

FILED
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 CLERK OF SUPREME COURT
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May 31, 2018

Honorable GERAL W. VandeWalle
 Chief Justice
 North Dakota Supreme Court
 600 E. Boulevard Ave. Dept. 180
 Via Email: supclerkofcourt@ndcourts.gov

Re: Proposed Amendments to N.D.Sup.Ct.Admin.R. 41
 Regarding Access to Court Records

Dear Chief Justice VandeWalle:

I appreciate the work done by the Court Services Administration Committee in considering and proposing amendments to N.D.Sup.Ct.Admin.R. 41. While I understand the rationale behind the overhaul of Rule 41, I am concerned about the unintended consequences of allowing remote access, and would like to voice my opposition to that portion of the proposal.

I acknowledge that often the law is behind in adapting to technological advancements, but such advancements should not necessarily dictate changes in law. Access to public records is such an example. While the public should not have hurdles to overcome in obtaining public records, such access should require more than the mere click of a mouse from the comforts of home where curiosity and boredom may be the only driving force. Even with the redaction of birth dates, social security numbers, etc., court records contain incredibly personal information. It should be noted, however, that many documents will contain such information in light of Section 4.0(d), which basically says whatever confidential information contained in documents filed before March 1, 2009, is of no matter and will not be redacted. It is alarming to see that although the steps have been taken to now protect such information out of privacy concerns, the Committee essentially shrugs its shoulders at the same information contained in documents filed prior to March 1, 2009. In light of the lengths identity thieves will go to obtain personal information, unfiltered online access to such information is reckless.

Unlike social media platforms where the user can determine the level of privacy to utilize, court pleadings often require inclusion of personal information which cannot be filtered or otherwise shielded from public scrutiny. For example, an affidavit filed in support of a criminal complaint charging a sexual offense will often contain very intimate

details of the alleged crime in referencing body parts and sexual acts, all of which is necessary in establishing probable cause for the offense. Even with victims' names being changed out for initials or "Jane Doe," many times, especially in small, rural communities, the public often knows who the victim is. Allowing then the public to be able to simply click and read the affidavit out of curiosity goes way beyond the goal of transparency that is the basis of open public records, and, instead, can work to fuel the gossip and rumormongering that plagues such cases, not to mention the potential shaming and embarrassment of an already traumatized victim. I understand the argument that viewing such documents could work to dispel such gossip, but one must simply turn to news articles where the journalists have relied on court documents to see that there still can be confusion or misinformation even when the actual documents are reviewed. It should be noted that such unfiltered access could also result in tainting the jury pool, which is often already small in rural areas, as the court documents can be virally shared throughout the community. Such access could also work then to undermine a defendant's presumption of innocence as judgments may well be made based simply on the review of court documents. Simply put, allowing the public to "creep" through court records, like is now done through social media pages, minimizes the significance and purposeful nature of the information contained therein, could advance motivations of stalking, harassment, ridicule, and identity theft, and potentially undermine the fair and impartial nature of criminal proceedings.

The above concerns are not isolated to criminal court records, as information contained in many civil records could work to fuel the rumormongering as well and encourage sinister motivations, such as harassment and stalking. Indeed, motivations of curiosity and boredom may be benign in comparison to malicious motivations. For example, while public in nature, custody arrangements and visitation schedules of families should not be so easily accessible as to allow anyone to simply click to view the details of children and families' lives. I think this is of particular concern to people in professional capacities or public service. In any event, I understand that a person requesting open records need not state a purpose, and do agree the underlying intentions are irrelevant to the State's obligation to be transparent to the public. However, a balance should be reached in allowing unobstructed access by the public and protecting the sanctity of the information contained in court records to prevent those records from having as little meaning as memes and photos that are virally exchanged now, many of which are simply for purposes of humor or to further political agendas, which may also become the case as well for sharing court records.

The proposed Rule states that "Every member of the public should have the same access to court records." Section 3.0(a). However, on its face the Rule does not provide that to the public. Online access is proposed to be available 24/7, while other requests of course are delegated to business hours of the clerk's offices. Online access will allow immediate viewing, while other requests of course will be delayed for processing times. There are many members of the public who do not have internet access or who will need assistance, and who have an underlying legitimate purpose for their document requests, but who, under the terms of the proposed Rule, will endure delay in receiving their documents. This is troubling when considering that individuals motivated by

boredom, curiosity, or other malicious intentions will then have faster and unlimited access than someone who requires assistance from the clerks. Requiring at least an electronic request to the clerks for documents, which can then be processed and complied with electronically during business hours, seems to be a better solution to affording all members of the public the same access. Requiring a specific request for a document also is in align with current open records law and does not impose a hurdle to the requestor. Memorializing the option of electronic requests and electronic transmittal of court records in Rule 41, which is already a practice used by many clerks' offices, is the best approach to adapting current rules to current technology.

In sum, a mouse click should not equal a records request in light of the significance of personal information contained in court records. A reasonable amendment to the Rule in light of the advancement of technology is to allow records to be requested and forwarded electronically through the clerks' offices. It ensures all requests are dealt with during business hours of the clerks' offices, and ensures confidential information can be redacted. Requiring more than the clicking of a mouse will dissuade perusing court records where there is no legitimate purpose to do so. Requiring at least a specific request directed to the clerk is no more a burden to the requestor than any other open record request to any other public entity. All things considered, requiring more than the clicking of a mouse from a requestor is not a hurdle to accessing court records and gives credence to the significance of information contained in court records. As such, I request the Court deny the proposed changes as it relates to unrestricted, remote access, and instead allow for requests to be made and fulfilled electronically directly with the clerks' offices.

Thank you for your consideration of my concerns, and the opportunity to relay them.

Sincerely,

A handwritten signature in cursive script, appearing to read "JBinder".

Jessica J. Binder