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April 2, 2018

Carolyn Koegler, Clerk
Advisory Committee on Rules
c/o New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Proposed Rule regarding *in camera* review of confidential records

Dear Rules Committee:

Thank you again to the entire committee for allowing me to testify at the non-public hearing conducted on March 9, 2018. Thank you further for allowing me to submit a proposed rule addressing my concerns. Specifically, I am seeking to clarify the rule for triggering of in camera review of records by including language found in New Hampshire Case Law. Hopefully this will lead to some consistency in the courts. I have also attempted a reasonable solution for the mechanism by which records should be submitted to the court, even when the custodian is unknown to the party seeking the records. Finally, I have attempted to clarify to the court its duties under *Gagne* and *MacDonald* of conducting *in camera* review without input from counsel, and without releasing non-essential information to either party.

Enclosed are my changes to committee's proposed rule Appendix G(1), which was the rule recommended for adoption by the Attorney General's Office. Appendix G(1) also seems to be the rule used by the Appellate Defender in their comments to the committee. I have also enclosed an "Explanation of Sources" to explain the origin for the wording of the rule I have proposed. I am available for further questions at any time.

Thank you all for your time and careful consideration of this important matter.

Very sincerely,

Sarah E. Warecki
Assistant County Attorney
Hillsborough County Attorney's Office

Proposed Rule:

Rule 209. Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records.

(a) *The requisite showing for in camera review of confidential records.*

(1) A party seeking to pierce the privilege of confidential records shall bear the burden of showing in its motion a reasonable probability that the records contain information that is material to his defense.

(2) Failure to show the following shall be grounds for denial of the motion for in camera review:

a. a specific concern, based on more than bare conjecture, that, in reasonable probability will be explained by the information sought; and

b. a logical and factual basis of knowledge for the request, based on independently obtained information.

(b) *Providing records for in camera review*

(3) Upon finding that a party has made the requisite showing, the court shall issue the moving party a court order to be served upon the custodian of the records to produce them to the court for an *in camera* review.

a. An officer of the court, or the moving party, shall serve the court order.

b. In a case in which the custodian of the records is unknown, and if the parties cannot reach an agreement as to disclosure of the custodian, a hearing may be held in which the presiding judge shall question the individual as to the identity of the custodian. Such a hearing shall not provide an opportunity for examination of the individual by either party.

c. If the court order for in camera review involves medical records, the moving party must also serve the individual whose records are sought. The individual may file a motion to quash or otherwise object to the disclosure of the requested records.

(4) The custodian of the records shall:

a. deliver the records directly to the court in a sealed envelope within 14 days; and

b. certify that the records produced are a complete and accurate copy of the documents which are the subject of the court order

for *in camera* review. This certification may be written and submitted with the documents to the court unless the custodian is otherwise ordered to appear.

(c) *Procedure for in camera review of confidential records.*

(1) Upon receiving records ordered produced under paragraphs (a) and (b), the court shall review the records in order to determine whether, in fact, they contain any information that is essential to the requesting party's case.

(2) The parties may provide the court with memoranda describing the kinds of information that would be essential to the case. However, in conducting its review of the records for such information, the court shall maintain the confidentiality of the records, and not disclose them to the parties or their counsel. Nothing in this paragraph shall prevent the court from enlisting the assistance of court staff in the review of the records.

(3) To the extent that the court finds that the records, or parts of the records, contain information that is not essential to the case, the court shall, without revealing the content of such information, notify the parties of that finding. In order to preserve such records for potential appellate review, the court shall maintain a copy of the records under seal, not subject to review by the public, the parties, or counsel.

(4) If the court finds that the records, or parts of the records, contain information that is essential to the requesting party's case. The court shall disclose that information to the parties, and it shall, subject to the Rules of Evidence, be available for use at trial. Any information that the court does not deem essential shall be redacted by the court and not disseminated to either party.

(5) Any information disseminated pursuant to this rule shall be subject to a protective order.

Rule 12-A: Procedure in Appeals Alleging error in Connection with *In Camera* Review of Privileged Records

In all cases in which relief is sought in the Supreme Court on the ground that the trial court erred in failing to disclose information contained in confidential records reviewed *in camera* by the trial court and held under seal pursuant to Superior Court Rule 209(b)(3), the trial court shall transfer to the Supreme Court such records held under seal. Such records shall be held under seal in the Supreme Court, not subject

to examination by the parties, counsel or the public. Nothing in this paragraph shall prevent the Court from enlisting the assistance of court staff in the review of records.

Explanation of Sources:

Section (a) The requisite showing for in camera review of confidential records.

Section (a)(1) derives directly from *State v. Gagne*, 136 N.H. 101 (1992). *Gagne* uses both the terms "material" and "relevant." The New Hampshire Appellate Defendant has recommended use of the term "relevant." The committee's proposed rule uses only the term "material." The New Hampshire Attorney General proposes using both terms.

The term "relevant" is defined under the New Hampshire Rules of Evidence. It means, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R. of Evid. 401.

The term "material," is defined under the perjury statute. It means "capable of affecting the course or outcome of the proceeding." N.H. Rev. Stat. Ann. 641:1.

