

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-1848

PROMULGATION OF AMENDMENTS
TO THE MINNESOTA RULES OF PUBLIC
ACCESS TO RECORDS OF THE JUDICIAL
BRANCH AND RELATED RULES

ORDER

In its report filed September 11, 2007, the Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch recommended certain amendments to the Rules of Public Access to Records of the Judicial Branch. This court held a hearing on the recommendations on November 13, 2007, reviewed the materials, and is fully advised in the premises.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The attached amendments to the Rules of Public Access to Records of the Judicial Branch be, and the same hereby are, prescribed and promulgated to be effective March 1, 2008, and apply to all cases pending on or after that date.
2. The inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments made therein.

Dated: December 28th, 2007

BY THE COURT:



Russell A. Anderson
Chief Justice

OFFICE OF
APPELLATE COURTS

DEC 28 2007

FILED

**AMENDMENTS TO THE RULES OF PUBLIC ACCESS
TO RECORDS OF THE JUDICIAL BRANCH**

Note to publishers: additions to rules are indicated by underlined text and deletions are indicate by ~~strikeout~~ text.

RULE 4. ACCESSIBILITY TO CASE RECORDS

Subd. 1. Accessibility. All case records are accessible to the public except the following:

* * *

- (e) *Race Records.* The contents of completed race census forms obtained from participants in criminal, traffic, juvenile and other matters, and the contents of race data fields in any judicial branch computerized information system, except that:

(1) the records may be disclosed in bulk format if the recipient of the records:

~~(1A)~~ executes a nondisclosure agreement in a form approved by the state court administrator in which the recipient of the records agrees not to disclose to any third party any information in the records from which either the identity of any participant or other characteristic that could uniquely identify any participant is ascertainable; and

~~(2B)~~ obtains an order from the supreme court authorizing the disclosure;

(2) A juror's race may be disclosed to the parties or their attorneys as part of the juror profile information unless otherwise provided by law or court rule.

Nothing in this section (e) shall prevent public access to source documents such as complaints or petitions that are otherwise accessible to the public.

* * *

Subd. 3. Access to Recordings. This subdivision governs access to recordings of proceedings in the district court:

- (a) General. Recordings of proceedings in the district court, including without limitation those used as a back-up to a stenographically recorded proceeding or as the electronic recording, are intended to assist in the preparation of a transcript. The transcript, and not the recording, is the official record of the proceedings. Recordings of proceedings in the district court may only be used as authorized in this or other applicable rules or orders promulgated by the Supreme Court.
- (b) Off the Record Remarks. Any spoken words in the courtroom that are not a part of a proceeding, hearing or trial of a specific case are not intended to be recorded. Recordings of such words may not be listened to or used in any way other than by authorized operators of the recording equipment to orient themselves on recording content.
- (c) Playback. Playback of any part of the recording of a proceeding, hearing, or trial of a specific case is authorized in only the following situations:
- (1) during the proceeding, hearing or trial at the direction of the court;
 - (2) by authorized operators of the recording equipment or an official court reporter or other authorized reporting service employee for the purpose of creating a transcript as the official record; and
 - (3) at the direction of the court for the use of the court.
- (d) Disseminate by Transcript Only. Except as provided in part (c) of this rule, the contents of the recording shall be disseminated by transcript only, which transcript, and not the recording, shall be the official record.
- (e) No Transcripts in Conciliation Court. Nothing in this rule shall permit the transcription of conciliation court proceedings, hearings or trials. Playback of any part of the recordings of conciliation court proceeding, hearing or trial is authorized only at the direction of the court for the use of the court.

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Advisory Committee Comment-2008

The 2008 addition of Rule 4, subd. 1(e)(2), is designed to recognize that race data is routinely disclosed to parties as part of juror profile information for purposes of voir dire.

The 2008 addition of Rule 4, subd. 3, is based in part on IL. 18th CIR. R. 1.03. Rule 4, subd. 3, attempts to clarify the application of the Rules to recordings of testimony in light of Supreme Court policy limiting audio and video coverage of trial court proceedings, and to clarify the proper scope and role of recordings in preparing and preserving the official record.

