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State of North Dakota

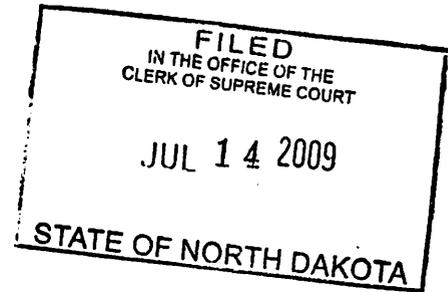
JOINT PROCEDURE COMMITTEE

20090208

CHAIR  
JUSTICE MARY MUEHLEN MARING  
STAFF ATTORNEY  
MICHAEL J. HAGBURG

July 14, 2009

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



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

Re: Proposed Amendments to N.D.R.Ct. 3.4 and N.D. Sup. Ct. Admin. R. 41

Dear Chief Justice:

The Joint Procedure Committee took up N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With the Court) and N.D. Sup. Ct. Admin. R. 41 (Access to Court Records) at its May 21-22, 2009, meeting. The Committee addressed these rules because numerous comments and suggestions have been received about them since Rule 3.4 became effective March 1, 2009.

The Committee proposes amendments to Rule 3.4 including:

1. deleting the address redaction requirement in criminal cases;
2. exempting the name of a minor from the redaction requirement when the minor is a party;
3. clarifying the procedure for filing an unredacted document under seal and requiring that such documents be given a separate docket number;
4. deleting the requirement that the prosecutor file a reference list containing certain defendant information;
5. allowing the court to order an improperly redacted document to be returned to the party prior to filing; and
6. adding material to the explanatory note.

The Committee proposed amendments to Administrative Rule 41 including:

1. allowing public access to personal information that is exempt from redaction under Rule 3.4;
2. eliminating the restriction on public access to addresses in criminal cases; and
3. providing an explanatory note.

The Committee's discussion of Rule 3.4 and Administrative Rule 41 was extensive and constituted a significant portion of its May meeting. An excerpt from the draft minutes of the meeting is attached to provide the Court with background information on the Committee's proposed amendments.

Staff Attorney Jim Ganje submitted a series of comments on issues related to Rule 3.4 and Administrative Rule 41 that the Committee considered at its May meeting. A copy of Mr. Ganje's comments, including some questions he has posed regarding the Committee's proposed amendments, is attached.

The proposed amendments to Rule 3.4 and Administrative Rule 41 are also attached. The Committee requests the Court consider the proposed amendments immediately as an emergency request under N.D.R.Proc.R. § 6.

Sincerely,

A handwritten signature in black ink that reads "Mary Muehlen Maring". The signature is written in a cursive, flowing style.

Mary Muehlen Maring  
Chair, Joint Procedure Committee

MH:kh  
attachment

RULE 3.4. PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, ~~or, in a criminal case, the home address of an individual~~; a party or nonparty making the filing must include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number; ~~and~~

~~(5) in a criminal case, the city and state of the home address.~~

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(4) a filing covered by Rule 3.4(c);

22 (5) a court filing that is related to a criminal matter and that is prepared before the  
23 filing of a criminal charge or is not filed as part of any docketed criminal case;

24 (6) an arrest or search warrant; **and**

25 (7) a charging document and an affidavit filed in support of a charging document; and

26 (8) the name of an individual known to be a minor when the minor is a party, and  
27 there is no statute, regulation or rule mandating nondisclosure.

28 (c) Filings Made Under Seal. The court may order that a filing be made under seal  
29 without redaction. The court may later unseal the filing or order the person who made the  
30 filing to file a redacted version for the public record.

31 (d) Protective Orders. For good cause, the court may by order in a case:

32 (1) require redaction of additional information; or

33 (2) limit or prohibit a nonparty's remote electronic access to a document filed with the  
34 court.

35 (e) ~~Option for Additional Unredacted Filing~~ Unredacted Document Under Seal. A  
36 person ~~making a redacted filing~~ a redacted document may also file an unredacted ~~copy~~  
37 version of the document under seal. The court must separately docket and retain the  
38 unredacted ~~copy~~ document as part of the record and indicate that it is filed under seal.

39 (f) Option for Filing a Reference List.

40 ~~(1) In General:~~ A filing that contains redacted information may be filed together with  
41 a reference list that identifies each item of redacted information and specifies an appropriate  
42 identifier that uniquely corresponds to each item listed. The list must be filed under seal and

43 may be amended as of right. Any reference in the case to a listed identifier will be construed  
44 to refer to the corresponding item of information.

45 ~~(2) Defendant Information. In a criminal case, the prosecutor must file a reference list~~  
46 ~~that includes the defendant's social security number, birth date and street address.~~

47 (g) Non-conforming Documents.

48 (1) Waiver. A person waives the protection of Rule 3.4(a) as to the person's own  
49 information by filing it without redaction and not under seal.

50 (2) Sanctions. If a party fails to comply with this rule, the court on motion of another  
51 party or its own motion, may order the pleading or other document to be returned to the party  
52 for reformation prior to filing, be reformed with an extension of time to complete the filing  
53 within any applicable deadline. If the document has been filed, and an order to reform is not  
54 obeyed, the court may order the document stricken.

55 EXPLANATORY NOTE

56 Rule 3.4 was adopted effective March 1, 2009. Rule 3.4 was amended, effective  
57 March 15, 2009;\_\_\_\_\_.

58 Parties should limit the amount of protected information they include in court filings.  
59 This rule requires parties to redact protected information when its inclusion in a filing cannot  
60 be avoided.

61 This rule's redaction requirements are intended to protect personal information from  
62 public disclosure. Unless a document is also placed in a non-restricted file, redaction of  
63 documents filed in cases that are confidential by law or rule is not required.

64           The term “financial-account number” includes any credit, debit or electronic fund  
65           transfer card numbers, and any other financial account number.

66           Documents containing unredacted protected information should be filed under  
67           subdivision (e) when a party is required by statute, policy or rule to include the protected  
68           information in the document. For example, N.D.C.C. § 14-05-02.1 requires a divorce decree  
69           to contain the social security numbers of the parties to the divorce. Under subdivision (e),  
70           a party to a divorce case may comply with this statute and the redaction requirements of this  
71           rule by filing a unredacted divorce decree under seal and a redacted version of the decree in  
72           the public part of the file.

