STATE OF MINNESOTA

IN SUPREME COURT

No. C4-85-1848

In re: Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch

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Recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch

FINAL REPORT

September 11, 2007

Hon. Paul H. Anderson, Chair

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Introduction

The RULES OF PUBLIC ACCESS TO RECORDS OF THE JUDICIAL BRANCH ("ACCESS RULES") were amended effective July 1, 2007, based on recommendations made in a November 2006 report by the advisory committee. The committee was reconvened to follow up on a few issues that arose subsequent to its November 2006 report. The advisory committee circulated materials for comment and met once to make recommendations.

The proposed changes are set forth in the familiar strikeout-underline format in Exhibit A attached to this report. The recommended changes are:

1. Amend ACCESS RULE 4 to recognize that race records from court computer systems are routinely disclosed to parties as part of the voir dire process and to law enforcement as part of, or to assist in execution of, warrants;

2. Amend ACCESS RULE 8 to allow remote access to publicly accessible, historical records (i.e., those in existence for at least 90 years) including records submitted by the parties;

3. Amend ACCESS RULE 8 to limit remote access to preconviction and preadjudication juvenile records in the same manner as preconviction criminal records.

The advisory committee also discussed the need to clarify accessibility to audio recordings of district court proceedings. Although a majority of the committee could not agree on a recommended approach, the alternatives that were discussed and that received some support are included in minority reports attached in Exhibits C, D, E and F. Vote counts included in the narrative sections of the report may differ from the total number of signatures on a given minority report. The reason for this is that committee members were not permitted to sign onto minority reports during final circulation of the report, as the committee's experience is that this has the potential for changing the votes after the discussion takes place and requiring potentially more time to finalize a report.

The committee also discussed a concern raised by a vocational rehabilitation counselor who requested that medical and other treatment related information not be included in sentencing records that are accessible to the public. The advisory committee concluded that the remedy for collateral consequences that flow from public access to such information are better addressed by the legislature.

The changes are being recommended with a January 1, 2008, effective date. This would allow for publication of the proposals and either a hearing or comment period as desired by the court.

The advisory committee, which has lost some members who have moved on to different positions, is also recommending that it be discontinued and that a reconstituted committee be established in the future when the need to revisit the rules arises.

I. Remote Access to Historical Records

State Court Administration recently received a request from a genealogical society to remotely display (i.e., over the internet) old probate and other court records up through 1915 or 1920. ACCESS RULE 8, subd. 2(a), precludes the remote display of party submitted documents. The executive branch data practices act allows broader pubic access for records that are approximately a lifetime old, and it is the general consensus of the advisory committee that remote access to publicly accessible documents submitted by parties should be permitted for records that have been in existence for 90 or more years. The recommended change to ACCESS RULE 8, subd. 2(a) (last paragraph), is set forth in Exhibit A.

II. Remote Access to Juvenile Preadjudication Records

Certain juvenile delinquency records—involving felony level conduct by a child who was at least 16 years old at the time of the offense—are accessible to the public, and there is no limitation on remote access similar to that for preconviction criminal records. Although not all computerized records are clearly marked to indicate this publicly accessible class of juvenile delinquency records, some of the records are identifiable, and state court administration has received requests for public access to the records in bulk format. It is the general consensus of the advisory committee that the policy on remote access to preadjudication delinquency records should be the same as the policy on remote access to preconviction criminal records. The recommended changes to ACCESS RULE 8, subds. 2(c) and 3, are set forth in Exhibit A. The recommendation has been reviewed by staff to the juvenile delinquency rules committee.

III. Race Record Disclosures for Warrants and Juror Profiles

ACCESS RULE 4, subd. 1(e), precludes public access to any race data fields in court computer systems, and this arguably creates a barrier to sharing race data with any person or entity unless that person or entity can show that there is some other legal authority authorizing access to the data. Race data has historically and continues

to be provided to parties as part of juror profile information,[1] and has also been and is being provided to law enforcement as part of arrest warrant information. These routine disclosures were not addressed when the race data provision was added to Access Rule 4, subd. 1(e), in 2005.[2] This raises the issue of whether race data should continue to be included in the juror and warrant information.[3]

For more than a decade, jury managers have provided the parties with a computer generated profile report that lists each prospective juror's name, city, occupation, education level, ages and number of children, spouse occupation, birth date, race, gender, and marital status. Racial composition of juries is often a subject of litigation and appeals.[4] Arrest warrants have historically included race information to aid in identifying the person to be arrested. Although race information often comes from law enforcement in the first instance,[5] in other

[1] MINN. GEN. R. PRAC. 814(b) provides in part that the "contents of completed juror qualification questionnaires except juror social security numbers must be made available to lawyers upon request in advance of voir dire."

[2] The scope of ACCESS RULE 4, subd. 1(e) as originally recommended by the advisory committee was limited to race census information. *Recommendations of the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch, Final Report*, June 28, 2004, No. C4-85-1848, at pp. 31-34, 52. The provision was expanded by the Supreme Court to encompass all race data fields in any judicial branch computer system. *Promulgation of Amendments to the Minnesota Rules of Public Access to Records of the Judicial Branch and Related Rules*, No. C4-85-1848, CX-89-1863 (Minn. S.Ct. filed May 6, 2005) (order modifying ACCESS RULES) *Promulgation of Amendments to the Minnesota Rules of Public Access to Records of the Judicial Branch*, No. C4-85-1848, CX-89-1863 (Minn. S.Ct. filed June 20, 2005) (amended order modifying ACCESS RULE 4, subd. 1(e)(2))

[3] *See, e.g.*, MINN. STAT. § 64526. (2007) (interpreting irreconcilable provisions).

[4] Race is a protected class that receives greater scrutiny. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986), recognizing a defendant's equal protection right to have members of the defendant's own race on their jury. The Batson approach has expanded to other protected classes and to civil litigation, and the focus has expanded from equal protection for the defendant to a juror's right to participate in the litigation process. *See* Mellili, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*,71 NOTRE DAME L. REV. 447 (1996).

[5] Existing ACCESS RULE 4, subd. 1(e), concludes with the statement that "[n]othing in this section (e) shall prevent public access to source documents such as complaints or petitions that are otherwise accessible to the public."

instances, such as a bench warrant for failure to appear at a hearing, the source of the race data is the race census data collected by the district courts.[6]

It is the general consensus of the advisory committee that the race data rule should be modified to recognize the routine disclosure of race data to parties as part of juror profiles and to law enforcement for purposes of issuing warrants. The recommended modification to Access Rule 4, subd. 1(e), is set forth in Exhibit A.

