MINUTES
July 31, 2017 Meeting
Capital Judicial Center

ATTENDEES:

Jack Baldacci, Ned Chester, Alyson Cummings, Ed Folsom, Peter Guffin, Jack Haycock, Hon. Andre Janelle, Brian MacMaster, Hon. Andrew Mead, Hon. Ann Murray, John Pelletier, Laura O'Hanlon, Elizabeth Ward Saxl, Heather Staples, Francine Stark, Ilse Teeters-Trumpy, Bonita Usher, and Debby Willis.
Guest: Laura Yustak, Assistant Attorney General who provided the group with valuable information about the records available to, by, and through the State Bureau of Investigation.)

MATERIALS DISTRIBUTED AT THE MEETING

The following materials were provided to Task Force Members:

- The agenda for the 7/31 TAP Task Force Meeting;
- The proposed minutes from the 6/7 TAP Task Force Meeting;
- Draft proposed Judicial Branch Policy Statement;
- Draft proposed Maine Rule of Civil Procedure 5A;
- Draft proposed Judicial Branch Administrative Order (JB-18-X);
- Preliminary Draft of TAP report; and
- Ed Folsom's email excerpt outlining criminal record issues.

INTRODUCTION

Justice Murray again welcomed the Task Force and explained that the meeting would be devoted to: 1) focusing on the important task of making recommendations on access issues related to juvenile and adult criminal records; 2) reviewing the draft documents listed above; 3) considering any outstanding issues, including the request of one member that the Task Force consider whether licensed attorneys should have access to all case files; and 4) discussing any new issues that arise during the meeting.

The minutes from the June 7, 2017 Meeting were unanimously approved.

DISCUSSION OF JUVENILE RECORDS

A. Juvenile Code Overview

Judge Janelle provided a high-level overview of the Juvenile Code. He explained that the Code applies to individuals under the age of 18 and that the District Court has exclusive jurisdiction over all juvenile crimes (defined as conduct that would constitute murder, class A, B, C, D, & E crimes if committed by an adult, and certain civil violations). An important purpose of the Code is to promote treatment, rehabilitation, and diversion for juveniles. Science suggests that children's brains continue to develop into adulthood (age 25-26 for males and slightly earlier for females), and juveniles are not fully capable of exercising sound judgment in all circumstances. Research continues to indicate that if you can divert juveniles out of the criminal justice system, 98% do not return to the system within a year.

Judge Janelle quoted from *Wade v. Warden of the State Prison*, 73 A.2d 128 (1950), in which the Law Court stated:

> The purpose of juvenile courts, and laws relating to juvenile delinquency, is to carry out a modern method of dealing with youthful offenders, so that there may be no criminal record against immature youth to cause detrimental local gossip and future handicaps because of childhood errors and indiscretions, and also that the child who is not inclined to follow legal or moral patterns, may be guided or reformed to become, in his mature years, a useful citizen.

It was noted that juvenile proceedings are a mix of public and nonpublic proceedings. For example, if a juvenile is charged with murder, or a Class A, B, or C crime, the proceeding is open to the public. In contrast, if a juvenile is charged with a class E crime, the proceeding is closed to the public. If the charge is a class D crime and the child has a previous class D or higher adjudication, then the second case is open to the public. Of course, attendees can listen to and take notes at public juvenile proceedings and can later talk or write about the proceedings. Additionally, if the proceedings are open to the public, the public also has the "right to inspect" the petition filed by the State, and the order of adjudication. Otherwise, the public does not have access to information about juvenile matters.

B. Discussion

The Task Force acknowledged that a lot of information about family members, including minor siblings, may be discussed during a juvenile proceeding. Putting

this type of information online may create a permanent impression about mistakes made by a young person who subsequently turns his or her life around. Additionally, information relating to the juvenile's family may tarnish the lives of family members of the juvenile who had nothing to do with the juvenile's actions.

The Task Force further acknowledged that some groups argue that when juveniles commit heinous crimes, the public should know about those instances. It was noted that the statute already draws a distinction between more serious crimes and less serious crimes.

