

State of North Dakota

JOINT PROCEDURE COMMITTEE

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July 21, 2011

Honorable Allan L. Schmalenberger
Chair, Odyssey Operations Group
P.O. Box 328
Dickinson, ND 58602-0328

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

Dear Judge Schmalenberger:

At its September 2010 and April 2011 meetings, the Joint Procedure Committee considered amendments to N.D.Sup.Ct.Admin.R. 41 – Access to Court Records. In April, the Committee voted to recommend approval of an amendment that would allow people to request removal of certain records from Internet display.

Here is the amendment language the Committee recommends be inserted in Section 6(a) of Admin. Rule 41:

(6) The court may prohibit public Internet access to an individual defendant's electronic court record in a criminal case:

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

(B) if the defendant is acquitted;

(C) if the retention period for the records of the case under N.D.Sup.Ct.Admin.R. 19 has expired; or

(D) if the court concludes, after conducting a balancing analysis and making findings as required by paragraphs (1) through (5) of this subdivision, that the interest of justice will be served.

The Committee will be presenting its proposed amendments to Admin. Rule 41 to the

Supreme Court as part of its annual rules petition. If the Court approves the proposed amendments, they will take effect March 1, 2012.

Under the proposed amendments, a party seeking to have a specified record removed from Internet display would be required to make a motion to the court. The Committee is working to develop a motion form to simplify this process. The Committee has concluded, however, that the best approach to handling records of the type listed in paragraphs (A), (B), and (C) of the proposed amendment would be to remove all such records from Internet display by segregating these records electronically.

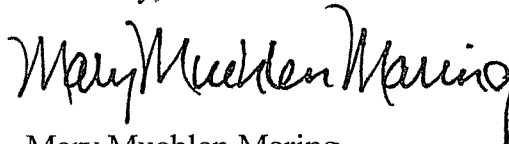
Specifically, the Committee approved a motion at its April meeting to recommend to the Odyssey Operations Group that it develop a policy and procedure to categorically remove records of the type listed in paragraphs (A), (B), and (C) of the proposed amendment as well as records related to motions for restraining or protection orders that were requested but never granted.

In addition, the Committee approved a second motion to recommend to the State Court Administrator that, if the Odyssey Operations Group develops a policy on non-display of certain records as requested, there should be a disclaimer posted on the District Court records site listing the types of records are not displayed on the site and advising users that such records will not appear in search results.

Attached are excerpts from the Committee's September 2010 minutes and the draft minutes from April 2011. These excerpts provide background on the Committee's rationale for its rule change proposal and for the recommendations above regarding policy changes on display of Internet records.

Thank you for your consideration of these recommendations.

Sincerely,



Mary Muehlen Maring
Chair, Joint Procedure Committee

MH:kh
attachment

cc: Justice Dale Sandstrom, Chair, Court Technology Committee
Ms. Sally Holewa, State Court Administrator
Mr. Thomas Dickson, Attorney at Law

EXCERPT FROM MINUTES OF MEETING
Joint Procedure Committee
September 23-24, 2010

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 97-153 OF THE AGENDA MATERIAL)

Staff explained that attorney Tom Dickson recently wrote a letter pointing out that records of deferred impositions of sentences resulting in dismissal are not accessible to the public under Rule 41 but that dismissals resulting from any other reason remain accessible. He has requested that this issue be addressed.

The Chair opened the matter for discussion.

A member said that the law creates an unfair result for people who have charges dismissed. The member talked about a letter written by a young woman who had been in an automobile where a large amount of drugs were found. The woman was arrested for possession with intent to distribute. Shortly thereafter, after investigating the woman's story that she had just borrowed the car without knowing the drugs were in it, the state dismissed all charges against the woman. Now, the woman writes that she can't get a job because the charge remains on her record (even though dismissed) and is easily accessible to people researching her background on the court website. The member said that the retention of dismissed criminal charges in court records, especially on the website, causes a severe impact on people's lives.

A member said that back when people had to go to the courthouse to look at court records, no one really cared whether records of dismissed charges were retained. The member said now that criminal records are easily available on the Internet, the retention of records of dismissed charges is a large issue. The member said the Supreme Court needs to look overall at how records are presented on the website and consider changing its policies on dismissed criminal charges.