The broad definition of “records” in Rule 3, subd. 1, appears to include recordings of court proceedings, but arguably may not include court reporter’s notes. Assuming that recordings are included, it is not clear whether recordings would then be subject to the work product exception to public access (Rule 4, subd. 1(c)) or the presumption of public access (Rule 2). Assuming the presumption applies, public access creates significant administrative burdens, unresolved issues regarding what constitutes the official record, and conflicts with the Supreme Court’s policy limiting audio and video coverage of trial court proceedings. MINN. GEN. R. PRAC. 4; MN. CODE JUD. CONDUCT CANON 3A(11); MINN. S. CT. ORDER, IN RE MODIFICATION OF SECTION 3A(10) OF THE MINNESOTA CODE OF JUDICIAL CONDUCT, # C7-81-300 (filed Jan. 11, 1996) (reinstating experimental program for audio and video coverage of trial court proceedings). Although the conflict might be partially reduced by permitting public access but no public dissemination of copies of the recordings, this conflicts with the policy in Rule 2 permitting both inspection and copying. Rule 4, subd. 3, provides a straightforward resolution of all conflicts and it includes controlled playback access in appropriate circumstances.

Rule 4, subd. 3(a), recognizes that the transcript is the official record and that recordings are intended to support the creation of that record. Use of recordings is limited as provided in the rule or in other rules or orders promulgated by the Supreme Court.

Rule 4, subd. 3 (b), recognizes that courtroom microphones may inadvertently pick up conversation that is intended to be protected by the attorney client privilege or is simply intended to be private conversation. The rule does not

permit public access to portions of recordings that contain this material.

The controlled playback access in Rule 4, subd. 3(c), reflects what typically occurs in practice. To the extent that any abuses occur, actions of the court in controlling playback are subject to appellate review. See, e.g., *Blanchard v. Golden*, No. C8-95-2390 (Minn. App. filed Feb. 29, 1996) (unpublished interim order) (denying appellant's motion for correction of transcript where trial court provided opportunity to listen to backup tape).

Rule 4, subd. 3(e), reflects the requirement of MINN. GEN. R. PRAC. 504(c) which provides that conciliation court proceedings and trials shall not be reported. Judges presiding in conciliation court often use recordings to supplement their notes. Access to the recordings of conciliation court proceedings, hearings or trials is treated in the same manner as judge's notes under Rule 4, subd. 1(c), and their playback is subject to the control of the court.

Rule 4, subd. 3, does not address the procedures for requesting and obtaining transcripts, or for correcting or modifying the same. These matters are addressed in other appropriate rules and statutes. See, e.g., MINN. R. CIV. APP. P. 110; MINN. R. CRIM. P. 28.02, subs. 8, 9; MINN. STAT. §§ 486.02-.03 (2006).

RULE 5. ACCESSIBILITY TO ADMINISTRATIVE RECORDS

All administrative records are accessible to the public except the following:

* * *

Subd. 13. Judicial Branch Internal Audit Records. Information, notes, and preliminary drafts of reports relating to an audit or investigation, created, collected, and maintained by the internal auditor or audit committee of the judicial branch, or persons performing audits for the judicial branch; provided that upon the release of a final audit report by the judicial branch auditor or if the audit or investigation is no longer being pursued actively, such audit records shall be accessible to the public except as otherwise provided by applicable law or rule.

* * *

(f) Duties Concerning Misuse of Public Money or Other Resources. If the judicial branch auditor's examination discloses misuse of public money or other public resources, the judicial branch auditor may disclose records relating to the examination to the attorney general to assist in the recovery of money and other resources and to the appropriate prosecuting authority to assist in the prosecution of criminal proceedings as the evidence may warrant.

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Advisory Committee Comment-2008

The 2008 addition of subd. 13(f) is based on policy applicable to records of the legislative auditor. See MINN. STAT. § 3.975 (2006) (legislative auditor). To the extent that misuse is uncovered as part of a personnel investigation, Rule 5, subd. 1(d), authorizes disclosure of the pertinent personnel records to law enforcement. Subd. 13(f) extends the same authority to the judicial branch auditor, who may be in a better position to report and assist law enforcement, particularly when misuse occurs in a court office that does not have the staff or technical ability to thoroughly investigate and report on the matter.

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RULE 8. INSPECTION, COPYING, BULK DISTRIBUTION AND REMOTE ACCESS

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Subd. 2. Remote Access to Electronic Records.

