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

November 9, 2006

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## Introduction

The advisory committee was reconvened in 2006 at the request of the Supreme Court to review how the new rules were working and to recommend any necessary follow-up changes. The advisory committee met six times,[1] and the issues covered in this report are listed in the table of contents on the previous page.

The proposed changes are set forth in the familiar strikeout-underline format in exhibits attached to this report. The report also contains minority reports on several issues as well as several other attachments. Committee members were permitted to sign onto minority reports during final circulation of the report, so vote counts included in the narrative sections of the report may differ from the total number of signatures on a given minority report.

The advisory committee's review included input from several national conferences attended by committee members, and presentations by the executive branch and private entities involved in government data issues.

[1] February 24; March 24; April 28; May 26; July 6; and September 13.

## I. Genetic Information—ACCESS RULE 4, subd. 1(f)

### A. Background

The advisory committee received an executive branch report entitled *A Report on Genetic Information and How it is Currently Treated Under Minnesota Law* (Jan. 13, 2006) (Minn. Dept. Admin.), which recommended, among other things,[2] that:

- DNA test results found in a civil or criminal case file should not be available to the public.
- The courts should adopt a rule requiring a protective order to prevent parties from making DNA test results available to those not involved in the court proceeding.

The unique aspect of DNA information is that it can include information on not just a single person but on anyone genetically related to that person.[3] This can have a significant impact on employment, housing, insurance and other aspects of life for the innocent as well as the guilty.[4] Even consent becomes an issue. In a recent case a son refused to submit to a DNA sample, but his parents agreed and provided a sample that affected the outcome of the criminal case against their son.

DNA records exist in court files in criminal, family/child protection and paternity matters. Although paternity case records contain the most DNA test information, paternity case records, except a final judgment, are not accessible to the public.

Criminal case records involving a DNA test typically include testimony of a qualified medical expert who would essentially explain what testing was done and that the results either exclude the defendant or exclude 99.9955 of the population

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[2] Following this report, the legislature defined and classified accessibility to genetic information maintained by the executive branch. 2006 Session laws, chapter 253 (codified as Minn. Stat. § 13.386 (2006)).

[3] Axelrad, *State Regulations on Low Stringency/Familial Searches of DNA Databases*, ASLME (undated); Lazer, Bieber, *Guilt by association? Should the law be able to use one person's DNA to carry out surveillance on their family? Not without a public debate*, NEW SCIENTIST (20 Oct. 2004); Simoncelli, *Retreating Justice, Proposed Expansion of Federal DNA Databases Threatens Civil Liberties*, 17 GENE WATCH No. 2 (March-April 2004).

[4] Stanley, Steinhardt, *Bigger Monster, Weaker Chains, the Growth of an American Surveillance Society*, ACLU (January 2003).

and that the defendant could not be excluded. A report showing the number (usually thirteen) of loci interpreted may also be in the court file. The report may also indicate race or other information on the person being tested. [5]

The advisory committee's Chair, Justice Paul H. Anderson, reported that he had attended a recent conference sponsored by the American Society of Law, Medicine and Ethics, and that leaders in the scientific community were not aware of the existence of genetic information in court records. Most thought that the current level of detail, with 13 tests on 12 loci, posed a limited danger from a disclosure perspective. Future levels of detail may include evidence of maternal heritage (using mitochondrial DNA)[6] and risk levels for certain conditions, which would increase the risk of inappropriate disclosure.

Other, focused DNA inquiries currently find their way into court records. In a child abuse case a DNA record may indicate presence of brittle bone syndrome or some other hereditary factor, which can affect more than just the person whose tissue was tested.

DNA records in criminal cases can also go beyond the defendant. DNA of a consensual partner of a rape victim may be tested to distinguish it from that of the alleged perpetrator. Similarly, the DNA of lab technicians who handled the DNA test and/or specimen to determine whether the specimen was contaminated by other DNA sources may be tested for comparisons.

### B. Discussion

The advisory committee considered several options for handling DNA records including: a presumptively closed approach, with grounds for disclosure; a presumptively open approach, with grounds for sealing; and the approach taken in regard to court services records in ACCESS RULE 4, subd.1 (b), in which the records would become accessible to the public if formally received into evidence in a testimonial hearing or trial.

Committee members favoring a presumptively open approach argued that:

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[5] A sample DNA Report and Affidavit is set forth in Appendix C. Race and other identifying information, including random loci numbers, have been redacted. The affidavit is from an unidentified paternity matter, but suffices for illustrative purposes.

[6] Isenberg, Moore, *Mitochondrial DNA Analysis at the FBI Laboratory*, 1 FORENSIC SCIENCE COMMUNICATIONS No. 2 (July 1999).

- Although there are many DNA tests ordered by law enforcement, few if any reports make it into criminal court files.
- Any rule should take into consideration that the testimony of experts will be based on documents such as reports from testing labs and it is likely that the reports will be admitted into evidence.
- No harm has been demonstrated by current public access in criminal cases that would outweigh the benefits of access and overcome the presumption of public access.
- The public benefit is the oversight and public scrutiny of testing and use of the data to convict people; given the novelty of the science, this should apply with more force to reassure the public that this information is being used appropriately.
- In a criminal case context, which is where most of the publicly-accessible DNA information is in our state courts (paternity, e.g., is largely off limits to the public), there are constitutional rights of access involved, and any closure must demonstrate a compelling interest that overrides the presumption of public access, and the closure must be narrowly tailored.
- The analogies between DNA records and SSN, tax information, financial records, and presentence investigation reports are distracting as tax records and psych evaluations are admitted into evidence in tax fraud cases and cases involving the mental status of the defendant, and the presentence investigation is not relevant to guilt or innocence.
- Trial courts currently rely on motions or stipulations to redact all types of records before they are admitted into evidence; for example, the fact that a victim was on birth control would be redacted from a medical report detailing injuries suffered by the victim; the committee could rely on this existing process for now.
- The harm from current disclosure of DNA test records submitted to courts is speculative.

Committee members favoring a presumptively closed approach made the following arguments:

- Although relatively few DNA test results are admitted in criminal trials, there are numerous instances in which discovery items, rather than the listing of discovery items as is required by court rule, are filed with the court and this includes DNA test results and, occasionally, tissue samples.
- There is highly sensitive information in the DNA reports that affects more than just the defendant, and that information could be used by others against such other persons; any rule could narrowly define the data to be protected as the DNA profile itself.

- The harm from public access to court DNA records is the ability to perform familial searching on persons other than the defendant.
- The fact that public disclosure of one's DNA test results could result in the denial of insurance or other benefits to a relative is a compelling interest.
- Privacy of DNA information is analogous to SSN, tax information, financial records, presentence investigation reports, and psychological exams, to which the public has limited access; an approach similar to what is now in place in the general rules of practice for submitting SSN and financial records could be applied to DNA records.
- Courts do not rely solely on an expert's opinion or affidavit more than the test results themselves; the number of loci tested, for example, can be significant in making a ruling on admission or weight of the DNA evidence.

The advisory committee overwhelmingly decided to recommend a rule that incorporates a compelling interest and narrowly tailored standard for closure of DNA records that have been admitted into evidence, and a presumptive closure of DNA records that are otherwise in the file.

### C. Testing Physical Objects: Outside Scope of Access Rule

The committee also addressed whether the scope of the rule was limited to information or whether it also included a determination on when physical objects such as tissue samples may be tested, and by whom. A clear majority decided that provisions addressing testing should not be incorporated into the rule; among the reasons were:

- Although the courts occasionally end up with actual samples, access to samples for "inspection" is already addressed in Access Rule 8, subd. 5, which does not allow access for purposes of "testing a sample." No court administrator would simply provide a sample of physical evidence, whether it is blood, cloth, contraband, or the like, for testing without reviewing that matter with the presiding judge. Often such discussions come up when a sample or other similar evidence is deposited with the court. Video and audio tapes are an example, and appropriate orders are generally issued. The Ming Sen Shieu case is an example of a video tape of a rape; it was played for the jurors but the courts upheld orders denying further release of the tape.
- Access for testing is outside the bailiwick of the access to records advisory committee, and the rules already address access to such matters for purposes of inspection. Beyond that, the system should trust the trial bench and the litigants to handle the information appropriately.

- There is common law developed for these situations that requires a judge to perform balancing.