Generally, the Task Force determined that minors deserved more protection than adults. However, the Task Force recognized that public safety concerns and the perspective of crime victims must be considered in making recommendations.

The Task Force discussed information available from the State Bureau of Investigation (SBI). SBI records are available for inspection by the general public. For a fee, the public can obtain a summary of public juvenile adjudications; but SBI does not have the underlying documents related to the case.

Three years after a juvenile is adjudicated, he or she has the right to petition the court to seal his/her juvenile records. The statute lists certain criteria that must be met. If the court grants the petition to seal the information, it is no longer public and the person can generally respond that he/she does not have juvenile adjudication(s). 15 M.R.S. § 3308.

Although a court may seal juvenile records and the person can generally respond he/she has not been adjudicated, employers, military recruiters, and others may have read about the case online, in newspapers, or at the courthouse before it was sealed. If a record that has been sealed was the subject of online postings or media attention prior to being sealed, historical facts are not erased and a search would reveal the information. On the other hand, practically speaking, there is no publication about most juvenile cases and, therefore, the information does not appear online. Additionally, employers and others may obtain otherwise confidential juvenile records by securing a release from the subject (either the former juvenile or parents, if the person is still a juvenile). The number of petitions filed to seal juvenile records is very small. Often juveniles do not know that their juvenile record is holding them back. Ned Chester is working with a group whose goal is to address issues related to the availability and protection of juvenile records. See *Unsealed Fate: The Unintended Consequences of Inadequate*

Safeguarding of Juvenile Records In Maine at http://muskie.usm.maine.edu/justiceresearch/Publications/Juvenile/UnsealedFate.pdf

If someone requests information from SBI, and the record is sealed, the response is "no record available". It was reported that if someone goes to the courthouse and asks about a juvenile case that has been sealed, responses from the clerks are not consistent. J. Murray will discuss this issue with court administration.

Task Force members readily reached consensus that online case record information should be available to the prosecutor and the defense counsel. Beyond this attorney access, members discussed the importance of not facilitating the widespread distribution of juvenile case information which would undermine the Juvenile Code's rehabilitation and diversion purposes. Accordingly, Task Force members discussed whether the court should make any online information about juvenile cases available to the general public, to family members, to the juvenile, or to victims directly.

Members expressed concern about the maturity level of juveniles and their ability to handle digital information appropriately. There was particular concern that some juveniles would post case information on Facebook or share information without thinking about the consequences. While the record must be open to inspection by the juvenile, the juvenile's parents, guardian or legal custodian, any agency to which legal custody of the juvenile was transferred as a result of adjudication and, in some instances, to DHHS, the statute does not require online access.

There was discussion about whether statutorily identified victim advocacy groups should have online access to juvenile case information involving those victims with whom they are working. *See* 16 M.R.S. §§ 53-B, 53-C. Some members suggested that such access should come from the victim witness advocate within local DA offices, or that the information should be accessed at the courthouse. Others expressed a concern about how the advocacy group would identify itself and demonstrate that it is working with an individual. Furthermore, there was a concern that others would become aware of the victim's relationship with the specific advocacy group.

C. Recommendations

The Task Force unanimously recommends that remote (online) access to all juvenile case records be available to the prosecutor and defense counsel only, and that information regarding next court dates be available to statutorily identified programs for victims of domestic or family violence or sexual assault.

The Task Force further unanimously recommends that juvenile records not be otherwise available online.

The Task Force recommends that members of the public continue to have a right to inspect records and to attend juvenile proceedings that are public by statute.

DISCUSSION OF ADULT CRIMINAL RECORDS

The Task Force then moved on to analyze issues related to access to criminal case records. The focus of the discussion was on the method of access in criminal cases and exceptions to access.

A. Adult Criminal Record Overview

Judge Janelle led a discussion about access to court records of criminal cases, which include murder and Class A, B, C, D and E crimes. He explained that a substantial number of criminal cases are disposed of by plea agreements and that court records necessarily include "criminal history record information." 16 M.R.S. § 703(3).

