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State of North Dakota

JOINT PROCEDURE COMMITTEE

CHAIR
JUSTICE DALE V. SANDSTROM
STAFF ATTORNEY
MICHAEL J. HAGBURG

FIRST FLOOR JUDICIAL WING
600 E BOULEVARD AVE DEPT 180
BISMARCK, ND 58505-0530

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OCT 05 2016
STATE OF NORTH DAKOTA

October 5, 2016

Honorable Gerald W. VandeWalle, Chief Justice
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Proposed Amendments to North Dakota Court Rules
Supreme Court No. 20160273

Dear Chief Justice:

The Joint Procedure Committee submitted its annual Petition for Adoption, Amendment or Repeal of Court Rules to the Supreme Court on July 27, 2016. The committee requests that the Court consider two additional rule amendments developed at the committee's September 29-30 meeting.

The committee suggests that several amendments be made to N.D.R.Crim.P. 41 on search and seizure in response to the United States Supreme Court decision in Birchfield v.North Dakota, 136 S.Ct. 2160 (2016). In its final report, the Electronic Search Warrant Workgroup proposed an amendment to Rule 41 to allow licensed peace officers to provide evidence establishing grounds for a search warrant in a declaration made under penalty of perjury. The Administrative Council reviewed this proposal at its September 23 meeting and voted to forward it to the Joint Procedure Committee. The committee discussed this proposed amendment at its September meeting and supports it.

The committee suggests that further amendments be made to Rule 41 to supersede N.D.C.C. 29-29-01, which usefully defines the elements of a search warrant but also requires evidence seized under a search warrant to be brought physically before the magistrate. A proposed amendment to Rule 41 would absorb the definition language of the statute into the rule but replace the statute's final clause with new language requiring an officer taking property under a warrant to preserve it until a court directs its disposition. A copy of Rule 41 containing the committee's suggested amendments is attached.

N.D. Sup. Ct. Admin. R. 41 on access to court records is currently before the Court as part of the committee's annual petition. Based on discussions at its September meeting, the committee would like to suggest possible further amendments to Administrative Rule 41.

The proposed changes to Administrative Rule 41 now before the Court are:

– amending Section 4(b) to allow the Court to enact and implement policies to regulate remote access to court records, to allow attorneys to remotely access court records through the secure public access system, and to limit remote access by name search to pre-conviction records in criminal cases.

– adding a new Section 5(b)(10) to exclude cases in which a magistrate finds no probable cause for the issuance of a complaint from public access and a new Section 5(b)(13) to exclude information about patrons of the North Dakota Legal Self Help Center from public access.

The further amendments the committee suggests the Court consider are:

– amending Section 2(c) to clarify that public access to information in court records may be limited under Section 5 of the rule.

– amending Section 4(a) to specify that a terminal will be available at each county courthouse for public access to court records stored in the Odyssey system.

– further amending the committee's proposed amendment to Section 4(b) to eliminate the use of the term "secure public access" and instead explain that attorneys may apply for remote access to public court records stored in the Odyssey system.

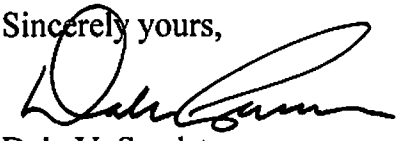
– amending Section 5(b)(9) to exclude pretrial diversion cases resulting in dismissal from public access.

A copy of Administrative Rule 41 containing the committee's additional proposed amendments is attached. During its discussion of Administrative Rule 41 the committee noted that it has been more than 10 years since the last major revision to the rule took effect on July 1, 2006. The committee suggests that it may be an appropriate time for a comprehensive review of the rule, such as was undertaken from 2003-2006. The Odyssey system had not been adopted in 2006 and the rule was not written to account for a wholly electronic system of court records management. In addition, some elements of the rule seem inconsistent with others. For example, Section 4(b)(3) allows a court to give a party to a bulk distribution agreement access to birth date, street address, and social security number

information while Section 5(b)(11) strictly limits public access to complete social security numbers and birth dates.

The committee appreciates the Court's consideration of these suggestions. Thank you for your attention to this matter.

Sincerely yours,



Dale V. Sandstrom
Chair, Joint Procedure Committee

RULE 41. SEARCH AND SEIZURE

1 (a) In General

2 (1) Definition. A search warrant is an order in writing, made in the name of

3 the state, signed by the magistrate, directed to a peace officer, commanding the

4 peace officer to search for personal property.

