

*MINUTES*  
(unofficial until approved)  
Court Services Administration Committee  
Supreme Court Front Conference Room/Conference Call  
August 28, 2015

Members Present

Justice Daniel Crothers , Chair  
Levi Andrist  
Aaron Birst  
Al Boucher  
Barb Hill  
Judge Steven Marquart  
Judge Josh Rustad  
Meredith Vukelic

Members Absent

Katherine Hinds  
Susan Hoffer  
Sen. Karen Krebsbach  
Judge Stacey Louser  
Mike Williams (SBAND Liaison)

Others Present

Scott Johnson, Ass't State Court Administrator  
Kelly Hutton, Chair, Digital Recording  
Workgroup  
Kristen Erickson, Electronic Recorder, ECJD  
Todd Becker, Judicial Branch Information  
Technology Department  
Jack McDonald, Bismarck attorney

Chair Crothers called the meeting to order at 10:00 a.m. and drew Committee members' attention to the August 14 meeting minutes - meeting material, pp. 2-5.

**It was moved by Aaron Birst, seconded by Judge Marquart, and carried that the minutes be approved.**

Chair Crothers summarized the issues and proposed rule amendments submitted by the Digital Recording Workgroup regarding Administrative Rule 40, which would provide that copies of audio recordings of court proceedings would not be available to the public or counsel absent a showing of good cause. He noted that at the August 14 meeting the Committee requested additional information about the frequency of problems noted in the Workgroup's submission, i.e., confidential information or inadvertent or extraneous comments by lawyers and others included in audio recordings. He then welcomed for comments and discussion Kelly Hutton, Chair of the Workgroup, and Kristen Erickson, Electronic Recorder in the East Central Judicial District.

Kelly Hutton summarized information she had gathered regarding how often copies of recordings have been requested and the occurrence of ostensible problems associated with confidential information or extraneous remarks reflected in the recordings. She said the information indicates that within the past year, and across the four administrative units, there have been about ninety requests for copies of recordings. She said Unit 1 information indicates that most of the

Minutes  
Court Services Administration Committee  
August 28, 2015

requested recordings included some kind of confidential information, often in the form of social security numbers. She said confidential information was less often cited as an issue in other units. She said her experience is that judges will often ask for social security numbers in open court.

In response to a question from Meredith Vukelic, Ms. Hutton said requests for copies of recordings are received most often from parties to the proceeding, with requests from others being more rare.

In response to a question from Justice Crothers concerning reasons for requests, Ms. Hutton said it appears that a copy is most often requested to facilitate preparation for the on-going proceeding. She noted that the cost obtaining a copy of the recording, about \$25, is less expensive than the cost of a transcript.

Levi Andrist asked whether there is any breakdown of the ninety or so copy requests that indicates how many requestors might have already obtained a transcript. Kristen Erickson responded that there are no specific numbers, but there have been instances in which a request for a copy was denied when there was a transcript already on file.

Ms. Erickson noted that parties to a proceeding are able to obtain a copy of the recording even if there is confidential information on the recording. She said there is, however, a concern about how the recording may be distributed or used.

In response to a question from Aaron Birst, Ms. Hutton said she is unaware of specific instances in which a recording has been used by a litigant in a proceeding. She explained that policy in the Northeast Judicial District requires that a written transcript must accompany a recording if the recording is offered in a proceeding.

Aaron Birst said it appears there may be little evidentiary value of a recording for someone who may request a copy. Judge Marquart agreed.

Judge Rustad noted a recent situation in which a party was seeking a disorderly conduct restraining order and requested a copy of the recording for purposes of emphasizing in a subsequent proceeding the tone of voice used by the respondent.

Kristen Erickson described a similar instance in which a copy of a recording was requested for purposes of replaying the voice, and tone, of the defendant. She said the judge in the proceeding in which the recording was to be replayed was the judge who had presided at the initial proceeding.

Minutes  
Court Services Administration Committee  
August 28, 2015

With respect to “extraneous information” on recordings, Justice Crothers noted the possibility of communications exchanged between a client and the client’s lawyer which might be protected by the attorney-client privilege. He asked whether there have been any instances in which those communications might have been recorded.

Kristen Erickson said it is not unusual to hear whispered conversations between a lawyer and the client on the recording.

Levi Andrist noted comments by Sally Holewa included in the Workgroup’s submission which suggest that extraneous information should not be a factor with regard to accessibility since the recorder has the responsibility of excluding that information from a transcript. He said the comments indicate there should be no more than 4-6 seconds of extraneous conversation on the recording if the recorder is properly monitoring the recording. The recorder, he said, is expected to ask for a pause in the proceeding to redirect attorneys and others when private or extraneous conversation is being picked up on microphones.

Judge Marquart observed that he would generally prefer not to be interrupted during the course of a proceeding.

Al Boucher said that an attorney should mute the microphone during conversations with the client since the attorney has an ethical responsibility to protect those conversations. Judge Marquart agreed but said the client should not face possible prejudice if the attorney forgets or fails to mute the microphone.

Justice Crothers noted that at the August 14 meeting there was discussion of developing signage or a courtroom colloquy to instruct attorneys and litigants about recording issues. Judge Marquart said Ms. Erickson has often instructed attorneys to mute their microphones but they quite often do not do so.

Chair Crothers asked whether there were any additional comments from Ms. Hutton or Ms. Erickson on recording issues.

