

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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OCTOBER 21, 2011
STATE OF NORTH DAKOTA

Supreme Court No. 20110230

Proposed Amendments to North Dakota Rules of Civil Procedure, North Dakota Rules of Appellate Procedure, North Dakota Rules of Criminal Procedure, North Dakota Rules of Court, and North Dakota Supreme Court Administrative Rules and Orders

May it please the Court. My name is Jack McDonald. I'm appearing today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association to oppose the adoption of a portion of the proposed amendments to Administrative Rule 41 concerning access to court records. Specifically, we oppose adoption of new subsection 6 beginning on page 78 at line 205 and continuing through line 213 on page 79.

The proposed changes dilute and essentially make useless what likely is the wave of the future, the electronic court record or docket. As the courts move forward with electronic filings and move steadily towards a paperless system, the electronic docket will soon become THE record.

However, the proposed changes dilute that record and ensure that no one will ever be sure what really is the record. We will have a different record, or docket entry system, for each of the districts.

The proposed changes allow the Court, upon a judge's complete discretion, to block access to the electronic docket, but not from the paper docket on file in each district court, information on criminal cases if the charges against the defendant are dismissed, the defendant is acquitted, the retention periods run or the defendant just asks the Court to remove the information.

Under the proposed changes, these decisions are mostly left up to the complete discretion of the state's 42 district court judges. We say mostly because at least in the case of requests under subparagraph (D) the judges will need to use the standards set out for sealing records.

However, we recognize that the main reason for these rule changes is to deal with dismissals and acquittals. There are no standards in these instances. A judge in Fargo, for example, may routinely deny access to the electronic docket for these cases, while a judge in Bismarck may decide he or she will never deny access. Judges within the same district will likely have different standards.

Meanwhile North Dakota citizens and businesses who are using this docket to verify information on individuals or to do routine and quick background checks will find that this great new tool, designed to make access to court documents easier, has really made the access to actual records more difficult.

What this means is that an individual can check the paper docket in Bismarck and find a true and correct docket, but cannot be assured of the same accuracy by checking the electronic docket. If a person hires a security firm to do a record check, or is able to qualify for a Bureau of Criminal Identification search, they can be assured ...for a fee...that they will get a complete and accurate record.

However, if a newspaper was writing a story about a case, and wants to do a check on the record of the defendant, it cannot be assured of any accuracy by checking the electronic record.

Employers hiring new employees, landlords looking at new tenants, schools hiring new teachers, and many others will no longer be able to rely on the court's electronic docket for a quick, inexpensive check.

Courts have generally held that sealing or closing access to court records are akin to closing trials and have adopted standards for sealing and closing records similar to the standards for closing trials.

North Dakota recognized this when it adopted amendments to Rule 41 several years ago and adopted the standards now found in paragraphs (1) through (5) regarding the sealing of records. These provisions remain. They do not, however, remove an entry from the docket.

The current rule change proposal now says the docket will be altered, but only electronically, and then only when any of the state's 42 district court judges decide to do so. What standards will they use? It's up to the 42 judges to decide.

If this Court finds in favor of a defendant, and the defendant then requests that access to the Court's electronic docket be blocked, will the Supreme Court be blocking access to its on-line docket but not its paper docket?

Where is the documentation or evidence that this change is needed? Are there any studies or records that show there is a driving need for this change? No. There is only anecdotal evidence that "some" people say they have problems getting jobs, or renting apartments, because there is a record on the internet of their dismissed or acquitted case. This is hardly a reason to destroy the accuracy of what will likely become the main court docket record in North Dakota...the electronic docket.

This proposed rule suggests that most North Dakotans cannot understand what the words dismissed or acquitted or not guilty mean. That's rather demeaning. The information concerning the original charge was likely already carried in a local newspaper or noted in a local broadcast.

In this electronic age, it's hard to believe that somehow the electronic docket cannot somehow better reflect, or emphasize, acquittals and dismissals. Most daily and weekly newspapers, for example, run the list of municipal and district court proceedings. The information for these listings comes from the courts through what is now called the Dispositional Bulletin. These listings used to include dismissals. Attached as Exhibit 1 is a listing from June 11, 2011, that ran in The Bismarck Tribune.

However, the Tribune says that since June the report no longer lists the dismissals. Why couldn't it?

We ask that the Court also consider the discussion of the importance of court dockets and their accuracy as dockets of record in *Judicial Branch v. Iowa District Court for Linn County*, 800 NW2d 569 (July 15, 2011). I recognize that this case dealt with statutory requirements not present in North Dakota, but I believe the court's discussion of the issues involved is relevant to the rule changes being proposed in North Dakota.

In summary, we ask that the Court reject the Rule 41 amendments proposed in lines 205 through 213 on pages 78 & 79, and thus maintain the electronic docket as the true and accurate docket of record in North Dakota.

Thank you for your time and consideration.

COURT POLICY – Bismarck Tribune – June 11, 2011

Nubs of the news information comes from district and municipal courts in Burleigh and Morton counties. In nubs of the news, the Tribune publishes all felony sentences; and misdemeanor sentences with fines of \$500 or more and/or a jail term, including suspended sentences.

COURTS (Cases closed from March 29 to April 1) South Central District Felony Sentences

Burleigh County

Judge David Reich

CASES DELETED FROM THIS EXHIBIT

Judge Sonna Anderson

CASES DELETED FROM THIS EXHIBIT

Judge Donald Jorgensen

CASES DELETED FROM THIS EXHIBIT

Felony Dismissals

Burleigh County

Colin J. Matthiesen, 21, 98 Benteen Drive, Lincoln, was charged with possession of marijuana. The charge was dismissed.

Joey H. Bolinger, 22, Seattle, was charged with possession of marijuana with intent to deliver. The charge was dismissed.

EXHIBIT 1