IV. Access to Audio Recordings

A. Background

The advisory committee received a request (attached as Exhibit B) from Judge Lucy Wieland, the Chief Judge of The Fourth Judicial District, to consider a rule similar to that adopted by an Illinois court that addresses access to audio recordings of district court proceedings. The request indicates that a handful of Minnesota judicial districts have recently implemented digital audio recording systems to enable the creation of transcripts, and that this development makes it important to ensure that access to the recordings is clearly defined.

The request identifies conflicting Minnesota policies and rules on access to recordings. The broad definition of "records" in ACCESS 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 judicial work product exception to public access (ACCESS RULE 4, subd. 1(c)) or the presumption of public access (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 district 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

[6] The legislature recently enacted a traveling data provision that requires executive branch agencies to honor data classifications established by the judicial branch when receiving data from the judicial branch. Act of May 24, 2007, ch. 129, § 3, 2007 Minn. Laws 1033-1034 (codified at MINN. STAT. § 13.03, subd. 4(e) (2007)).

approach conflicts with the policy in ACCESS RULE 2 permitting both inspection and copying.

Chief Judge Wieland's request suggests consideration of the rule adopted by the court in DuPage County, Illinois, which has also implemented similar digital audio recording equipment. That rule is included as part of at the attached Exhibit B. Advisory committee staff reviewed existing Minnesota practice on controlled playback,[7] and prepared a draft rule (attached as Exhibit D) based on the DuPage County, Illinois rule and existing Minnesota practice, and circulated the draft to committee members for their review. The committee met and discussed the draft rule and other possible approaches.

B. Digital Audio Recording System Implementation

Fourth Judicial District Court's digital recording system, manufactured by CourtSmart, is connected to a number of courtrooms in the Fourth Judicial District court facilities (the system is also used in the Second and Sixth Judicial Districts). The CourtSmart system feeds the audio signal into a central room that is monitored by a court reporter who oversees several courtrooms at a time to ensure that the audio is being picked up and that participants and cases are logged in. Each case file is bar coded and the code is used to denote the audio portion of different cases on a large court calendar. There is a separate video monitor for each courtroom so that the monitoring person can see what is going on, but that video signal is not recorded.

The Fourth Judicial District does not typically use the CourtSmart system for trials, which are stenographically recorded, but the stenographic reporter will make his or her own audio back up using smaller tape machines or his or her own computer. The CourtSmart digital audio system is used for larger calendars such as arraignments because this is where the system helps to alleviate significant workers compensation concerns such as carpal tunnel syndrome injuries to court reporters.

The district courts turned to the use of the digital audio system due to the lack of skilled reporters. Audio tape systems were initially used but were not sufficient to prepare accurate transcripts. The lack of skilled reporters is due to turnover, higher paying jobs in the private sector such as closed captioning, the length of

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7 *See, e.g.*, Order C8-95-2390 (Minn. Ct. App. Filed Feb. 29, 1996) (denying appellant's motion for correction of transcript where trial court provided opportunity to listen to backup tape) (attached to this report as Exhibit C).

training, and lack of local training opportunities. For a time Minnesota had no court reporter training schools and one has only recently reopened. It takes 2 years to complete the court reporter training.

The Fourth Judicial District prepared 400 transcripts last year with the use of the CourtSmart system, and these included special term, housing, and criminal and juvenile arraignments. There is a rotating system that determines which reporter prepares a transcript. The reporter who works in the monitoring room is not always the reporter who will prepare the transcript of the proceedings being monitored.

The CourtSmart system stays on during breaks and the equipment is sensitive enough to pick up any conversation in the courtroom. Some courts, such as those in the Sixth Judicial District, have posted warning signs at courtroom doors explaining the sensitivity of the equipment. Although a judge has a mute button to control what is broadcast over the speakers within a courtroom (e.g., for a side bar conversation), the recording system continues to run for backup purposes and only the court reporters have physical access to the recording.

Currently in the Fourth Judicial District there is no staff with time available to facilitate public access. This is a labor issue that may need to be negotiated with the unions representing court reporters. Reporters are paid a salary plus their transcript fees, and they prepare the transcript on their own time outside of court hours. Historically court reporters have claimed ownership of their steno notes and recordings as they have been required to supply their own equipment.

C. Discussion

Committee discussion of the draft rule was extensive. Those in favor of the rule note that:

- The Minnesota Supreme Court formerly had a policy of recording its oral arguments but only providing limited public access to the recordings. Although the Minnesota Supreme Court has modified its position, the U.S. Supreme Court still has a general rule precluding any public audio or video coverage of its oral arguments.
- The digital audio system equipment is so sensitive that it will pick up conversations in the courtroom that people will normally not overhear. Attorneys must be able to communicate with clients but if uncontrolled public access is permitted, attorneys will have to leave the courtroom each time they want to have a private word with their clients, and that will slow down the court proceedings.

- A critical issue is what constitutes the official record. The public will not learn much about the court system by hearing background conversation.
- Allowing uncontrolled public access to audio recordings is a back door means of getting cameras into the courtroom.
- There is no reason that everything that goes on in a courtroom should be accessible. Private conversations should be edited before permitting public access.
- In the digital audio recording system context, if the court reporter in the monitoring room marks the recordings in real time in the log, it is technically feasible to redact but it is time consuming and therefore expensive. This raises questions about who would do it and who pays for it. These questions raise real fiscal concerns.
- There is also concern about the ability to ferret out off-the-record remarks given the different technology used by court reporters and the different arguments about ownership depending on whether court reporters use their own recording equipment or the digital audio system. Potential unfair labor practices issues are also a concern.
- Some approaches may also require collective bargaining.
- Although the draft rule does not appear to provide a procedure or standard for obtaining access at the discretion of the court, the Fourth Judicial District would be comfortable with a motion and good cause showing for access to the recordings.
- Although security cameras covering courtrooms are monitored by sheriffs in some courts, in others they are monitored by court staff. The accessibility ought to be the same, and arguably is controlled by the judiciary, regardless of who is doing the monitoring.
- Security tapes are typically recorded over after 24 hours and their video resolution and audio quality are not of the same caliber as the digital audio system.
- Although courts use interactive video to allow remote participation—usually by the judge—this process is collateral to the digital audio recording issue.

Those opposed to the rule as drafted point out that:

- Allowing uncontrolled public access is a terrific way to show the public what happens in court.
- Thomson-West just announced that they will begin to video stream appellate court proceedings.
- The policy discussion on this proposed rule on access to digital audio recordings should be kept separate from the cameras in the courtroom issue presently before another advisory committee.