### D. Clarifying the Phrase "admitted into evidence"

The advisory committee also debated just when a DNA record would be deemed to be "admitted into evidence," thereby triggering the compelling interest and narrowly tailored standard for closure. Points made in the discussion included:

- Other ACCESS RULES using the phrase "admitted into evidence" have been consistently interpreted by the state court administrator's office to mean that the item has been marked and officially received into evidence at a hearing or trial. Items can often be discussed at length at a pretrial proceeding and not be officially offered and received by the court as part of a hearing or trial. Pretrial determinations often concern whether a particular item will be admissible in an upcoming hearing or trial.
- Court clerical personnel need some concrete event, such as officially being received into evidence, to be able to determine whether an item has been formally admitted.
- Many practitioners may think that simply attaching a copy of a genetic report to an affidavit at a nontestimonial motion hearing would be admitting the report into evidence. This could be clarified in the comment.
- There is a Second Circuit case that held that attachments to a memorandum or brief become a part of the official record in the case.
- If admitted into evidence means any submission to the court, then the rule provides no privacy for genetic records.
- Constitutional law may in some situations require that a genetic record that has not been formally marked and received into evidence at a testimonial hearing or trial but has been relied on to make a substantive decision is nonetheless publicly accessible. A rule cannot override a constitutional principle.
- In a situation in which the court orders that DNA evidence is excluded from a hearing or trial, as happened in the recent case where a baby was found in a dumpster, the only means for the public to understand the ruling is to have access to the report containing DNA evidence.
- Crafting a rule that delineates what is a substantive decision would be difficult, and court administrators would have a difficult time enforcing it. They would have to consult with the judge in most cases and that is not an effective or efficient process.
- Given that genetic records are a very narrow category, an effective and efficient rule accompanied by comments alluding to the potential constitutional issues would be appropriate.

- ACCESS RULE 2 expressly recognizes that courts generally have discretion to authorize disclosure of otherwise nonpublicly-accessible records.
- The comment should cite the federal cases and the Minnesota right to privacy cases such as the '95 *Gomez* decision and the more recent *Lake v. Wal-Mart* case, as the Minnesota Constitution provides greater privacy protection than the federal constitution.

The advisory committee unanimously agreed that this issue could be adequately addressed by the addition of comments explaining that only an evidentiary exhibit in a testimonial type context qualifies as admission into evidence, subject to potential constitutional arguments that may permit greater public access, citing federal and state cases mentioned earlier. The recommended rule and comment are set forth in Exhibit A as ACCESS RULE 4, subd. 1(f).

## E. Distinguishing Documents from Data

The recommendation on genetic information set forth in Exhibit A as ACCESS RULE 4, subd. 1(f), is not intended to preclude judges, parties and their attorneys from discussing genetic information in their pleadings, orders, decisions and other documents. Only documents submitted by the medical and scientific professionals are intended to be excluded from public access. Otherwise, significant efforts would have to be made to redact any and all references to genetic information in pleadings, orders, decisions and all otherwise publicly-accessible documents. The committee wanted to avoid the burdens that such redacting would create.

Crafting a rule that accomplishes the advisory committee's intent runs the risk that technology may eventually redefine the concept of a document from information set forth on a piece of paper to individual data elements arranged in various formats by a computer.[7] There is a distinction between classifying public access

[7] Late in the committee process, a few members supported a draft rule that attempted to make the committee's intent clearer, although other members felt that clarification was unnecessary. That alternative draft would have added a new provision as ACCESS RULE 4, subd. 1(f), as follows:

> (f) Genetic Information. Genetic information documents from medical or scientific professionals, including but not limited to reports and affidavits, unless the document has been admitted into evidence in a hearing or trial. For purposes of this rule "genetic information document" means a document containing information about a specific human being that is derived from the presence, absence, alteration, or mutation of a gene

(footnote continued next page)

to documents, essentially the approach incorporated in the ACCESS RULES, and classifying public access to data, which is the hallmark of the executive branch Data Practices Act. As technology continues to change, so to must the ACCESS RULES. Examples of recent change in the ACCESS RULES include ACCESS RULE 4, subd. 1(e) regarding race records and in the committee's proposed change to Access Rule 8, subd. 2(b) regarding witness and victim identifiers. Eventually the court may need to revise the overall document versus data approach of the ACCESS RULES. This brief discussion is intended as a "heads-up" in that regard.

## II. Collective Bargaining Position Records-- ACCESS RULE 5, subd. 2

The advisory committee unanimously agreed to recommend that the ACCESS RULES provide temporary closure of collective bargaining positions (and related records) before they are presented during collective bargaining or an interest arbitration. Such records generally do not identify particular employees except as a bargaining group and thus would arguably not be protected from disclosure by the personnel records provisions of ACCESS RULE 5, subd. 1. Similar records in the executive branch are protected from disclosure,[8] and a consistent policy is desired. The recommended rule is set forth in Exhibit A as ACCESS RULE 5, subd. 2.

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> or genes, or the presence or absence of a specific deoxyribonucleic acid or ribonucleic acid marker or markers, and which has been obtained from an analysis of an individual's biological information or specimen or the biological information or specimen of a person to whom an individual is genetically related. Nothing in this paragraph shall prohibit parties, their attorneys, or the court from including genetic information from the documents in their own pleadings, orders and other records that are otherwise accessible to the public.

[8] MINN. STAT. § 13.37, subd. 1(c), precludes public access to "Labor relations information [meaning] management positions on economic and noneconomic items that have not been presented during the collective bargaining process or interest arbitration, including information specifically collected or created to prepare the management position."

## III. Remote Access—ACCESS RULE 8, subd. 2

### A. Witness and Victim Identifiers-- ACCESS RULE 8, subd. 2(b)

Current limits on remote access to victim and witness identifiers in ACCESS RULE 8, subd. 2, present difficulties where identification is crucial to enforcement of a no-contact order in a criminal case or to the comprehensibility of an appellate opinion. The advisory committee reviewed several examples of opinions in which the use of witness identifiers was required for purposes of clarity and comprehensibility.[9] The committee was also mindful of the fact that even before adoption of the remote access limitations the appellate courts had begun to minimize the casual identification of victims and witnesses in appellate opinions.

Some other state courts, including those in Pennsylvania, California and Wisconsin, address witness and victim identifiers only in regard to case management system records, which are easy to control if the identifiers are in a data field. The advisory committee unanimously agreed to recommend adoption of the data element approach plus the use of hortatory language "recommending" that courts attempt to minimize the use of witness and victim identifiers in text fields such as the text of appellate opinions and no-contact orders, etc., except where necessary and relevant. The use of such hortatory language is designed to minimize potential appellate issues.

The recommendation would not affect requirements of other rules such as Rule 11 of the General Rules of Practice which directs the confidential handling of certain identifiers such as social security numbers and financial account numbers. The recommendation also treats expert witnesses differently from other witnesses as experts serve a different role in the judicial process.

The committee feels that the proposed rule should help change how judges write their decisions and orders. This approach will require educational outreach to all judges. The recommended rule is set forth in Exhibit A as amendments to ACCESS RULE 8, subd. 2(b).

[9] *See, e.g., State v. Cuypers*, 481 N.W.2d 553 (Minn. 1992); *State v. Mems*, 708 N.W.2d 526 (Minn. 2006); and *State v. Penkaty*, 708 N.W.2d 185 (Minn. 2006).

### B. Clarifying the term "Preconviction"-- ACCESS RULE 8, subd. 2(c)

The advisory committee unanimously agreed to recommend clarification of several questions raised by the limits on remote access to preconviction records: (1) reversal on appeal does not make a record into a preconviction record for remote access purposes; (2) if there is a conviction on one charge, and others are dropped or not sentenced, there should be remote access to the whole case; and (3) the scope of "known, mainstream, automated tools" recognizes that the participant index on the Court's case management system is included in the scope of the limits on remote searching of preconviction records. The recommended rule is set forth in Exhibit A as ACCESS RULE 8, subd. 2(c).

### C. Designating Court Facilities-- ACCESS RULE 8, subd. 2(d)

ACCESS RULE 8, subd. 2(d), currently permits the public, while physically present in a court facility, to remotely access electronic records from another court facility. The advisory committee reviewed a request by the state court administrator to extend this concept to any government facility designated by the state court administrator as a court facility for purposes of remote access. For example, a government service center, registrar of titles office or similar location that is not in the same building as the court's offices could be designated as a location where the public could have access to court records without the limitations on remote access. In some counties, these types of offices are located in the courthouse and in other counties they are in a separate building. The requested change would permit the same level of remote access regardless of the physical location of the office.