73           Subdivision (a) was amended, effective \_\_\_\_\_, to eliminate the requirement  
74           to redact addresses in criminal matters.

75           Subdivision (b) was amended, effective \_\_\_\_\_, to add a redaction exemption  
76           for the name of a minor when the minor is a party and there is no statute, regulation or rule  
77           mandating nondisclosure of the minor’s name.

78           Subdivision (e) was amended, effective \_\_\_\_\_, to clarify how unredacted  
79           documents filed under seal are to be handled and docketed.

80           Subdivision (f) was amended, effective \_\_\_\_\_, to eliminate the requirement  
81           that state’s attorneys file reference lists containing certain defendant information.

82           Subdivision (g) was amended, effective \_\_\_\_\_, to allow courts to order  
83           reformation of documents not in conformity with this rule prior to filing.

84           Sources: Joint Procedure Committee Minutes of May 21-22, 2009, pages \_\_\_\_\_;

85 January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page  
86 31.

87 Statutes Affected:

88 Considered: N.D.C.C. § 14-05-02.1.

89 Cross Reference: N.D.R.Ct. 3.1 (Pleadings); N.D. Sup. Ct. Admin. R. 41 (Access to  
90 Judicial Records).

RULE 41. ACCESS TO COURT RECORDS

Section 1. Purpose.

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

Section 2. Definitions.

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

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

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

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

(b) "Court record" does not include:

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

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

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

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

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

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

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

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

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

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

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

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

39 Section 3. General Access Rule.

40 (a) Public Access to Court Records.

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

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

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

49           (b) When Court Records May Be Accessed.

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

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

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

63           Section 4. Methods of Access to Court Records.

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

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

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

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

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

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

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

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

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

93 (5) judgments, orders, or decrees in a case and liens affecting title to real property;

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

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

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

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

105 (3) A court may allow a party to a bulk distribution agreement access to birth date,

106 street address, and social security number information if the party certifies that it will use the  
107 data for legitimate purposes as permitted by law.

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

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

116 (2) Requesting compiled restricted information.

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

120 (B) The request must:

121 (i) identify what information is sought,

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

124 (iii) explain provisions for the secure protection of any information requested to which  
125 public access is restricted or prohibited.

126 (C) The court may grant the request and compile the information if it determines that

127 doing so meets criteria established by the court and is consistent with the purposes of this  
128 rule, the resources are available to compile the information, and that it is an appropriate use  
129 of public resources.

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

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

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

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

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

#### 141 Section 5. Court Records Excluded From Public Access.

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

143 (a) Information that is not accessible to the public under federal law.

144 (b) Information that is not accessible to the public under state law, court rule, case law  
145 or court order, including:

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

148 (2) information in a complaint and associated arrest or search warrant to the extent  
149 confidentiality is ordered by the court under Section 29-05-32 or 29-29-22, NDCC;

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

151 (4) domestic violence protection order files and disorderly conduct restraining order  
152 files when the restraining order is sought due to domestic violence, except for orders of the  
153 court;

154 (5) names of qualified or summoned jurors and contents of jury qualification forms  
155 if disclosure is prohibited or restricted by order of the court;

156 (6) sexually explicit material or property that is evidence in a case;

157 (7) records of deferred impositions of sentences resulting in dismissal;

158 (8) unless exempted from redaction by N.D.R.Ct. 3.4(b), personal information:

159 – except for the last four digits, social security numbers, taxpayer identification  
160 numbers, and financial account numbers,

161 – except for the year, birth dates, and

162 – except for the initials, the name of an individual known to be a minor, ~~and;~~

163 ~~=in criminal cases, the home street address of an individual;~~

164 (9) judge and court personnel work material, including personal calendars,  
165 communications from law clerks, bench memoranda, notes, work in progress, draft  
166 documents and non-finalized documents.

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

169 (1) federal, state, and local officials, or their agents, examining a court record in the  
170 exercise of their official duties and powers.

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

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

176 Section 6. Requests to Prohibit Public Access to Information in Court Records or to  
177 Obtain Access to Restricted Information.

178 (a) Request to Prohibit Access.

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

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

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

189 (4) The closure of the records must be no broader than necessary to protect the

190 articulated interest. The court must consider reasonable alternatives to closure, such as  
191 redaction or partial closure, and the court must make findings adequate to support the  
192 closure. The court may not deny access only on the ground that the record contains  
193 confidential or closed information.

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

196 (b) Request to Obtain Access.

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

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

204 (c) Form of Request.

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

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

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

211 access be prohibited.

212 Section 7. Obligations Of Vendors Providing Information Technology Support To  
213 A Court To Maintain Court Records.

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

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

222 EXPLANATORY NOTE

223 Adopted on an emergency basis effective October 1, 1996; Amended and adopted  
224 effective November 12, 1997; March 1, 2001; July 1, 2006 March 1, 2009; \_\_\_\_\_;  
225 Appendix amended effective August 1, 2001, to reflect the name change of State Bar Board  
226 to State Board of Law Examiners.

227 The term "financial-account number" in Section 5(b)(8) includes any credit, debit or  
228 electronic fund transfer card number, and any other financial account number.

229 Section 5(b)(8) was amended, effective \_\_\_\_\_, to incorporate the  
230 exemptions from redaction contained in N.D.R.Ct. 3.4(b). A document containing personal  
231 information that is exempt from redaction under N.D.R.Ct. 3.4(b) is accessible to the public.

232 HISTORY: Joint Procedure Committee Minutes of May 21-22, 2009, pages \_\_\_\_\_;  
233 January 29-20, 2009, pages 3-4; September 25, 2008, pages 2-6; January 24, 2008, pages 9-  
234 12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23, 2005,  
235 pages 6-16; April 28-29, 2005, pages 22-25; Court Technology Committee Minutes of June  
236 18, 2004; March 19, 2004; September 12, 2003; Conference of Chief Justices/Conference  
237 of State Court Administrators: Guidelines for Public Access to Court Records.

