

MEMORANDUM

To: N.H. Supreme Court Advisory Committee on Rules
Justice Robert Lynn, Chairman

From: Subcommittee of the N.H. Supreme Court Advisory Committee on Rules
N. William Delker, Chairman

Date: May 9, 2017

Re: Docket No. 2016-006: Proposed Rules Regarding Motions to Seal Confidential Documents and Pleadings

At the request of Justice Lynn, I chaired a subcommittee to propose rules of procedure regarding motions to seal confidential documents and pleadings. This subcommittee was formed after Attorney William Chapman suggested the need for rules about how to unseal documents placed under seal by the court. Because there are no uniform rules on how documents and pleadings are placed under seal or how the public can move to unseal, the subcommittee addressed both issues.

I convened a subcommittee of lawyers and court staff representing a broad spectrum of practice areas. The participants of the subcommittee were Circuit Judge Michael Garner, Attorney Chapman of Orr & Reno, who represents media outlets including the Concord Monitor, Greg Sullivan of Malloy & Sullivan who also represents media outlets including the Union Leader, Nicholas Casolaro of McLane Middleton who is a civil litigator, Katherine Morneau of Morneau Law who practices family law and estate planning, N.H. Public Defender David Rothstein, Assistant Attorney General Geoffrey Ward, Superior Court Clerk Administrator Karen Gorham, and Carolyn Koegler who is the secretary of the Advisory Committee on Rules.

The subcommittee unanimously recommends the adoption of uniform rules on motions to seal and unseal confidential pleadings and documents. The same set of rules should be incorporated in the superior court rules of civil and criminal procedure, including the rules applicable in Felonies First jurisdictions, and the rules applicable to all case types in Circuit Court that are not governed by electronic filing. In making this recommendation, the subcommittee considered the following materials:

- Proposed rules and associated public comments relating to motions to seal considered by the Advisory Committee and the Supreme Court in 2013-2014;
- N.H. Supreme Court Rule 12 and N.H. Circuit Court Electronic Filing Rules 11 to 13; and
- Sample rules from federal and state courts in other jurisdictions; and
- Attorney Chapman's proposal from May 13, 2016; and
- The memo to the Advisory Committee on Rules from Carolyn Koegler dated May 31, 2016.

Using the Circuit Court Electronic Filing Rules as the foundation, the subcommittee crafted the attached proposals. The subcommittee considered Justice Lynn's suggestion to subject motions to seal filed by private litigants and motions to seal filed by government actors to different standards. The subcommittee concluded that it would be inconsistent with existing N.H. case law to do so. See generally Associated Press v. State, 153 N.H. 120 (2005) (addressing constitutional right of public right of access to court records and proceedings in civil cases).

The subcommittee also considered the amendments to the 2013-2014 proposed motions to seal which would have allowed a party to withdraw a case record if the motion to seal was denied. The subcommittee also discussed the comments presented by Chief Judges Nadeau and Kelly and Tim Gudas, staff attorney at the Supreme Court, who all opposed allowing the withdrawal of pleadings as a matter of right. The subcommittee also discussed current practice on this issue. Under current practice, judges address a request to withdraw a pleading or exhibit on a case-by-case basis. The proposed 2013-2014 rules would have granted a party the power to withdraw a document that was not placed under seal as a matter of right. Because withdrawal of a document or pleading from the record may be appropriate in some circumstances but not others, the subcommittee recommends that the current proposed rules not address this issue. Rather, judges should continue to be allowed to rule on such a request based on the facts and circumstances of a particular case.

Finally, the subcommittee discussed whether to propose rules on sealed hearings, such as a so-called Howard hearing. Ultimately, the subcommittee concluded that this issue was better left for another day so as not to overly complicate the current proposal.

Proposed Rule I. Access To Case Records

- (a) General Rule. Except as otherwise provided by statute or court rule, all pleadings, attachment to pleadings, exhibits submitted at hearings or trials, and other docket entries (hereinafter referred to collectively as “case records”) shall be available for public inspection. This rule shall not apply to confidential or privileged documents submitted to the court for *in camera* review as required by court rule, statute, or case law. The following rules regarding sealed case records also do not apply to the rules regarding electronic filings.
- (b) Burden of Proof. The burden of proving that a case record or a portion of a case record should be confidential rests with the party or person seeking confidentiality.

Proposed Rule II: Case Records Which Contain Confidential Information

- (a) The following provisions govern a party’s obligations when filing a case record containing “confidential information” as defined in this rule. If a case record is confidential in its entirety, as defined in Rule III, the party must follow the procedures for filing a confidential document set forth in Rule III.
- (b) “Confidential Information” means:
 - (1) Information that is not public pursuant to state or federal statute, administrative or court rule, a prior court order placing the information under seal, or case law; or
 - (2) Information which, if publicly disclosed, would substantially impair
 - i. the privacy interests of an individual; or
 - ii. the business, financial, or commercial interests of an individual or entity; or
 - iii. the right to a fair adjudication of the case; or
 - (3) Information for which a party can establish a specific and substantial interest in maintaining confidentiality that outweighs the strong presumption in favor of public access to court records.
- (c) The following is a non-exhaustive list of the type of information that should ordinarily be treated as “confidential information” under this rule:
 - (1) information that would compromise the confidentiality of juvenile delinquency, children in need of services, or abuse/neglect, termination of parental rights

proceedings, adoption, mental health, grand jury, or other court or administrative proceedings that are not open to the public; or

- (2) financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit card numbers or Personal Identification Numbers (PINs) of individuals including parties and non-parties; or
- (3) personal identifying information of any person, including but not limited to social security number, date of birth (except a defendant's date of birth in a criminal case), mother's maiden name, a driver's license number, a fingerprint number, the number of other government-issued identification documents or a health insurance identification number.

