

Court Services Administration Committee

- An Advisory Committee of the Supreme Court -

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Justice Daniel J. Crothers, Chair
North Dakota Supreme Court
600 E. Boulevard Ave Dept 180
Bismarck, ND 58505-0530
Phone: (701) 328-4205

October 1, 2015

Honorable Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard, Dept. 180
Bismarck, ND 58505-0530

Re: Administrative Rule 41 - Proposed Amendments Regarding Audio Recordings of District Court Proceedings

Dear Chief Justice VandeWalle:

Following referral to it by the Supreme Court, the Court Services Administration Committee reviewed proposed amendments to Administrative Rule (AR) 40 submitted by the Digital Recording Workgroup. AR 40 governs access to audiotapes of district court proceedings and establishes a process by which a copy of an audiotape can be provided to a requestor. The Workgroup proposed amendments to AR 40 to essentially disallow providing copies of audio recordings to the public or counsel absent a showing of good cause. There would be exceptions for mental health and juvenile court proceedings and situations in which a copy is provided in accordance with a court order. The Workgroup proposed the limitation on providing copies of audio recordings for two broad reasons: 1) the solicitation in court of information that is confidential by rule or statute, such as social security numbers, dates of birth, and financial account numbers, and which is then included in the recording; and 2) the inclusion in the recording of extraneous or inadvertent comments or conversations, the most problematic example being conversations between counsel and a client which may be subject to the attorney-client privilege.

Over the course of three meetings, the Committee reviewed the concerns submitted by the Workgroup; relevant rules and policies, including Administrative Rule 41 governing access to court records and Trial Court Administration Policy 503, which implements the process for providing copies of recordings established by AR 40. The Committee also reviewed rules from other jurisdictions. Some of these jurisdictions allowed the provision of copies without apparent

restriction, some allowed copies to be provided subject to advance approval, and some - most notably Minnesota - generally prohibited providing copies of audio recordings. The Committee was also assisted in its review by Kelly Hutton, Chair of the Digital Recording Workgroup, Kristen Erickson, Electronic Recorder in the East Central Judicial District, and Todd Becker from the Information Technology Department.

Information compiled by Ms. Hutton indicated that within the preceding year there had been about ninety requests for copies of audio recordings. Many of these requests came from a party to the proceeding or the party's counsel. Other requests came from those not associated with the proceeding. With respect to providing a copy of an audio recording to a party or the party's counsel, the presence of confidential information such as social security numbers, dates of birth, etc., on the recording is not considered an issue of general concern since Administrative Rule 41, Section 5(c), allows access to otherwise confidential information in a record by parties to an action or the parties' counsel, unless the court restricts access. Inclusion in a recording of extraneous or inadvertent comments or conversations is more problematic, particularly if conversations between counsel and a client are recorded. Providing a copy of the recording may risk violating the attorney-client privilege and may prejudice the client.

In considering how to resolve issues related to providing copies of audio recordings, the Committee reviewed the process by which a recording is retained at the trial court level on the recorder's PC and a copy retained on the central server in Bismarck. The Committee discussed whether there is a practical process for locating and excising particular confidential or extraneous information from the recording. The Committee learned that excising information from a recording would permanently remove the information from both versions of the recording. The Committee also learned that there apparently is not at this time a practical process by which a recording can be copied, essentially to create a third version, and information located and excised from that copy.

In addition to discussing problems associated with inclusion of confidential or extraneous conversations in recordings and the technological limitations on removing that information from a recording, the Committee noted the uncertainty regarding the status of a recording - as the "record" of the proceeding - if a copy could be made and provided. The Committee concluded that, at a minimum, it should be made clear that the transcript of a proceeding, and not the audio recording, is the official record of the proceeding.

In light of the issues presented by the Digital Recording Workgroup and the general concerns summarized above, the Committee concluded that the preferable approach would be to generally prohibit providing copies of audio proceedings and to clarify that the transcript is the official record of the proceeding.

The Committee voted - with three dissenting votes - to recommend the attached proposed amendments to Administrative Rule 41 which create a new Section 6 to the rule and add an

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explanation paragraph to the Explanatory Note. The proposed amendments, which are based on Minnesota's rule provision, provide that the audio recording is intended only to assist in the preparation of a transcript and can be disseminated only by transcript. The proposed amendments also clarify that the transcript is the official record of the proceeding. As a corollary to the proposed amendments, the Committee recommends that if the amendments are adopted, Administrative Rule 40 and related Trial Court Administration Policy 503 should be repealed. Both the rule and the policy are based on the availability of copies of audio recordings

If you have any questions regarding the Committee's recommendation, please contact me at your convenience.