- Courts also permit use of interactive video to allow remote participation.
- Security cameras monitored by law enforcement are already operating in many courtrooms, and under chapter 13, the video records are arguably presumptively public. If that does not change, then this discussion may be moot.
- Even if the draft rule were modified to allow access on a motion for good cause, it is not clear whether the public or only parties could make such a motion and whether the public could obtain a copy of a recording to broadcast.
- Costs of making or producing copies can be passed on to the party that requests a copy of an audio recording.
- The public rarely requests a transcript as that is too expensive and time consuming to prepare.
- The media may be willing to accept the proposed rule if it expressly avoids making any recommendation regarding a permanent rule on cameras in the courtroom.

It is the consensus of the advisory committee that the recordings belong to the court and not to individual reporters and that the transcript of the proceeding is the official record, not a recording. A motion was made to adopt the proposed rule provisionally until the court acts on the cameras in the courtroom petition pending before another advisory committee, with the understanding that this group or its successor will reexamine the issue at that time. This motion also included changing "testimony" to "recordings or proceedings" in the opening clause of paragraph (a) of the proposed rule. The motion failed on a vote of 5 yes to 7 no.

Additional alternatives to the draft rule were suggested, including:

1. Make a very short addition to the Access Rules indicating that the public may have access to transcripts and recordings with off-the-record material edited out, subject to the understanding that the courts may have to resolve compensation issues with court reporters via collective bargaining.

2. Add a provision to the proposed rule allowing limited availability of the recording for research purposes and allowing access by motion for good cause—such as in the case of a challenge to the accuracy of a transcript—made by a party or the public.

The committee voted on the two suggested alternatives and the original draft as submitted to the committee. The draft rule failed with only 6 Yes votes; the first numbered alternative failed with only 4 Yes votes, and the second alternative

failed with only 2 Yes votes. Proponents of the various proposals have submitted minority reports and those reports are attached as Exhibits E, F, and G.

V. Access to Medical Conditions Included in Sentencing

The advisory committee received a letter (attached as Exhibit H) from a vocational rehabilitation counselor raising concerns about public access to medical information in probation and parole records maintained by various parts of the criminal justice system. Publicly-accessible sentencing information often includes personal health information such as "treatment ordered," "attend AA meetings," "no possession of drugs or alcohol," "UA on demand," and "CD treatment." These comments routinely appear in sentencing and criminal history records of the BCA and the courts.

The vocational rehabilitation counselor appeared before the advisory committee and made the following points:

- Adding mental or chemical issues to a conviction makes it more difficult for ex-offenders to find work.
- Last year in Minnesota there were 139,000 people with criminal histories looking for work; 131,000 were under some form of formal supervised release, and 7,700 were released from prison.
- Federal law makes medical and chemical treatment information in other contexts private. For example HIPAA makes medical records private in certain circumstances, and the EEOC prevents employers from asking applicants about disabilities. This policy should be extended to make Minnesota criminal justice system records about these items private as well.
- Some states, such as Ohio, do not release personal health information about sentencing.
- DHS and other licensing agencies and law enforcement should still be able to obtain this information when performing background checks on persons who are applying to work with vulnerable people.

Advisory committee members noted the following:

- The law requires the court to state sentencing conditions on the record and in court orders.
- Constitutional requirements create a high standard for closing the details of a criminal court proceeding, and suggest that closure must be on a case by case basis.

- In probation revocation cases, one issue is whether the defendant was fully aware of the conditions of probation, so conditions often are not just put in writing but orally explained to the defendant on the record.
- ACLU is working with Native Americans to attempt to remove "no drinking" requirements in probation and other release orders in situations in which the alleged offense was not related to drinking.
- Ultimate solution is for the legislature to provide appropriate limitations on the use of the information.
- The Council on Crime and Justice has a project that is examining collateral consequences and this issue might fit into their project.

There was a general consensus of the advisory committee that the inclusion of medical information in sentencing orders has collateral consequences that the legislature needs to address.

VI. Effective Date

The advisory committee believes that while these recommendations may require a few months lead time to allow the courts and litigants to prepare for their implementation, it should be feasible to adopt them in late 2007 and have them take effect on January 1, 2008. This timeframe is sufficient to permit the court to hold a hearing or solicit comments on the proposed changes if the court deems that desirable.

VII. Follow Up

The advisory committee does not at this time recommend continuation of the committee on a permanent basis to consider additional changes to the rules. The committee recognizes that the go slow approach incorporated into the remote access provisions of the rules, along with future developments, may require occasional revisions. In addition, the remote access permitted under the rules has yet to be implemented but should be coming to fruition within the next year. Thus, the committee agrees that there is a need for future monitoring of the rules, but the committee was divided as to how soon this future review should occur. There was also some ambivalence with regard to whether the monitoring should be done by this committee or a reconstituted committee. The familiarity and expertise of the current members would be beneficial for an expedient review in the near future. At the same time, similar expertise may also be found in new members who would bring a fresh perspective that may have value to the court. The committee leaves this matter to the sound discretion of the court.

EXHIBITS

Exhibit A: Proposed Changes to The Rules of Public Access to Records of The Judicial Branch

Key: Additions to the rules are indicated by underlined text and deletions indicated 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:

(~~1~~A) 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

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

(2) An individual's race may be disclosed to law enforcement as part of, or for purposes of carrying out, an arrest warrant for that individual; and

(3) 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.

* * *

Advisory Committee Comment-2007

The 2007 addition of Rule 4, subd. 1(e)(2) and (3), is designed to recognize that race data is routinely disclosed to parties as part of juror profile information for purposes of voir dire, and to law enforcement as part of, or for purposes of executing, warrants.

* * *

Rule 8. Inspection, Copying, Bulk Distribution and Remote Access.

* * *

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 (2004), 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 preconviciton 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.

* * *

Advisory Committee Comment-2007

The 2007 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 (2007) (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 2007 modifications to Rule 8, subd. 2(c), and subd. 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 (2007); traffic offender adjudications are governed by MINN. R. JUV. DEL. P. 17.09, subd. 2(A) and MINN. STAT. § 260B.235, subd. 4 (2007); 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 (2007). Juvenile records that are otherwise publicly accessible but have not reached the appropriate adjudication or conviction are note remotely accessible under Rule 8, subd. 2(c) and subd. 3.

