

Minutes: Court Services Administration Committee

Friday, September 16, 2016

10:00 a.m. – 2:00 p.m.

ND Supreme Court Training Center (1st Floor), Room 133
State Capitol, Bismarck

Members Present:

Justice Daniel Crothers, Chair
Michael Williams
Susan Hoffer
Hon. Stacy Louser (by phone)
Kathryn Hinds
Hon. Steven Marquart (by phone)
Alvin Boucher
Meredith Vukelic

Members Absent:

Sen. Karen Krebsbach
Aaron Birst
Hon. Joshua Rustad
Levi Andrist
Barbara Hill

Others Present:

Sally Holewa, State Court Administrator
Larry Zubke, ITD
Cammie Schock, ITD
Jeff Stillwell, ITD
William Phillips, ITD

Staff:

Lindsey Nieuwsma

Chair Crothers called the meeting to order at 10:11 am and the attendees introduced themselves.

Chair Crothers called attention to the minutes of the August 9, 2016 meeting. **Michael Williams moved to approve the minutes and Meredith Vukelic seconded. The motion passed.**

Introduction

Chair Crothers gave an introduction of the committee objectives, a review of the August meeting, and an explanation of the discussion topics on the agenda.

Sally Holewa provided a recap of the issues, background on the current retention policy, and issues that have demonstrated the need for review of the policy as technology progresses.

Susan Hoffer asked whether the committee will be addressing the court records only or administrative records as well. Ms. Holewa answered that both should be addressed; currently

the court has generic administrative record retention schedules that follow the executive branch schedules, but those schedules do not address day-to-day business records.

Small group general policy statement discussion and reporting

Chair Crothers moved the group into small-group discussions of goals and priorities for the committee with respect to retention, destruction/disposition, and public (or non-public) access. Chair Crothers directed the group to the [JTC Resource Bulletin: Developing an Electronic Records Preservation and Disposition Plan](#) in the meeting materials.

The small groups discussed the broad issues and reported to the committee the issues and questions that the members foresaw:

- Critical and non-critical documents
 - Who determines what is critical
- Whether there should be distinctions between treatment of paper and electronic documents
- Physical exhibits
- The value of different types of records
 - Case files v. administrative records
- Whether destruction of records is automated or must be approved by a “destruction supervisor”
- Utah’s court-focused approach
 - Too aggressive
- How to balance costs and interests at stake
- Permissive v. mandatory retention/destruction of records
- Potential use of historical society and state archives as storage and access resource
- Keeping records confidential/restricted access to sensitive information

Access and Retention of Electronic Court Records

Chair Crothers introduced committee member Susan Hoffer, Clerk of District Court, Ward County. Ms. Hoffer recently conducted a study to assess public opinion on access and retention of electronic court records. She presented the research, survey questions, and results to the committee. (Meeting materials: [Access and Retention of Electronic Court Records](#)).

Michael Williams asked during the presentation whether there was current capability with technology and staff to take old information, such as social security numbers in files predating 2009, and allow for redaction and access. Ms. Hoffer distinguished between confidential party information and information contained within court documents like pleadings or briefs; party

information could be kept confidential. William Phillips stated, however, that there was no accurate tool to redact sensitive information from within documents and that pre-2009 documents are not available online. The pre-2009 paper documents are still being held in clerks' offices.

There was discussion about whether there was a need to implement storage methods and procedures for the pre-2009 paper documents as well as electronic documents. Ms. Hoffer stated that her goal for the committee would be a review of the paper document retention rule as well as building an electronic record retention rule.

Ms. Hoffer continued with her presentation and provided the group with information about the retention portion of her study.

Report on Digital Record Assessments

The committee members returned from lunch break to hear a report on Digital Record Assessment by Sally Holewa. Ms. Holewa gave an explanation of the materials that she provided and a summary of the assessment conclusions. She stated that her inquiry began with the technological side of record retention. She defined digital continuity as the ability to maintain digital information in a way that it will continue to be available, complete, and usable. On the positive side, the [Digital Continuity Checklist](#) showed that a user could identify when, where, and by whom records are being created and where they are stored. What record is being created is not always understandable.

With respect to case records, an area for improvement is in the digital audio records. Because of the method of recording, the type and identity of hearings being recorded is not clear. The naming convention is also an issue; court reporters are all supposed to name records in the same way, but that is not happening consistently which leads to difficulty in locating audio. There are also issues with documents created in word processing; it is unclear what and whose documents they are.

On the positive side, the court has put a lot of resources into good preservation, e.g. backups and disaster recovery, and security of its records. With respect to other areas of improvement in digital continuity, roles and responsibility for administrative files, e.g. litigation holds, email correspondence, departing employee records, need to be assigned. There is also uncertainty about metadata being created and about the reliability of records. There are no methods in place for validating the integrity of files.

Ms. Holewa moved on to the [Digital Preservation Capability Self-Assessment](#), which relates to how information will be accessed in the future. On the positive side, the court is doing well with security and using preservation file formats which are media neutral. There is also a good

foundation with current retention policy. The integrity of the documents was an improvement area under this checklist, and the court does not have an archiving policy in place.