5 (2) Authority to Issue a Warrant. A state or federal magistrate acting within

6 or for the territorial jurisdiction where the property or person sought is located, or

7 from which it has been removed, may issue a search warrant authorized by this

8 rule.

9 (b) Persons or Property Subject to Search and Seizure. A warrant may be

10 issued for any of the following:

11 (1) property that constitutes evidence of a crime;

12 (2) contraband, the fruits of crime, or things criminally possessed;

13 (3) property designed or intended for use, or which is or has been used as

14 the means of, committing a crime;

15 (4) a person for whose arrest there is probable cause, or who is unlawfully

16 restrained.

17 (c) Issuing the Warrant.

18 (1) Warrant on Affidavit or Sworn Recorded Testimony.

19 (A) In General. A warrant other than a warrant on oral testimony under

20 Rule 41 (c)(2) may issue only ~~on~~ when the grounds for issuing the warrant are
21 established in:
22 (i) a written declaration by a licensed peace officer made and subscribed
23 under penalty of perjury, or
24 (ii) an affidavit or affidavits sworn to or sworn recorded testimony taken
25 before a state or federal magistrate ~~and establishing the grounds for issuing the~~
26 ~~warrant~~.
27 (B) Examination. Before ruling on a request for a warrant, the magistrate
28 may require the licensed peace officer, affiant or other witnesses to appear
29 personally and may examine under oath the licensed peace officer, affiant and any
30 witnesses the affiant may produce. This examination must be recorded and made
31 part of the proceedings.
32 (C) Probable Cause. If the state or federal magistrate is satisfied that
33 grounds for the application exist or that there is probable cause to believe they
34 exist, the magistrate must issue a warrant identifying the property or person to be
35 seized and naming or describing with particularity the person or place to be
36 searched. The finding of probable cause may be based upon hearsay evidence in
37 whole or in part.
38 (D) Command to Search. The warrant must be directed to a peace officer
39 authorized to enforce or assist in enforcing any law of this state. It must command
40 the officer to search, within a specified period of time not to exceed ten days, the

41 person or place named for the property or person specified.

42 (E) Service and Return. The warrant must be served in the daytime, unless
43 the issuing authority, by appropriate provision in the warrant, and for reasonable
44 cause shown, authorizes its execution at times other than daytime. It may designate
45 a state or federal magistrate to whom it must be returned.

46 (2) Warrant by Telephonic or Other Reliable Electronic Means. In
47 accordance with Rule 4.1, the magistrate may issue a warrant based on information
48 communicated by telephone or other reliable electronic means.

49 (3) Warrant Seeking Electronically Stored Information. A warrant under
50 Rule 41(c) may authorize the seizure of electronic storage media or the seizure or
51 copying of electronically stored information. Unless otherwise specified, the
52 warrant authorizes a later review of the media or information consistent with the
53 warrant. The time for executing the warrant refers to the seizure or on-site copying
54 of the media or information, and not to any later off-site copying or review.

55 (d) Execution and Return With Inventory.

56 (1) Execution. The person who executes the warrant must enter the date and
57 time of the execution on the face of the warrant.

58 (2) Inventory. An officer present during the execution of the warrant must
59 prepare and verify an inventory of any property seized. The officer must do so in
60 the presence of the applicant for the warrant and the person from whom, or from
61 whose premises, the property was taken. If either one is not present, the officer

62 must prepare and verify the inventory in the presence of at least one other credible
63 person. In a case involving the seizure of electronic storage media or the seizure or
64 copying of electronically stored information, the inventory may be limited to
65 describing the physical storage media that were seized or copied. The officer may
66 retain a copy of the electronically stored information that was seized or copied.
67 (3) Receipt. The officer taking property under the warrant must:
68 (A) give a copy of the warrant and a receipt for the property taken to the
69 person from whom or from whose premises the property was taken; or
70 (B) leave a copy of the warrant and receipt at the place from which the
71 officer took the property.
72 <u>(C) preserve the property taken until the court directs its proper disposition.</u>
73 (4) Return. The officer executing the warrant must promptly return
74 it—together with a copy of the inventory—to the magistrate designated on the
75 warrant. The officer may do so by reliable electronic means. The magistrate on
76 request must give a copy of the inventory to the person from whom, or from whose
77 premises, the property was taken and to the applicant for the warrant.
78 (e) Motion for Return of Property. A person aggrieved by an unlawful
79 search and seizure of property or by the deprivation of property may move the trial
80 court for the property's return. The court must receive evidence on any factual
81 issue necessary to decide the motion. If it grants the motion, the court must return
82 the property to the moving party, although the court may impose reasonable