EXCERPT FROM DRAFT MINUTES

Joint Procedure Committee  
May 21-22, 2009

RULE 3.4, N.D.R.Ct., PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT; RULE 41, N.D.Sup.Ct.Admin.R., ACCESS TO COURT RECORDS (PAGES 117-140 OF THE AGENDA MATERIAL)

Staff explained that numerous requests for adjustment of Rule 3.4 and Admin. Rule 41 had been received since Rule 3.4 went into effect March 1, 2009.

Judge Geiger MOVED to approve the proposed amendments to Rule 3.4 and Admin. Rule 41. Mr. Mack seconded.

Judge Nelson MOVED to delete the requirement to redact street addresses in criminal cases on page 119, lines 6-7. Mr. Mack seconded.

A member said the street address redaction requirement, and restrictions on releasing defendant street addresses in criminal cases, was causing a lot of problems.

A member said that the courts were moving toward electronic filing of all documents and that this should be considered before allowing street addresses to be released. A member replied that street addresses were not difficult to obtain in the phone book or on the Internet. The member said that when the courts withhold street addresses in criminal cases the identity of the defendant becomes ambiguous.

A member said that all street addresses in criminal cases, including the addresses of witnesses, victims and jurors, could become accessible once electronic filing is in place. A member asked whether electronic access to some of this data could be restricted. A member replied that if information is accessible in the court file, it will be accessible electronically.

A member said the question of whether the public will get full access to all electronically filed documents had not yet been answered. The member said there was an argument that only parties and their attorneys should get full access to all electronically filed documents in a court file. A member said that allowing a clerk to show a file to someone who appeared in person to look at it was different that allowing the whole world to look at the file over the Internet.

The Chair commented that the new computer system that the court was working to bring online could be set up to restrict access to a defendant's address before conviction and to allow access after conviction. A member said that this would not help with traffic citations, which are a large part of the "criminal" cases and currently need to be copied and physically redacted. The member said this a job that the clerks currently perform because they have been instructed to do so.

A member said that there was no evidence that allowing release of street addresses had caused particular harm. The member said making addresses available would be beneficial and would reduce the extra workload on the clerks.

A member said that there were other issues to consider. The member said that witnesses and jurors in criminal cases have an expectation of some privacy. The member said it would be harder for people involved in criminal cases if their addresses were made public by the court. A member replied that the addresses of criminal witnesses are generally not made part of the court record.

A member observed that the addresses of witnesses in civil cases are already available because they are listed in the pretrial order.

The Chair asked whether documents like pretrial orders would be available electronically under the new court computer system. The Chair said that only docket information is available under the current system. A member replied that electronically filed documents could be made available online.

A member said that, in federal court, any person with a PACER account could open any filed document electronically. The member said the person would have to pay to do this and the court would know who examined the file.

A member said the default position ought to be that everything in a court record is public. The member said a witness should not be able to testify anonymously. A member said any exceptions to making information public should be directed at preventing identity theft. The member said that the trial court should also have the right to protect the identity of the jurors – after they have been selected and before the verdict is read – if this is necessary to protect the integrity of the trial.

A member said that under the current rule, the clerks have been instructed to review files for protected information before allowing a person to view the file. This can be a lengthy process in some cases, such as a contentious divorce. The member said if the clerks find unredacted information that is protected under Admin. Rule 41, they must photocopy the document, redact the information on the copy, and place the redacted version in the

public part of the file while placing the unredacted version in the sealed part of the file. The file cannot be released to the public until this review is done.

A member said that the clerks were not planning on having to do this review on all files, especially old files. The member said the result of the redaction was sometimes absurd, such as in a name change of a minor in which the only public document would contain no names at all, but only the old initials and the new initials. The member said this was work was taking the clerks an enormous amount of time.

A member said the minor initial requirement created problems also in the case of domestic violence protection orders. If the protection order is against a minor, only the initials can be used, and then who is served with the order?

A member said that the change suggested by the motion was a good idea, but additional language in the rule would have to be changed if the motion was accepted.

A member asked what drove the rule provision restricting access to street addresses in criminal cases. The Chair explained that the provision was taken from the federal rule. A member said that the federal courts were in a lot different position than the state courts and do not have traffic cases and other small-scale criminal matters.

The motion to amend page 119 at lines 6-7 CARRIED. By unanimous consent, additional changes were made throughout the rule to conform to the amendment. Also by unanimous consent, Admin. Rule 41 at page 130, line 163, was amended to conform to the Rule 3.4 amendment.

Staff said that Staff Attorney Jim Ganje had raised an issue regarding how a “financial-account number” was to be defined under the rule. The Committee reviewed Mr. Ganje’s written comments. Staff said that the reference to financial account numbers contained in N.D.R.Ct. 3.1 had been more specific than the reference in the current rule. Staff said that “financial-account number” is the term used in the federal rule.

A member said if the specific additional terms referenced by Mr. Ganje – “credit, debit, and electronic fund transfer numbers” – were added to the text of the rule in addition to “financial-account number” it could be seen as broadening the scope of the term “financial account number.”

Ms. Ottmar MOVED to amend the explanatory note at page 121-122 to include an explanation that: “The term ‘financial-account number’ includes any credit, debit or electronic fund transfer card numbers, and any other financial account number.” Judge

Nelson seconded.

A member said it would be unwise to specifically refer to bill numbers because they did not seem to fit the definition of “financial-account number” and because in some cases, like divorce cases, there were numerous bills used as evidence, from medical bills to plumbers’ bills.

The motion CARRIED.

A member asked whether an explanatory note should also be added to Admin. Rule 41 explaining the scope of the term “financial-account number.”

Judge Schmalenberger MOVED to add an explanatory note on financial-account numbers to Admin. Rule 41. Ms. Ottmar seconded. Motion CARRIED.

A member said that if someone seeks a protection order against a person who is younger than 18, Rule 3.4 requires that only the initials of the subject of the order be used. The member said this means no one knows who the protection order is against, which defeats the purpose of the order – people should know whether some other person may be a threat. The member said there should be an exception, at least for domestic violence protection orders, that would allow the full name of the minor to be used.

A member asked whether there would ever be a situation, outside of juvenile court, where it would be necessary to protect the identity of a minor. The member said this would possibly be necessary if the minor was a victim of a crime. A member added that protecting the identities of children involved in divorce cases was also important.