Sincerely,


Daniel J. Crothers, Chair
Court Services Administration Committee

DJC/sah
Attachment

PROPOSED AMENDMENTS TO PROHIBIT DISSEMINATION OF COPIES OF RECORDINGS OF COURT PROCEEDINGS AND ESTABLISH THE TRANSCRIPT AS THE OFFICIAL RECORD

Effective March 1, 2015 _____

1 ACCESS TO COURT RECORDS - Administrative Rule 41

2 Section 1. Purpose.

3 The purpose of this rule is to provide a comprehensive framework for public access to court records.
4 Every member of the public will have access to court records as provided in this rule.

5 Section 2. Definitions.

6 (a) "Court record," regardless of the form, includes:

7 (1) any document, information, or other thing that is collected, received, or maintained by
8 court personnel in connection with a judicial proceeding;

9 (2) any index, calendar, docket, register of actions, official record of the proceedings, order,
10 decree, judgment, minute, and any information in a case management system created by or prepared
11 by court personnel that is related to a judicial proceeding; and

12 (3) information maintained by court personnel pertaining to the administration of the court
13 or clerk of court office and not associated with any particular case.

14 (b) "Court record" does not include:

15 (1) other records maintained by the public official who also serves as clerk of court;

16 (2) information gathered, maintained or stored by a governmental agency or other entity to
17 which the court has access but which is not part of the court record as defined in this rule; and

18 (3) a record that has been disposed of under court records management rules.

19 (c) "Public access" means that the public may inspect and obtain a copy of the information in a
20 court record.

21 (d) "Remote access" means the ability to electronically search, inspect, or copy information in a
22 court record without the need to physically visit the court facility where the court record is

1 maintained.

2 (e) "Bulk distribution" means the distribution of all, or a significant subset, of the information in
3 court records, as is and without modification or compilation.

4 (f) "Compiled information" means information that is derived from the selection, aggregation or
5 reformulation by the court of some of the information from more than one individual court record.

6 (g) "Electronic form" means information in a court record that exists as:

7 (1) electronic representations of text or graphic documents;

8 (2) an electronic image, including a video image, of a document, exhibit or other thing;

9 (3) data in the fields or files of an electronic database; or

10 (4) an audio or video recording, analog or digital, of an event or notes in an electronic file from
11 which a transcript of an event can be prepared.

12 Section 3. General Access Rule.

13 (a) Public Access to Court Records.

14 (1) Information in the court record is accessible to the public except as prohibited by this rule.

15 (2) There must be a publicly accessible indication of the existence of information in a court
16 record to which access has been prohibited, which indication may not disclose the nature of the
17 information protected.

18 (3) A court may not adopt a more restrictive access policy or otherwise restrict access beyond
19 that provided for in this rule, nor provide greater access than that provided for in this rule.

20 (b) When Court Records May Be Accessed.

21 (1) Court records in a court facility must be available for public access during normal business
22 hours. Court records in electronic form to which the court allows remote access will be available for
23 access subject to technical systems availability.

24 (2) Upon receiving a request for access to information, the clerk of court must respond as
25 promptly as practical. If a request cannot be granted promptly, or at all, an explanation must be given
26 to the requestor as soon as possible. The requestor has a right to at least the following information:
27 the nature of any problem preventing access and the specific statute, federal law, or court or
28 administrative rule that is the basis of the denial. The explanation must be in writing if desired by
29 the requestor.

1 (c) Access to Court Records Filed Before March 1, 2009. Court records filed before the adoption
2 of N.D.R.Ct. 3.4 may contain protected information listed under N.D.R.Ct. 3.4(a). This rule does not
3 require the review and redaction of protected information from a court record that was filed before
4 the adoption of N.D.R.Ct. 3.4 on March 1, 2009.

5 (d) Fees for Access. The court may charge a fee for access to court records in electronic form, for
6 remote access, for bulk distribution or for compiled information. To the extent that public access to
7 information is provided exclusively through a vendor, the court will ensure that any fee imposed by
8 the vendor for the cost of providing access is reasonable.

9 Section 4. Methods of Access to Court Records.

10 (a) Access to Court Records at Court Facility.