83 conditions to protect access and use of the property in later proceedings. If a
84 motion for return of property is made or heard after an indictment, information, or
85 complaint is filed, it must be treated also as a motion to suppress under Rule 12.
86 (f) Motion to Suppress. A motion to suppress evidence may be made in the
87 trial court as provided in Rule 12.
88 (g) Return of Papers to Clerk. The magistrate to whom the warrant is
89 returned must attach to the warrant a copy of the return, inventory and all other
90 related papers and must file them with the clerk of the trial court.
91 (h) Scope and Definitions.
92 (1) Scope. This rule does not modify any statute regulating search or
93 seizure, or the issuance and execution of a search warrant in special circumstances.
94 (2) Definitions. The following definitions apply under this rule:
95 (A) "Property" includes documents, books, papers and any other tangible
96 objects.
97 (B) "Daytime" means the hours from 6:00 a.m. to 10:00 p.m. according to
98 local time.
99 EXPLANATORY NOTE
100 Rule 41 was amended, effective September 1, 1983; March 1, 1990; March
101 1, 1992 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012; March 1,
102 2013;_____.
103 Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement

104 the provisions of Article I, Section 8, of the North Dakota Constitution and the
105 Fourth Amendment to the United States Constitution, which guarantee, "The right
106 of the people to be secure in their persons, houses, papers and effects against
107 unreasonable searches and seizures shall not be violated; and no warrant shall issue
108 but upon probable cause, supported by oath or affirmation, particularly describing
109 the place to be searched and the persons and things to be seized." To implement
110 this constitutional protection, an illegal search and seizure will bar the use of such
111 evidence in a criminal prosecution. The suppression sanction is imposed in order
112 to discourage abuses of power by law enforcement officials in conducting searches
113 and seizures.

114 Subdivision (a) provides that a search warrant be issued by a magistrate,
115 either state or federal, acting within or for the territorial jurisdiction. The provision
116 which permits a federal magistrate to issue a search warrant is the reciprocal of the
117 federal rule, which permits a state magistrate to issue a search warrant pursuant to
118 a federal matter. It is contemplated that a search warrant will be issued by a federal
119 magistrate only on the nonavailability of a state magistrate.

120 Subdivision (a) does not require that the individual requesting the search
121 warrant be a law enforcement officer. There appears to be common-law support
122 for the use of the search warrant as a means of getting an owner's property back.
123 The primary purpose of the rule, however, is the authorization of a search in the
124 interest of law enforcement and as a practical matter the request for issuance of a

125 search warrant by someone other than a law enforcement officer is virtually
126 nonexistent.

127 Subdivision (a) was amended, effective _____, to add
128 language defining a search warrant.

129 Subdivision (b) describes the property or persons which may be seized with
130 a lawfully issued search warrant. Issuance of a search warrant to search for items
131 of solely evidential value is authorized. There is no intention to limit the protection
132 of the Fifth Amendment against compulsory self-incrimination, so items that are
133 solely "testimonial" or "communicative" in nature might well be inadmissible on
134 those grounds.

135 Paragraph (c)(1) follows the federal rule except that North Dakota's rule
136 permits the issuance of a warrant on sworn recorded testimony without an
137 affidavit. Probable cause for the issuance of a search warrant should be assessed
138 under the totality-of-circumstances test.

139 Paragraph (c)(1) was amended, effective _____, to allow
140 grounds for issuance of a search warrant to be established in a written declaration
141 by a licensed peace officer made and subscribed under penalty of perjury.

142 The provision in subparagraph (c)(1)(B) for examination of the affiant
143 before the magistrate is intended to assure the magistrate an opportunity to make a
144 careful decision as to whether there is probable cause based on legally obtained
145 evidence. The requirement that the testimony be recorded is to insure an adequate

146 basis for determining the sufficiency of the evidentiary grounds for the issuance of
147 the search warrant if a motion to suppress is later filed.

148 The language of subparagraph (c)(1)(E), "for reasonable cause shown," is
149 intended to explain the necessity for executing the warrant at a time other than the
150 daytime. This provision is intended to be a substantive prerequisite to the issuance
151 of a warrant that is to be executed at a time other than daytime, although it is not
152 necessary that the quoted language ("for reasonable cause shown") be defined in
153 subdivision (h).