There are two methods of disposition, "filing" and "deferred disposition," that present unique issues. When a case is "filed," either no plea is entered or the not guilty plea stands. The written filing agreement, which includes conditions such as payment of costs and refraining from criminal conduct, must establish a fixed period of filing of up to one year. Unless a violation of the agreement is proven, the court dismisses the pending charge at the conclusion of the filing period.

A "deferred disposition" involves a delayed disposition based upon a "deferred disposition" agreement. Generally, a "deferred disposition" results in the delayed disposition of a Class C, D, or E charge pursuant to a deferred disposition agreement. Each agreement is different, but the court-imposed requirements frequently include conditions that require the defendant to abstain from substance

use, engage in counseling, submit to search and testing for illegal substances or weapons, and/or pay a supervision fee and restitution. This alternative requires a defendant to enter a guilty plea and the court postpones sentencing for a fixed period of time. If the defendant successfully completes the deferral period, the defendant may be allowed to withdraw the plea and the State dismisses the charge or another agreed upon sentence may be imposed.

Title 16 of the Maine Revised Statutes governs access to criminal records available through the State Bureau of Investigation (SBI). Access to records is based upon how and by what entity information is collected. SBI receives notice of arrest or summons information from law enforcement, charging decisions from prosecutors (but not the charging instruments), and dispositions as reported by the courts. SBI does not maintain pleadings or docket records in criminal cases. Thus, the courts have more information pertaining to a criminal case than SBI. Furthermore, availability of information through SBI is different than availability at the courts because of legislative policy choices, and court directives issued under the Court's authority to control its own records.

Under CHRIA, SBI is authorized to disseminate information about case resolution[1] as follows:

- All dismissals are publicly available for thirty days from the date of disposition.
- Dismissals pursuant to plea agreements continue to be available to the public after the initial thirty days.
- Dismissals, other than those entered as a result of a plea agreement, are confidential and thus not available to the public after the initial thirty days.
- Criminal charges that have been subject to a filing agreement, if more than one year has elapsed from the date of filing, are not available to the public. During the filing agreement period,[2] if no disposition information is received by SBI, the case appears as pending in SBI records, and will be available to the public during the period of pendency.

[1] The Criminal History Record Information Act defines a disposition as "information of record disclosing that a criminal proceeding has been concluded, although not necessarily finalized, and the specific nature of the concluding event." 16 M.R.S. § 703(5).

[2] If a charge is dismissed at the conclusion of the filing or deferral period, the nature of the dismissal, as relayed to SBI, determines its treatment. If a charge is dismissed pursuant to a plea agreement, and that information is transmitted to SBI, it will be public. If a charge is dismissed outright, SBI treats the dismissal (and associated underlying charge) as confidential criminal history record information.

- For criminal charges subject to a deferred disposition agreement - during a deferred disposition agreement period[3] - if no disposition information is received by SBI, the case appears as pending in SBI records, and will be available to the public during the pendency.

Because cases under filing or deferred disposition agreements are public during their pendency, but may ultimately result in dismissals that are confidential, they present complex policy issues and were the focus of a detailed discussion by TAP.[4]

B. Discussion

In adult criminal cases, the State initiates the charges. which are publicly filed in the Maine courts. These filings are open to the public as are the proceedings associated with the charges. The Task Force members discussed the of allowing the public to have access to the status of an ongoing or resolved criminal case and the prohibitions that have been imposed by the court upon an individual.

There was little disagreement that information regarding criminal cases should generally be available to the public. The focus of the discussion was on exceptions to availability, in particular, access to filings and deferred dispositions, which may ultimately result in dismissal.

One member urged the Task Force to consider the implications of publishing cases on the internet when the charges had been dismissed. The question was posed: is it fair to saddle a defendant with a history of charges that could not be proven or with a record of something s/he did not do? Even in instances where there is an acquittal, members of the public may think that the defendant just "got off."