Exhibit B: Request for Consideration of Rule on Access to Audio Recordings

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

LUCY A. WIELAND
CHIEF JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487-0422
(612) 348-9808

December 12, 2006

Justice Paul Anderson
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Dear Justice Anderson,

In 2005, Hennepin County implemented a digital recording system that is utilized to make a verbatim record of district court proceedings. This system, known as the Court Record Project, ensures that an accurate, verbatim record is kept in all of our courtrooms. Other digital and tape recording systems are utilized around the state for the same purpose. These recordings then enable the creation of the transcript which is the official court record.

With the increasing use of recording systems due to a shortage of court reporters, a question has arisen surrounding public access to these recordings. The question is whether the public access rules, or any other rules, govern public access to digital or tape recordings of court proceedings, and if so, whether these recordings are publicly accessible.

Rule 3 of the Rules of Public Access to Records of the Judicial Branch defines the term record as follows:

> **Subd. 5. Records.** "Records" means any recorded information that is collected, created, received, maintained, or disseminated by a court or court administrator, regardless of physical form or method of storage. A "record" does not necessarily constitute an entire file, as a file may contain several "records." Court reporters' notes shall be available to the court for the preparation of a transcript.

It has been suggested that the reference to court reporter's notes in this definition means that a transcript is a "record" under the Access Rules but stenographic notes and tape recordings are not records, rather they are merely tools for creating a "record." However, this conclusion clashes with the obvious intent of the definition to cover a broad range of data and it relies on the tenuous premise that recordings would be considered "court reporter's notes" within the meaning of the Rule.

If this ambiguity is resolved in favor of digital and tape recordings being considered judicial records, the Access Rules govern. However, the application of the Access Rules to these recordings is still unclear. Under Rule 4, judicial work product and drafts are exempt from public access. This provision does not refer directly to tapes or any other electronic recording of court proceedings. Thus, the position may be taken that these tapes are not judge's notes but rather tapes made for the benefit of the court reporter who must prepare the transcript. If this is the case, no public access exception appears to exist for tapes and they must be considered publicly accessible.

However, significant problems exist in allowing access to the recordings of court proceedings. First, it creates ambiguity surrounding the definition of the official court record. How are the recordings themselves to be treated? Can they be cited without obtaining a transcript? What is the official court record if this is the case? Currently, there is a lack of clarity and authority surrounding these issues. Second, current application of the Access Rules to these recordings conflicts with the Supreme Court's policy limiting audio and video coverage of trial court proceedings. In order to reconcile this conflict, it has been suggested that the public be allowed to listen to the recordings but be prohibited from copying the recordings. However, at this time there is a lack of rationale or legal authority supporting this position. Taken together, these problems warrant attention.

The proposed solution to these problems is a straightforward rule that addresses electronic recordings of court proceedings. Specifically, I would ask that you consider a rule similar to that found in DuPage County, Illinois, the leading jurisdiction regarding the use of electronic recording systems, a copy of which is enclosed. Your consideration of such a rule is appreciated.

Sincerely,

Lucy Wieland
Chief Judge of District Court

LAW/kck
Cc: Mike Johnson

Westlaw.

Eighteenth Judicial Circuit Court **Rule 1.03**

WEST'S ILLINOIS COURT RULES AND PROCEDURE--VOLUMES I, II AND III
RULES OF THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT [DuPage County]

PART I. ADMINISTRATION OF THE COURT
ARTICLE I. GENERAL RULES

Current with amendments received through 4/1/2006

RULE 1.03 COURT REPORTING SERVICES

(a) Employees

(1) The number of court reporting services employees designated to serve the circuit shall be determined by the Supreme Court, with the aid of the Administrative Office of the Illinois Courts.

(2) The Chief Judge shall appoint employees to vacant court reporting services positions, consistent with Supreme Court Rule 45 and The Administrative Regulations of 10/20/03, as amended, which employees shall serve at the pleasure of the Chief Judge.

(3) The Chief Judge, or the Reporter Supervisor under the direction of the Chief Judge, shall assign all such employees to their duties, consistent with Supreme Court Rule 45, The Administrative Regulations of 10/20/03 and general administrative powers.

(b) Electronic Recording

(1) Electronic reporting systems have been approved for use and installed in this Circuit. Pursuant to subparagraph (a)(3) above, court reporting services employees shall be assigned to be trained and to operate the electronic recording systems.

(2) The production of the physical medium storing the electronic recording of any court proceedings shall be monitored by trained court reporting services employees who shall certify that each retained electronic recording was fully and accurately recorded at the time and place indicated. Said certification shall be affixed to and accompany the electronic recording medium, and the medium shall be securely preserved in an unaltered and unalterable condition.

(3) Digital computer recordings of testimony are created for only one purpose. That purpose is to preserve the words spoken in formal courtroom proceedings, hearings and trials in a particular case, so that a transcript-- the official record--may be subsequently produced. The digital computer recordings are owned by the Circuit Court of the 18th Judicial Circuit, and may only be used pursuant to rule.

(4) Any spoken words in the courtroom that are not a part of a proceeding, hearing or trial of a specific case are not intended recordings; other than by authorized operators of the CourtSmart system to orient themselves on recording content, they may not be listened to or used in any way.

Eighteenth Judicial Circuit Court **Rule 1.03**

(5) Playback of any portion of the computer recording of a proceeding, hearing, or trial of a specific case is authorized in only four situations:

(i) During the proceeding, hearing or trial at the direction of the Judge;

(ii) By a court reporting services employee for the purpose of creating a transcript as the Official Record;

(iii) At the direction of the Court for the use of the Court;

(iv) Pursuant to the procedure outlined in (c)(3) below.

(6) In all other instances, the contents of the electronic recording medium shall be disseminated by transcript only, which transcript, and not the medium, shall be the official record. Only the Chief Judge may authorize exceptions to these rules upon good cause shown.

(c) Transcripts

(1) A request for a transcript, from either the electronic recording systems or from a court reporting services employee, is obtained by completing a "Transcript Request Form", available in the court reporters' office.

(2) Transcripts generated from the electronic recording systems shall be prepared in accordance with applicable statutory authority, rule and administrative regulation and shall utilize the following certification:

I, _____, certify the foregoing to be a true and accurate transcript of the electronic recording of the proceeding of the above entitled cause, which recording contained the operator's certification as required by Local ***Rule 1.03****(b)(2).*

_____

(Signature)

_____

(License or Restricted License Number)

Date: _____

(3) If the accuracy of a certified transcript generated from the electronic recording system is questioned, the following procedure shall be used:

(i) Every challenged portion of the transcript shall be identified in writing and provided to the Reporter Supervisor. A copy of the challenged portion of the transcript shall be given to the certifying court reporting services employee to make the necessary corrections.