(d) **Filing Case Records Containing Confidential Information.**

- (1) When a party files a case record the party shall omit or redact confidential information from the filing when the information is not required to be included for filing and is not material to the proceeding. If none of the confidential information is required or material to the proceeding, the party should file only the version of the case record from which the omissions or redactions have been made. At the time the case record is submitted to the court, the party must clearly indicate on the case record or by separate coverletter that the case record has been redacted or information has been omitted pursuant to Rule II(d)(1).
- (2) It is the responsibility of the filing party to ensure that confidential information is omitted or redacted from a case record before the case record is filed. It is not the responsibility of the clerk or court staff to review case records filed by a party to determine whether appropriate omissions or redactions have been made.
- (3) If confidential information is required for filing and/or is material to the proceeding, and therefore must be included in the case record, the filer shall:
 - i. File a motion to seal as provided in Rule IV;
 - ii. Submit for the public file the case record with the confidential information redacted by blacking out the text or using some other method to clearly delineate the redactions; and
 - iii. Submit an unredacted version of the case record clearly marked as confidential.

Proposed Rule III: Filing A Case Record Which Is Confidential In Its Entirety

- (a) The following provisions govern a party's obligations when filing a "confidential document" as defined in this rule. "Confidential document" means a case record that is confidential in its entirety because it contains confidential information and there is no practicable means of filing a redacted version of the document.
- (b) A confidential document shall not be included in a case record if it is neither required for filing nor material to the proceeding. If the confidential document is required or is material to the proceeding, the party must file the confidential document in the manner prescribed by this rule.
- (c) A party filing a confidential document must also file a separate motion to seal pursuant to Rule IV.
- (d) A party filing a confidential document shall identify the document either in the caption of a pleading or in a cover letter to the court so as not to jeopardize the confidentiality of the document but in sufficient detail to allow a party seeking access to the confidential document to file a motion to unseal pursuant to Rule V.

Proposed Rule IV: Motions to Seal

- (a) No confidential document or case record containing confidential information shall be filed under seal unless accompanied by a separate motion to seal consistent with this rule. In other words, labeling a document as "confidential" or "under seal" or requesting the court to seal a pleading in the prayers for relief without a separate motion to seal filed pursuant to this rule will result in the case record being filed as part of the public record in the case.
- (b) A motion to seal a confidential document or a case record containing confidential information shall state the authority for confidentiality, *i.e.*, the statute, case law, administrative order or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. An agreement of the parties that a case record is confidential or contains confidential information is not a sufficient basis alone to seal the record.
- (c) The motion to seal shall specifically set forth the duration the party requests that the case record remain under seal.

DRAFT

- (d) Upon filing of the motion to seal with a confidential document or the unredacted version of a case record, the confidential document or unredacted case record shall be kept confidential pending a ruling on the motion.
- (e) The motion to seal shall itself automatically be placed under seal without separate motion in order to facilitate specific arguments about why the party is seeking to maintain the confidentiality of the case record or confidential information.
- (f) The court shall review the motion to seal and any objection to the motion to seal that may have been filed and, if necessary, hold a hearing thereon. The Court shall determine whether the unredacted version of the document shall be confidential. An order will be issued setting forth the court's ruling on the motion to seal. The order shall include the duration that the confidential document or case record containing confidential information shall remain under seal.
- (g) A party or person with standing may move to seal or redact confidential documents or confidential information that is contained or disclosed in the party's own filing or the filing of any other party and may request an immediate order to seal the document pending the court's ruling on the motion.
- (h) If the court determines that the case record is not confidential, any party or person with standing shall have 10 days from the date of the clerk's notice of the decision to file a motion to reconsider or a motion for interlocutory appeal to the supreme court. The case record shall remain under seal pending ruling on a timely motion. The court may issue additional orders as necessary to preserve the confidentiality of a case record pending a final ruling or appeal of an order to unseal.

Proposed Rule V: Procedure for Seeking Access to Case Records That Have Been Determined to Be Confidential.

- (a) A person who is neither a party nor counsel in a case and who seeks access to a case record or portion of a case record that has been determined to be confidential shall file a motion with the court requesting access to the record in question.
- (b) Upon receipt of the motion, an order of notice shall be issued to all parties and other persons with standing in the case.
- (c) The Court shall examine the case record in question together with the motion to unseal and any objections thereto to determine whether there is a basis for nondisclosure and, if necessary, hold a hearing thereon.

DRAFT

- (d) An order shall be issued setting forth the court's ruling on the motion, which shall be made public. In the event that the court determines that the records are confidential, the order shall include findings of fact and rulings of law that support the decision of nondisclosure.
- (e) If the court determines that the case record is not confidential, the court shall not make the record public for 10 days from the date of the clerk's notice of the decision in order to give any party or person with standing aggrieved by the decision time to file a motion to reconsider or motion for interlocutory appeal to the supreme court.

Proposed Rule VI: Sanctions for Disclosure of Confidential Information

If a party knowingly publicly files documents that contain or disclose confidential information in violation of these rules, the court may, upon its own motion or that of any other party or affected person, impose sanctions against the filing party.