11 (1) Request for Access. Any person desiring to inspect, examine, or copy a court record must
12 make an oral or written request to the clerk of court. If the request is oral, the clerk may require a
13 written request if the clerk determines that the disclosure of the record is questionable or the request
14 is so involved or lengthy as to need further definition. The request must clearly identify the record
15 requested so that the clerk can locate the record without doing extensive research. Continuing
16 requests for a document not yet in existence may not be considered.

17 (2) Response to Request. The clerk of court is not required to allow access to more than ten files
18 per day per requestor but may do so in the exercise of the clerk's discretion if the access will not
19 disrupt the clerk's primary function. If the request for access and inspection is granted, the clerk may
20 set reasonable time and manner of inspection requirements that ensure timely access while protecting
21 the integrity of the records and preserving the affected office from undue disruption. The inspection
22 area must be within full view of court personnel whenever possible. The person inspecting the
23 records may not leave the court facility until the records are returned and examined for completeness.

24 (3) Response by Court. If a clerk of court determines there is a question about whether a record
25 may be disclosed, or if a written request is made under Section 6(b) for a ruling by the court after the
26 clerk denies or grants an access request, the clerk must refer the request to the court for
27 determination. The court must use the standards listed in Section 6 to determine whether to grant or
28 deny the access request.

29 (b) Remote Access to Court Records. The following information in court records must be made
30 remotely accessible to the public if it exists in electronic form, unless public access is restricted
31 under this rule:

32 (1) litigant/party indexes to cases filed with the court;

33 (2) listings of new case filings, including the names of the parties;

34 (3) register of actions showing what documents have been filed in a case;

1 (4) calendars or dockets of court proceedings, including the case number and caption, date and
2 time of hearing, and location of hearing; and

3 (5) reports specifically developed for electronic transfer approved by the state court administrator
4 and reports generated in the normal course of business, if the report does not contain information that
5 is excluded from public access under Section 5 or 6.

6 (c) Requests for Bulk Distribution of Court Records.

7 (1) Bulk distribution of information in the court record is permitted for court records that are
8 publicly accessible under Section 3(a).

9 (2) A request for bulk distribution of information not publicly accessible can be made to the
10 court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes
11 when the identification of specific individuals is ancillary to the purpose of the inquiry. Prior to the
12 release of information under this subsection the requestor must comply with the provisions of
13 Section 6.

14 (3) A court may allow a party to a bulk distribution agreement access to birth date, street
15 address, and social security number information if the party certifies that it will use the data for
16 legitimate purposes as permitted by law.

17 (d) Access to Compiled Information From Court Records.

18 (1) Any member of the public may request compiled information that consists solely of
19 information that is publicly accessible and that is not already in an existing report. The court may
20 compile and provide the information if it determines, in its discretion, that providing the information
21 meets criteria established by the court, that the resources are available to compile the information
22 and that it is an appropriate use of public resources. The court may delegate to its staff or the clerk
23 of court the authority to make the initial determination to provide compiled information.

24 (2) Requesting compiled restricted information.

25 (A) Compiled information that includes information to which public access has been
26 restricted may be requested by any member of the public only for scholarly, journalistic,
27 political, governmental, research, evaluation, or statistical purposes.

28 (B) The request must:

29 (i) identify what information is sought,

30 (ii) describe the purpose for requesting the information and explain how the information
31 will benefit the public interest or public education, and

32 (iii) explain provisions for the secure protection of any information requested to which

1 public access is restricted or prohibited.

2 (C) The court may grant the request and compile the information if it determines that doing
3 so meets criteria established by the court and is consistent with the purposes of this rule, the
4 resources are available to compile the information, and that it is an appropriate use of public
5 resources.

6 (D) If the request is granted, the court may require the requestor to sign a declaration that:

7 (i) the data will not be sold or otherwise distributed, directly or indirectly, to third parties,
8 except for journalistic purposes;

9 (ii) the information will not be used directly or indirectly to sell a product or service to an
10 individual or the general public, except for journalistic purposes; and

11 (iii) there will be no copying or duplication of information or data provided other than for
12 the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.

13 The court may make such additional orders as may be needed to protect information to which
14 access has been restricted or prohibited.