(ii) If the certifying court reporting services employee and the person challenging the transcript's accuracy cannot agree upon the challenged portions, those portions shall be identified in writing and provided to the Reporter Supervisor.

(iii) The Supervisor shall cause identified portions to be reviewed against the archived electronic recording for accuracy, and designate necessary corrections to be made by the certifying court reporting services employee.

Eighteenth Judicial Circuit Court **Rule 1.03**

(iv) If the certifying court reporting services employee, in good faith, is unable to certify the corrections designated, the dispute will be placed before the judge that heard the transcribed proceeding, with notice to all necessary parties.

(v) The certifying court reporting services employee shall personally appear and present the questioned transcript. The Reporter Supervisor shall present the disputed corrections, along with a digital recording of the proceedings. The judge shall review the material presented, make any necessary changes in the certifying reporter's transcript, and issue a court order certifying the transcript as accurate.

(4) Transcripts generated from stenographic notes shall be prepared and certified by qualified official court reporting services employees pursuant to relevant statute, regulation and rule and are not affected by subparagraphs (b), (c)(2) and (c)(3) above.

(5) Unless specifically authorized by court order to the contrary, only a transcript certified by one of the official court reporting services employees of this Circuit is the Official Record. The Official Record shall be given preference for use in all courtrooms and as a part of the Record on Appeal for any case from this Circuit.

(d) Authority

Adopted April 19, 2004; amended eff. June 15, 2004.

Eighteenth Judicial Circuit Court **Rule 1.03**

IL R 18 CIR **Rule 1.03**

END OF DOCUMENT

Exhibit C: Appellate Court Order Regarding Review of Audio Recording

STATE OF MINNESOTA

IN COURT OF APPEALS

Richard Martin Blanchard,

Appellant,

vs.

Lawrence Richard Golden, et al.,

Respondents.

ORDER

C8-95-2390

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. This pro se appeal has been pending since November 13, 1995. Pursuant to this court's January 11, 1996, order, appellant's brief was due on February 8, 1996.

2. Appellant filed a motion in the trial court to correct the trial transcript. The motion was heard on January 31, 1995. The attorney who represented appellant at trial appeared on his behalf for the motion.

3. In support of his motion, appellant filed an affidavit containing 20 paragraphs alleging major omissions and errors, and 67 paragraphs alleging less significant errors. At the hearing, court reporter Sandra Skelly testified as to her findings regarding the alleged major omissions, and the "backup" tape recording pertaining to these portions of the proceedings was played. The trial court denied appellant's motion to play the backup tape recording as to certain alleged minor omissions, as well as transcript portions outside of appellant's affidavit.

4. By order dated February 2, 1996, the trial court denied appellant's motion to correct the trial transcript. The trial court accepted the previously filed transcript, with certain minor corrections certified by reporter Skelly.

5. On February 8, 1996, appellant filed a pro se motion for an order directing the trial court to allow appellant to listen to the backup tape recording of the entire trial, and to correct errors and omissions in the transcript. Alternatively, appellant requests a new trial, claiming that the backup tapes have been altered. In addition, appellant requests an extension of time to file his brief and an award of sanctions and attorney fees. Respondents oppose the motion.

6. "If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and determined by the trial court and the record made to conform." Minn. R. Civ. App. P. 110.05. This provision is virtually identical to the federal rule. See Fed. R. App. P. 10(e). The federal courts have held that a transcript need not be correct in every detail, but need only report the proceedings with reasonable completeness and substantial accuracy. United States v. Neal, 27 F.3d 1035, 1044 (5th Cir. 1994). The trial court's determination as to the accuracy of the transcript is conclusive, absent a showing of intentional falsification or plain unreasonableness. Id.

7. Appellant was afforded a hearing and an opportunity to listen to the backup tape regarding his alleged major omissions and errors. Appellant is not entitled to review of the tape recording with respect to claimed minor errors and omissions, because there is no showing that such minor errors, even if verified, would affect this court's review. The trial court's acceptance of the transcript was reasonable. Appellant has cited no evidence in support of his claim that the backup tape was intentionally altered.

8. We will afford appellant a final opportunity to file his brief.

IT IS HEREBY ORDERED:

1. Appellant's motions for correction of the transcript, a new trial, and an award of sanctions and attorney fees are denied.

2. Appellant's motion for an extension to file his brief is granted. Appellant's brief shall be served and filed no later than March 11, 1996. Briefing shall continue pursuant to Minn. R. Civ. App. P. 131.01.

3. The Clerk of Appellate Courts shall provide copies of this order to the Honorable Marilyn J. Justman, appellant pro se, respondent's counsel, and the court administrator.

Dated: February 28, 1996

BY THE COURT

Edward Toussaint
Chief Judge

AW/dr

OFFICE OF
APPELLATE COURTS

FEB 29 1996

FILED

Exhibit D: Draft Rule on Access to Audio Recordings

RULE XXX. Access to Recordings. This rule governs access to recordings of testimony in the district court:

(a) **General**. Recordings of testimony 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 testimony 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 portion of the recording of a proceeding, hearing, or trial of a specific case is authorized in only the following situations:

(i) During the proceeding, hearing or trial at the direction of the Judge;

(ii) 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

(iii) 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 portion 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.

Drafting Comments—2007

This draft rule is based in part on IL. R. 18 CIR. RULE 1.03 (2006). This rule attempts to clarify the application of the RULES OF PUBLIC ACCESS TO RECORDS OF THE JUDICIAL BRANCH ("ACCESS 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 ACCESS 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 (ACCESS RULE 4, subd. 1(c)) or the presumption of public access (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 ACCESS RULE 2 permitting both inspection and copying. The draft rule provides a straightforward resolution of all conflicts and it includes controlled playback access in appropriate circumstances.

Paragraph (a) of the rule 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.

Paragraph (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 paragraph (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.,* Order C8-95-2390 (Minn. Ct. App. Filed Feb. 29, 1996) (denying appellant's motion for correction of transcript where trial court provided opportunity to listen to backup tape).

Paragraph (e) reflects the requirement of MINN. GEN. R. PRAC. 504(e) 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 ACCESS RULE 4, subd. 1(c), and their playback is subject to the control of the court.

This rule 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, subds. 8, 9; MINN. STAT. §§ 486.02-.03 (2006).