Some committee members were concerned that the designated locations be limited to government facilities so that the state court administrator cannot select private entities, who may decide to charge for access. Such limitations would, however, exclude private institutions such as the William Mitchell law library. The concern about access fees applies regardless of whether the facility is private or government.

The committee unanimously agreed to recommend that the Access Rules be amended to permit the state court administrator to designate facilities other than court facilities as official locations for public access to court records where records can be electronically searched, inspected or copied without the need to physically visit a court without violating remote access limits. The recommended rule is set forth in Exhibit A as a modification to ACCESS RULE 8, subd. 2(d).

## D. E-mail and Facsimile Transmission--ACCESS RULE 8, subd. 2(e)(3)

Routine, in-person requests at a courthouse for criminal complaints and disposition bulletins (which include preconviction records) are now being replaced by requests to have such documents disclosed via facsimile transmission and/or e-mail. Technically such disclosures constitute remote access (ACCESS RULE 8, subd. 2(d); "information in a court record can be electronically searched, inspected, or copied without the need to physically visit a court facility"), which is prohibited by the current rule. The advisory committee considered whether this is the result that the committee intended, whether fees are an issue, and whether state court administration is the proper custodian (see ACCESS RULE 3) for responding to such requests.

Prior to the revised remote access rules, courts routinely faxed complaints and e-mailed disposition bulletins to many court users, both within the criminal justice system and the general public including the media. Extra effort is involved in preparing, sending and monitoring facsimile transmissions, whereas the new case management system MNCIS will allow routine batch processing of e-mailed reports such as the disposition bulletin. The disposition bulletin is not an online report but can be run overnight with other batch reports, and is routinely requested and obtained at the courthouse by many media representatives.

The advisory committee unanimously agreed that preventing such routine disclosures was not intended by the committee when it proposed limits on remote access. The fact that not all court administrative offices have the ability to accept credit card payment of copy-related fees is a practical issue that can be dealt with at the local level. In addition, other privacy laws, such as the federal legislation known as HIPAA, which seeks to protect against unauthorized electronic transmission of health records, exclude facsimile transmission from their scope. The only concern was crafting a rule that would not circumvent the bulk disclosure limitations on preconviction records.

The advisory committee considered whether facsimile and e-mail disclosures of complaints and disposition bulletins should be limited to one or more individual documents in response to a specific request. Unless the rule limits how many times per day a request can be made, a person could simply call back multiple times and/or the court could respond with separate, multiple transmissions and stay within the spirit and letter of the rule. By a vote of 12 to 2, the committee concluded that the rule should rely on the common sense of court administrators to apply the rule appropriately. The proposed rule is set forth in Exhibit A as ACCESS RULE 8, subd. 2(e)(3), and a minority report on the issue is set forth in Exhibit D.

## IV. Financial Source Documents; Restricted Identifiers—GEN. R. PRAC. 11

The advisory committee discussed the need to clarify MINN. GEN. R. PRAC. 11 to clarify that a financial source document that is admitted into evidence in a publicly-accessible proceeding is then accessible to the public. This is the result under the Washington state court rule upon which MINN. GEN. R. PRAC. 11 is based. The committee's 2004 report shows that this was what the committee had in mind when it initially proposed this rule. The General Rules committee expanded this advisory committee's initial proposal to all cases and left out the words that addressed exhibits from a public hearing or trial.

The pros and cons of the idea were debated; among the points made were:

- Unless the matter is clarified, there is bound to be confusion and inconsistent results when requests for public access to financial source documents are made, and litigants and practitioners need to have a clear picture of the situation so that they know when they might have to seek a protective order or perform redacting when offering such a document into evidence at a testimonial hearing or trial.
- The question is on whom should the burden of making this information nonaccessible fall?
- The burden of redaction should fall first on the litigants and their attorneys.
- What if the other side introduces the harmful information, even purposefully so?
- Existing Rule 11 allows the court to impose sanctions in such situations, and the court can on its own direct the closure of such information.
- The court-ordered closure may be after the fact, and when the cat is already out of the bag, particularly in this electronic age, it is difficult if not impossible to put it back in.
- If the rule protected information instead of documents, it would preclude public access to court orders and any factual findings that summarize the protected information.
- Making the information nonaccessible unless admitted into evidence places the burden on court administrators and it would be unreasonable to require court staff to preview each and every document in all case types before granting public access.
- We have a presumption of access that we need to honor, and if the financial information that was presented to the court is not accessible, the public has no way of determining whether the decision was fair and just.

- Judges have concerns about doing the redacting themselves as it is putting the burden on the judge to remove information from the record. In practice judges currently handle this now by simply asking parties if they meant to redact an item and then suggesting that the parties do the redaction and then re-offer the exhibit.
- The rule should not be limited to "parties" but should include restricted identifiers of all "persons." A recent case involving the breakup of a law firm included thousands of pages of billings that included identifiers for the clients. Although the case settled, neither attorney sought to protect the billings as they are not included in the list of financial source documents under the current rule, and no identifiers were redacted.
- Redaction of restricted identifiers is a training issue for lawyers. Staff has made and will continue to make appearances at continuing legal education seminars, and local court staffs have and continue to make information available to litigants and practitioners about Rule 11 and its implications.
- It may also be helpful for judges to incorporate some direction about redaction into their routine pretrial orders alongside issues such as numbering of exhibits.
- It may also be helpful to incorporate a section on redaction into the civil trial book that is appended to the General Rules of Practice.

By a vote of 7 to 3, the committee agreed to: (1) modify Rule 11.03 to clarify that sealed financial source documents become accessible upon admittance into evidence in a testimonial hearing or trial; (2) add commentary about the need to redact restricted identifiers upon admission into evidence; and (3) modify Rule 11.01(a) so that it protects restricted identifiers of parties or "other persons." The recommended changes to GEN. R. PRAC. 11 are set forth in Exhibit B.

## V. Parenting Expeditor Complaints and Sanctions-- ADR CODE OF ETHICS.

Use of parenting expeditors is a form of Alternative Dispute Resolution (ADR). The judicial branch through its ADR Review Board oversees complaints against ADR providers who are either placed on the statewide rosters maintained by the state court administrator or appointed as nonrostered providers by any state court. MINN. GEN. R. PRAC. 114, Appendix Code of Ethics Enforcement Procedures, Rules III and IV, generally provide confidentiality for files and records of the ADR Review Board but require public access to "sanctions" in the form of publication of the neutral's name, a summary of the violation, and any sanctions imposed.

MINN. STAT. § 518.1751, subd. 2b (2006) requires trial courts to maintain local rosters of parenting time expeditors, and although the ADR Review Board can process complaints about such expeditors, the local trial court has to make its own decisions on its own local rosters, and the statutes do not address public access to locally maintained records on complaints. This creates confusion over whether the records maintained by the trial court are personnel records on expeditors and whether in fact any "final discipline" has occurred, triggering public access. The advisory committee unanimously recommends that the handling of complaint information should be consistent at both the ADR Review Board and local level. The recommended rule is set forth in Exhibit B as GEN. R. PRAC. APPENDIX, RULE IV.D. OF THE ADR CODE OF ETHICS.

## VI. Other Issues Discussed

The advisory committee also discussed several issues that did not result in proposed rule changes. These included access to medical records, remote access to judgment debtor addresses, legal basis for nondisclosure agreement contemplated under ACCESS RULE 8, subd. 4(b), and copyrights in appellate briefs.

### A. Medical Records

The advisory committee considered whether it should create a broad catch-all that would limit public access to medical records. In particular it reviewed Washington State Court Rule GR 22 which was recently amended to add medical records to the list of items excluded from public view under a process that is similar to our GEN. R. PRAC. 11 regarding financial source documents. The Washington rule is limited to family and guardianship matters.

The advisory committee's discussion was extensive; among the points made were:

- An exception precluding public access to medical records would be a dramatic and radical change to Minnesota law. Much of the courts' business revolves around injured or allegedly injured people and publicly measuring how well and fair the courts are treating people requires some public access to this information.
- Thirty years ago there was no law in Minnesota addressing how private industry could handle medical records. Insurance companies essentially controlled that. The change was dramatic and it took a while to work through the details.
- Litigants waive their medical privilege when they put their health into issue in a case.