154 Former paragraphs (c)(2) and (c)(3) were deleted and a new paragraph
155 (c)(2) was added, effective March 1, 2013, to allow the magistrate to issue a
156 warrant based on information communicated by telephone or other reliable
157 electronic means under the procedure set out in Rule 4.1.

158 Paragraph (c)(3) was added and paragraph (d)(1) was amended, effective
159 March 1, 2012, to provide guidelines for warrants authorizing the seizure of
160 electronic storage media and electronically stored information and for the
161 inventory of seized electronic material. The amendments were based on the
162 December 1, 2009, amendments to Fed.R.Crim.P. 41.

163 Subdivision (d) is intended to make clear that a copy of the warrant and an
164 inventory receipt for property taken shall be left at the premises at the time of the
165 lawful search or with the person from whose premises the property is taken if he is
166 present.

167 Paragraph (d)(3) was amended, effective _____, to require
168 the officer taking property under a warrant to preserve it until the court directs its
169 disposition.

170 Paragraph (d)(4) was amended, effective March 1, 2013, to allow an officer
171 to make a return by reliable electronic means.

172 Subdivision (e) requires that the motion for return of property be made in
173 the trial court rather than in a preliminary hearing before the magistrate who issued
174 the warrant. It further provides for a return of the property if: (1) the person is
175 entitled to lawful possession, and (2) the seizure is illegal. However, property
176 which is considered contraband does not have to be returned even if seized
177 illegally. The last sentence of subdivision (e) provides that a motion for return of
178 property, made in the trial court, shall be treated as a motion to suppress under
179 N.D.R.Crim.P. 12. The purpose of this provision is to have a series of pretrial
180 motions disposed of in a single appearance, such as at a Rule 17.1 (Omnibus
181 Hearing), rather than in a series of pretrial motions made on different dates causing
182 undue delay in administration.

183 Subdivisions (a), (b), and (c) were amended in 1983, effective September 1,
184 1983, to add persons as permissible objects of search warrants. These amendments
185 follow 1979 amendments to Fed.R.Crim.P. 41 and are intended to make it possible
186 for a search warrant to issue to search for a person if there is probable cause to
187 arrest that person; or that person is being unlawfully restrained.

188 Subdivisions (c) and (d) were amended, effective March 1, 1990. The
189 amendments are technical in nature and no substantive change is intended.
190 Subdivision (e) was amended, effective March 1, 1992, to track the federal
191 rule.
192 Rule 41 was amended, effective March 1, 2006, in response to the
193 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
194 language and organization of the rule were changed to make the rule more easily
195 understood and to make style and terminology consistent throughout the rules.
196 SOURCES: Joint Procedure Committee Minutes of
197 _____: January 26-27, 2012, pages 26-27; April 28-29, 2011,
198 page 17; September 23-24, 2010, page 32; April 29-30, 2010, page 20, 25-26;
199 April 28-29, 2005, pages 5-8; January 27-27, 2005, pages 33-34; April 28-29,
200 1994, pages 22-23; November 7-8, 1991, page 4; October 25-26, 1990, pages
201 15-16; April 20, 1989, page 4; December 3, 1987, page 15; October 15-16, 1981,
202 pages 12-15; December 7-8, 1978, pages 23-26; October 12-13, 1978, pages
203 15-19; April 24-26, 1973, page 14; December 11-15, 1972, pages 31-37;
204 November 18-20, 1971, pages 3-9; September 16-18, 1971, pages 11-32; March
205 12-13, 1970, page 3; November 20-21, 1969, pages 19-24; May 15-16, 1969,
206 pages 21-23; Fed.R.Crim.P. 41.
207 STATUTES AFFECTED:
208 SUPERSEDED: N.D.C.C. §§ 29-29-01, 29-29-02, 29-29-03, 29-29-04,

209 29-29-05, 29-29-06, 29-29-07, 29-29-10, 29-29-11, 29-29-12, 29-29-13, 29-29-14,

210 29-29-15, 29-29-16, 29-29-17.

211 CONSIDERED: N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3),

212 ~~29-29-01,~~ 29-29-08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02.