A member said the woman who had written about her situation had included copies of her records as printed off the Internet. The member said that it was hard to tell that the charges against the woman had been dismissed without closely examining the records. The member said that records of dismissed criminal charges displayed on the website should somehow clearly indicate that charges were dismissed or the record should not be displayed at all.

A member said that in another case, a truck driver was arrested on a felony drug possession charge at the border. The driver said, and the state verified, that it was his first trip with the truck and he had no knowledge of the drugs in the truck. The member said the charges were ultimately dismissed, but the record of the charges will now be on display permanently and will likely affect the driver's future ability to keep a commercial license.

A member said the main problem was how dismissed charges were displayed on the website. The member said that sometimes, the state will make five charges against a defendant and dismiss two during plea negotiations. The member said that these dismissed charges should not be hidden, but that it should be clear they were dismissed when the record is displayed.

A member said that, for law enforcement purposes, dismissed charges should not be eliminated from the court record. The member, however, questioned the value of retaining a record of dismissed charges that is available online to the public. The member said that even when it is a clear a charge has been dismissed, the stain remains from the charge.

A member said that the Committee historically had resisted considering rule changes that would allow possible expungement of criminal records. The member said Minnesota had a statute allowing applications for expungement and giving courts discretion to address the issue in appropriate cases by sealing records.

Staff stated that Section 6 of Administrative Rule 41 allows individuals to ask the court to restrict access to a court record. Staff said the court record information that is posted on the web is generated from information input by the clerks, so the clerks would need to be involved if there was any new policy regarding display of records involving dismissed criminal charges.

A member said that if people understood how much information is available to the public on the court records website, they would go crazy. The member said the courts need to be responsive to people's concerns about the availability of information. The member said that the state was on the verge of a sea change in record availability and access, which could conceivably make even more information easily available on the web.

A member said that it is a problem when a defendant has to plead guilty to charges that the state wants to dismiss in order to get a deferred imposition, which will be sealed. A member said that easy access to records of dismissed criminal charges not only impacts job searches but also whether a person can find a place to rent. The member said Minnesota has a nice mechanism that allows people to apply to have their records sealed and gives courts discretion to act in appropriate cases.

A member said that Rule 41 allows sealing of records, but that courts had not been willing to grant motions to seal. A member said this was why courts react negatively to these requests, reasoning that it is not fair to single out records to seal.

A member said the computerization of the information was the root of the problem. The member said that dismissed criminal charge records have always been available at the courthouse, but the fact that they can now easily be called up from anywhere creates a lifetime stigma. A member said that the problem extends beyond criminal charges to records in family law cases such as termination of parental rights matters.

A member said the Committee was an appropriate forum to address the issues involving Rule 41. The member said that the Committee had addressed matters such as access to bulk records under the rule. The member said the Committee should address the issue of sealing records itself.

A member said it is unlikely that the legislature would pass a statute allowing automatic sealing of dismissed criminal charges because of the politics of the issue.

A member said one approach that could be used with dismissed criminal charges would be to replace the record with a note, instructing the researcher to see the clerk of court for information about the record. This would allow serious record researchers the opportunity to see the record if they were willing to make the trip to the courthouse.

A member said that work needs to be done in this area beyond just changing the rule. The member said that input from the public is needed to guide the court how to move forward. The member said that a task force could be assembled to meet with the public as has been done in the past when topics needed to be addressed.

A member said that assembling a task force would be useful, but that the issue of electronic posting of dismissed criminal charges needed to be addressed in a timely manner. The member said it was unlikely a mere rule change allowing simplified sealing of records would accomplish much because many people who have dismissed criminal charges are not likely to be aware of rule changes or the procedure to have records sealed. The member said that a new policy for handling posting of dismissed criminal charges needed to be implemented.

A member said a simple place to start would be having the initial screen listing criminal charges against a person to show which of those charges had been dismissed.

The Chair suggested that she could send a letter to the Chief Justice indicating that the Committee had identified concerns about displaying records of dismissed criminal charges on the web and ask the Chief Justice whether this concern could be referred to an appropriate committee, such as the Court Technology Committee.