Members also discussed how the courts should treat "deferred dispositions" during the pendency, and after possible dismissal of associated charges. After thirty days dismissals (not pursuant to a plea agreement) and not coded as such when sent to SBI) are confidential: a public inquiry to SBI will result in a response that there is "no record found." However, the history associated with the criminal charge, including the charging instrument, docket record, deferred disposition agreement

[3] *See* previous footnote.

[4] Although the group focused on these two disposition types, acquittals, dismissals as a result of mental incompetence, mistrials and full and free pardons present similar issues—underlying criminal matters are public during their pendency (if active within a one-year period), but ultimate disposition may render the entire matter confidential in the hands of a criminal justice agency. 16 M.R.S. § 703(2).

and dismissal, would be available at the courthouse (to the extent permitted by the Court).

One member recommended that deferred dispositions and filings not be posted on the Internet unless there was a failure to abide by the conditions. The member argued that posting information during the filing or deferral period defeats the purpose of using a filing or deferred disposition to encourage rehabilitation and reform. Others asked questions about how this would affect employers and others inquiring about the status of the case. There was additional discussion about creating an impression that cases were languishing or creating other impressions that would not be accurate.

After a robust discussion and weighing multiple options, because of the societal interest in knowing about criminal cases, the group ultimately decided to the general framework TAP recommended for other non-confidential case types; and to recommend that court-generated records in adult criminal cases should be available online to the public to the same extent that criminal history record information is available under SBI's current practice.

C. Recommendations

The Task Force unanimously recommended that prosecutors & defense attorneys and defendants who register have remote (online) access to all adult criminal case records.

The majority of the Task Force recommended that members of the public have access to all adult criminal docket entries; and that there should not be any exceptions for information about deferred dispositions and filings.

- **One member voted that docket entries about deferred dispositions and filings not be available to the public on the Internet.**
- **One member voted that the public not have any online access to criminal docket entries.**
- **The one member who voted for full online access to all records in the other case types was not present for the July 31, 2017 meeting.**

The Task Force further recommended that, if possible under the new CMS system, the Court handle the online publication of cases with certain types of dismissals in the same manner as SBI currently handles such dismissals.

The Task Force recommended that a notice be posted on the online Case Management System that information may be available at the courthouse that is not available online.

DISCUSSION OF OTHER MATTERS

A. Attorney Access to All Case Records

One member raised a suggestion that licensed members of the Maine bar be given access to all case records, including on those cases on which the attorney is not an attorney of record. There were several reasons offered, including to research matters before accepting cases, and the ability to advise unrepresented litigants about the status of their cases, even if an attorney was unable to take the case. In contrast, other concerns about which attorneys would be looking at which cases and why were discussed. It was suggested that attorneys could have potential clients register for access to his/her case and allow the attorney access in this manner. At this time, the Task Force did not feel it was appropriate to recommend broad access to all members of the bar to all cases.

Members do not recommend that licensed attorneys have access to all case records that are available remotely (online). Attorneys will have remote access to cases on which they have entered an appearance, but not more generally.

B. Discussion of Victim Names In Remote (Online) Access

One member indicated that the draft materials did not include information about the handling of victim names. The drafting team will look for ways to address this concern in the next set of draft documents.

C. Additional Work

Our report to the Supreme Judicial Court is due by September 30, 2017.
The Task Force voted to conclude its work by circulating drafts of the Report and other materials. If any committee member believes a further meeting should be held, such member shall email that request to the Task Force email.

CONCLUDING REMARKS

Justice Murray thanked the members for their time and effort in studying and working through the important issues assigned to the Task Force.

NEXT STEPS

At this time, no additional meetings are contemplated.

A revised version of the draft report and supporting documents will be circulated to the Task Force. Task Force members will have ten days to submit comments, concerns, or suggestions. Concurring and dissenting statements must be submitted within 12 days of the draft report circulation. Thereafter, if any member in the majority wishes to submit further comment, he/she shall do so within three days.