

MINUTES
(unofficial until approved)
Court Services Administration Committee
Conference Call
August 14, 2015

Members Present

Justice Daniel Crothers , Chair
Aaron Birst
Kathryn Hinds
Judge Steven Marquart
Judge Josh Rustad
Meredith Vukelic
Mike Williams (SBAND Liaison)

Members Absent

Levi Andrist
Al Boucher
Barb Hill
Susan Hoffer
Sen. Karen Krebsbach
Judge Stacey Louser

Others Present

Scott Johnson, Ass't State Court Administrator
Jack McDonald, Bismarck attorney

Chair Crothers called the meeting to order at 12 Noon for purposes of initial discussion of a matter referred to the Committee by the Supreme Court. He said the referral concerns a proposal submitted by the Digital Recording Workgroup to amend Administrative Rule 40 to provide that copies of audio recordings of court proceedings should not be available to the public or counsel absent a showing of good cause. He said the purpose of this meeting is to briefly review the proposal and reasons for it submitted by the Workgroup and review related background information. He said a follow-on meeting on August 28 will more fully discuss the merits of the proposal and consider possible responses.

At the request of Chair Crothers, staff reviewed the proposal and related North Dakota court rules and provisions from other jurisdictions. He said the proposal recommends limiting the availability of copies of audio proceedings for two general reasons illustrated by examples in the proposal: the potential for confidential information being included on the recording when the information is presented in court, and the possibility of extraneous or inadvertent communications being included on the recording. The latter, he said, is a particular concern with respect to possible attorney-client conversations.

With respect to related North Dakota rules, staff explained that Administrative Rule 41 governs access to court records. Court records are generally presumed to be open to the public under the rule unless the record information is confidential by state statute, court rule, or federal law or regulation. The definition in the rule of "court record", he said, would seem to clearly apply to audio recordings of court proceedings. The rule, he said, provides that public access includes the opportunity to examine the record and obtain a copy of the record. He said Administrative Rule 40,

the rule to which amendments are proposed, generally permits the public to purchase copies of the audio recording of a proceeding, unless the proceeding is closed or confidential or the court orders that all or a part of the recording not be available because of considerations set out in the rule.

With respect to related rules or policies in other jurisdictions, staff said research indicates that similar to Administrative Rules 40 and 41, several jurisdictions consider audio recordings of court proceedings to be a public record with copies available. For example, he said, New Hampshire rules provide that any person may request a copy of an audio recording and Wisconsin policy provides that a member of the public may purchase an electronic copy of a record in a matter in which a transcript would also be available. Both jurisdictions have exceptions related to confidential proceedings. Some jurisdictions, he said, prohibit providing copies of audio recordings. An example, he said, is the 19th Judicial District in Colorado in which an administrative order was promulgated by the district's Chief Judge which instructed that copies of digital recordings of court proceedings would not be provided. Reasons for the limitation set out in the order are generally similar to concerns outlined in the Digital Recording Workgroup's proposal to amend Administrative Rule 40.

Chair Crothers then requested general discussion of the proposal before the Committee. He said an initial consideration is likely the extent and frequency of the problems outlined in the Workgroup's submission.

Mike Williams agreed that it would be useful to know how often problems set out by the Workgroup are encountered. He said he does not recall ever having requested a copy of a audio recording.

Judge Marquart suggested problems may be more commonly associated with proceedings involving self-represented litigants, but he agreed that the scope of the problem is uncertain.

Scott Johnson observed that during the Digital Recording Workgroup's discussion of the issues, there was no mention of how often the difficulties outlined in the submission have been encountered. However, he said the group considered the problems significant enough to propose the rule amendments. He said the group could be polled to obtain any available information regarding how often problematic situations have arisen in the past.

Justice Crothers asked whether there was a general approach followed when requests for a copy of an audio recording is received and it involves a proceeding in which, for example, confidential information is disclosed in the proceeding.

Scott Johnson said there is an issue regarding how review of the recording is conducted, but, he said, there is a question regarding how to remove parts of the recording that relate to confidential information.

With respect to confidential information disclosed in the proceeding, Mike Williams observed that counsel and the parties will have already heard the information. He wondered whether another issue with respect to inadvertent or extraneous information would be an inadvertent comment by counsel or a party that was not intended to be heard by the opposing side. Justice Crothers agreed the issue of privileged attorney-client communications is a consideration.

Judge Marquart noted that electronic recorders in the East Central judicial district do not transcribe extraneous communications that occur during the proceeding. Consequently, he said, if a transcript is prepared issues identified by the Workgroup will likely be addressed.

In response to a question from Justice Crothers, Judge Marquart said confidential personal information would most likely arise in proceedings such as child support enforcement proceedings, which are routinely recorded in the East Central judicial district. Additionally, he wondered who would have the responsibility of reviewing recordings in general to determine whether confidential or extraneous information are included in a recording.

Katherine Hinds noted that the Workgroup's submission underscores the burden associated with reviewing a recording when a copy is requested to determine whether confidential or extraneous information is present in the recording.

Judge Marquart said another consideration is that if a copy of a recording is provided, then staff likely would not be required to prepare a transcript. Justice Crothers observed that there may be a question regarding whether the recording, then, would be considered as being the same as a transcript prepared by a recorder or reporter.

Staff noted that other jurisdictions have provided by rule that an audio recording is not considered the official record of the a proceeding. Mike Williams said Minnesota's rule governing audio recordings is one example and provides that the recording is a back-up to assist in preparing the transcript and is not the official record.

Judge Marquart said, based on the general nature of the problem, he would be inclined to support a blanket rule disallowing providing a copy of the audio recording.

In response to a question from Justice Crothers regarding the technical ability to edit recordings to remove confidential or extraneous information, Scott Johnson said Information Technology staff could be invited to the next meeting to discuss how the process might work.

Jack McDonald said he hoped the Committee could identify the nature and frequency of problems that would justify the substantial change proposed by the Workgroup. He said it may be that confidential information may appear only one time in a proceeding, which would seem not to justify prohibiting a copy of the entire recording. He said technology should be able to provide a mechanism for editing recordings to remove confidential or extraneous information.

Following further discussion and in response to a question from Chair Crothers, Committee members agreed information should be assembled, to the extent possible, regarding the frequency of problems identified by the Workgroup. It was also agreed Information Technology staff should be invited to the next meeting to discuss methods for editing recordings. Scott Johnson suggested, and Committee members agreed, that a member of the Workgroup should be invited to more fully discuss the concerns outlined in the proposal.

Scott Johnson suggested Administrative Rule 40 and also Administrative Rule 39 (Recording District Court Trials and Proceedings and Preparing Transcripts) should be reviewed for possible updating of language. Additionally, he suggested the Committee might consider developing a colloquy to be used by the judge and courtroom signage to inform counsel and parties about recording practices.

There being no further business, the meeting was adjourned at 12:40 p.m.

Jim Ganje, Staff