A member said sending such a letter would be a good idea. The member said the letter should stress that this is a hot button issue with court administrators, the clerks of court, and the public. The member said people were being subjected to unfair consequences due to easy availability of information about dismissed criminal charges on the web.

A member said a related issue was the problem of people with common names. The member said that, because of the Committee and the Court's concern with privacy, information needed to establish the actual identity of a person with a common name, such as address or birth date, is not available on the web.

The Chair pointed out that the Court had amended the rules to allow more personal identifying information to be posted. The Chair said that it is a balancing act between privacy and the public's need for information.

The Chair said she would send a letter to the Chief Justice. In addition, by unanimous consent, staff was instructed to perform additional research into the Minnesota expungement rule and into the current North Dakota statutes and rules on sealing records.

Staff explained that State Court Administrator Sally Holewa has proposed two amendments to Rule 41, Section 5(b): restricting access to domestic violence protection order and disorderly conduct restraining order cases when the initial petition is dismissed on its face; and restricting access to cases brought under N.D.C.C. ch. 14-15.1, Child Relinquishment to Identified Adoptive Parents.

Mr. Quick MOVED to adopt the proposed amendments to Rule 41. Ms. Ottmar seconded.

A member said the suggested amendments pointed out problems with the way Rule 41 has been dealt with since it was adopted. The member said that the rule just grows without any overarching analysis to guide it. The member said that there should be some serious analysis of what the court wants to do with the rule, rather than using a band aid approach to fix problems.

A member asked what harm the proposed amendment limiting access to dismissed domestic violence and disorderly conduct cases was designed to address. Members said there

could be very harmful information directed at the respondent in the petition, and if a petition is so without merit to be dismissed on its face, references to this information should not be made public.

A member said that such petitions are often not even filed and would not be accessible to the public in the first place. A member said all petitions are supposed to be filed, but when they come in at the last minute and are taken directly to the first available judge, they sometimes are not filed. A member said that some counties have a policy to enter an order on every petition, even when summarily denied. A member said this policy eliminates judge shopping by parties, who might come back and try with a different judge if rejected the first time.

A member asked why orders on petitions rejected on their face should be restricted when orders on petitions rejected after a hearing are public. The member said rejected petitions should all be treated the same.

A member wondered why voluntary child relinquishment cases are not already protected under the adoption statutes. A member said that the voluntary cases are covered by a different chapter of the code, adoption proceedings are under N.D.C.C. ch. 14-15 while voluntary relinquishment is under N.D.C.C. ch. 14-15.1

The motion to adopt the proposed amendments to Rule 41 CARRIED.

EXCERPT FROM DRAFT MINUTES OF MEETING
Joint Procedure Committee
April 28-29, 2011

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 69-104 OF THE AGENDA MATERIAL)

Staff explained that Rule 41 came before the Committee at the September 2010 meeting when the Committee discussed access to records of dismissed criminal charges. Based on the September discussion, staff prepared proposed amendments to Rule 41 that would allow people with dismissed criminal charges to apply to have Internet access to those records restricted.

Mr. Quick MOVED to recommend adoption of the proposed amendments to Rule 41. Mr. Hoy seconded.

A member said that it would be better if dismissed criminal charges and related records were automatically removed from the Internet. The member said it would be a burden to parties and the courts to require motions to have these records removed from Internet access. The member said that the courts have received many requests to remove records from dismissed criminal cases and other matters when requested relief, such as a request for a disorderly conduct restraining order, was not granted.

The member said that the current display of records on the Internet, where the initial screen shows only the criminal charge and not the resolution, is misleading. The member said some persons have been the subject of serious criminal charges that were quickly dismissed and these persons are harmed by the continued display of those charges on their Internet record. A member said that many people checking Internet records only look at the first screen and do not click through and further investigate the disposition of listed charges.

A member said dismissed charges should not be displayed on the Internet and there should be a disclaimer on the District Court records site that indicates that records of dismissed charges are not disclosed on the site. The member said the site should guide people looking for information about dismissed charges to appropriate resources such as the attorney general's office.

A member said the reason having records on the Internet creates problems for people with dismissed charges is because of the easy access. The member said people look up records on the Internet who would never have bothered to go to the courthouse to look up records.

A member said that criminal attorneys encourage their clients to plead guilty to charges in exchange for deferred sentences, because these are later sealed. Charges that are dismissed are not sealed.

