

**From:** Neff, Charles <CNeff@ndcourts.gov>  
**Sent:** Wednesday, July 20, 2022 2:18 PM  
**To:** (SUP) Clerk of Court Office <SupClerkofCourt@ndcourts.gov>  
**Subject:** Comment on Proposed Rule Amendments; Docket No. 20220170

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Dear Clerk of the North Dakota Supreme Court,

Please find below my comment regarding North Dakota Supreme Court Docket No. 20220170 dealing with Amendments to N.D. Sup. Ct. Admin. R. 19 Regarding the Court Records Management Program and 41 Regarding Access To Court Records; and N.D.R.Juv.P. 19 Regarding Juvenile Records. Thank you for passing said comments along to the Supreme Court.

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Dear Chief Justice and Justices of the North Dakota Supreme Court,

I'm in regards to the proposed amendments to N.D.Sup.Ct.Admin.R. 19, N.D.Sup.Ct.Admin.R. 41, and N.D.R.Juv.P. 19, found at North Dakota Supreme Court Docket No. 20220170. Specifically, I would like to address lines 138-140 of the amendments, which would be cited as N.D.Sup.Ct.Admin.R. 41(3)(b)(7)(D):

- A judge or court employee's work material, including personal calendars, communications to or from law clerks, bench memoranda, notes, work in progress, draft documents and non-finalized documents;

This is a continuation of the current N.D.Sup.Ct.Admin.R. 41(5)(e)(3)(N):

- judge and court personnel work material, including personal calendars, communications from law clerks, bench memoranda, notes, work in progress, draft documents and non-finalized documents;

It appears one of the overarching goals of these amendments is to incorporate the open records design and procedures found at N.D.C.C. § 44-04-18:

The longstanding public policy of the State of North Dakota is that records of public or governmental entities are public, open and accessible for inspection. This rule implements the constitutional open records provision for the judicial branch. To do so, the supreme court through this rule exercises its constitutional authority to provide for management of judicial

branch records by adopting the structure and many of the procedures applicable to the rest of state government.

By this rule, the court exercises its authority under N.D.Const. art. XI, § 6 and art. VI, § 3. Unless another procedure is specifically provided in this rule, the procedures set out in N.D.C.C. §44-04-18 (2021) for access to records of other public entities are expressly adopted as the procedures for accessing court records. Statutory amendments after the effective date of this rule are not applicable to the judicial branch unless expressly adopted by an amendment to this rule.

Proposed N.D.Sup.Ct.Admin.R. 41(1) [l. 4-15]. Prior to becoming a staff attorney for the Northwest Judicial District, I spent over 4.5 years as either an Assistant State's Attorney or State's Attorney in North Dakota. Part of that role was interpreting and advising on open records and open meeting laws of the State of North Dakota. I fully support openness and transparency in government. I applaud the North Dakota Supreme Court in working to adopt the ideas and procedures that have worked well in the Executive Branch and other political subdivisions. However, I believe that certain records should be kept confidential because of the nature of those records.

I would strongly encourage that "staff attorneys" be added as an alternative to law clerks in the amendment. Staff attorneys are a recent addition to the stable of district court personnel, becoming more of a permanent law clerk type position for each district in the state. Not only can each district have a staff attorney, but now individual judges could potentially have a court recorder/staff attorney, thus increasing the number of staff attorneys state-wide. The communications protected by this rule for law clerks would, in my opinion, warrant even more protection for staff attorneys, as law clerks are traditionally temporary in nature. While staff attorneys would fit as "court personnel", specifically naming law clerks in the rule should necessitate specifically naming staff attorneys. In these situations, an exemption to open records must be specific and should not be implied, vague, or arguable. Adams County Record vs. Greater North Dakota Ass'n, 529 N.W.2d 830, 833 (N.D. 1995); Open Records Manual, Office of Attorney General, p. 23; <https://attorneygeneral.nd.gov/sites/ag/files/documents/OpenRecordsManual.pdf>. It may also warrant including language protecting communications between staff attorneys and law clerks, as in some districts the law clerks are supervised by a staff attorney and similar communications regarding cases would fit under the proposed amendment.

Next, I would request moving the protection of "work material" from exempt to confidential, thus placing it at N.D.Sup.Ct.Admin.R. 41(3)(b)(6)(M) [l. 133-135]. The proposed amendments mirror the open records policies in that "confidential" is prohibited from being open to the public, whereas "exempt" is not required to be open to the public, but may be released in the discretion of the court. (l. 34-37). Under existing open records procedures, any entity possessing an exempt record makes its own determination on disclosure when a request is raised. N.D.A.G. 2002-L-06; N.D.A.G. 98-L-73; Open Records Manual at 23-24. Here, it appears the amendments place that determination with the district court handling the case at issue, by way of someone filing a written motion with notice to all parties. N.D.Sup.Ct.Admin.R. 41(4)(b); 41(4)(c) [l. 255-272]. However, it also appears that the clerk of court office may act as a gatekeeper in initially determining possible disclosure. N.D.Sup.Ct.Admin.R. 41(4)(e) [l. 311-316]. While designating work material as stated above will not prevent all disclosure, I believe the heightened protection is necessary given the circumstances of the communications at issue. While some staff attorneys/law clerks are situated in the same courthouses as the judges they assist; some are not. This necessitates communication via email regarding thought process on cases, and the back and forth emails to help judges on cases. Further, many judges request staff attorneys/law clerks to draft bench briefs/memos outlining the case. These memos

often provide the positions/arguments of various parties as interpreted by the staff attorney/law clerk and the opinion of the staff attorney/law clerk regarding the outcome/merit of the case. Draft opinions are also often sent via email, and such drafts may change along the course of time. The ability of judges and staff attorneys/law clerks to have open and frank discussions regarding cases can only be achieved by trusting that such communications shall be confidential. One can look to the leaking of the draft opinion at the U.S. Supreme Court this spring to see the shattering of that trust. Again, I firmly believe in openness and transparency for government records, but it would be an impairment to the judiciary if emails regarding work material on a case, especially between staff attorneys/law clerks and judges, were not protected as confidential.

Thank you for taking the time to review my comments. Please let me know if I can provide additional information.

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