A member said that the use of initials alone for minors could sometimes cause confusion, as when all children in a family have the same initials.

A member suggested that an exception to the minor initial requirement be made for cases in which the minor is a named party. The member said that, outside of juvenile court, there was no reason to protect the identity of a minor who was a party.

A member said there may be reason to protect the identity of a minor who is the subject of a paternity action. A member replied that making this particular information public was important – the very reason for a paternity action was to establish that a certain person was the father of a certain child.

A member said there was a particular need to know the identity of a minor who is the

subject of a protection order. The member said not only law enforcement, but school officials would need to know if one person was a threat to another person. The member said that domestic relations protection orders are most often obtained against minors when a dating relationship goes bad, and the people involved are likely still going to school with each other.

A member asked whether any exception to the rule would need to go beyond a narrow exception for domestic relations protection orders. A member said that use of the full name should be allowed in name change actions, especially given that these actions have a publication requirement. A member said that often the notice of name change will be published using the whole name and then filed with the clerk using the initials only.

Judge Schmalenberger MOVED to add an exception to Rule 3.4 allowing the use of the full name of a minor when the minor is a party. Judge Nelson seconded.

A member asked whether the exception should apply to paternity actions. A member said that paternity actions are closed files, but the judgment is public. A member said it was appropriate that the child's full name appear in the judgment of a paternity action. A member asked whether there was a statutory provision that required that the name of a child in a paternity action remain sealed. A member said that it was the language of Rule 3.4 that currently protected the identity of children in paternity actions.

The Committee discussed where the proposed amendment should be placed in the rule. A member suggested that the proposed exception properly belonged in subdivision (b) of the rule, which deals with exemptions. By unanimous consent, the proposed amendment was moved to paragraph (8) of subdivision (b) creating an exception to redaction of "the name of an individual known to be a minor when the minor is a party."

Mr. Plambeck MOVED to add "unless prohibited by statute, regulation or rule" to the end of the proposed amendment. Judge Nelson seconded.

Judge Geiger MOVED to amend the motion to used the words "when there is no statute requiring nondisclosure." Judge Schneider seconded.

A member said that the Uniform Parentage Act, N.D.C.C. 14-20-05, protected the identity of individuals involved in proceedings under the act.

A member said using the term "regulation" was important because administrative rules could also prohibit identification of minors in certain proceedings. The member said there were likely to be provisions other than statutes that protect the identity of minors.

A member asked what Judge Geiger's proposed language would accomplish that Mr. Plambeck's proposed language does not accomplish. A member said the language seemed to be clearer but that it sought the same goal.

The motion to amend the motion CARRIED.

Mr. Plambeck MOVED to add the words "regulation or rule" after "statute" in the amended motion. Mr. Dunn seconded.

Mr. Dunn MOVED to amend the motion to change the word "requiring" in the amended motion to "mandating." Judge Nelson seconded. Motion CARRIED.

The motion to amend the amended motion CARRIED.

The amended motion CARRIED.

A member asked whether Admin. Rule 41 needed to be amended to reflect the proposed change to Rule 3.4.

Judge Nelson MOVED to amend Admin. Rule 41 to incorporate all the exemptions in Rule 3.4 by adding "unless exempted by Rule 3.4 (b)" before the words "personal information" at page 130, line 158. Ms. Ottmar seconded. Motion CARRIED.

Staff said that Mr. Ganje had a question about the meaning of language at page 119, lines 19-20. Mr. Ganje said the definition of "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed" was not clear. The Committee reviewed Mr. Ganje's written comments.

A member said the language referred to court records that existed prior to the imposition of the Rule 3.1(j) redaction requirement, which became effective March 1, 2005. The member said that the provision was intended to relieve court staff of the need to go back and redact files submitted before the redaction requirement was put in place. The member said this language should be retained in the rule.

Staff said the language the Committee just proposed for Admin. Rule 41 would extend the Rule 3.4(b) exemptions into Admin. Rule 41. A member said this should eliminate any inconsistencies between Rule 3.4 and Admin. Rule 41. A member said there should be a note to Admin. Rule 41 explaining the Committee's intent that Rule 3.4 and Admin. Rule 41 be read together. A member said that it had been the Committee's desire from the time

redaction requirements were first introduced to place the burden of protecting personal information on parties submitting documents to the court.

A member pointed out that Rule 3.4 and Admin. Rule 41 address different issues. One addresses the form of material that is being filed, the other addresses disclosure of material that has been filed. The member said that there are documents that were filed before the redaction rules that contain information that could assist identity theft. The member said that this information would not be protected under the proposed change to Admin. Rule 41. The member said while it is a burden on the clerks to check documents to stop the release of protected information, the purpose of Admin. Rule 41 is to protect people from having their personal information released.

A member said most of the material filed before 2005 is in paper form. The member said that this material was not going to be scanned and put on the Internet, as possibly may be done with newly filed material when the new district court file management system is put in place. The member said that people have been able to walk into courthouses for a hundred years and look at the physical file. The member said that paper files have an additional degree of protection because people have to walk in and stand in front of the clerk before they can see them.

A member said one example of an old file that would need to be extensively redacted by the clerks under current practice would be an old probate file. This is a file type that would likely contain substantial amounts of personal information. A member said that allowing access to the old personal information was important because they are “treasure troves” of information necessary for locating people who possibly have ownership interests in land or other property. The member said they also contain unique historical and geneological information. A member said these files would be essentially worthless if redaction of old personal information continues to be required. A member said it would be doing the public a disservice if the information in old case files must redacted.

Staff drew the Committee’s attention to a proposed amendment to Rule 3.4 at page 120, line 25. Staff said the proposed change would eliminate the redaction exemption for charging documents and affidavits in support of charging documents. Staff said there had been complaints that this exemption had created a lot of work for the clerks because the people submitting these documents do not need to redact them so the clerks are then forced to redact them if copies are requested by the public or media.

Mr. Mack MOVED to restore the deleted material at page 120, line 25. Judge Nelson seconded.

A member said it was important to retain the charging document redaction exemption. The member said when a person with a common name is charged with a crime, it is important for the public to have details about the person charged, and information in the charging document provides these details.