Exhibit E: Minority Report Supporting Draft rule on Access to Audio Recordings

August 5, 2007

Michael Johnson
Senior Legal Counsel
Legal Counsel Division, State Court Administration
Minnesota Judicial Branch
140-C Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: Minority Report on Public Access to Court Records Regarding the Issue of Access to Electronic Recordings of Court Proceedings.

Dear Mr. Johnson:

I am writing on behalf of Judge Kathleen Gearin, Judge John Rodenberg and myself on the issue of proposed amendments to the Rules of Public Access to Court Records concerning access to electronic recordings of court proceedings. We are in agreement that the concerns expressed by Chief Judge Lucy Wieland in her letter to Justice Paul Anderson of December 12, 2006 are valid concerns. As the courts move toward digital recordings of court proceedings, it is important to determine what constitutes the official record of those proceedings, and to limit access to the underlying recordings which likely contain extraneous conversation not intended for the record, including privileged communications between attorney and client.

We support the proposed rule based on the Illinois rule presented to the committee by Chief Judge Wieland. This rule clearly sets out that the written transcript constitutes the official record, and that any recordings of court proceedings are intended only to support the creation of the official transcript. The rule thus limits public access to extraneous conversations inadvertently picked up by the recording system, and protects privileged communications. It also, however, allows court review of the recordings if there is a challenge to the official transcript.

It is our belief that this rule adequately protects the public's right to know what happened in court without infringing on the expectation and the right of participants to protect their privileged communications. It also provides a method of review to safeguard the accuracy of the official record. We therefore urge the Supreme Court to adopt the proposed rule, based on the Illinois model, to clarify and protect the official record.

Very truly yours,

Warren R. Sagstuen
Judge of District Court
Fourth Judicial District

Exhibit F: Minority Report Supporting Alternative 1 on Access to Audio Recordings

ARGUMENT
favoring the Motion (4 votes) to
recommend to the Supreme Court that

RECORDINGS OF COURT PROCEEDINGS BE DEEMED ACCESSIBLE TO THE PUBLIC EXCEPT THAT COMMENTS UNINTENDED FOR THE RECORD SHOULD BE REDACTED.

FIRST: **Public Policy**. Minnesota's General Policy of openness in Government, and, hence, access to government records, inheres both in the Minnesota Government Data Practices Act **(Minn. Stat. ∋13.03, subd. 1)**[8] -- with respect to records in executive branch agencies and in the *Rules of Access to Records of the Judicial Branch* ("RARJB"), **Rule 2**,[9] with respect to records of the udicial branch.

-

SECOND: Application of the Policy.

~ RARJB's **Rule 2** begins: "Records of all courts and court administrators are presumed to be open to any member of the public for inspection or copying...."

~ **Rule 3, subd. 5,** of the RARJB defines "records" as any recorded information that is collected, created, received, maintained, or disseminated by a court..."

~ Clearly, a recorded court proceeding falls within the ambit of the definition of a record.

-

[8] First enacted in 1974.

[9] Promulgated in 1988.

THIRD: **The purported issues** arising from the application of the policy definitionally are three-fold: **(1)** Are the recordings really "court records." or do they are they the property of the court reporters who monitor them? **(2)** Can the court reporters charge for editing or transcribing recording if they are court records?

(3) What about stray comments captured by the sensitive software but whose speakers never intended to be overheard?

Discussion:

(1) Court records: The recordings are made in the court room of hearings and other proceedings before judicial officers. Regardless of who owns the machines that record them, the recordings are "court records." They should be as accessible (and more accurate) than either court reporter symbols or someone's handwritten notes.[10]

(2) Compensation: Whether court reporters may charge for transcribing or editing recordings is a matter of collective bargaining between the Court Reporters Union and the Court; their compensation is a discrete issue from whether the recordings should be accessible to the public.

(3) Stray remarks. The software -- currently used in Hennepin and Ramsey Counties -- is sensitive enough to pick up "off-the-record" sidebar conversations, attorney-client conversations at counsel table,[11] and whispered comments of witnesses or observers sitting in the back of the courtroom. None of those kinds of statements is intended to become part of any court record; to allow it to become publicly accessible would interfere with attorney-client privilege and would prevent judges from helpfully interceding informally at sidebar conferences at the bench.

[10] Surely, notes of government officials, inscribed on company time, are the government's property even if the pens inscribing them are the property of the individual owners. {Whether those notes are accessible is a separate matter}.

[11] Some public defenders meet their clients for the first time at arraignment and conduct their "consultations" in the court room in hushed tones which they reasonably expect will be private.

Therefore, the most rational and consistent policy comprises:

~ Pronounce that recordings are indeed accessible to the public;

~ Ordering that the court reporters assigned to the case redact the stray remarks unintended to be part of the record;[12]

~ Declare that the court reporters' compensation for transcribing or redacting be determined through collective bargaining.

PROPOSED LANGUAGE: <*Keep Rule 3, subd. 5 ("Records") as it is*>**;** *Amend Rule 4 ("ACCESSIBILITY TO CASE RECORDS") by changing Subd.1(f) to Subd. 1(g) and inserting a new Subd. 1(f), to read as follows:*

(f) Digital or mechanical recordings. Those parts of digital or mechanical recordings which comprise off-the-record sidebar conferences, privileged attorney-client conversations, and stray remarks from individuals in the court room but not intended to be part of the court proceeding. Judicial officers shall supervise the redactions by court reporters from the records before the records are made accessible to the public.

Offered by: Gary A. Weissman (maker of the motion)

Supported by: Mark Anfinson, Esq.
Donald A. Gemberling, Esq.
Sen. Gene Merriam (ret.)

[12] According to judges from both the second and fourth judicial districts, a court reporter monitors all recordings and inserts the name of the speaker, so that if the recording is ever transcribed, the transcriber will know the identity of the speaker. Consequently, redacting attorney-client conversations, sidebar conferences after the judge or referee has said "off the record," and whispered comments from individuals in the gallery can easily be redacted.

Exhibit G: Minority Report Supporting Alternative 2 on Access to Audio Recordings

The issue of whether to allow access to electronic recordings of court proceedings raises several competing issues. Although the recordings are likely the most accurate representation of what took place during the proceeding, the highly sensitive recording devices also pick up extraneous matters, such as confidential discussions between a party and their attorney that are not and should not be incorporated into the official record. Electronic recordings must be transcribed into writing in order to be useful for the court, attorneys and the parties; therefore, it is not feasible to designate the recording itself as the official record of the proceeding. But transcripts of electronic recordings may contain errors and may not accurately reflect the official record. Some errors may have a significant impact on the outcome of a case. When a party identifies what they believe to be an error or inaccuracy in a transcript, the obvious course would be to consult with the electronic recording to determine the accuracy of the transcript. Finally, the public has an interest in knowing whether and to what extent official transcripts are accurate and complete.