15 Section 5. Court Records Excluded From Public Access.

16 The following information in a court record is not accessible to the public:

17 (a) information that is not accessible to the public under federal law;

18 (b) information that is not accessible to the public under state law, court rule, case law or court
19 order, including:

20 (1) affidavits or sworn testimony and records of proceedings in support of the issuance of a
21 search or arrest warrant pending the return of the warrant;

22 (2) information in a complaint and associated arrest or search warrant to the extent
23 confidentiality is ordered by the court under N.D.C.C. §§ 29-05-32 or 29-29-22;

24 (3) documents filed with the court for in-camera examination pending disclosure;

25 (4) case information and documents in Child Relinquishment to Identified Adoptive Parent
26 cases brought under N.D.C.C. ch. 14-15.1;

27 (5) domestic violence protection order files and disorderly conduct restraining order files
28 when the restraining order is sought due to domestic violence, except for orders of the court;

29 (6) documents in domestic violence protection order and disorderly conduct restraining order

1 cases in which the initial petition was dismissed summarily by the court without a contested hearing;

2 (7) names of qualified or summoned jurors and contents of jury qualification forms if disclosure
3 is prohibited or restricted by order of the court;

4 (8) records of voir dire of jurors unless disclosure is permitted by court order or rule;

5 (9) records of deferred impositions of sentences resulting in dismissal;

6 (10) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected information:

7 (A) except for the last four digits, social security numbers, taxpayer identification numbers,
8 and financial account numbers,

9 (B) except for the year, birth dates, and

10 (C) except for the initials, the name of an individual known to be a minor, unless the minor
11 is a party, and there is no statute, regulation, or rule mandating nondisclosure;

12 (11) judge and court personnel work material, including personal calendars, communications
13 from law clerks, bench memoranda, notes, work in progress, draft documents and non-finalized
14 documents.

15 (c) This rule does not preclude access to court records by the following persons in the following
16 situations:

17 (1) federal, state, and local officials, or their agents, examining a court record in the exercise
18 of their official duties and powers;

19 (2) parties to an action and their attorneys examining the court file of the action, unless
20 restricted by order of the court, but parties and attorneys may not access judge and court personnel
21 work material in the court file.

22 (d) A member of the public may request the court to allow access to information excluded under
23 Section 5 as provided in Section 6 7.

24 Section 6. Access to Recordings of District Court Proceedings - Limitation. Recordings of
25 proceedings in the district court, including without limitation those used as a back-up to a
26 stenographically recorded proceedings or as the electronic recording, are intended to assist in the
27 preparation of a transcript. The transcript, and not the recording, is the official record of the
28 proceedings. Recordings of proceedings in the district court may only be used as authorized by this
29 or other applicable rules or orders promulgated by the Supreme Court. The contents of the recording

1 may be disseminated by transcript only. The transcript, and not the recording, is the official record.

2 Section 6 7. Requests to Prohibit Public Access to Information in Court Records or to Obtain Access
3 to Restricted Information.

4 (a) Request to Prohibit Access.

5 (1) A request to the court to prohibit public access to information in a court record may be made
6 by any party to a case, by the individual about whom information is present in the court record, or
7 on the court's own motion on notice as provided in Section 6(c).

8 (2) The court must decide whether there are sufficient grounds to overcome the presumption
9 of openness of court records and prohibit access according to applicable constitutional, statutory and
10 case law.

11 (3) In deciding whether to prohibit access the court must consider that the presumption of
12 openness may only be overcome by an overriding interest. The court must articulate this interest along
13 with specific findings sufficient to allow a reviewing court to determine whether the closure order
14 was properly entered.

15 (4) The closure of the records must be no broader than necessary to protect the articulated
16 interest. The court must consider reasonable alternatives to closure, such as redaction or partial
17 closure, and the court must make findings adequate to support the closure. The court may not deny
18 access only on the ground that the record contains confidential or closed information.

19 (5) In restricting access the court must use the least restrictive means that will achieve the
20 purposes of this rule and the needs of the requestor.

21 (6) If the court concludes, after conducting the balancing analysis and making findings as
22 required by paragraphs (1) through (5), that the interest of justice will be served, it may prohibit
23 public Internet access to an individual defendant's electronic court record in a criminal case:

24 (A) if the charges against the defendant are dismissed; or

25 (B) if the defendant is acquitted.

26 If the court grants a request to prohibit public Internet access to an electronic court record in a
27 criminal case, the search result for the record must display the words "Internet Access Prohibited
28 under N.D.Sup.Ct. Admin.R. 41."

29 (b) Request to Obtain Access.

30 (1) A request to obtain access to information in a court record to which access is prohibited
31 under Section 4(a), 5 or 6(a) may be made to the court by any member of the public or on the court's
32 own motion on notice as provided in Section 6(c).