213 N.D.C.C. ch. 28-29.1. N.D.C.C. ch.19-03.1.

214 CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or

215 Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 12

216 (Pleadings and Pretrial Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and

217 Pretrial Conference); N.D.R.Ct. 2.2 (Facsimile Transmission); N.D. Sup. Ct.

218 Admin. R. 52 (Interactive Television).

RULE 41. ACCESS TO COURT RECORDS

1 Section 1. Purpose.

2 The purpose of this rule is to provide a comprehensive framework for
3 public access to court records. Every member of the public will have access to
4 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
8 maintained by court personnel in connection with a judicial proceeding;

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

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

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

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

19 (2) information gathered, maintained or stored by a governmental agency or

20 other entity to which the court has access but which is not part of the court record
21 as defined in this rule; and
22 (3) a record that has been disposed of under court records management
23 rules.
24 (c) "Public access" means that the public may inspect and obtain a copy of
25 the information in a court record, except as excluded under Section 5.
26 (d) "Remote access" means the ability to electronically search, inspect, or
27 copy information in a court record without the need to physically visit the court
28 facility where the court record is maintained.
29 (e) "Bulk distribution" means the distribution of all, or a significant subset,
30 of the information in court records, as is and without modification or compilation.
31 (f) "Compiled information" means information that is derived from the
32 selection, aggregation or reformulation by the court of some of the information
33 from more than one individual court record.
34 (g) "Electronic form" means information in a court record that exists as:
35 (1) electronic representations of text or graphic documents;
36 (2) an electronic image, including a video image, of a document, exhibit or
37 other thing;
38 (3) data in the fields or files of an electronic database; or
39 (4) an audio or video recording, analog or digital, of an event or notes in an
40 electronic file from which a transcript of an event can be prepared.

41 Section 3. General Access Rule.

42 (a) Public Access to Court Records.

43 (1) Court records are accessible to the public except as prohibited by this

44 rule.

45 (2) There must be a publicly accessible indication of the existence of

46 information in a court record to which access has been prohibited, which

47 indication may not disclose the nature of the information protected.

48 (3) A court may not adopt a more restrictive access policy or otherwise

49 restrict access beyond that provided for in this rule, nor provide greater access than

50 that provided for in this rule or as governed by N.D. Sup. Ct. Admin. R. 40 with

51 respect to recordings of trial court proceedings.

52 (b) When Court Records May Be Accessed.

53 (1) Court records in a court facility must be available for public access

54 during normal business hours. Court records in electronic form to which the court

55 allows remote access will be available for access subject to technical systems

56 availability.

57 (2) Upon receiving a request for access to a court record, the clerk of court

58 must respond as promptly as practical. If a request cannot be granted promptly, or

59 at all, an explanation must be given to the requestor as soon as possible. The

60 requestor has a right to at least the following information: the nature of any

61 problem preventing access and the specific statute, federal law, or court or

62 administrative rule that is the basis of the denial. The explanation must be in
63 writing if desired by the requestor.
64 (3) The clerk of court is not required to search within a court record for
65 specific information that may be sought by a requestor.
66 (c) Access to Court Records Filed Before March 1, 2009. Court records
67 filed before the adoption of N.D.R.Ct. 3.4 may contain protected information listed
68 under N.D.R.Ct. 3.4(a). This rule does not require the review and redaction of
69 protected information from a court record that was filed before the adoption of
70 N.D.R.Ct. 3.4 on March 1, 2009.
71 (d) Fees for Access. The court may charge a fee for access to court records
72 in electronic form, for remote access, for bulk distribution or for compiled
73 information. To the extent that public access to information is provided exclusively
74 through a vendor, the court will ensure that any fee imposed by the vendor for the
75 cost of providing access is reasonable.
76 Section 4. Methods of Access to Court Records.
77 (a) Access to Court Records at Court Facility.
78 (1) Public Access Terminal. A terminal will be available at each county
79 courthouse for public access to court records stored statewide in the Odyssey
80 system.
81 (~~1~~ 2) Request for Access to Other Records. Any person desiring ~~to inspect,~~
82 ~~examine, or copy~~ public access to a court record that is not available on the public

83 access terminal must make an oral or written request to the clerk of court. If the
84 request is oral, the clerk may require a written request if the clerk determines that
85 the disclosure of the record is questionable or the request is so involved or lengthy
86 as to need further definition. The request must clearly identify the record requested
87 so that the clerk can locate the record without doing extensive research.
88 Continuing requests for a document not yet in existence may not be considered.
89 (~~2~~ A) Response to Request. The clerk of court is not required to allow
90 access to more than ten files per day per requestor but may do so in the exercise of
91 the clerk's discretion if the access will not disrupt the clerk's primary function. If
92 the request for access and inspection is granted, the clerk may set reasonable time
93 and manner of inspection requirements that ensure timely access while protecting
94 the integrity of the records and preserving the affected office from undue
95 disruption. The inspection area must be within full view of court personnel
96 whenever possible. The person inspecting the records may not leave the court
97 facility until the records are returned and examined for completeness.
98 (~~3~~ B) Response by Court. If a clerk of court determines there is a question
99 about whether a record may be disclosed, or if a written request is made under
100 Section 6(b) for a ruling by the court after the clerk denies or grants an access
101 request, the clerk must refer the request to the court for determination. The court
102 must use the standards listed in Section 6 to determine whether to grant or deny the
103 access request.