A member asked whether retaining this exception would eliminate the current issues revolving around personal information, such as dates of birth, in uniform traffic citations. A member said that if a uniform traffic citation meets the definition of a charging document, it is exempt from the redaction requirement.

A member said the identity of a named defendant in a criminal case should be known. The member said a problem is that it is becoming more common for prosecutors not to do an affidavit of probable cause, other than one that just refers to attached police reports. The member said that all manner of information can be found in police reports, well beyond mere information about the defendant's identity. A member replied that time constraints force prosecutors to take the approach of including police reports with the affidavit of probable cause. A member said the court can order that the police reports in a given case be sealed if necessary.

The motion CARRIED.

Staff said that Mr. Ganje had asked what kind of "court filing" the language at page 120, lines 22-23, referred to. The Committee reviewed Mr. Ganje's written comments.

A member said the language could refer to a document like an affidavit in support of a search warrant. The member said it could also refer to materials related to a state's attorney's inquiry or a subpoena for financial records. A member said it would be preferable to retain the language unless there is evidence that it has created a problem.

Staff said that amendment of subdivision (e) at page 120, lines 33-36, had been proposed. Staff said the amendment was designed to clarify procedure for filing unredacted documents under seal. Staff said Mr. Ganje had pointed out that the current language of the provision has created some confusion, especially about whether an unredacted document filed under seal could be considered an "original." The Committee reviewed Mr. Ganje's written comments.

A member said a key problem was how the unredacted document is treated as far as the docket is concerned. The member said if the unredacted document is not docketed, then the redacted document must be considered the original while the unredacted version will be treated as just a piece of paper in the file. The member said that how to handle redacted and

unredacted versions of documents as far as the record was concerned was a problem. The member said that clerks seemed to be filing all the confidential material on the left side of the file and not necessarily including the confidential material on the docket or the record of actions.

A member said if an attorney filed a redacted version and an unredacted version of a document at the same time, both are now given the same file number, with one version on the public side and the other on the sealed side. The member said that the cover sheet on the sealed side would have an index listing the documents that have been filed.

A member said giving the same number to two versions of a document is dangerous. The member said that one document could be removed and no one would know by looking at the docket. A member said the solution to this would be to note that there are two versions when preparing the docket sheet, indicating that there is a redacted version and an unredacted version with the same number.

A member said that the new computer system could not handle having two documents with the same number. The member said having separate docket numbers for documents is important so that people can understand how the documents in the file came to be in the file. A member asked whether the computer system could handle having a number for the unredacted document and a number/letter combination for the redacted document so that the same base number could be retained for a given document.

A member said that making clear through docket numbering that two different versions of the same document exist in the file would solve any issues the clerks might have with certifying a document as "a true copy."

Mr. Plambeck MOVED to amend subdivision (e) at page 120, line 35, to add after "The court must" the words "separately docket and" and to add the words "and indicate it is filed under seal" at the end of the sentence. Judge Schmalenberger seconded.

A member asked whether the court would have to order the unredacted document to be filed under seal or whether the clerk could simply file it under seal at the party's direction. A member said that a filing under subdivision (e) could be done routinely without court involvement while the court itself may order filing under seal under subdivision (c).

A member said if the register of actions indicated that one number in the file was the redacted version and another number in the file was the unredacted version, the clerk could make a certified copy of either version and properly indicate it was a true copy of the version filed at the given docket number.

The motion CARRIED.

Staff said that Mr. Ganje had raised an issue related to the text at page 121, lines 43-44, of Rule 3.4. Staff explained that this text was added to the rule by the Supreme Court as way to make certain that the defendant's social security number, birth date, and street address were made part of the file, even though this data would be redacted and not released in the public part of the file. Mr. Ganje indicated that this language had created confusion about whether prosecutors were required to prepare and file lists containing references for all the protected personal information that might be in documents related to a given defendant or whether prosecutors could simply redact this material. The Committee reviewed Mr. Ganje's written comments.

Mr. Mack MOVED to delete the text at page 121, lines 43-44. Judge Nelson seconded.

A member said that including the prosecutor reference list requirement in the rule was not anticipated by the Committee. The member said the information required is not always available to the prosecutor and obtaining it can be difficult. The member said that the requirement created an additional workload for full-time and part-time prosecutors and that this created a real cost that had to come out of someone's pocket. The member said that the court usually obtains information about the defendant's social security number, birth date and street address at the defendant's initial appearance. The member said this procedure assures the accuracy of the information.

A member said the new computer system is party-based rather than case-based. The member said that once a party is in the system, the system brings all the documents related to the party together under the party's name. The member said it is important to have certain identifying information – social security number, birth date, address – in the system to make sure that the information being brought together belongs to the appropriate party. The member said that the prosecutor reference list requirement is one way to bring this information into the system.

A member said the best way to get this information into the system is to get it directly from the defendant at the initial appearance. A member replied that it would be best to get the information before the case is opened so that the computer system can start tying all the information about the defendant together right away.

A member said that the clerks are mishandling reference lists by requiring prosecutors to create a reference list as required by the rule and to also provide a redacted copy of this list. A member said this is a misinterpretation of the rule – filing a reference list under seal

is an alternative to redaction.

A member said that it is not a universal practice for the court to inquire about social security numbers, birth dates and addresses at the initial appearance. The member said this is generally not being done in Cass County.

A member said that if a prosecutor cannot obtain all the information required to be part of a reference list before the case begins, the prosecutor can amend the list later. A member replied that perhaps the defense attorneys would be most likely to have access to the most accurate information and they should be required to file the list.

Mr. Plambeck MOVED a substitute motion: instead of deleting the text at page 121, lines 43-44, retain the text and add at line 44 after “includes” the words “if available” and at the end of the line delete “street address” and add “any other information subject to redaction under Rule 3.4 (a) which is included in a charging document or supporting affidavit.” Mr. Quick seconded.

A member said that the Committee had decided to keep the exemption making the charging document not subject to redaction. The member said that the proposed language made it sound as if the charging document was subject to redaction. The member said the amendment would cause confusion.

By unanimous consent, the motion language was changed to delete the language referring to the charging document and supporting affidavit.