The official court record of proceedings should be considered a public record and the public should have a right to access that record as part of their oversight of the judicial system. There are; however, strong policy reasons for limiting public access to electronic recordings. Consultations between clients and their attorneys are legally privileged and the Court has a duty to ensure that those conversations are not disclosed to the public. Discussions that are not part of official proceedings also should not be incorporated into the official proceeding simply by virtue of the fact that the sensitive recording equipment has picked up those conversations. The Court and court reporters have a means of dealing with the issue by identifying parts of the electronic recording that are not part of the official record and omitting them from the transcript of the proceeding. Electronic recordings can be redacted to remove private conversations that are not part of the official record, but that process is likely burdensome and expensive. The high volume of electronic recordings increases the chances that some private conversations will remain by mistake.

On the other hand, electronic recordings can shed important light on the work of the Court and may have a significant impact on individual proceedings. The public has an interest in ensuring that our judicial system is implemented in a fair, evenhanded and accurate manner. To that end, the public has an interest in knowing how accurate court transcripts are in general. Access to electronic recordings for purposes of scholarly research would help to inform the public about the workings of the judiciary and the accuracy of its official records. In some individual cases, the existence of an electronic record to check the accuracy of a transcript may make the difference between an innocent person being acquitted or convicted.

We recommend that the Court steer a middle path through these competing interest by adopting a rule that would designate the transcript of proceedings to be the official record of the court; but that would allow public access to the redacted electronic recordings for limited purposes including for scholarly research (for a fee and subject to a nondisclosure

agreement), and for good cause shown that there are in accuracies in an individual transcript. This middle course would allow the Court to have some degree of certainty by designating the transcript as the official record. It would also allow some flexibility in light of the fact that transcripts do sometimes contain inaccuracies. The requirement to show good cause for reviewing the electronic record for inaccuracies will reduce the burden on Court staff to redact and make available electronic recordings in every case. Allowing access to redacted electronic recordings for research purposes would also benefit the Court because it would allow for outside review of the accuracy of the Court's official records and could help the Court identify and fix problems with its records. A fee for access to the records would help defray the burden on Court staff to redact electronic records. A nondisclosure agreement similar to that allowed for access to race data would ensure that electronic records are not resold or disseminated once the research is completed.

DRAFT RULE:

RULE XXX. Access to Recordings. This rule governs access to recordings of testimony in the district court:

(a) General. Recordings of testimony 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 testimony 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 portion of the recording of a proceeding, hearing, or trial of a specific case is authorized in only the following situations:

(i) During the proceeding, hearing or trial at the direction of the Judge;

(ii) 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;

(iii) At the direction of the court for the use of the court; and

(iv) Pursuant to the procedures outlined in Rule XXX (d).

(d) Access to recordings by a party or a member of the public

(i) A party to the proceedings, or a member of the public who has good cause to show that a transcript generated from an electronic recording is inaccurate, may make a motion to the trial court to have access to, or a copy of an electronic recording for

purposes of correcting the transcript. The motion shall be supported by affidavit or other evidence showing that the transcript is inaccurate. If the Court finds that there is good cause to believe that the transcript is inaccurate, the Court shall allow the movant to have access to the electronic recording after all off the record remarks have been redacted from the recording. Corrections or modifications of the Record shall be made pursuant to Minn. R. Civ. App. P. §110.05.

(ii) Redacted copies of electronic recordings may be made available to the public for research purposes if the recipient:

a. executes a nondisclosure agreement approved by the state court administrator in which the recipient of the recordings agrees not to disclose or disseminate to any third party any of the recordings obtained under this subdivision;

b. obtains an order from the supreme court authorizing their access to the requested recordings; and

c. pays for the actual costs of redacting and copying the requested electronic recordings.

(e) Disseminate by Transcript Only. Except as provided in part (c) and part (d) 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.

(f) No Transcripts in Conciliation Court. Nothing in this rule shall permit the transcription of conciliation court proceedings, hearings or trials. Playback of any portion 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.

Teresa Nelson
Timothy Sullivan

Exhibit H: Submissions on Medical Information in Sentencing

Dear Justice Anderson; Chair of Access to Public Information Committee, August 29, 2006

I'm writing to you because I feel our current laws involving the release of personal health information to the public are in violation of Federal Law and should be changed. I'm referring specifically to BCA background check reports and information available at the county level. As you know, ex-offenders face many obstacles to employment. Having worked exclusively with this population for over 12 years, I can attest to the difficulties they face.

For the past year, I've worked with Rehabilitation Services clients that have criminal histories. Many of these individuals have mental, physical, chemical and learning disabilities. My role is to assist them in gaining employment. When I work with a client, I always request a copy of the BCA report. I'm appalled at the information being released under the heading of "sentencing" and the fact that it's legal to do so in Minnesota.

To be specific, I recently had a client with two felony convictions involving damage to property. In her sentencing information, it stated: "comply with all mental health case management; continue taking all mental health meds." She saw this in the report and asked me whether the employer would see it. My answer was: "Yes, but I'm going to look into this."

I feel very strongly that it's unfair to the individual, to provide mental health information (especially of this nature) to a potential employer. It's difficult enough to get hired with a record. Adding these details is an injustice and further exacerbates the difficulty in gaining employment. This situation provides another reason for the employer to eliminate the client from consideration.

Many potential employers don't understand mental health issues and are afraid of dealing with people who have them. I have seen clients lose their jobs because coworkers found out they took medication for depression. ADA does not require an individual to divulge such personal information.

In my 7 years teaching Work Readiness at the workhouse in Plymouth, I've seen the following listed under sentencing:
- No possession of alcohol or drug
- Treatment ordered
- Attend AA meetings
- Court ordered psychological evaluation
- CD treatment
- Random testing
- UA on demand
- No use of mind altering substance including alcohol
- No alcohol violations
- Out patient treatment
- Chemical dependency evaluation / treatment
- Abstain drug and alcohol
- Comply with psych meds

The conviction itself may not have been an indicator of these issues. For example, I had a client with a theft conviction and in the sentencing it stated: "No possession of alcohol or drug; treatment ordered." Once again, another issue is introduced that may deter the employer from hiring the individual. The employer is entitled to know about the conviction not mitigating circumstances.