The Chair said that the Committee could recommend approval of the proposed rule change to give people a tool to use to have their dismissed charges removed from the Internet. The Chair said the Committee could also recommend to the Supreme Court that, as a matter of policy, records of dismissed criminal charges not be displayed on the Internet. The Chair said that the Committee also needs to provide advice to the Court Administrator about what should appear on the Internet display when someone researching criminal records looks up the record of a person who had a dismissed criminal charge that had been removed from the Internet.

A member said that dismissed criminal charges should not be displayed at all in response to an Internet search. The member suggested the Court should post a notice on the Internet stating that dismissed criminal charges are not displayed on the District Court search site.

A member said that people have been denied jobs and housing because someone looked them up on the Internet and found a dismissed criminal charge. The member said that future dismissed charges should not be listed on the Internet and there should be a means for people who have dismissed charges already listed on the Internet to have those matters removed. The member said the best approach would be for the Court to simply remove these items without requiring a motion or application.

A member said that in Minnesota, the Odyssey system Internet display was set up to give the charge and disposition on the first screen. The member says this still associates a person with a criminal charge, even though it is clearer that the charge is dismissed.

A member said that the proposed rule change seemed like a good approach to allow people to seek to have dismissed charges and related items removed from Internet display. The member said it was a good mechanism.

A member said that, if the Committee is going to recommend to the Court that dismissed charges automatically be removed from display on the Internet, the proposed rule change should be amended so that it is limited to items not subject to automatic removal from the Internet. A member replied that it was not certain that the Court would decide to automatically remove all dismissed items already in the system, so it would be useful to have a mechanism for people to seek removal of these items. A member said that having the rule would also give judges information that the types of items listed in the rule are to be treated

differently than other items that are part of the Internet record.

Judge Schneider MOVED to amend at page 80, line 205 to strike “in its discretion.” Judge McCullough seconded. Motion CARRIED.

A member said that one way to save work for people seeking to have records removed from Internet display under the proposed rule would be to make available a motion form that people could fill out and submit to the clerk. The Chair said that the Court Administrator had asked that such a form be developed so that motions could be made easily.

The motion to recommend amendment of Rule 41 to include the proposed language allowing people to request removal of specified items from Internet display CARRIED.

Judge McCullough MOVED to recommend to the Odyssey Operations Group that they develop a policy and procedure to categorically remove records of requests for restraining or protection orders that were requested but never granted and the other electronic court record items listed on page 80, lines 207-210, from Internet access. Judge Herauf seconded.

A member raised a concern about not displaying dismissed protection order requests. The member said a protection order can be in place for a period of time and then dismissed and such an order should still be displayed. A member said the motion language was intended to restrict display only when there has been a request for an order and the request has never been granted. The member said that if a request is granted, no matter how short lived or temporary the order, the order would be displayed.

A member said that orders that are granted and then dismissed soon after should not be displayed. A member replied that the proposed language for the rule would allow parties to come in and seek to have the order removed under the balancing test.

A member said that domestic violence protection orders are not displayed now and would not be in the future. The member said the motion would apply instead to disorderly conduct restraining orders.

The motion CARRIED.

Judge Fontaine MOVED to recommend to the State Court Administrator that, if the recommended policy on non-display of certain records is put in place, a disclaimer be posted on the District Court records site indicating types of records not displayed on the site. Judge Herauf seconded.

A member said that a different approach would be to have the language “record not accessible by the Internet” come up when a search is made for one of the types of records specified by the motion. A member said that posting the disclaimer on the search page, on display even before any search is run, would be a better approach.

The Chair asked whether the proposed disclaimer would come up in response to a specific search. A member said the intent of the motion was that the disclaimer be on the initial search page and that no results would be displayed if the search led to a type of record that was restricted from display.

A member said that a searcher can get a full criminal record for a person in a variety of ways. The member said the search page disclaimer should simply indicate that specific items that might be part of a person’s criminal record are not available on the Internet through the District Court search site.

The motion CARRIED.

Staff was instructed to draft a form that could be used by people seeking to have their records removed from display on the Internet under the proposed rule provision. A member said that the form should include a motion on one page and a separate page with the order.