- MINN. STAT. § 144.335 places limits on further disclosure of medical records on the person who receives a medical record from a health care provider, as in the case of *Swarthout v. Mutual Service Life Insurance*, 632 N.W.2d 741 (Minn. App. 2001). Typically the court does not receive medical records directly from providers, so section 144.335 would not directly affect the courts.
- Currently prevailing constitutional law would not allow the courts to close off public access to medical records.
- Why are genetic records and financial source documents given a higher status in the access rules than other medical records?
- Vocal communities have pushed for changes in those areas but no case has been made, and there is no evidence of harm caused by public access to such records that outweighs the harm caused by denying public access to such records.
- Medical records would generally not fall into the current scope of remotely accessible documents because they are typically submitted by the parties and only court-created documents are remotely accessible under the current rules. In the future if party-submitted documents become remotely accessible, the committee may need to take a closer look at the broader category of medical records.

The committee decided, by a vote of 8 to 3, that it would be appropriate to delay further discussion of access to medical records until later when, and if, party-submitted medical records become remotely accessible.

### B. Remote Access: Judgment Debtor Addresses

In its June 2004 report the advisory committee recommended limits on disclosure of street addresses and other information on parties, jurors, etc., now codified in ACCESS RULE 8, subd. 2(b). In September 2004 in response to the advisory committee's proposal, the Conference of Chief Judges Technology Workgroup submitted additional comments seeking, among other things, that remote access to street addresses and pleadings be permitted either directly or by access agreement in a form to be approved by the Conference of Chief Judges' successor organization, the Judicial Council.[10] Although the Supreme Court ultimately did not adopt the CCJ recommendation, the committee did not have an opportunity to fully consider the proposal.

[10] Relevant portions of the report are included in Exhibit D.

The advisory committee met with representatives from Hennepin County Recorder of Deeds and Registrar of Titles office and NAZCA, Inc., which provides software and services that assist counties in providing public information related to real estate closings, to learn about their needs for access to street addresses of court participants. Hennepin County has been taking steps to increase services while at the same time reducing foot traffic in county facilities. Security concerns in the courthouse create congestion at security checkpoints, and the more information that can be provided online reduces the number of people who have to come to the courthouse. NAZCA's products help the county provide land records to real estate lawyers and professionals, including title insurance companies and banks. One key piece of information needed on all real estate closings is judgment information, including the judgment debtor's name, amount of any judgment, and the street address of the debtor. The Access Rules permit public access to all three data elements at the courthouse, but remote access to street addresses is not currently permitted. Hennepin County and NAZCA are requesting access to street addresses under the September 2004 CCJ proposal.

The county service provided through NAZCA would be a fee-based, subscription service and would not use property tax dollars. Data required for real estate closings is difficult to get without remote access. Real estate is a 250 billion dollar per year industry, with 50 billion represented by title matters, and remote access reduces these costs for everyone. The NAZCA product is designed to operate in an authenticated environment that can be limited to certain individuals or entities, such as title insurance companies, etc., and the authentication is flexible to accommodate changes to access laws and rules.

Committee members opposed to the request argued that:

- There is a philosophical concern about providing address information on a fee basis when there will be individuals who cannot afford the fee, and the media will also want access.
- There is also a concern that this process is being built outside the Data Practices Act by providing it to commercial users but not to the public; the Data Practices Act prohibits a county from asking people why they need access to public data.
- Access should be available to individuals, and for no cost.
- Courts cannot be in the business of telling second-and third-tier recipients of information what they can do with it.
- The request places significant discretion with the Judicial Council to determine when access agreements would be appropriate.
- The discretion is too broad; the parameters and purpose should be defined by the committee.

- The ultimate purchaser of the information would not have any restriction on the use or disclosure of the information.
- Accretion of data will allow those with access to charge more for the information, not less.
- If the proposal essentially crafts an exception for corporate entities, that is not a strong public policy reason for adopting it.

Committee members in favor of the request countered that:

- If the remote access limits were modified to permit full remote public disclosure of street addresses from the court's own website, the County/NAZCA service would still have commercial value as it ties other related items together.
- The Hennepin County Board concluded that remote access is not required by law, so this is an add-on service for which a fee can be charged. The county would in effect be entering into a contract where the user would agree to limit its use of the data to real estate purposes.
- Potential misuse can be controlled in part by contracts that limit the use.
- Street addresses of individuals are readily available on the Internet, and there are a number of services that provide address information.
- Persons with common last names may be better served by remote access to more information that would help distinguish individuals.
- The media could also have access with use limitations; e.g., use for verification but not publish street addresses.
- The Judicial Council is comprised of the chief justice (who is the chair), the chief judge of the court of appeals, the chief judges from each district, the district judges' association president, one associate justice, and five at-large judges, plus a handful of nonvoting, administrative personnel.
- The Judicial Council should be trusted. Judges exercise significant discretion on a daily basis and this should be no different.
- Case-by-case discretion should be permissible as the uses under the proposed rule would be few and far between; we should allow experience under the proposal to accumulate.
- Parameters and purpose underlying the discretion could be addressed in a comment to the rule.
- In the past similar agreements have been used, coupled with court orders authorizing access to confidential court records for purposes such as scholarly research. Those agreements were largely prepared by advisory committee staff and reviewed by the council or one of its predecessors or related groups.
- It is anticipated that some model agreements may emerge and that individual agreements would also be prepared.

- In preparing the *Public Access to Court Records, Guidelines for Policy Development by State Courts*, the Conference of Chief Justices and Conference of State Court Administrators favored use limitations such as those established in the Fair Credit Reporting Act; similar use restrictions could be imposed under the Judicial Council's agreements.
- The real estate use that Hennepin County/NAZCA contemplates involves redisclosure in the context of land transactions.
- The Judicial Council agreement could, for example, prohibit bulk re-disclosures of the information.
- Street addresses were previously available via the Fourth Judicial District's subscription service, without incident; this would restore that access in a slightly different way.
- The proposal would allow land transactions to proceed more efficiently, and would allow a responsible body to create exceptions where necessary.

By a close vote of 7 to 6, the advisory committee rejected the request. A minority report is set forth in Exhibit E.

### C. Nondisclosure Agreements Under Access Rule 8, subd. 4

At the request of one of its members, the advisory committee reviewed whether an executive branch entity can comply with the nondisclosure agreement contemplated under ACCESS RULE 8, subd. 4(b), and maintain the confidentiality of the records under the Data Practices Act. Under this rule certain executive branch agencies can have access to certain court records that are not accessible to the public if they sign a nondisclosure agreement. The rule was designed to avoid the necessity of having courts issue hundreds of orders and instead rely solely on the nondisclosure agreement. The concern raised is that such orders provided clear legal authority upon which executive branch entities could comply with the nondisclosure agreement.

A detailed legal analysis was prepared and reviewed by judicial branch and executive branch access experts and is attached as Exhibit F to this report. The memo identifies several legal arguments to support the use of nondisclosure agreements and recommended steps, such as express recognition of such arguments in the agreements, to reinforce those approaches.

Committee members also pointed out that:

- County attorneys, corrections and social services, who are the primary parties to such nondisclosure agreements, maintain records that are generally off limits to the public anyway, so an agreement may be unnecessary.
- The agreement may not serve any purpose; the rule itself should provide the authority.
- The agreement can serve to reinforce the understanding of what law applies and what authority is involved.
- A traveling data clause, i.e., that data traveling to an executive branch entity from the judicial branch retains its judicial branch data access classification, is included in draft legislation regarding integrated criminal justice computer systems, but that legislation has not yet made its way through the legislative process for financial and other reasons.
- A temporary classification could also be sought, which creates a subsequent legislative issue.
- Seeking legislative assistance is difficult and unpredictable.

The committee unanimously agreed that the matter should simply be addressed in a comment. Proposed commentary is set forth in Exhibit A following ACCESS RULE 8.

## D. Copyrights in Briefs

The advisory committee considered potential copyright issues involved in appellate court briefs, and decided that the issue is not appropriate for a rule but that the Supreme Court should be made aware of the issue as the current rules permit the state law library to post briefs on the Internet.