A member said that the rule said nothing about when the reference list was supposed to be filed by the prosecutor. A member replied that the clerks expect the reference list to be filed with the charging document. A member said it would be difficult to provide all the requested information at that time.

A member said that the purpose of the rule was privacy protection. The member said that the purpose of the language requiring prosecutors to file a reference list was not privacy protection but to have a particular document that would provide identifying information about a defendant. The member said this requirement was troubling because it did not fulfill the purpose of the rule.

A member said it would perhaps be better for the court system to gather information about defendants through some other medium than through Rule 3.4. The member said that it would make sense for the court system to create a form so that the courts could gather information necessary for the proper operation of the new computer system.

A member said that prosecutors do not realistically have access to the information requested under the reference sheet requirement. The member said that in a bad check case, for example, a prosecutor years ago would have been able to get the defendant's social security number off the check. Now, this information is more private and the prosecutor with bad check in hand would know only the defendant's name and address. A member said it is important to gather information about defendants, but that prosecutors are not in the best position to obtain this information.

The substitute motion FAILED.

A member asked, if the prosecutor reference sheet requirement was deleted, where would the courts obtain the needed information about defendants? A member said that, once the new computer system comes online, the court administrator could distribute forms statewide for defendants to fill out, requesting the required information. At the initial appearance, the court could confirm the information was provided. A member replied that this would delay matching up defendants to their past records.

A member said the sheriffs or law enforcement could collect the information. A member said that, regardless of who collected the information, there needed to be some requirement that it be collected. The member said if the prosecutor reference sheet language was deleted as proposed, there would be no requirement to collect the information.

A member asked whether this was a concern that should be addressed in Rule 3.4. A member replied that it was through Rule 3.4 that the court said it did not want this information coming into the system in public documents. The member said, however, that the court still needed the information that was being excluded or redacted because of Rule 3.4.

A member said this identifying information should be available on the warrant for arrest if possible to make certain that the right person is picked up.

The motion to delete CARRIED.

Mr. Mack MOVED to add a requirement at page 119 in subdivision (a) that, in a criminal case, the birth date of a defendant be stated if available. Motion FAILED for lack of a second.

A member suggested that an exception be added to subdivision (b) of the rule allowing the birth date of a criminal defendant to be used without redaction. A member said that arrest or search warrants were already exempt from the redaction requirement so a

defendant's birth date could be included in these documents already of desired.

A member said that some courts were already gathering information from defendants such as birth dates and social security numbers and if the Supreme Court decided it needed this information to be brought into the system, it could require all courts to collect it as an administrative matter.

Staff said that the next proposed change to the rule involved elimination of the waiver of protection at page 121, lines 46-47. Under the waiver a party who failed to properly redact its own documents would waive any protection under Rule 3.4 for the unredacted information. Staff said that current practice in some courts was to return improperly redacted documents to the filing party, which the waiver provision less useful.

A member said that some clerks had been ordered stop the practice of returning improperly redacted documents and to file them. A member said the rule could be changed to make it clear that clerks were allowed to return improperly redacted documents without filing them. The member said once the district courts move to electronic filing, the clerks will be able to review submitted documents before filing and will be able to immediately inform the filer if the document is not acceptable.

A member said barring the return of an improperly redacted documents before it is filed can creates problems with the system: the document will have to be given a docket number and if the court decides to strike the document it cannot be easily returned for correction.

Judge Nelson MOVED to retain the waiver language at page 121, lines 46-47. Mr. Quick seconded.

A member said that the waiver provision was made part of the rule to make it clear that if a party files a document containing information that should have been redacted, the party must be held responsible. The member said the main problem with this provision is that it does not account for a party filing another party's personal information without proper redaction. The member said that if a party files its own tax returns or other documents containing personal information without proper redaction, the party should bear the consequences.

The motion CARRIED.

A member said it was important to make it clear that a judge has the authority to order the clerk to return a document to a party before filing without the need to have the document

filed and then ordered stricken. The member said that having the ability to turn back documents to parties was particularly useful when a party has established a pattern of failing to properly redact documents.

A member said that sometimes documents need to be filed to meet a deadline. The member said that giving the clerks the ability to return documents that a party believed had been filed (and that had met a deadline) would create problems. The member said the proper approach is to file documents that appear to meet the filing requirements, and if these documents later turn out to be improperly redacted, the court may order them stricken.

A member said the court should have the power to order that a document not be filed in the first place. A member replied that there is no way to know that a document presented to the clerk is deficient and not worthy of filing without an examination of the document. The member said it is appropriate to allow filing of presented documents, which the court and other parties can then examine.

Judge Schmalenberger MOVED to amend at page 121, line 49, inserting after “to be” the words “returned to the party to be” and inserting after “If the” the words “document has been filed, and an.” Mr. Hoy seconded.

A member said the proposed amendment was acceptable because it did not require clerks to return documents before filing but instead allowed judges to issue an order on returning documents. The member said clerks should not be put in the position of deciding whether or not to file a document they have been given.

The Committee discussed the wording of the proposed amendment. By unanimous consent, the motion was amended so that page 121, lines 48-49, would read: “If a party fails to comply with this rule, the court on motion of another party or its own motion, may order the pleading or other document to be returned to the party for reformation prior to filing, be reformed with an extension of time to complete the filing within any applicable deadline.”

A member pointed out that there was no deadline in the proposed language for a party to request an extension. A member said whether a request for extension was reasonable would need to be decided by the court.

The motion CARRIED.

Staff said that Mr. Ganje had raised an issue regarding the redaction of materials contained in confidential files. Staff said that new language was proposed for the Rule 3.4 explanatory note to address this issue, but that Mr. Ganje had questioned whether the

proposed language was adequate. The Committee review Mr. Ganje's written comments.

A member said the only files that are actually "sealed" are adoptions. The member said mental health files, for example, are "red files" and are confidential. The member said that the explanatory note language seemed to make it clear that material in confidential files does not need to be redacted because the whole file is non-public and confidential.

A member said that Mr. Ganje's concern seemed to be that there may be a confidential file, as in a paternity case, in which the documents are not redacted. Later, someone may take a document from that file, such as the judgment, and make it part of a non-confidential file. The member said that Mr. Ganje's question was if the judgment would then have to be redacted.