With respect to Administrative Rule 40, Ms. Erickson said Section 2 of the rule does not provide for an opportunity of a party to object to a copy of a recording being provided. She suggested that additional language regarding an opportunity to object, perhaps with notice provided by the requesting party, should be considered. Additionally, she drew attention to the Minnesota rule provision [meeting material, pp.31-32] that clarifies that a transcript is the official record and that a recording is merely intended to assist in preparation of the transcript. She said transcripts are

Minutes  
Court Services Administration Committee  
August 28, 2015

prepared by professionally trained staff and it is problematic to provide copies of recordings, which are an unofficial record.

Judge Marquart suggested that one important objective may be to simply define what constitutes the official record of a proceeding.

In response to a question from Aaron Birst, Ms. Erickson said proper techniques for editing transcripts are part of a national standard.

Meredith Vukelic observed that transcript costs may be a substantial burden for an indigent client or a self-represented litigant. In response to her question regarding transcripts costs, Ms. Erickson said transcript preparation costs are \$4 per page.

Al Boucher wondered about situations in which someone brings a tape recorder into the courtroom and records the proceeding. He noted that one attorney in his area regularly brings a recorder into municipal court. Barb Hill said there are signs posted in the Stutsman County courtrooms instructing that all cell phones, which can be used to record, must be turned off.

Justice Crothers observed that there is a court rule that prohibits recording a proceeding without the court's permission. [Post-meeting ed. note: Rule 10.1(d) of the Rules of Court is the applicable rule].

Chair Crothers then welcomed Todd Becker, Information Technology Department, for comments regarding the feasibility of redacting confidential or extraneous information from an audio recording.

In explanation, Mr. Becker said a PC set-up hooked to a sound system is in place in every courtroom, which digitally records proceedings locally to that computer. He said while the proceeding is recording, a copy is made which is streamed to the server in Bismarck. As a result, he said, there are two "copies" of the recorded proceeding. He said recorder staff have a software application on their PC by which they can listen to any recording, burn a CD, or export a copy to a thumb-drive. He said the electronic recorder monitors the recording of the proceeding as the recording occurs, with about a 1-3 second delay, and can annotate the recording to reflect notes pertinent to the proceeding.

In response to a question from Levi Andrist, Mr. Becker said the recorder can annotate the record to note that confidential information, such as a date of birth, is present.

In response to a question from Al Boucher, Mr. Becker said the recording is not searchable.

Minutes  
Court Services Administration Committee  
August 28, 2015

In response to a question from Judge Marquart regarding whether the recording can be edited, Mr. Becker said information, such as confidential information, could be redacted from the recording but the redaction would be permanent from both the original recording and the copy.

Judge Marquart said it would be unwise to initiate a process by which information would be permanently redacted from a recording of a proceeding.

Justice Crothers asked what would be required to, for example, provide a copy of a recording with confidential information and extraneous information, such as attorney-client communications, removed from the recording. Mr. Becker responded that the IT department would have to assist in locating the particular hearing and then, by way of a software tool, find the location of the particular information to be removed.

In response to a question from staff, Mr. Becker said it is currently not possible to make a copy of the recording stored on the central server and redact information from that copy.

Chair Crothers thanked Kelly Hutton, Kristen Erickson, and Todd Becker for their participation in the meeting. He then requested Committee discussion and any conclusions regarding the issue before the Committee.

**It was moved by Judge Marquart and seconded by Aaron Birst to amend the relevant rules to remove any reference to providing a copy of a digital recording of a proceeding and to further amend the relevant rule to include the following:**

**“Recordings of proceedings in the district court, including without limitation those used as back-up to a stenographically recorded proceedings or as the electronic recording, are intended to assist in the preparation of a transcript. The transcript, and not the recording, is the official record of the proceedings. Recordings of proceedings in the district court may only be used as authorized in this or other applicable rules or orders promulgated by the Supreme Court. The contents of a recording shall be disseminated only by transcript, which transcript, and not the recording, shall be the official record.”**

Jack McDonald said there do not appear to be problems to an extent that would warrant the proposed restriction. He said unless a hearing is confidential for some reason, all the information reflected on a recording will have been presented in open court and could have been heard by anyone present. He said there may be only one occurrence of confidential information or problematic extraneous information in a recording, which seems to be a questionable basis for prohibiting access to the entire recording.

Minutes  
Court Services Administration Committee  
August 28, 2015

Levi Andrist agreed and said he is not prepared to support a blanket prohibition against providing copies of recordings. He noted the past requests for copies of recordings for purposes of indicating the tone of voice to the court. He wondered whether there is no value at all to bringing to the attention of the court the tone of voice used by a party in a proceeding.

Judge Marquart said a printed transcript has been the standard record of the court for years and tone of voice would have no significance in a printed record.

Aaron Birst observed that with different technological capabilities it may be possible to make recordings available to a litigant, but the current system does not have those capabilities.

In response to a question from Levi Andrist regarding the transcript as the official record, Justice Crothers suggested that, at a minimum, there should be a rule statement that the transcript is the official record.

Levi Andrist said that if it is clear that the transcript is the official record, then any evidentiary issues may be less problematic if the recording is considered an unofficial record. Additionally, he agreed with earlier comments regarding the potential cost to indigent or self-represented litigants if obtaining a transcript at \$4 per page is required, rather than obtaining a copy of a recording for \$25. He said the potential cost raises an important issue regarding access to justice.

Judge Marquart observed that a litigant would not be required to pay transcript costs if found to be indigent.

Meredith Vukelic said there are other litigants who may not be truly indigent but for whom transcript costs would be a substantial burden.

Following further discussion, **the motion carried.** (Levi Andrist, Meredith Vukelic - no; Chair not voting).

Chair Crothers said draft amendments would be prepared for Committee review. He said a future meeting date will be coordinated with Committee members.

There being no further business, the meeting was adjourned at 11:20 p.m.

---

Jim Ganje, Staff