Little has been written on potential copyrights in briefs. It has been suggested, however, that although there may be copyright interests in briefs, appellate courts may be protected by 11th amendment immunity from suit, legal mandates to provide public access and archiving of records, and the fair use doctrine of copyright law.[11]

Among concerns raised by a few committee members is that digitization of briefs permits widespread plagiarism and commercial exploitation (ala Napster) of

[11] Whiteman, *Appellate Court Briefs on the Web: Electronic Dynamos or Legal Quagmire?* Law Library Journal (Summer 2005).

copyrightable work product. Courts could require some notice or warning regarding further use of briefs posted on the Internet (similar to the warning on most copy machines in public libraries). Other committee members countered that ethical rules and the copyright laws themselves[12] should suffice to address any concerns that an attorney may copy another lawyer's work and pass it off as his own. It was also noted that other courts, including Florida, post briefs online.

## VII. 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 early 2007 and have them take effect sometime during the first one-half of 2007. This timeframe is sufficient to permit the court to hold a hearing on the proposed changes if the court deems that desirable. The advisory committee is aware that supporters of minority positions, including individuals and entities outside of the committee membership, would welcome and appreciate the opportunity to appear and discuss the issues with the court.

## VIII. 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

[12] A copyright notice with the word "copyright" or the "c" within the circle are no longer necessary to establish a copyright in a work. Copyright exists the moment the work is set forth in a tangible medium. 17 U.S.C. § 101. Practically speaking, however, copyright notice will avoid or minimize the potential defense of innocent infringement. Generally, a work also has to be registered before an infringement action can be filed to enforce the copyright. 17 U.S.C. § 411.

be done by this group or a reconstituted group. 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:

* * *

(f) *Genetic Information.* Records on genetic information, other than records that have been admitted into evidence in a hearing or trial, that are from medical or scientific professionals, including but not limited to reports and affidavits. For purposes of this rule "genetic information" means information about a specific human being that is derived from the presence, absence, alteration, or mutation of a gene or genes, or the presence or absence of a specific deoxyribonucleic acid or ribonucleic acid marker or markers, and which has been obtained from an analysis of an individual's biological information or specimen or the biological information or specimen of a person to whom an individual is genetically related.

(g) *Other*. Case records that are made inaccessible to the public under:

(1) state statutes, other than Minnesota Statutes, chapter 13;

(2) court rules or orders; or

(3) other applicable law.

**Subd. 2. Restricting Access; Procedure.** Procedures for restricting access to case records shall be as provided in the applicable court rules.

* * *

**Advisory Committee ~~Note~~Comment-2006**

The 2006 addition of Rule 4, subd. 1(f), is designed to provide some privacy protection for genetic information on individuals. The definition of "genetic information" is based in part on the privacy law governing executive branch genetic information. 2006 MINN. LAWS, ch. 253, § 4 (codified as MINN. STAT. § 13.386). Genetic information can affect not only a party, witness or victim, but also his or her genetic relatives. Courts and parties need to consider the scope of this information

when admitting and offering to admit such information into evidence. Rule 4, subd. 2, recognizes that, where necessary, protective orders can be issued under applicable procedural rules. The factors to consider in seeking a protective order in regard to criminal case records are discussed in Rule 25, Rules of Criminal Procedure, *Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983), and *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn. 1977). For civil cases, see Rule 26.03, Rules of Civil Procedure, and *Minneapolis Star & Tribune v. Schumacher*, 392 N.W.2d 197 (Minn. 1986).

* * *

**Rule 5. Accessibility to Administrative Records.**

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

*** * ***

**Subd. 2. Personnel Related Records**

(a) *Collective Bargaining Planning Records*. Management positions on economic and noneconomic labor relations items that have not been presented during the collective bargaining process or interest arbitration, including information specifically collected or created to prepare the management position.

(b) *Applicant Records.* Records on individuals collected because the individual is or was an applicant for employment with the judicial branch, provided, however, that the following information is accessible to the public: veteran status; relevant test scores; rank on eligible lists; job history; education and training; work availability; and, after the applicant has been certified by the appointing authority to be a finalist for a position in public employment, the name of the applicant.

**Advisory Committee Comment-2005~~5~~6**

The 2005 changes to Rule 5, subd. 1, are based on policy applicable to employee records held by the executive branch. MINN. STAT. § 13.43 (2004). There are, however, some subtle differences from executive branch policy, including the fact that judicial employee discipline is governed by a separate set of procedures and access provisions. *See* RULES OF THE BOARD ON JUDICIAL STANDARDS. In addition, judicial branch e-mail addresses are not accessible to the public unless individual employees authorize disclosure. Limiting access helps minimize the potential for ex parte contact prohibited by law. *See* MINN. CODE JUD. CONDUCT, CANON § 3A(7).

The 2006 addition of Rule 5, subd. 2(a), is based on policy applicable to collective bargaining records held by the executive branch. MINN. STAT. § 13.37, subd. 1(c) (2006).

* * *

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

*** * ***

**Subd. 2. Remote Access to Electronic Records**.

* * *

(b) **Certain Data Not To Be Disclosed**. Notwithstanding Rule 8, subd. 2 (a), the public shall not have remote access to the following data fields in ~~an electronic case record~~ the register of actions, calendars, index, and judgment docket, with regard to parties or their family members, jurors, witnesses (other than expert witnesses), or victims of a criminal or delinquent act:

(1) social security numbers and employer identification numbers;
(2) street addresses;
(3) telephone numbers;
(4) financial account numbers; and
(5) in the case of a juror, witness, or victim of a criminal or delinquent act, information that either specifically identifies the individual or from which the identity of the individual could be ascertained.

Without limiting any other applicable laws or court rules, and in order to address privacy concerns created by remote access, it is recommended that court personnel preparing judgments, orders, appellate opinions and notices limit the disclosure of items (2), (3) and (5) above to what is necessary and relevant for the purposes of the document. Under GEN. R. PRAC. 11, inclusion of items (1) and (4) in judgments, orders, opinions and notices is to be made using the confidential information form 11.1. Disclosure of juror information is also subject to GEN. R. PRAC. 814, R. CRIM. P. 26.02, subd. 2, and R. CIV. P. 47.01.

(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 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. 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.

(d) "**Remotely Accessible" Defined**. "Remotely accessible" means that information in a court record can be electronically searched, inspected, or copied without the need to physically visit a court facility. The state court administrator may designate publicly-accessible facilities other than court facilities as official locations for public access to court records where records can be electronically searched, inspected or copied without the need to physically visit a court. This shall not be remote access for purposes of these rules.

(e) **Exceptions.**

(1) *Particular Case*. After notice to the parties and an opportunity to be heard, the presiding judge may by order direct the court administrator to provide remote electronic access to records of a particular case that would not otherwise be remotely accessible under parts (a), (b) or (c) of this rule.

(2) *Appellate Briefs.* The State Law Library may, to the extent that it has the resources and technical capacity to do so, provide remote access to appellate court briefs provided that the following are redacted: appendices to briefs, data listed in Rule 8, subd. 2(b), of these rules, and other records that are not accessible to the public.

(3) *E-mail and Facsimile Transmission.* Any record custodian may, in the custodian's discretion and subject to applicable fees, provide public access by e-mail or facsimile transmission to publicly accessible records that would not otherwise be remotely accessible under parts (a), (b) or (c) of this rule.

**Advisory Committee Comment-2006**

The 2006 modifications to Rule 8, subd. 2(b), recognize the feasibility of controlling remote access to identifiers in data fields and the impracticability of controlling them in text fields such as documents. Data fields in court computer systems are designed to isolate specific data elements such as social security numbers, addresses, and names of victims. Access to these isolated elements can be systematically controlled by proper computer programming. Identifiers that appear in text fields in documents are more difficult to isolate. In addition, certain documents completed by court personnel occasionally require the insertion of names, addresses and/or telephone numbers of parties, victims, witnesses or jurors. Examples include but are not limited to appellate opinions where victim or witness names may be necessary for purposes of clarity or comprehensibility, "no-contact" orders that require identification of victims or locations for purposes of enforceability, orders directing seizure of property, and various notices issued by the court.

The use of the term "recommends" intentionally makes the last sentence of the rule hortatory in nature, and is designed to avoid creating a basis for appeals. The reference to other applicable laws and rules recognizes that there are particular provisions that may control the disclosure of certain information in certain documents. For example, the disclosure of restricted identifiers (which includes social security numbers, employer identification numbers, and financial account numbers) on judgments, orders, decisions and notices is governed by MINN. GEN. R. PRAC. 11. Rules governing juror-related records include MINN. GEN. R. PRAC. 814, MINN. R. CRIM. P. 26.02, subd. 2(2), and MINN. R. CIV. P. 47.01.