Mr. Hoy MOVED to amend the explanatory note at page 121, line 58, adding the words "Unless also filed in a non-restricted file," at the beginning of the second sentence of the note. Judge McLees seconded.

The motion CARRIED.

A member said that 99 percent of the problems related to the handling of confidential personal information would be eliminated by making divorce cases confidential. The member said there would be minimal need for Rule 3.4 if divorce files were "red files." The member said the divorce files in New York are confidential.

Staff drew the Committee's attention to a letter from Joel Skjed that had been directed to the Committee. Staff said that the issues raised by Mr. Skjed were representative of those raised by many citizens who had contacted the courts about their objections to the large quantity of case information now available online.

A member said that there was a particular issue relating to deferred imposition of sentence that illustrated the complexity of putting case information online. The member said that if some gets a deferred imposition of sentence, the case is dismissed and the file is sealed. The member said, on the other hand, that someone can be charged with murder and have the charge dismissed because it is baseless, but this file would not be sealed. So, everyone can see the dismissed charge but no one can see the deferred charge. The member said there was a fairness problem with sealing deferred charges but allowing dismissed charges to be posted.

A member said one solution was to get a deferred imposition on all charges so that everything can be sealed. The member said a defendant was better off to plead guilty and

get a deferred imposition of sentence than to have all charges dismissed.

A member asked whether the Committee could prepare an expungement rule. A member replied that the term “expungement” was highly disfavored. A member said that it seemed that the courts had authority to determine what records could be posted publically. A member said that 20 states have provisions that would allow for the “expungement” of criminal records, including dismissals. A member said that “sealing” may be a better word than expungement.

A member said that even deferred sentences were not private. The member said that once information becomes public in the Internet world, it stays public. A member said that even if the court files were “expunged” or “sealed” in a given case, law enforcement files on the case would remain open.

A member said that the public and the news media wants to see the process that goes on when someone is charged with a crime. The member said that if the courts starting sealing cases that were dismissed, the public would object. A member said that another approach would be to treat cases dismissed after deferred imposition the same as cases that are simply dismissed: let the record reflect that charges were made and eventually dismissed rather than sealing the file.

Mr. Plambeck MOVED to add the words “to reform” on page 121, line 50, after the word “order.” Judge McLees seconded. The motion CARRIED.

Staff said that Mr. Ganje had raised an issue regarding personal information in audio recordings of court proceedings. The Committee reviewed Mr. Ganje’s written comments.

A member said that if a court reporter has been transcribing a proceeding and someone wants a transcript, the person has to pay for a transcript and the court reporter can redact personal information from the transcript as part of the preparation process. The member said when a court recorder makes an audio tape of a proceeding, anyone can purchase a copy of the recording, which has not been redacted.

The member said some states do not allow audio copies to be made of court proceeding recordings. Instead, they will release only a written transcript of the recording, which will be more expensive than the audio copy and take more time to produce. A member said this would be a real problem in North Dakota, especially for counsel who only want to hear a brief part of the proceeding.

A member said that there is voice recognition software available that will allow an

audio recording to be searched for specific terms.

The Chair suggested that staff be directed to research the issue to see what other states are doing about the audio recording issue.

A member noted that Admin. Rule 41 barred the release of birth dates except for the year. The member said that, in criminal cases, defendant birth dates should be released. Staff said that, under the language added to Admin. Rule 41 applying the Rule 3.4 exemptions, a defendant birth date in a document exempt from redaction, such as a charging document, could be released.

The motion to approve the proposed amendments to N.D.R.Ct. 3.4 and N.D.Sup.Ct.Admin.R. 41 and to send the rules to the Supreme Court CARRIED.

Judge Nelson MOVED that the proposed amendments be sent to N.D.R.Ct. 3.4 and N.D.Sup.Ct.Admin.R. 41 immediately to the Supreme Court as an emergency measure. Judge Geiger seconded. The motion CARRIED.

## Hagburg, Mike

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**Subject:** FW: proposed amendments to Rule 3.4 and Admin. Rule 41

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**From:** Ganje, Jim  
**Sent:** Wednesday, May 27, 2009 10:27 AM  
**To:** Hagburg, Mike  
**Subject:** RE: proposed amendments to Rule 3.4 and Admin. Rule 41

Mike —

*I went through the amendments and have a couple of thoughts/questions about them, and then some questions about some of the questions I sent to you earlier - wondering if there was any discussion or conclusions.*

*So - first the thoughts/questions about the draft amendments.*

*1) I'm not sure I understand the changes regarding minor names. 3.4(a)(3) retains the requirement to show only the minor's initials (party or not). Draft 3.4(b)(8) exempts from redaction a minor party's name if there isn't a statute, regulation, or rule requiring nondisclosure. AR41, Section 5(b)(8) retains confidentiality (requires nondisclosure?) for a minor's name (party or not), except for initials. So - if I'm "following" this right: A filed document must show only the minor's initials, but a minor's name need not be redacted if there isn't a rule etc mandating nondisclosure, but there is a rule that makes the minor's name - except for initials - confidential (i.e. "nondisclosable"). Are these dots connecting? Or do they connect in a way that is just not obvious to me?*

*2) Under draft amendments to 3.4(g)(2), a court can order a nonconforming document "returned to the party for reformation prior to filing with an extension to complete the filing within any applicable deadline". Why would an extension of time be necessary if filing is to be completed "within any applicable deadline"? And, is the extension of time language intended to permit a court to modify time deadlines imposed by rule or to modify, say, a statute of limitations?*

*That's about it regarding the draft amendments. Now for the questions about the earlier questions. I pasted in the particular questions below if you want to suffer through them again. Shorthand:*

*Re 1) - did the Committee discuss whether 3.4(b)(3) is meant to be a "bright line", as it were, about redaction of documents in the file that pre-exist the rule?*

*Re 2) - any discussion about what 3.4(b)(5) might mean - or are we left to our own devices?*

*Re 4) - the draft amendments to 3.4(e) don't really address whether one or the other, or both, documents would be considered the "original". Any discussion on that?*

*Re 6) - any discussion on the question of access to recordings of proceedings that contain personal information?*

*And, re 7) - any discussion about the status of confidential personal information contained in an otherwise public document that is part of a confidential case file? The 3rd para. of the draft amendments to the*

Explanatory Note talks about also placing a doc in a non-restricted file (redaction) when it is filed in a restricted case (no redaction), but this is the other side: a document that is actually a part of the confidential case file, but is public by rule (and then has personal info in it as well).