104 (b) Remote Access to Court Records.

105 (1) In General. The following information in court records must be made
106 remotely accessible to the public if it exists in electronic form, unless public access
107 is restricted under this rule:

108 (~~1~~ A) litigant/party indexes to cases filed with the court;

109 (~~2~~ B) listings of new case filings, including the names of the parties;

110 (~~3~~ C) register of actions showing what documents have been filed in a case;

111 (~~4~~ D) calendars or dockets of court proceedings, including the case number
112 and caption, date and time of hearing, and location of hearing; and

113 (~~5~~ E) reports specifically developed for electronic transfer approved by the
114 state court administrator and reports generated in the normal course of business, if
115 the report does not contain information that is excluded from public access under
116 Section 5 or 6.

117 (2) Access Regulation.

118 (A) The Supreme Court may adopt and implement policies to regulate
119 remote access to court records. These policies must be posted publicly on the
120 Court's website.

121 (B) Attorneys licensed in North Dakota may apply to obtain remote access
122 to court records stored in the Odyssey system.

123 (C) A record of a closed criminal case for which there is no conviction may
124 not be remotely accessed through a name search except by an attorney granted

125 remote access to the Odyssey system.

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

127 (1) Bulk distribution of information in the court record is permitted for

128 court records that are publicly accessible under Section 3(a).

129 (2) A request for bulk distribution of information not publicly accessible

130 can be made to the court for scholarly, journalistic, political, governmental,

131 research, evaluation or statistical purposes when the identification of specific

132 individuals is ancillary to the purpose of the inquiry. Prior to the release of

133 information under this subsection the requestor must comply with the provisions of

134 Section 6.

135 (3) A court may allow a party to a bulk distribution agreement access to

136 birth date, street address, and social security number information if the party

137 certifies that it will use the data for legitimate purposes as permitted by law.

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

139 (1) Any member of the public may request compiled information that

140 consists solely of information that is publicly accessible and that is not already in

141 an existing report. The court may compile and provide the information if it

142 determines, in its discretion, that providing the information meets criteria

143 established by the court, that the resources are available to compile the information

144 and that it is an appropriate use of public resources. The court may delegate to its

145 staff or the clerk of court the authority to make the initial determination to provide

146 compiled information.

147 (2) Requesting compiled restricted information.

148 (A) Compiled information that includes information to which public access

149 has been restricted may be requested by any member of the public only for

150 scholarly, journalistic, political, governmental, research, evaluation, or statistical

151 purposes.

152 (B) The request must:

153 (i) identify what information is sought,

154 (ii) describe the purpose for requesting the information and explain how the

155 information will benefit the public interest or public education, and

156 (iii) explain provisions for the secure protection of any information

157 requested to which public access is restricted or prohibited.

158 (C) The court may grant the request and compile the information if it

159 determines that doing so meets criteria established by the court and is consistent

160 with the purposes of this rule, the resources are available to compile the

161 information, and that it is an appropriate use of public resources.

162 (D) If the request is granted, the court may require the requestor to sign a

163 declaration that:

164 (i) the data will not be sold or otherwise distributed, directly or indirectly, to

165 third parties, except for journalistic purposes,

166 (ii) the information will not be used directly or indirectly to sell a product or

167 service to an individual or the general public, except for journalistic purposes, and

168 (iii) there will be no copying or duplication of information or data provided

169 other than for the stated scholarly, journalistic, political, governmental, research,

170 evaluation, or statistical purpose.

171 The court may make such additional orders as may be needed to protect

172 information to which access has been restricted or prohibited.