1 (2) In deciding whether to allow access, the court must consider whether there are sufficient
2 grounds to overcome the presumption of openness of court records and continue to prohibit access
3 under applicable constitutional, statutory and case law. In deciding this the court must consider the
4 standards outlined in Section 6(a).

5 (c) Form of Request.

6 (1) The request must be made by a written motion to the court.

7 (2) The requestor shall give notice to all parties in the case.

8 (3) The court may require notice to be given by the requestor or another party to any individuals
9 or entities identified in the information that is the subject of the request. When the request is for
10 access to information to which access was previously prohibited under Section 6(a), the court must
11 provide notice to the individual or entity that requested that access be prohibited.

12 Section 7 8. Obligations Of Vendors Providing Information Technology Support To A Court To
13 Maintain Court Records.

14 (a) If the court contracts with a vendor to provide information technology support to gather, store,
15 or make accessible court records, the contract will require the vendor to comply with the intent and
16 provisions of this rule. For purposes of this section, "vendor" includes a state, county or local
17 governmental agency that provides information technology services to a court.

18 (b) By contract the vendor will be required to notify the court of any requests for compiled
19 information or bulk distribution of information, including the vendor's requests for such information
20 for its own use.

21 EXPLANATORY NOTE

22 Adopted on an emergency basis effective October 1, 1996; Amended and adopted effective
23 November 12, 1997; March 1, 2001; July 1, 2006; March 1, 2009; March 15, 2009; March 1, 2010;
24 March 1, 2012; March 1, 2015.

25 Appendix amended effective August 1, 2001, to reflect the name change of State Bar Board to State
26 Board of Law Examiners.

27 Section 3(C) was adopted, effective March 1, 2010, to state that protected information may be
28 contained in court records filed before the adoption of N.D.R.Ct. 3.4.

29 Section 4(C) was amended, effective March 15, 2009, to allow parties who enter into bulk
30 distribution agreements with the courts to have access to birth date, street address, and social security
31 number information upon certifying compliance with laws governing the security of protected
32 information. Such laws include the Federal Fair Credit Reporting Act, the Gramm Leach Bliley Act,
33 the USA Patriot Act and the Driver's Privacy Protection Act.

1 Section 5(b)(6) was amended, effective March 1, 2015, to clarify that the restriction on public access
2 to documents in domestic violence protection order and disorderly conduct restraining order cases
3 under this paragraph is limited to cases that were dismissed summarily.

4 Section 5(b)(8) was amended, effective March 15, 2009, to list types of protected information open
5 to the public.

6 The term “financial-account number” in Section 5(b)(8) includes any credit, debit or electronic fund
7 transfer card number, and any other financial account number.

8 Section 5(b)(8) was amended, effective March 1, 2010, to incorporate the exemptions from redaction
9 contained in N.D.R.Ct. 3.4(b). A document containing protected information that is exempt from
10 redaction under N.D.R.Ct. 3.4(b) is accessible to the public.

11 This rule was amended, effective _____, to create new Section 6 to provide a general
12 prohibition against the use of recordings of district court proceedings except as otherwise authorized
13 by Supreme Court rule or order and to clarify that the transcript of a proceeding is the official record
14 of the proceeding.

15 Section 6 7(a)(6) was added, effective March 1, 2012, to provide a method for the court to prohibit
16 public Internet access to an electronic case record when charges against a defendant are dismissed
17 or the defendant is acquitted. A request under Section 6 7(a)(1) is required before the court can act
18 to prohibit access under Section 6 7(a)(6).

19 Nothing in this rule or N.D.R.Ct. 3.4 precludes a clerk of court or the electronic case management
20 system from identifying non-confidential records that match a name and date of birth or a name and
21 social security number.

22 HISTORY: Court Services Administration Committee Minutes of August 14, 2015; August 28,
23 2015, September 23, 2015; Joint Procedure Committee Minutes of April 24-25, 2014, page 27; April
24 28-29, 2011, pages 9-12; September 23-24, 2010, pages 16-20; September 24-25, 2009, pages 8-9;
25 May 21-22, 2009, pages 28-44; January 29-20, 2009, pages 3-4; September 25, 2008, pages 2-6;
26 January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31;
27 September 22-23, 2005, pages 6-16; April 28-29, 2005, pages 22-25; April 29-30, 2004, pages 6-13,
28 January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12.
29 Court Technology Committee Minutes of June 18, 2004; March 19, 2004; September 12, 2003;
30 Conference of Chief Justices/Conference of State Court Administrators: Guidelines for Public
31 Access to Court Records.

32 CROSS REFERENCE: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With the Court).