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The "long" questions:

1) Questions regarding Rule 3.4(b)(3) [redaction requirement does not apply to "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed]. First, this provision seems "not of a kind" with the other exemptions under paragraph (b). The other exceptions pertain to various kinds of filings and, therefore, are consistent with the general prospective direction under paragraph (a) that "a party ... making the filing must include only [X]." Paragraph (b)(3) seems directed at filings pre-existing the rule and does not seem to follow from the "party making the filing" approach in paragraph (a), unless it was intended to guard against the assertion that "party making the filing" encompasses filings made before the rule by the party, with the party then required to "go back" and redact those documents. Paragraph (b)(3) would then prevent that burdensome reading of the rule. Now...the related questions.

Does "the record of a court or tribunal" mean the same thing as "court record" under AR41? If it does, is (b)(3) intended to mean that redaction (by anyone) is not required with respect to personal information, otherwise subject to Rule 3.4's redaction requirements, that was in the file before the rule was adopted? And if that is the intended meaning, how does it relate to the categorical protections set out in AR41, Section 5(b)(8)? As I think you know, we've told clerks that when access to a file is requested (by someone other than a party or counsel) they must screen the file to ensure personal information is not disclosed, regardless of when the information came into the file. We are aware of the Rule 3.1(j) "no duty" provision. Aside from the workload issue, in the end it seemed nonsensical to say, for example, that a document filed on Feb 28 containing a DOB is public, but the next document filed on March 2 with a DOB must be redacted. Seems to defeat the purpose of protecting personal information. The screening process clerks have been instructed to follow consists of making a copy of the affected document, redacting personal information, placing the redacted document in the public portion of the file, and placing the unredacted original in the confidential portion.

Since Rule 3.4 is directed at redaction requirements when documents are filed, and AR41, Section 5(b)(8) is directed at general protection of information in the court record, the rules arguably serve different purposes and impose different responsibilities. However, if paragraph (b)(3) is intended to "ripple through" and withdraw privacy protections from documents preexisting Rule 3.4, then the limitation should likely be reflected in AR41, Section 5(b)(8), as well. Perhaps something like, "Personal information governed by this section which is contained in a document not subject to the redaction requirements under N.D.R. Ct. 3.4 is not confidential".

2) Question regarding Rule 3.4(b)(5) [redaction requirement does not apply to "a court filing related to a criminal matter and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case"]. Is there any idea of what such a filing might be? In several conversations with clerks, we've been unable to come to any general conclusions.

4) Original vs Copy vs Version - Certification. Rule 3.4(e) permits a person making a redacted filing to also file an unredacted "copy" under seal. Questions have arisen concerning how a clerk would provide a certified copy if what is requested is a copy of the document that is the unredacted "copy". The clearest example, which is addressed in the draft amendments to Rule 3.4's Explanatory Note, is the situation in which a party has filed a redacted divorce decree, but also files the unredacted "copy" because of the necessary inclusion of social security numbers. The draft amendments also replace the troubling reference to "copy" with "version". Is it to be inferred, then, that the clerk could rightfully certify that a copy of the unredacted "version" is a "true and correct copy of the original", or words to that effect? Or, otherwise, since redacted and unredacted versions

*filed under Rule 3.4(e) would almost certainly be filed contemporaneously, could both versions be regarded as "first submitted version[s]", and therefore both considered "originals" under Rule 3.1(e)?*

*6) Access to Recordings of Proceedings. You note in your background memorandum my question concerning access to and providing copies of recordings of proceedings during which personal information governed by AR41 is made part of the court record. A little additional explanation. This has been a much more infrequent issue in the past when protected information was limited to SSANs and financial account numbers. However, the recent 3.4-related inclusion of additional protected information [DOB, home street address(criminal cases), minor's name (initials)] in AR41 has expanded substantially the kinds of proceedings that may be involved. It is only a matter of time before this becomes a troublesome issue.*

*7) Personal Information in Public Documents in Otherwise Confidential Case Files. There are several kinds of proceedings and related case files, and documents within files, that are confidential under court rule or state or federal law. In the draft amendments to Rule 3.4's Explanatory Note you've helpfully clarified that the rule's redaction requirements do not apply to documents filed in confidential cases. However, there is a related question concerning personal information contained in documents that are part of a confidential case file, but which are otherwise accessible to the public. There are other examples, but the easiest one is a protection order. AR41, Section 5(b)(4), establishes that protection order files are confidential, but provides an exception for "orders of the court". There is usually a great deal of personal information contained in a protection order. AR41, Section 5(b)(8), of course, describes the kinds of personal information in a court record that are confidential. Question: Would the confidentiality of personal information under (b)(8) be considered an "exception" to the otherwise public status of the court's protection order? That is, because the order is public, when it is filed would there have to be a redacted version (for public access) and unredacted version, or would the public status of the order under (b)(4) trump the personal information confidentiality under (b)(8)? Trying to read the provisions together in a complementary fashion suggests to me that redacted and unredacted is the "answer". Keep in mind too that the parties and counsel would have access to the unredacted order, as would law enforcement (by way of the allowance under AR41, Section (c)(1) for access by state and local officials examining a court record in the exercise of official duties, although "examining" is something of an odd reference in this context since they are enforcing the order -- albeit by examining it first).*

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**From:** Hagburg, Mike  
**Sent:** Tuesday, May 26, 2009 11:05 AM  
**To:** Ganje, Jim  
**Subject:** proposed amendments to Rule 3.4 and Admin. Rule 41

For your information and edification, here are the latest proposed amendments to Rule 3.4 and Admin. Rule 41. I will be passing them on to the court within the next couple of weeks. Judge Nelson was present at the meeting and was fully involved with the discussion, advocating the interests of the clerks.

<< File: Rule41.admin.wpd >> << File: Rule3.4.ct.wpd >>