173 Section 5. Court Records Excluded From Public Access.

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

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

176 (b) information that is not accessible to the public under state law, court

177 rule, case law or court order, including:

178 (1) affidavits or sworn testimony and records of proceedings in support of

179 the issuance of a search or arrest warrant pending the return of the warrant;

180 (2) information in a complaint and associated arrest or search warrant to the

181 extent confidentiality is ordered by the court under N.D.C.C. §§ 29-05-32 or

182 29-29-22;

183 (3) documents filed with the court for in-camera examination pending

184 disclosure;

185 (4) case information and documents in Child Relinquishment to Identified

186 Adoptive Parent cases brought under N.D.C.C. ch. 14-15.1;

187 (5) domestic violence protection order files and disorderly conduct

188 restraining order files when the restraining order is sought due to domestic
189 violence, except for orders of the court;
190 (6) documents in domestic violence protection order and disorderly conduct
191 restraining order cases in which the initial petition was dismissed summarily by the
192 court without a contested hearing;
193 (7) names of qualified or summoned jurors and contents of jury
194 qualification forms if disclosure is prohibited or restricted by order of the court;
195 (8) records of voir dire of jurors, unless disclosure is permitted by court
196 order or rule;
197 (9) records of deferred impositions of sentences or pretrial diversions
198 resulting in dismissal;
199 (10) records of a case in which the magistrate finds no probable cause for
200 the issuance of a complaint;
201 ~~(10)~~ (11) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected
202 information:
203 (A) except for the last four digits, social security numbers, taxpayer
204 identification numbers, and financial account numbers,
205 (B) except for the year, birth dates, and
206 (C) except for the initials, the name of an individual known to be a minor,
207 unless the minor is a party, and there is no statute, regulation, or rule mandating
208 nondisclosure;

209 ~~(11)~~ (12) judge and court personnel work material, including personal
210 calendars, communications from law clerks, bench memoranda, notes, work in
211 progress, draft documents and non-finalized documents;
212 ~~(12)~~ (13) party, witness and crime victim contact information gathered and
213 recorded by the court for administrative purposes, including telephone numbers
214 and e-mail, street and postal addresses~~.~~;
215 (14) the name of a patron of the North Dakota Legal Self Help Center or
216 information sufficient to identify a patron or the subject about which a patron
217 requested information.
218 (c) This rule does not preclude access to court records by the following
219 persons in the following situations:
220 (1) federal, state, and local officials, or their agents, examining a court
221 record in the exercise of their official duties and powers~~.~~;
222 (2) parties to an action and their attorneys examining the court file of the
223 action, unless restricted by order of the court, but parties and attorneys may not
224 access judge and court personnel work material in the court file.
225 (d) A member of the public may request the court to allow access to
226 information excluded under Section 5 as provided in Section 6.
227 Section 6. Requests to Prohibit Public Access to Information in Court
228 Records or to Obtain Access to Restricted Information.
229 (a) Request to Prohibit Access.

230 (1) A request to the court to prohibit public access to information in a court
231 record may be made by any party to a case, by the individual about whom
232 information is present in the court record, or on the court's own motion on notice
233 as provided in Section 6(c).
234 (2) The court must decide whether there are sufficient grounds to overcome
235 the presumption of openness of court records and prohibit access according to
236 applicable constitutional, statutory and case law.
237 (3) In deciding whether to prohibit access the court must consider that the
238 presumption of openness may only be overcome by an overriding interest. The
239 court must articulate this interest along with specific findings sufficient to allow a
240 reviewing court to determine whether the closure order was properly entered.
241 (4) The closure of the records must be no broader than necessary to protect
242 the articulated interest. The court must consider reasonable alternatives to closure,
243 such as redaction or partial closure, and the court must make findings adequate to
244 support the closure. The court may not deny access only on the ground that the
245 record contains confidential or closed information.
246 (5) In restricting access the court must use the least restrictive means that
247 will achieve the purposes of this rule and the needs of the requestor.
248 (6) If the court concludes, after conducting the balancing analysis and
249 making findings as required by paragraphs (1) through (5), that the interest of
250 justice will be served, it may prohibit public Internet access to an individual

251 defendant's electronic court record in a criminal case:

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

253 (B) if the defendant is acquitted.

254 If the court grants a request to prohibit public Internet access to an

255 electronic court record in a criminal case, the search result for the record must

256 display the words "Internet Access Prohibited under N.D.Sup.Ct. Admin.R 41."

257 (b) Request to Obtain Access.

258 (1) A request to obtain access to information in a court record to which

259 access is prohibited under Section 4(a), 5 or 6(a) may be made to the court by any

260 member of the public or on the court's own motion on notice as provided in

261 Section 6(c).

262 (2) In deciding whether to allow access, the court must consider whether

263 there are sufficient grounds to overcome the presumption of openness of court

264 records and continue to prohibit access under applicable constitutional, statutory

265 and case law. In deciding this the court must consider the standards outlined in

266 Section 6(a).

267 (c) Form of Request.