The 2006 modifications to Rule 8, subd. 2(c), recognize that criminal cases often involve a conviction on less than all counts charged, and that appellate records that have long been remotely accessible have included pretrial and preconviction appeals. The clarification regarding automated tools recognizes that the participant index on the court's case management system is included in the scope of the limits on remote searching of preconviction records.

The 2006 modification to Rule 8, subd. 2(d), authorizes the state court administrator to designate additional locations as court facilities for purposes of remote access. For example, a government service center, registrar of titles office or similar location that is not in the same building as the court's offices could be designated as a location where the public could have access to court records without the limitations on remote access. In some counties, these types of offices are located in the courthouse and in other counties they are in a separate building. This change allows such offices to provide the same level of access to court records regardless of where they are located.

The 2006 addition of Rule 8, subd. 2(e)(3), is intended to reinstate the routine disclosure, by facsimile transmission or e-mail, of criminal complaints, pleadings, orders, disposition bulletins, and other documents to the general public. These disclosures were unintentionally cut off by the definition of remote access under Rule 8, subd. 2(d), which technically includes facsimile and e-mail transmissions. Limiting disclosures to the discretion of the court administrator relies on the common sense of court staff to ensure that this exception does not swallow the limits on remote and bulk data access. The rule also recognizes that copy fees may apply. Some but not all courts are able to process electronic (i.e., credit card) fee payments.

ACCESS RULE 8, subd. 4(b), authorizes disclosure of certain records to executive branch entities pursuant to a nondisclosure agreement. MINN. STAT. 13.03, subd. 4(a), provides a basis for an executive branch entity to comply with the nondisclosure requirements. It is recommended that this basis be expressly recognized in the nondisclosure agreement and that the agreement limit the executive branch agency's use of the nonpublicly-accessible court records to that necessary to carry out its duties as required by law in connection with

any civil, criminal, administrative, or arbitral proceeding in any federal or state court, or local court or agency or before any self-regulated body.

Exhibit B: Proposed Changes To The General Rules of Practice For the District Courts

## RULE 11. Submission of Confidential Information

### Rule 11.01 Definitions

The following definitions apply for the purposes of this rule:

(a) "Restricted identifiers" shall mean the social security number, employer identification number, and financial account numbers of a party or other person ~~party's child~~.

(b) "Financial source documents" means income tax returns, W-2 forms and schedules, wage stubs, credit card statements, financial institution statements, check registers, and other financial information deemed financial source documents by court order.

* * *

### Rule 11.03 Sealing Financial Source Documents

Financial source documents shall be submitted to the court under a cover sheet designated "Sealed Financial Source Documents" and substantially in the form set forth as Form 11.2 appended to these rules. Financial source documents submitted with the required cover sheet are not accessible to the public except to the extent that they are admitted into evidence in a testimonial hearing or trial or as provided in Rule 11.05 of these rules. The cover sheet or copy of it shall be accessible to the public. Financial source documents that are not submitted with the required cover sheet and that contain restricted identifiers are accessible to the public, but the court may, upon motion or on its own initiative, order that any such financial source document be sealed.

*** * ***

**Advisory Committee Comment—2006 Adoption**

The 2006 amendment to Rule 11.01(a) expands the rule to protect the restricted identifiers of all persons, not just a party and a party's child. Records submitted to the court may include restricted identifiers of persons other than a party or the party's child, such as clients or other fiduciaries.

The 2006 amendment of Rule 11.03 recognizes that if a sealed financial source document is formally offered and admitted into evidence in a testimonial hearing or trial the document will be accessible to the public to the extent that it has been admitted. This is the result under WASHINGTON GR 22 (2006) upon which this rule is based. In such situations, it is strongly recommended that restricted identifiers be redacted from the document before its admission into evidence.

**Gen. R. Prac. 114 (Alternative Dispute Resolution) Appendix:**

**CODE OF ETHICS ENFORCEMENT PROCEDURE**

**Rule IV. Confidentiality**

**A.** Unless and until sanctions are imposed, all files, records, and proceedings of the Board that relate to or arise out of any complaint shall be confidential, except:

(1) As between Board members and staff;

(2) Upon request of the neutral, the file maintained by the Board, excluding its work product, shall be provided to the neutral;

(3) As otherwise required or permitted by rule or statute; and

(4) To the extent that the neutral waives confidentiality.

**B.** If sanctions are imposed against any neutral pursuant to Section III A (2)-(5), the sanction shall be of public record, and the Board file shall remain confidential.

**C.** Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Board or staff.

**D**. Accessibility to records maintained by district court administrators relating to complaints or sanctions about parenting time expeditors shall be consistent with this rule.

**Advisory Committee Comment-2006**

The 2006 addition of Rule IV.D. is designed to make the treatment of complaint and sanction information consistent in the hands of both the statewide ADR Review Board, which has jurisdiction over any expeditor appointed by the court regardless of whether that expeditor is listed on the statewide ADR neutral rosters (MINN. GEN. R. PRAC. 114.05(b)), and the local court administrator who is required by law to maintain a local roster of parenting time expeditors. MINN. STAT. § 518.1751, subds. 2b, 2c (2005). Although statutes address public access to records of the expeditors and their process, they do not address public access to complaints or sanctions about rostered expeditors.

Exhibit C: Sample DNA Report and Affidavit

[redacted]

Laboratory Corporation of America

P.O. Box 2230 Burlington, NC 27216 Telephone: (336) 584-5171 Relationship Report

**Account Information**
Acct #: [redacted]
Acct Ref 1: [redacted]
Acct Ref 2:
Acct Ref 3: [redacted]

LabCorp Case # [redacted]

| Relationship | Party | | Race | Date(s) Drawn |
|---|---|---|---|---|
| Mother | [redacted] | [redacted] | [redacted] | [redacted] |
| Child | [redacted] | [redacted] | [redacted] | [redacted] |
| Alleged Father | [redacted] | [redacted] | [redacted] | [redacted] |

DNA Analysis

| | D3S1358 | D7S820 | vWA | FGA | D8S1179 | D21S11 | D18S51 | D5S818 | D13S317 |
|---|---|---|---|---|---|---|---|---|---|
| AF | [redacted] | 8, 11 | 15, 17 | 21 | [redacted] | 30 | 13, 16 | [redacted] | 12, 14 |
| C | 15, 17 | [redacted] | [redacted] | 21, 25 | 12, 13 | [redacted] | 13, 19 | 8, 12 | [redacted] |
| MF | 15, 16 | 10 | 13, 15 | [redacted] | 14 | 30.2, 31.2 | [redacted] | 11, 13 | 12 |
| PI | | | | | | | | | |

DNA Analysis

| | D16S539 | TH | TPOX | CSF1PO |
|---|---|---|---|---|
| AF | [redacted] | 9.3 | 9, 10 | 7, 11 |
| C | 10, 11 | [redacted] | [redacted] | 7, 12 |
| MF | 9, 12 | 9, 9.3 | 8, 11 | [redacted] |
| PI | | | | |

**Conclusion:**

Combined Paternity Index: 0 to 1 Probability of Paternity: 0.00% (Prior Probability = 0.5)

The alleged father is excluded from paternity in the following systems: D7S820, vWA, D8S1179, D21S11, D18S51, D5S818, D13S317, D16S539, TH, TPOX, CSF1PO. These results indicate that [redacted] is not the biological father of the child, [redacted]

I, the undersigned Director, upon being duly sworn on oath, do depose and state that I read the foregoing report on the analysis of specimens from the above named individuals, signed by myself, and under penalties for perjury it is my belief that the facts and results therein are true and correct.

[redacted], Director

State of North Carolina
County of Alamance

I, Jane S. Langley, a notary public for Alamance County, North Carolina, certify that [redacted] personally came before me this day and acknowledged that he (or she) is an employee of Laboratory Corporation of America Holdings, a corporation, and that as an employee being authorized to do so, executed the foregoing on behalf of the corporation.

Subscribed and sworn to [or affirmed] before me this OCT 04 2005 at Burlington, NC.

