting agenda included further discussion about the availability of victim and witness information, as well as discussion about the definition of sealed versus shielded records. New issues and concerns were also addressed. In preparation for the next meeting, committee members were assigned certain tasks.

The January 12, 2005 meeting was postponed due to scheduling conflicts. The committee met on February 15, 2005 to discuss how to resolve the concerns about access to victim and witness information. The committee decided to invite Sue Schenning (Deputy State's Attorney, Baltimore County) and Russell Butler to the April meeting. The committee asked that Judge Alan Wilner be invited, too, to assist the committee in its deliberations.

The April 4, 2005 meeting included discussions about access to victim and witness information, the definitions of sealed and shielded records, the exemption from disclosure of records concerning child abuse and neglect, and the concerns expressed by family law practitioners.

In preparation for the May 18, 2005 meeting of the full committee, certain members met with the victims' rights advocates on April 20 and May 13, and with State's Attorney representatives on May 10. The purpose of the meetings was to identify how to minimize entering information about victims and witnesses into court files. The committee was asked to endorse the language being proposed to the Rules Committee that would shield victim and witness information from being made accessible electronically. The committee voted unanimously to recommend to the Court of Appeals that the block on UCS data remain in place until the merits of the issue reached resolution. Subsequently, the committee sent an interim report to the Court of Appeals explaining the issue and suggesting a course of action.

Two approaches to the application of the language in Rule 16-1006 (c) regarding the exemption from disclosure of records concerning child abuse and neglect were discussed. There was a difference of opinion and the committee agreed to submit a second interim report to the Court that included the minority view.

On June 7, 2005, the committee convened for the last time. All remaining issues and concerns were considered. Below is a summary of those issues that require further action, or have been referred elsewhere for consideration. The committee's recommendations are included.

Recommendations:

1. The terms “shielded” and “sealed” are used throughout Rules 16-1001 through 16-1011. For purposes of properly shielding records in paper and electronic form and instructing court staff accordingly, the committee discussed at length how the terms should be applied. The mechanisms for sealing and shielding were created based on this discussion. The committee recommends that the terms be construed to mean that only a judge can “seal” a record and that clerks may “shield” records, and that the clerks be advised to apply this construction accordingly.
2. The requirement in Rule 16-1009(b) for a hearing on disputes within 5 days may not permit enough time for parties to be served. The issue should be monitored for compliance difficulty.
3. There is conflicting guidance about the treatment of financial statements that needs to be resolved (see Rule 9-203). One approach would be to remove the requirement from the Rules to file financial statements with certain pleadings and, instead, exchange financial information as part of the discovery process. The issue should be referred to the Rules Committee for further discussion.
4. The question arose about public accessibility of trust records. They appear to be open to inspection and the committee recommends that such notice be provided to those filing the trust records.
5. Family law practitioners, in particular, are concerned about the confidentiality of their clients’ personal information and the resulting liability issues if the information is not properly shielded. Rule 16-1010 requires that notices to clerks be specific and that clerks respond to those notices. The committee recommends that an administrative order be issued pursuant to Rule 16-1010(b)(1) to outline procedures for responding to these notices, including the creation of redacted copies for the public files. Also, there is an inconsistent practice about what forms or documentation is required to be produced to inspect court records. This order should address as many of the records of concern to attorneys as possible and what the clerk may require to permit the public to inspect, or obtain copies of, court records. Concurrently, the Court may wish to consider educational outreach to members of the Bar about the necessity of filing confidential information, and additional comments to existing Rules, or adopting new Rules, about including confidential information in papers filed with the clerk only when necessary. If the Court accepts the recommendation for a change in the Rules with regard to financial information exchange

described above, an additional comment from the Court may be appropriate.

