

July 10, 2015

Penny Miller
Clerk of the Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Ms. Miller,

The Digital Recording Work Group would like to propose a change to Administrative Rule 40, Access to Audiotapes of Proceedings in District Court.

We believe that copies of audio proceedings should NOT be provided to the public and/or counsel unless good cause is shown, with the exception of time-sensitive mental health and juvenile court proceedings OR by court order.

The following information is often picked up or contained in a recording:

1) Inadvertent comments

- a. Discussions between counsel and clients. Many times counsel and client are conferring during the hearing and this is picked up in the recording. If a transcript is requested we, as professionals, know this was not meant to be “on the record” and do not transcribe it.
 - i. In the AAERT manual this topic is covered in the transcript portion under Private Communications and in the Sidebar/Bench Conference section. In Private Communications, AAERT writes, “Because recordings include whatever arrives through the microphone, you will occasionally be able to hear attorneys whispering to each other or to their clients. These are considered inadvertently recorded aside comments and should NOT be transcribed.” The sidebar/bench conference section points out that they too are sometimes recorded but off the record. We do not shut off our machines for off the record sidebars unless instructed to do so by the judge. We do annotate the sidebar conversations and when transcribing, we would simply not transcribe them. Every time a recording is shut off, we risk missing part of what should be on the record.
- b. Also, the judge is not always clear as to when to “close the record” and inadvertent comments are captured that are not to be part of the record. (Example - comments regarding another case, a basketball game, etc.)
 - i. Many judges just all of a sudden start the record, so recorders have adapted by turning on the recording the moment the judge comes into the courtroom. Because of this, there may be inadvertent comments recorded.

- ii. There are often multiple things taking place at the same time during a hearing. The same goes for comments made at the end of a hearing once the judge says “hearing adjourned.” We cannot always immediately hit the stop recording button because we’re still annotating.
 - c. Comments by others in the courtroom. A court reporter may or may not hear these comments and uses discretion in including these in their notes or transcripts. The court recorder/transcriber should follow that same process.
 - d. We also hear all conversation on a delay so it can be difficult to stop the recording before inadvertent conversations are picked up and recorded.
- 2) Confidential information is recorded that would normally be redacted in a transcript.
- a. Social Security and Taxpayer Identification Numbers
 - b. Year of Birth
 - c. Minor Children/Victims
 - d. Financial Account Numbers
 - e. Juror voir dire information
- 3) “Bleed over” or running the recording from one case to another. What we mean by this is that when the Court moves from one case to another there is often no pause to find the next case to record under. Judges are moving quickly from one case to another, so by the time the Electronic Court Recorder clicks “record” to record the current case, the beginning of the new case records onto the end of the prior case. Again, as transcribers we know this and are able to access the end of a recording for the beginning of the transcript. You cannot isolate out a portion of one recording and add it to another recording.
- 4) Time does not allow for a recorder or reporter to listen to each recording, when someone requests one, to determine whether or not it includes comments/information that should not be released.

Thank you for your time in considering this matter. Please let us know when it might be convenient for the Supreme Court to consider our request.

Sincerely,

Digital Recording Workgroup Committee
Laurel Alber, Court Recorder, SEJD
Ronda Colby, Court Reporter, SCJD
Kristen Erickson, Court Recorder, ECJD
Tammy Henriksen, Court Recorder, NEJD
Nancy Horst, Court Recorder, NWJD
Jean Lindvig, Court Recorder, NWJD
Lori Schlieve, Court Recorder, NEJD
Gina Wariner, Court Recorder, SWJD
Todd Becker, Network Analyst, IT
Kelly Hutton, Assistant Trial Court Administrator, Unit 1

Administrative Rule 40 - ACCESS TO AUDIOTAPES OF PROCEEDINGS IN DISTRICT COURT

1. SECTION 1. Authority

Under Article VI, Section 3 of the North Dakota Constitution, the supreme court has the authority to establish policies and procedures to be followed by all courts of the state. The court also has specific authority to establish policies relating to court records under 27-02-05.2, NDCC.

SECTION 2. Public Access to Audiotapes

1. Copies of the audiotape recording of trial court proceedings made under this rule may be purchased by the public unless the proceeding is closed or confidential, or the judge has ordered that all or part of the recording not be available because:

- a. it would materially interfere with a party's right to fair trial;
- b. a witness or party has objected and shown good cause why it should not be available;
- c. it includes testimony of an adult victim or witness in a prosecution under Chapter 12.1-20, N.D.C.C., or for charges in which an offense under that chapter is an included offense or an essential element of the charge, unless the victim or witness consents;
- d. it includes testimony of a juvenile victim or witness in a proceeding in which illegal sexual activity is an element of the evidence; or
- e. it includes testimony of undercover agents or relocated witnesses.

2. The Council of Presiding Judges shall establish procedures to ensure appropriate access to audiotapes.