As you know, we have strict Federal Laws governing the release of health information (HIPPA). This is to protect a person's privacy and rights. Here is an excerpt from the HIPPA, Your Health Information Privacy Rights: http://www.hhs.gov/ocr/hipaa/consumer_rights.pdf

Decide whether to give your permission before your information can be used or shared for certain purposes:

"In general, your health information cannot be given to your employer, used or shared for things like sales calls or advertising, or used or shared for many other purposes unless you give your permission by signing an authorization form. This authorization form must tell you who will get your information and what your information will be used for."

It should be noted:
- BCA and county criminal history information can be obtained without a person's consent
  -- At the BCA, conviction information (to include sentencing details) is public for 15 years after they complete the sentence (probation is part of the sentence)
  -- At the county level, anyone can access personal information on a computer and read sentencing and case details, including detailed sentencing directives
- Some employers run a background check "after" they hire the individual. I've seen many a person let go as a result of a background check, which came in a few days or a week after they were hired. Minnesota is in violation of HIPPA laws by providing the sentencing details containing health information, without a signed authorization.

I understand employers have concerns about potential employees and liability issues. If that same client didn't have a record, the employer would never know about the mental / chemical health issue and therefore, couldn't judge them based on it. This information should not be public. It's creating an additional obstacle to employment.

I ask you to consider having personal health information deleted from BCA reports and county criminal history databases. I've been pursuing this issue for several months and hope you will address this and help me to change the law.

I would be more than happy to provide any additional information or meet with you to answer any questions you may have. I think our current system is wrong and a serious violation of a persons rights and the Federal Law. I appreciate your consideration of this issue and look forward to hearing from you.

Sincerely,

Maria L. Anderson

Maria L. Anderson
National Trainer / Consultant
Ex-Offender Employment
(612) 599-2852
maria@anderson-training.com

9144 Ranchview Lane N
Maple Grove, MN 55369

A little bit about my self and what I do:

National Trainer / Consultant
- Provide staff and client training on Ex-Offender Employment
- Over 13 years working with ex-offenders
- Bachelors in Criminology, Minor In Psychology
-Work Readiness Program Coordinator Adult Correctional Facility in Plymouth for 7 years
-Past 2 years, consultant for Vocational Rehabilitation (working with ex-offenders)

- The focus of my work and business is to help ex-offenders obtain employment

A few facts for you to consider:

2006

- 131,000 under supervision at the county level (doesn't include DOC)

- Over 7,700 were released from prison or work release programs

- (2006) 139,000 people job searching w/ a record

- I've read thousands of BCA reports and have seen the impact they have on my clients getting a job

- There's a lot of talk about obstacles to employment; I feel the information we currently release creates another obstacle and severely impacts people who are trying to get a job (housing)

The issue at hand: releasing personal health information to the public: BCA background reports and on public computers.
(I also need to mention the same information is discussed publicly in open court and can be released to the public by a Probation Officer)

It's a very large issue, however, I would like to focus on one piece of the issue: what is reported to employers

I gave you a list in my letter with some examples of things that are reported under sentencing.

It's hard enough for someone to get hired with a conviction but to release the fact that they have mental or chemical health issue, adds fuel to the fire

We have federal laws that exist to protect privacy and prevent discrimination, in releasing health information.

While they may not apply under these conditions, the precedent has been set and a clear intent is established.

---

1) Title I of the ADA: can't ask on job applications:

- Have you ever been treated by a psychiatrist or psychologist?
- Are you taking any prescribed drugs?
- Have you ever been treated for drug addiction or alcoholism?

2) EEOC prohibits employers from asking job applicants about disabilities

3) HIPAA Laws also address the release of health information (protect privacy)

5) In MN, the Dept of Human Rights investigates employers who seek health information on job applications to protect people from discrimination

6) I can't get information on my clients mental / chemical health disabilities without their signed consent

Some would say ex-offenders lose their rights once convicted. Loss of civil rights is one of the penalties imposed on felony offenders. For example: right to vote, hold public office, carry a firearm. Losing the right to privacy is not.

I believe this is an unintended consequence / collateral sanction to having a conviction. It's an additional penalty.

When I consult with clients - I advise them not to reveal anything in regards to drug, alcohol or mental health issues - lessens their chance of being hired, and can cause closer scrutiny on the job.

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2 Voc Rehab Client Scenario's:

- Client 1 ND: (Violating Protection Order) Employer will get basic information. ND won't release mental / chemical health info due to their laws
- Client 2 MN same offense: basic information and "Continue counseling Pyramid Mental Health Center; take prescribed drugs. No stalking"

- Client 1 (OH) Don't release mental / chemical health info) Theft: release basic info

- Client 2 (MN) Theft: Abstain Drug / Alcohol, Chemical Dependency Treatment. Follow prescribed therapy. Cognitive Skills Training. Anger Management

In the scenario of the theft offense, to add Chemical Dependency treatment, introduces another problem the employer would not have known about.

- Not to mention - would you hire someone who had to take Anger Management or Violence Prevention

Normally employers don't know if someone has a drinking / drug / or mental health issue. But in MN they do and "only" for people with records not everyone.

Understanding the standards set by the government to protect the people, I think we should follow the spirit of the law and protect privacy and prevent discrimination

I would ask that we, like so many other states - simply release the basic conviction information. Not personal health information, which should be private not public.

Agencies requiring that information should be given access: Department of Human Services in overseeing who works with vulnerable adults; law enforcement; corrections, etc.

Not just anyone who wants to snoop on a government computer. Not the manager at SuperAmerica who wants to hire a cashier.

My goal is to help people get their lives on track. Reduce recidivism, help them to be independent and self sufficient. They can't do that without a job. Employers are getting stricter all the time. We shouldn't introduce more damaging information.

We shouldn't allow the person to be stereotyped: addict, alcoholic, mentally ill

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In conclusion:

The current procedure for the release of health information on ex-offenders:

1) goes directly against the "precedent and spirit" of current federal law to protect privacy and prevent discrimination

2) establishes an unintended consequence (additional penalty)

3) denies the right to privacy for health information "only" to people with conviction records

4) provides additional reasons for an employer to discriminate against ex-offenders

5) attaches negative stereotypes

6) adds another obstacle to employment

7) increases recidivism rates

8) keeps our jails and prisons full

9) jeopardizes public safety

In short - it significantly decreases the chances for an ex-offender to get a job (and as I say - get a life)

This may be legal but to me it's just not right and should be changed.
- Imagine how hard it would be for you or a family member to get a job with a conviction. Now imagine the employer knows it was because of drug addiction or mental illness. What do you think your chances would be now?

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