- (a) **Remotely Accessible Electronic Records.** Except as otherwise provided in Rule 4 and parts (b) and (c) of this subdivision 2, a custodian that maintains the following electronic case records must provide remote electronic access to those records to the extent that the custodian has the resources and technical capacity to do so.
- (1) register of actions (a register or list of the title, origination, activities, proceedings and filings in each case [MINN. STAT. § 485.07(1)]);
 - (2) calendars (lists or searchable compilations of the cases to be heard or tried at a particular court house or court division [MINN. STAT. § 485.11]);
 - (3) indexes (alphabetical lists or searchable compilations for plaintiffs and for defendants for all cases including the names of the parties, date commenced, case file number, and such other data as the court directs [MINN. STAT. § 485.08]);
 - (4) judgment docket (alphabetical list or searchable compilation including name of each judgment debtor, amount of the judgment, and precise time of its entry [MINN. STAT. § 485.07(3)]);
 - (5) judgments, orders, appellate opinions, and notices prepared by the court.

All other electronic case records that are accessible to the public under Rule 4, and that have been in existence for not more than ninety (90) years, shall not be made remotely accessible but shall be made accessible in either electronic or in paper form at the court facility.

* * *

- (c) **Preconviction Criminal Records.** The Information Technology Division of the Supreme Court shall make reasonable efforts and expend reasonable and proportionate resources to prevent preconviction criminal records and preconviction or preadjudication juvenile records from being electronically searched by defendant name by the majority of known, mainstream automated tools, including but not limited to the court's own tools. A "preconviction criminal record" is a record, other than an appellate court record, for which there is no conviction as defined in MINN. STAT. § 609.02, subd. 5 (2006), on any of the charges. A "preconviction or preadjudication

juvenile record” is a record, other than an appellate court record, for which there is no adjudication of delinquency, adjudication of traffic offender, or extended jurisdiction juvenile conviction as provided in the applicable RULES OF JUVENILE DELINQUENCY PROCEDURE and related MINNESOTA STATUTES, on any of the charges. For purposes of this rule, an “appellate court record” means the appellate court’s opinions, orders, judgments, notices and case management system records, but not the trial court record related to an appeal.

* * *

Subd. 3. Bulk Distribution of Court Records. A custodian shall, to the extent that the custodian has the resources and technical capacity to do so, provide bulk distribution of its electronic case records as follows:

- (a) Preconviction criminal records and preconviction or preadjudication juvenile records shall be provided only to an individual or entity which enters into an agreement in the form approved by the state court administrator providing that the individual or entity will not disclose or disseminate the data in a manner that identifies specific individuals who are the subject of such data. If the state court administrator determines that a bulk data recipient has utilized data in a manner inconsistent with such agreement, the state court administrator shall not allow further release of bulk data to that individual or entity except upon order of a court.
- (b) All other electronic case records that are remotely accessible to the public under Rule 8, subd. 2, shall be provided to any individual or entity.

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Advisory Committee Comment-2008

The 2008 modifications to Rule 8, subd. 2(a), recognize that privacy concerns in regard to remote access, such as identity theft, subside over time while the historical value of certain records may increase. The rule permits remote access to otherwise publicly accessible records as long as the records have been in existence for 90 years or more. This provision is based in part on the executive branch data practices policy of allowing broader access to records that are approximately a lifetime in age. See Minn. Stat. § 13.10, subd. 2 (2006) (private and confidential data on decedents becomes public when ten years have elapsed from the actual or presumed death of the individual and 30 years have elapsed from the creation of the

data; “an individual is presumed to be dead if either 90 years elapsed since the creation of the data or 90 years have elapsed since the individual's birth, whichever is earlier, except that an individual is not presumed to be dead if readily available data indicate that the individual is still living”).

The 2008 modifications to Rule 8, subds. 2(c) and 3, recognize that certain juvenile court records are accessible to the public and that the remote access policy for preconviction criminal records needs to be consistently applied in the juvenile context. There are both adjudications and convictions in the juvenile process. Delinquency adjudications are governed by MINN. R. JUV. DEL. P. 15.05, subd. 1(A), and MINN. STAT. § 260B.198, subd. 1 (Supp. 2007); traffic offender adjudications are governed by MINN. R. JUV. DEL. P. 17.09, subd. 2(B) and MINN. STAT. § 260B.225, subd. 9 (2006); and extended jurisdiction juvenile convictions are governed by MINN. R. JUV. DEL. P. 19.10, subd. 1(A) and MINN. STAT. § 260B.130, subd. 4 (2006). Juvenile records that are otherwise publicly accessible but have not reached the appropriate adjudication or conviction are not remotely accessible under Rule 8, subds. 2(c) and 3.