

Minutes of the 4th
Judicial Information Systems Council (“JIFFY”)
Public Access Subcommittee (“PAS”)
Judicial Information Division (“JID”)
Tuesday, May 13, 2008
1:04-3:21 p.m.

Voting Members present:

Judge Karen Mitchell, Chair
Judge Mark A. Basham
Judge Steve Lee
Judge Steven Bell (*via phone*)
Robert Mead
Steve Prisoc
Dana Cox
Dennis Jontz (*via phone*)
Geri Lynn Sanchez (*via phone*)

Voting Members absent:

Arthur W. Pepin
Veronica Maestas

Minutes taken by: LaurieAnn Trujillo

Judge Karen Mitchell called the meeting to order at 1:04 p.m. and established a quorum.

I. Approve Agenda.

Judge Mark A. Basham moved to approve today’s agenda. Judge Steve Lee seconded. No further discussion. No opposition noted. Motion carried.

II. Discussion on position assignments:

A. Should pre-conviction records be publicly available on the internet? Judge Basham explained his position paper that supported the “yes” position on this issue. He summarized his position by stating that if someone could walk into a courthouse and obtain information, then he found no reason why that same information should not be made available on the internet. Pre-conviction records are currently available on the Judiciary’s public Case Lookup website.

Steve Prisoc explained his position paper that “*Governments should limit access, to the extent allowed by the First Amendment, to records of pending criminal cases where guilt has not be determined and also limit access to adjudicated criminal cases where all charges were acquitted, reversed on appeal, nolle prossed, vacated, set aside or otherwise resolved in such a way that did not result in a conviction.*” He spoke of the following:

- Employers and landlords accessing internet repositories to obtain information on prospective employees and tenants.

- The rationale for his position.
- Commercial sites that purport the public to offer information on people that have been arrested.
- Criminal justice experts agree that access to housing and employment is a predictor of future criminality and recidivism, in particular for convicted criminals. He found no research relative to arrestees only.
- Having print cards for a system such as the Judiciary's system where one can search only by name, and the likelihood that the wrong person could be chosen and denied housing and/or employment as a result.
- Possible guidelines for online court or criminal history as provided on page 3 of the handout.
- Instances where employees have misused computer systems to obtain information for personal use.
- The difference between obtaining information in person at the clerk's office versus pulling it down from the internet.
- Criminal history consolidators going to the courthouses and scanning documents to enter into their systems.

There was discussion about:

- Shifting the burden to landlords and employers, rather than arrestees, when arrests are a good indicator that someone is undesirable.
- Mr. Prisoc shared several landmark cases.
- Cases being dismissed for a variety of reasons.
- Displaying arrest records for convicted felons only.
- Law enforcement and prosecutors stacking charges.
- Serving those that have a vested interest in a case—the parties.
- Putting the case and charges on the internet but not the offender name, which would require someone to have a case number.
- False identity problems.
- Once a case is closed, removing the record from the website.
- Different degrees of access.
- Disparate impact cases and employment law.
- How to handle cases for those persons that committed a crime in their youth and have since lived crime-free.
- Criminal Offender Employment Act.

B. Summary outlining the documents that should be sealed by the courts; and why/why not. Dana Cox explained her position paper. She focused it on the local statutes and local court rules.

1. Are there categories of information that should not be included in otherwise unsealed, public court records? Ms. Cox referred to page 3 of her position paper, which outlined the categories of information that should not be included in otherwise unsealed public court records. Categories generally include personal identifiers and information sealed as a matter of law.

2. Are there categories of cases that are currently sealed and will continue to be sealed, regardless of format? Ms. Cox referred to page 4 of her position paper and explained the categories of cases that are currently sealed and will continue to be sealed, regardless of format.

3. Can courts seal records from digital publication on their own motion or a motion of the parties? Ms. Cox referred to pages 4, 5, 6 and 7 and noted that judges could seal records if he/she saw a privacy or protective issue. She pointed out that it would be beneficial if the courts had a comprehensive rule of procedure to sealing, similar to the federal and civil courts, as opposed to a local court rule. She went through some of the local court rules in New Mexico. She suggested that the PAS start by using the local court rules and the federal court sealing rule to draft a sealing rule of procedure for the state courts.

4. What types of court files are categorically sealed as a matter of law? Ms. Cox referred to pages 7, 8 and 9 to explain the types of court files that are categorically sealed as a matter of law. She noted her support for a level of access policy so attorneys are able to access information. There was discussion relative to the case management system capability in terms of redacting certain information and the sealing statutes and local court rules.