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

269 (2) The requestor ~~shall~~ must give notice to all parties in the case.

270 (3) The court may require notice to be given by the requestor or another

271 party to any individuals or entities identified in the information that is the subject

272 of the request. When the request is for access to information to which access was
273 previously prohibited under Section 6(a), the court must provide notice to the
274 individual or entity that requested that access be prohibited.

275 Section 7. Obligations Of Vendors Providing Information Technology
276 Support To A Court To Maintain Court Records.

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

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

285 EXPLANATORY NOTE

286 Adopted on an emergency basis effective October 1, 1996; Amended and
287 adopted effective November 12, 1997; March 1, 2001; July 1, 2006; March 1,
288 2009; March 15, 2009; March 1, 2010; March 1, 2012; March 1, 2015; March 1,
289 2016; October 1, 2016;_____. Appendix amended effective August 1,
290 2001, to reflect the name change of State Bar Board to State Board of Law
291 Examiners.

292 Section 2(c) was amended, effective_____, to clarify that the public

293 may have access to information in a court record except when access is excluded
294 under Section 5.
295 Section 3(a)(1) was amended, effective October 1, 2016, to reference N.D.
296 Sup. Ct. Admin. R. 40, which governs access to recordings of trial court
297 proceedings.
298 Section 3(b)(3) was added, effective March 1, 2016, to clarify that the clerk
299 of court is not required to search within a court record for specific information that
300 may be sought by a requestor.
301 Section 3(c) was adopted, effective March 1, 2010, to state that protected
302 information may be contained in court records filed before the adoption of
303 N.D.R.Ct. 3.4.
304 Section 4(a) was amended, effective _____, to specify
305 that a terminal will be available at each county courthouse for public access to
306 court records stored in the Odyssey system.
307 Section 4(b) was amended, effective _____, to allow the
308 Supreme Court to enact and implement policies to regulate remote access to court
309 records and to limit remote access by name search to pre-conviction records in
310 criminal cases. An additional amendment would allow attorneys to apply for
311 remote access to public court records stored in the Odyssey system.
312 Section 4(c) was amended, effective March 15, 2009, to allow parties who
313 enter into bulk distribution agreements with the courts to have access to birth date,

314 street address, and social security number information upon certifying compliance
315 with laws governing the security of protected information. Such laws include the
316 Federal Fair Credit Reporting Act, the Gramm Leach Bliley Act, the USA Patriot
317 Act and the Driver's Privacy Protection Act.

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

322 Section 5(b)(8) was amended, effective March 15, 2009, to list types of
323 protected information open to the public. The term "financial-account number" in
324 Section 5(b)(8) includes any credit, debit or electronic fund transfer card number,
325 and any other financial account number.

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

330 Section 5(b)(9) was amended, effective_____, to exclude pretrial
331 diversion cases resulting in dismissal from public access.

332 Section 5(b)(10) was added, effective_____, to exclude cases in which
333 a magistrate finds no probable cause for the issuance of a complaint from public
334 access.

335 Section 5(b)(12) was added, effective March 1, 2016, to exclude party,
336 witness and crime victim contact information gathered and recorded by the court
337 for administrative purposes from public access.

338 Section 5(b)(13) was added, effective _____, to exclude information
339 about patrons of the North Dakota Legal Self Help Center from public access.

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

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

348 Joint Procedure Committee Minutes of _____; May 12-13,
349 2016, pages 22-25; January 28-29, 2016, pages 2-7; September 24-25, 2015, pages
350 15-16, 20-21; April 23-24, 2015, pages 8-10; April 24-25, 2014, page 27; April
351 28-29, 2011, pages 9-12; September 23-24, 2010, pages 16-20; September 24-25,
352 2009, pages 8-9; May 21-22, 2009, pages 28-44; January 29-20, 2009, pages 3-4;
353 September 25, 2008, pages 2-6; January 24, 2008, pages 9-12; October 11-12,
354 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23, 2005, pages
355 6-16; April 28-29, 2005, pages 22-25; April 29-30, 2004, pages 6-13, January

356 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003,
357 pages 6-12. Court Technology Committee Minutes of June 18, 2004; March 19,
358 2004; September 12, 2003; Conference of Chief Justices/Conference of State
359 Court Administrators: Guidelines for Public Access to Court Records.
360 Cross Reference: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With
361 the Court).