Notary Public

OFFICIAL SEAL
Notary Public, North Carolina
County of Alamance
Jane S. Langley
My Commission Expires 11-25-08

[redacted]

Laboratory Corporation of America is accredited by the AABB.
*Asterisks denote loci reported using standard non-denaturing gel nomenclature per International Society for Forensic Genetics

PWD1

STATE OF MINNESOTA

Mother: [redacted]

Child: [redacted]

Alleged Father: [redacted]

LabCorp Case Number: [redacted]

**AFFIDAVIT REGARDING PARENTAGE TESTING RESULTS**

STATE OF NORTH CAROLINA )
) ss
COUNTY OF ALAMANCE )

[redacted] Ph.D., D(ABHI), being first duly sworn on oath, deposes and says:

1. My position is [redacted]

2. I am an expert in the application of genetic testing to paternity evaluation and am qualified to supervise the laboratory testing of samples for this purpose. I am also qualified to analyze and interpret the results of such testing. I am qualified as an expert in the field of paternity testing because, (1) My education is as follows: [redacted] Masters of Science degree from [redacted]

3. I have reviewed the results of the testing performed on the parties and on the minor child in the above case. The attached report and chain of custody documents summarize the genetic testing in this case.

4. Standard procedures pertaining to identification of parties, labeling, testing, analysis and reporting of results were used in this case.

5. The alleged father, [redacted], was excluded.

6. Assuming the facts set out above, it is my opinion to a reasonable scientific certainty that the alleged father, [redacted] is not the biological father of the minor child, [redacted]

[redacted]
DNA Identification Testing Division
Laboratory Corporation of America Holdings

THE STATE OF NORTH CAROLINA )
) ss
COUNTY OF ALAMANCE )

I, [redacted], a notary public for Alamance County, North Carolina, certify that [redacted] personally came before me this day and acknowledged that he (or she) is an employee of Laboratory Corporation of America Holdings, a corporation, and that as an employee being authorized to do so, executed the foregoing on behalf of the corporation.

Subscribed and sworn to [or affirmed] before me this OCT 0 4 2005 at Burlington, NC

Notary Public

[redacted]

OFFICIAL SEAL
Notary Public, North Carolina
County of Alamance
Jana S. Langley

My Commission Expires 11-25-06

Exhibit D: Minority Report on E-mail and Facsimile Transmission

The proposed amendment to Rule 8 regarding e-mail and facsimile transmission has the potential to completely erode the rule limiting remote access to case records. The proposal resulted from a concern that the rule, as written, would limit the ability of court personnel to fax or e-mail documents that they routinely send out, such as disposition bulletins or other case documents that are requested on an individual basis. The Advisory Committee recognized that the rule generally did not intend to foreclose this convenient method of sending out documents in response to requests for the information. Facsimiles and e-mails often require less staff time and are less expensive than making a photocopy of case records and mailing them to a requestor. However, by crafting a broad exception to the general limitations on remote access, the exception has the real potential of rendering the general rule utterly meaningless. For example, the proposed amendment would grant the record custodian the discretion to set up an e-mail subscription service that would automatically send various case records on a daily basis. The proposal would further allow the custodian to establish fees for such an e-mail subscription.

The Advisory Committee earlier rejected a proposal that would have allowed remote access to judgment debtor street addresses contained in the judgment docket pursuant to a limited use agreement that would be established by the Judicial Council. The Judicial Council anticipated that groups such as real estate professionals and the media would be the most likely groups to utilize such a service. The Advisory Committee discussion on the proposal included several concerns ranging from an argument that a commercial need for personal addresses was an insufficient policy justification for deviating from the rule limiting remote access to party addresses to a concern that access to the records should not be limited to entities who have the funds to pay for the information. Notwithstanding that rejection, the proposed changes to Rule 8 would allow judgment debtor street addresses to be routinely and automatically disclosed via a paid e-mail subscription.

The proposed comments do note that the rule "relies on the common sense of court staff to ensure that this exception does not swallow the limits on remote and bulk data access." However, there is little comfort in the comment because the commentary is just that – commentary. It is not part of the rule. The proposed exception does not include any limiting language. While it is presumed that record custodians do have the "common sense" to ensure that the rule does not become subsumed by the exception, operation of the exception will turn on an individual custodian's determinations about when a particular e-mail or facsimile disclosure effectively becomes remote access under the rule. In addition, the rules do not directly define "bulk" data. Thus, the determination of when the

exception swallows the rule regarding the disclosure of bulk data may be based on an individual record custodian's interpretation of what constitutes bulk data.

The proposed amendment should incorporate limiting language to provide guidance to record custodians and to ensure that the exception is tailored to address the actual need for e-mail and facsimile transmission of some records in response to specific requests for those particular case records.

- Teresa Nelson
- Gordon Stewart

Exhibit E: Minority Report on Remote Access to Judgment Debtor Addresses

By a one-vote margin the majority rejected the proposal to permit remote access to judgment debtors' addresses either directly or pursuant to an access agreement approved by the Judicial Council. The bulk of the majority's arguments centered around perceived problems relating to the lack of use restrictions on ultimate recipients or consumers of the information, and to some extent the digital/economic divide. The majority was not persuaded that concerns about use restrictions could be sufficiently addressed by access agreements, relying on the discretion given to the Judicial Council.

The Judicial Council has been entrusted with the task of governing the judicial branch through the establishment and monitoring of administrative policies. The scope of the discretion exercised in this governance role is huge compared to that involved in approving access agreements, yet the majority refuses to trust the Judicial Council when it comes to the latter. Not only is this lack of trust unfounded, it is inconsistent with the equally broad discretion accorded by the same majority to local court staff to decide whether to transmit by e-mail or facsimile records that are otherwise not remotely-accessible to the public.

Under the proposal discussed by the Committee, recipients of judgment debtor information would hardly be free of use limitations. A commercial entity that provides credit related information may be subject to fair credit reporting laws, for example. More fundamentally, explicit limitations could be imposed on the initial ring of recipients by means of access agreements. Such agreements may also permit more flexibility in creating appropriate use limitations.

The majority also opposes the proposal on the grounds that the public, including the media, should have access at no cost, and on the related argument that if judgment debtor addresses are provided only to select commercial enterprises, those enterprises will be able to charge more for the information, not less, thereby increasing the overall cost of real estate closings. However, the media would not be precluded from seeking an access agreement from the Judicial Council. The media currently have numerous access agreements with the courts that provide bulk data access without fee (except nominal copy preparation fees) in exchange for limiting use of the information to newsgathering purposes (as opposed to running a commercial employment search business).

Concerns about the public being able to obtain judgment debtor information may be addressed in access agreements by requiring the party signing the agreement to provide on-site access for the general public. This is similar to designating a non-court facility as an official location for the public to gain access

to court records as if the remote access limitations did not apply. If the majority is willing to extend discretion for designating such locations to the state court administrator, it should be willing to extend it to the Judicial Council, which now officially oversees the activities of the state court administrator.

The bulk of the majority's arguments vanish if the judgment debtor information is simply made remotely accessible to the public from the court's own Web site. The original proposal submitted by the Judicial Council's predecessor (see excerpt attached to this report) included this as an alternative approach. The majority does not directly address this option.

The supposed harm from providing direct remote access to judgment debtor addresses is purely speculative, and implausible at that. The Fourth Judicial District previously made judgment debtors' address information remotely accessible on a subscription basis for several years, and no reported harm came from it, even though there were no use limitations. Yet the discontinuation of remote access to judgment debtor addresses under the Fourth Judicial District's subscription service because of current Access Rule 8, subd. 2, has, in the words of the Judicial Council's predecessor, had "a direct and negative impact on trial court operations." [13] That harm is not speculative.

In short, permitting the amendment to the Rule supported by the minority (and the Conference of Chief Judges) will produce benefits that far outweigh any possible disadvantages. The ban on remote access to judgment debtors' addresses does little more than add expense, inconvenience, delay, and uncertainty. It is important to note that this is experienced not simply (or even primarily) by the initial commercial recipients, but by the hundreds of thousands of Minnesotans who rely on this information in the context of real estate transactions. For these reasons, the undersigned advisory committee members would adopt the proposal to permit remote access to judgment debtors' addresses either directly or pursuant to an access agreement approved by the Judicial Council.

Mark Anfinson
Sue Dosal
Hon. Kathleen Gearin

[13] See the introduction section of the attached excerpt from the Conference of Chief Judges' Sept. 2004 *Written Statement Concerning Amendments to the Rules of Public Access to Records of the Judicial Branch*.