Lastly, Ms. Holewa addressed the [Records Management Program Review](#), which relates to the creation or receipt of records, the maintenance and use of records, and the disposition of records. The current retention policy provides a good foundation, but it likely needs to be reviewed and expanded. There are also some gaps in the record management program. The position for the records coordinator position has been limited in the past and is vacant right now. There has not been any active personnel training on access and retention policies, and there are no policies governing things like email, voicemails, and litigation holds. This is problematic in situations like open records requests which may include emails or in a situation where a written request or complaint is received via email instead of regular mail. Mr. Williams asked how many open records requests are being made. Ms. Holewa said they are typically party requests and she was aware of three situations in the past year.

She brought up another issue with the current retention policy. Currently, retention is mandatory and disposition is discretionary. Arizona, which has a discretionary disposition policy, was sued for differing practices between counties. That approach should be considered and addressed in this committee's work. Chair Crothers also pointed out the problem with correcting errors in court records and different practices by counties in addressing that issue.

Group Discussion of Electronic Records Retention and Access Issues

Chair Crothers moved the group to a discussion of the goals of the committee going forward and a breakdown of the work to be done.

Chair Crothers introduced the issue of the definition of "court records." The group reviewed the current North Dakota definitions of court records contained in Administrative Rules 19 and 41, which are different. The consensus was that there should be one definition of court records for both the retention and access policies. There was discussion about whether the court records definition should encompass administrative records and the distinctions between court, case, and administrative records. The consensus was that "court records" encompasses both case and administrative records, but administrative records should be identified separately from case records and different policies should apply to each. There was also discussion about including electronic forms of records in the definition and which courts are included under the policies.

Mr. Phillips pointed out the committee should consider that different access mechanisms and procedures will need to be set forth for administrative records and case records. There was discussion about audio records and including them in case records and the increasing use of emails in court business. There has been a distinction between audio recordings which are

made by the court recorder and recordings which are used as backup for a court stenographer, with the former considered to be a court record and the latter as work product.

Alvin Boucher asked how the retention and access policies for court interplay with the open records laws. Ms. Holewa explained that, according to attorney general opinions, the open records laws do not apply to the judicial adjudicative activities, but that other judicial activities, e.g. travel voucher payments, may be subject to the open records laws.

Chair Crothers moved on to the topic of methods of records retention and destruction. Judge Marquart asked, for retention purposes, whether the retained case file would include the images and exhibits. Chair Crothers said that is exactly one of the questions that need to be addressed. There was discussion about the different components of the case file, which components should be retained, how long to retain, and whether there should be a distinction between electronic and paper records for retention and access purposes.

The group moved on to discussion about what should happen to the record at the end of the retention period. Concerns that were voiced included the cost of storing large amounts of information and the obsolescence of electronic record forms. There was also general discussion about the problem of incorrect data in retained records and the use of disclaimers and contracts which shift liability to avoid issues. The group also discussed the consideration of the case type in determining the retention period and access questions and whether the court would work with the state archives for storage.

Ms. Holewa brought up the issue of whether parties have access to their own case documents (not just the docket). The discussion centered on why the litigant should have the expense of traveling to the courthouse or paying an attorney (who has free remote access) to tell them what is in their own file. Mr. Phillips explained that IT manually creates each attorney user account. The justification for the accounts is that it takes less time and cost to create a remote access account than it would for the clerks at the county courthouses to provide records to each attorney, and as fee-paying members of the state bar and officers of the court, attorneys should have access. There is a cost of \$16 per month for each person who has a remote access account. Mr. Phillips also pointed out that the cost associated with transferring case file images over the internet would be very high if remote access to all files was expanded to the public. Mr. Phillips talked about a fee-per-view or cost for downloading documents option that could be used, similar to PACER. Access for self-represented persons could be limited to their cases alone, and the court could charge for that access. Chair Crothers discussed a narrow request by a self-represented litigant to have access to his files within his own case.

Chair Crothers reviewed the issues presented within the small group discussion in the morning and invited questions or comments on anything that had not been addressed in the afternoon discussion.

The meeting concluded with the assignment of members to subcommittees:

- a. Subcommittee on definition of court records and access policy
 - i. Mike Williams (Chair)
 - ii. Kathryn Hinds
 - iii. Judge Rustad
 - iv. Levi Andrist
- b. Subcommittee to articulate retention policy
 - i. Judge Marquart (Chair)
 - ii. Aaron Birst
 - iii. Al Boucher
 - iv. Barb Hill
- c. Subcommittee to articulate destruction policy
 - i. Susan Hoffer (Chair)
 - ii. Meredith Vukelic
 - iii. Judge Louser
 - iv. Sen. Krebsbach

The group addressed timeframes for future meetings and for subcommittees to report back to the large group. The goal is to have an updated policy by completed by September 2017 for submission to the Court for consideration. The group will continue to meet every 6-8 weeks until June 2017.

With no further business, the **meeting adjourned at 2:08 pm.**