There was discussion about potential arguments that could be brought up at a public hearing on a sealing rule; criminal cases; and the curiosity of why grand jury “no bills” are sealed by statute, but preliminary hearing information where no probable cause is found is not sealed.

C. Who is responsible for ensuring that prohibited information is kept out of the court records? Judge Mitchell referred to her position paper and explained why the parties are responsible for ensuring that prohibited information is kept out of the court record. She spoke of states that have rules and laws that specifically make it the sole responsibility of the parties to ensure that prohibited information is kept out of the court records; and they do not make a determination of whether the party is an attorney or pro se. In her research, most of the articles she found specifically dealt with civil cases. She did not find much on criminal cases. There was discussion on the following:

- The possibility of having two repositories (one to be the official court record and the other for the redacted court record).
- Having the system run through the redacted repository for online access.
- Having the clerks run documents through redaction software before it is printed.
- Setting up the system so clerks could not print anything for the public that is not redacted.
- Palm Beach study on traffic filings.
- Inspection for Public Records Act.

D. Should self-represented litigants be held to the same standards as attorneys for adhering to non-disclosure rules? Judge Mitchell noted that she believed that self-represented litigants should be held to the same standards as attorneys for adhering to non-disclosure rules. The question to resolve is how the courts would enforce this standard.

E. Should bulk downloading of records by private companies be allowed? Dennis Jontz noted that he believed public access and access by consolidators as being related. Mr. Prisoc reported that in his position paper regarding “*Should pre-conviction records be publicly available on the internet,*” he stated in one of his guidelines that information on arrests and/or convictions shall not be sold or otherwise be provided to for-profit businesses that sell information to members of the public. He spoke about name checks being the only way to access all of the internet criminal history records and the problems related to identity theft.

Mr. Jontz spoke of his position paper on the issue: “*Does the right of the public to access court records occur only at the courthouse counter, or should such documents be made available electronically and facilitated by bulk resellers.*” There was discussion on:

- Bulk records.
- Reliable consolidators versus unreliable consolidators.
- Entering information that should not be disclosed differently, so it is easier to identify what should not be released.
- Contractually requiring consolidators to perform valuable protective practices, such as requiring them to expunge certain things from their records after the court expunges them, and if they fail to do so, the courts removing their access to obtain further information.
- Consolidators that have a flawless record of contractually complying with the requirements of courts and public agencies where they are required.
- Limiting sales to reliable consolidators.
- Mr. Jontz spoke of two life examples that he experienced over the years relative to public access issues.
- The public not understanding criminal history information versus leaving it up to the public to decide what the information means.
- Planning for electronic filing.
- Colorado and Vermont do not allow bulk downloading.

F. Legal presumption/positions that court records are public. Judge Mitchell explained that Arthur Pepin provided his position paper that only court personnel should have unfiltered access to court records; Judge Steven Bell provided his position paper via email that only attorneys should have electronic access to court records as long as paper files are available for inspection by others; Robert Mead’s position paper that court records are public; and Mr. Jontz’s position paper that public access to court records is guaranteed by law and that the internet allows easier and wider access, while the courts still balance personal safety and privacy with public access. Judge Mitchell asked the members to review the position papers on this issue for further discussion at next month’s meeting.

Action Item: Per Judge Mitchell, add to the June PAS agenda, the discussion of “Legal presumption/positions that court records are public.”

Action Item: Ms. Cox offered to scan and email the Miami Dade case that was discussed today, so the PAS can reference it when drafting the sealing rule.

Action Item: Per Judge Mitchell, Ms. Cox and Mr. Mead will draft a sealing rule (one for civil, one for criminal, or one that covers both, for all state courts). They will bring their draft to the June PAS meeting.

Action Item: Mr. Prisoc asked the PAS to come up with a recommendation to take to JIFFY for how the new case management system should handle sealed data.

Action Item: Per Judge Mitchell, add to June's PAS agenda the item that PAS will vote on the issue: "Who is responsible for ensuring that prohibited information is kept out of the court records?"

Judge Mitchell referred to Judge Lee's handout entitled, "*Rule 123. Public Access to the Judicial Records for the State of Arizona.*"

Judge Basham asked Mr. Prisoc about the status of the case that does not display on the public Case Lookup website. Mr. Prisoc advised that he is still investigating the matter.

III. Future Meetings

The next meeting will be held on Tuesday, June 17, 2008 at 1:00 p.m. at JID.

IV. Adjourn

Judge Mitchell adjourned today's meeting at 3:21 p.m.

Final Minutes Approved by Judge Mitchell on May 30, 2008.