C4-85-1848

STATE OF MINNESOTA

IN SUPREME COURT

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Written Statement Concerning Proposed Amendments to the Rules of Public Access to Records of the Judicial Branch

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Minnesota Conference of Chief Judges

By Lucy A. Wieland
Chief Judge, 4th Judicial District
Member, Conference of Chief Judges
Chair, CCJ Technology Workgroup

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## INTRODUCTION

The Minnesota Conference of Chief Judges (hereinafter "CCJ") makes the following statements regarding the proposed amendments to the Rules of Public Access to Records of the Judicial Branch.

CCJ appreciates the hard work and excellent product of the Advisory Committee on Rules of Public Access to Records of the Judicial Branch, as set forth in its Final Report, dated June 28, 2004. CCJ recognizes that issues of public access are complex and multi-faceted, and that modifications to existing rules to allow for remote access to case records may have widespread impact.

The Rules of Public Access to Records of the Judicial Branch and any amendments thereto (hereinafter "the Rules") have a direct and significant impact on the operations of the district courts throughout 87 Minnesota Counties. The Rules impact the daily practices and limited resources of the district courts because they are carried out, on a daily basis, by local district court clerks and judges.

For these reasons, the CCJ reviewed and discussed the Rules and Final Report and hereby presents a written statement with alternative recommendations on select rule provisions. The focus of CCJ's review was the impact of the Rules on technology, resources, and existing practices of district courts. Further, throughout its review, CCJ discussed at length the various alternative proposals, including philosophical differences and the impact of the proposals on society. In the end, CCJ decided to restrict its recommendations to those areas that had a direct and negative impact on trial court operations.

The foregoing statement is organized by rule number and contains discussion and proposed modified language. The proposed modified language is intended in the spirit of the corresponding discussion. However, if the Court prefers alternative language, CCJ would support such language as long as it addresses CCJ's stated concerns.

### Access Rule 8, subd. 2(b). Certain Data Elements Not To Be Disclosed

**Recommendation:**

A modification is needed to allow better access to "party street address" in the context of judgment dockets.

**Background:**

Proposed Rule 8, subd. 2(b) is too restrictive and may create a barrier for the public to obtain complete judgment information because it does not allow the public to view party street address on the judgment docket. Either the street address should be displayed on all judgment dockets through remote access or the street address should be allowed through remote access under an access agreement. At the very least, street address should be available to the credit industry and banks that need this information to conduct business, through an access agreement.

If access agreements are implemented, the Judicial Conference, or other judicial body with policy-making authority, should be designated to define the circumstances under which access agreements may be used to authorize remote access to party addresses.

**Proposed Language:**

**Subd. 2. Remote Access to Electronic Records**.

. . .

(c) **Certain Data Elements Not To Be Disclosed**. Notwithstanding Rule 8, subd. 2 (a), the public shall not have remote access to the following data elements in an electronic case record with regard to parties or their family members, jurors, witnesses, or victims of a criminal or delinquent act:

(1) social security numbers [and employer identification numbers];
(2) street addresses, except that the street address of parties should be available by access agreement as defined by the Judicial Conference.[14]
(3) telephone numbers;
(4) financial account numbers; and
(5) in the case of a juror, witness, or victim of a criminal or delinquent act, information that specifically identifies the individual or from which the identity of the individual could be ascertained.

[14] Or other judicial body with policy-making authority.

Exhibit F: Memorandum on Nondisclosure Agreements Under Access Rule 8, subd. 4

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MEMORANDUM

TO: Advisory Committee on the Rules of Public Access To Records of the Judicial Branch

FROM: Mike Johnson

DATE: April 24, 2006

SUBJECT: Nondisclosure Agreements under ACCESS RULE 8, subd. 4

One of the issues identified at the February meeting is whether an executive branch entity can comply with the nondisclosure agreement contemplated under ACCESS RULE 8, subd. 4(b), and maintain the confidentiality of the records under the data practices act.

ACCESS RULE 8, subd. 4(b) provides:

> *(b) Discretionary Authorization for Statewide Access to Certain Case Records.* Except with respect to race data under Rule 4, subd. 1(e), Minnesota County attorneys, Minnesota state public defenders, Minnesota state and local corrections agencies, and Minnesota state and local social services agencies may obtain remote and bulk access to statewide case records in MNCIS that are not accessible to the public and are classified as Civil Domestic Violence, Juvenile, and Parent/Child Relationship case records, if the recipient of the records:
>
> (1) executes a nondisclosure agreement in form and content approved by the state court administrator; and
>
> (2) the custodian of the records reasonably determines that the recipient has a legitimate business need for the records and disclosure to the recipient will not compromise the confidentiality of any of the records.

**MINN. STAT. § 13.03, subd. 4.** One argument is that Minn. Stat. § 13.03, subd. 4, recognizes that executive branch records are also subject to interaction with the judicial branch and that the interaction may require a different classification of the data in the hands of the executive branch. Section 13.04, subd. 4(a), provides in part that:

> (a) the classification of data in the possession of an agency shall change if it is required to do so to comply with either judicial or administrative rules pertaining to the conduct of legal actions …

The ACCESS RULES would appear to constitute judicial rules "pertaining to the conduct of legal actions." The rules address public access to court records about legal actions and are an integral part of the judicial process. Moreover, under the access agreements the executive branch agency's use of the nonpublicly-accessible court records is limited to that necessary to carry out its duties as required by law in connection with any civil, criminal, administrative, or arbitral proceeding in any federal or state court, or local court or agency or before any self-regulated body. Thus, it is reasonable to conclude that section 13.03, subd. 4(a), provides a basis for an executive branch entity to comply with the nondisclosure agreement entered into under ACCESS RULE 8, subd. 4(b).

There are some steps that could be taken to strengthen this conclusion. One is that the access rules could expressly allow the use of records for the business need specified in the nondisclosure agreement (i.e., as necessary to carry out its duties as required by law in connection with any civil, criminal, administrative, or arbitral proceeding in any federal or state court, or local court or agency or before any self-regulated body). Another step would be to have the executive branch entity acknowledge in the nondisclosure agreement that because access is limited to purposes related to legal proceedings, then MINN. STAT.§ 13.04, subd. 4(a), applies to the data and preserves the classification that the Access Rules has assigned.

One might question why, if the purpose is to use data in litigation, an executive branch entity needs bulk as opposed to remote access. Data may not always be available in a remote manner and bulk access can be used to provide data that is not otherwise remotely available.

**MINN. STAT. § 13.37, subd. 2**. Another argument is that MINN. STAT. § 13.37, subd. 2, requires executive branch entities to preclude public access to security and trade secret information, which are defined as:

> (a) "Security information" means government data the disclosure of which would be likely to substantially jeopardize the security of information, possessions, individuals or property against theft, tampering, improper use, attempted escape, illegal disclosure, trespass, or physical injury. "Security information" includes crime prevention block maps and lists of volunteers who participate in community crime prevention programs and their home addresses and telephone numbers.

> (b) "Trade secret information" means government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

MINN. STAT. § 13.37, subd. 1 (2005). Passwords provided for electronic access would arguably be considered security information, as would perhaps order for protection information that is not accessible to the public under Access Rule 4, subd. 1(a). Licensed third-party technology in many instances would arguably be a trade secret. Whether all nonpublicly-accessible case records being made available to an executive branch entity would arguably be a trade secret is not clear.

Advisory opinions issued under MINN. STAT. § 13.072 have held that the responsible authority of the executive branch entity must determine whether any particular data is either (or both) security information or trade secret information. Staff that prepare the advisory opinions do not think that one responsible authority would change a determination made by a predecessor on whether a particular software qualified as trade secret (unless, perhaps, the facts have changed). Trade secrets and security information are flexible concepts. Thus, reliance on section 13.37 to support a non-disclosure agreement is arguable, but is also tentative due to the nature of trade secrets and security information.

**Other possibilities**. Another possible approach to the problem is to convince the legislature to adopt a provision that would allow the judicial branch's classification of data to "travel" to the executive branch. See MINN. STAT. § 13.03, subd. 4(d) (the so-called traveling data provision--data disseminated to state agencies, political subdivisions, or statewide systems from another state agency, statewide system or political subdivision shall have the same classification in the hands of the entity receiving it as it had in the entity providing it). Such a provision was recommended by CriMNet planning groups as part of a larger proposal addressing CriMNet records, but it has not been passed by the legislature. Another legislative approach would be to classify the data received from the judicial branch in the hands of the executive branch agencies; this piecemeal approach could be daunting.