6. The issue of access to victim and witness information in both paper and electronic form was the subject of much discussion and debate. The committee's interim report to the Court of Appeals prompted a hearing that resolved the issues surrounding access to that information in electronic form. The questions about what information needs to be in the paper file and what notice should be provided to victims and witnesses about the availability of this information remain. One approach was to revise the charging document forms to add notice language. The difficulty with this approach is that the Rules require a full adversary hearing on a motion to shield, negating the desire to keep the whereabouts of victims or witnesses unknown from the alleged perpetrator of the crime where safety is at issue. The committee recommends that Rule 16-1009 be reexamined and revised to permit *ex parte* proceedings in considering motions to shield contact information where the safety of the victim or witness is involved. Also, the committee recognizes the issue of how this information gets entered in the paper files needs more study and urges that the dialogue with State's Attorneys and victims' rights advocates should continue. The committee recognizes that Judge Wilner and Judge Battaglia are participating in discussions with the affected groups on this issue.
7. Rule 16-1002(c) states that records admitted or considered as evidence become subject to public inspection even if considered exempt from disclosure elsewhere in the Rules. Although the committee assumed this applied only to evidence in open court proceedings, the language could be construed to apply to proceedings closed to the public. The committee recommends that clarification be provided.
8. Rule 16-1002(b)(2) suggests that procedures for the timely production, inspection and copying of court records could be addressed in an administrative order. The committee recommends that such an order be issued to address whether to require written requests for records and to include a statement about the time frame for production of records. The language should be similar to the requirements of the Maryland Public Information Act such that records should be produced within 30 days recognizing that circumstances may exist that affect the custodian's ability to meet the 30-day target. In the event those circumstances exist, an explanation to the requester must be provided. The committee recommends some flexibility in producing records that are not immediately available.

9. There were a number of issues involving the use of technology in accessing court records. The committee dealt with all the issues connected with the remediation of computer programs to ensure full compliance with the new Rules. At the same time, the committee considered the need for uniformity in approach and took the opportunity to take steps to achieve uniformity, if possible. There were many issues raised and discussed that the committee decided were more appropriate for the Technology Oversight Board to consider. These are: (a) how to provide access to databases not maintained by the Judicial Information Systems (JIS) department in the public data warehouse being created or for future programs that may need to be written; (b) how to ensure those databases not maintained by JIS are in full compliance with the new Rules; (c) whether to make the UCS criminal module available via dial-up access; (d) the need to reexamine the type of statistics we collect in relation to the increasing number of requests for them particularly from legislative staff and justice system partners; (e) what obligation, if any, an entity has to update information it has gotten from us when cases are expunged, sealed or corrected when that information is intended for further distribution; and (f) how the new Rules apply to e-filing and imaging of records.
10. It was difficult for the committee to anticipate how the Rules would apply to future technological advances, like e-filing and imaging of records. Also, the committee recognized that issues and concerns about access to court records continue to arise. The committee recommends that a standing advisory committee should be created for this purpose. Members of this committee could serve as a resource to court personnel to provide immediate responses to questions.
11. The committee recognizes that the issue of how archived records should be handled requires further study. Procedures should be developed for the retrieval of archived records including who is responsible for making those records available. Additionally, once paper records are archived, the question remains about how long the electronic records should exist and be accessible to the public. Once these procedures are identified, they could be included in the administrative order the committee recommended be issued pursuant to Rule 16-1010(b)(i). The standing advisory committee recommended above could undertake this study.

Conclusion

Technological advances will affect access to court records in both paper and electronic form. In addition, the Rules adopted on October 1, while fully implemented, will continue to generate questions and issues. This committee's

mission was to prepare the Judiciary for the implementation of the Rules, which we have done. We have outlined what tasks remain in our final report.

We want to take this opportunity to thank the committee's members and consultants for their dedication to this project. The committee met regularly, 11 times over the past 12 months, not counting the numerous subcommittee meetings. The meetings of the full committee were quite lengthy due to the breadth and complexity of the issues. We offer sincere thanks to all our committee members, whose dedication was borne out by the high level of attendance we had at every meeting. We would also like to take the opportunity to especially thank Sally Rankin, who assisted with meeting arrangements, prepared agendas, drafted reports, provided guidance to the group, and served as the liaison to judges and external stakeholders. We also wish to commend David Durfee for his responsiveness to our requests for legal opinions. His constructions and analysis of the laws and rules were extremely helpful. For your reference, the members of our committee are:

Lisa Anapolsky, JIS Manager

David Durfee, AOC Executive Director for Legal Affairs and committee consultant

Mary Hutchins, JIS Manager

Suzanne James, Court Administrator, Circuit Court for Prince George's County

Diane Pawlowicz, Assistant Chief Clerk, District Court

Cookie Pollock, JIS Manager

Hon. Frederick Price, Circuit Court for Kent County

Sally Rankin, Court Information Officer

Hon. Essom Ricks, Anne Arundel County District Court and liaison to the Technology Oversight Board

Hon. Milnor Roberts, Frederick County District Court

Molly Ruhl, Clerk of Court, Circuit Court for Montgomery County

Karen Winters, JIS Manager

Respectfully submitted,

Hon. Diane O. Leasure, co-chair

Hon. Keith E. Mathews, co-chair