Upon reading these definitions, it would seem that all things material are necessarily relevant, but not all things that are relevant would necessarily be material. The Appellate Defender recommends lowering the standard from "material" to merely "relevant," which is not supported by New Hampshire case law. *See Gagne*, 136 N.H. at 105. The committee's proposed rule seeks to eliminate the redundancy created by adopting only the higher standard term of "material." The Attorney General's Office seeks to mimic case law.

Where the purpose of this proposal is to provide clarity to the trial courts when determining the triggering of *in camera* review, I agree with the committee's proposed rule to eliminate the redundancy created by use of the word "relevant." Therefore, this proposed rule uses only the term "material," where all material evidence would also necessarily be relevant.

Section (a)(2)(a) derives from *State v. Taylor*, 139 N.H. 96, 99 (1994). This language is heavily quoted in the New Hampshire case law that has been issued since the original *Gagne* ruling. *See id*; *See also State v. Fiske*, 170 N.H. 279 (2017); *State v. Eaton*, 162 N.H. 190, (2011); *State v. Guay*, 162 N.H. 375 (2011); *State v. King*, 162 N.H. 629 (2011); *State v. Amirault*, 149 N.H. 541 (2003); *State v. Madore*, 150 N.H. 221, (2003); *State v.McLellan*, 146 N.H. 108 (2001); *State v. Sargent*, 148 N.H. 571 (2002); *State v. Hoag*, 154 N.H. 47 (2000); *State v. Pandolfi*, 145 N.H. 508 (2000); *State v. Porter*, 144 N.H. 96 (1999); *State v. Ellsworth*, 142 N.H. 710 (1998); *State v. Graham*, 142 N.H. 357 (1997); *State v. Locke*, 139 N.H. 741 (1995); *State v. Puzzanghera*, 140 N.H. 105 (1995).

Section (a)(2)(b) also derives from *Ellsworth*, 142 N.H. 710. This language has also been quoted throughout New Hampshire case law, and provides further clarity regarding what kind of showing is necessary to meet the threshold for *in camera* requests. *See Fiske*, 170 N.H. 279; *Eaton*, 162 N.H. 190; *See also*, *Taylor*, 139 N.H. 96; *Locke*, 139 N.H. 741; *c.f.*, *Gagne*, 136 N.H. at 106.

Section (b)Providing records for in camera review.

In this section, I have attempted to address the issues presented by the committee regarding circumstances in which the custodian of records is unknown. I have also attempted to address the Attorney General's letter regarding potential issues involved in designating prosecutors as curriers of the court for *in camera* records.

Section (b)(3)(a) puts the onus on the moving party to serve upon the custodian of records the order for documents. This language is consistent with *State v. Lewandowski*, 169 N.H. 340 (2016). In *Lewandowski*, the New Hampshire Supreme Court ruled that the judicial

branch does not have the power to compel the executive branch "to obtain evidence for the defendant." *See id* at 342.

Section (b)(3)(b) seeks to address circumstances where the custodian of records may be unknown, as is common in criminal cases where the defendant seeks medical records of the victim. In this proposal, both parties would have a chance to agree to disclosure of the identity of the custodian. If an agreement cannot be made, since it is the court who is ordering the records, the court may hold a hearing with the witness present to inquire as to the identity of the custodian. If such a hearing was required, only the court would command the authority to question the witness at such a hearing.

Section (b)(3)(c) derives from *In re Grand Jury Subpoena for Med. Records of Payne*, 150 N.H. 436 (2004). In that case, the State was seeking medical records of the defendant. The New Hampshire Supreme Court recognized that patients have a statutory privilege to privacy in their medical records, and must be furnished notice when that privilege is to be breached so that they may object. The Court ruled that "any subpoena issued to a hospital or medical provider to obtain privileged medical records must also be served upon the individual whose records are sought. Either the defendant or the medical provider or both may file a motion to quash or otherwise object to disclosure of the requested records." *See Payne*, 150 N.H. at 447-48.

Although this proposed rule deals with court orders and not grand jury subpoenas, the concept remains the same. If the judicial branch of the government is seeking to pierce a confidential privilege between a patient and her doctor, that patient should be given notice and ability to object. There is no case or statute diminishing the rights of crime victims from other citizens of New Hampshire, and so this right to notice and to object should apply to all persons.

(c) Procedure for in camera review of confidential records

Section (c) largely mimics the committee's proposed rule with a few exceptions. In section (c)(1), the Appellate Defender has suggested erasure of the term "essential" in order to loosen the standard for when confidential information is available at trial. The Attorney General's Office did not comment on the committee's proposal to include both the term "essential" and "reasonably necessary." As the appellate defender notes, all information that is "reasonably necessary" is also "essential." Therefore, for the sake of clarity the committee could adopt use of the term "essential" in lieu of "essential and reasonably necessary." However, it would be a violation of current New Hampshire case law to lower the standard to merely "reasonably necessary." *See Gagne*, 136 N.H. at 106.

Section (c)(4) clarifies the court's duty to redact non-essential information. This conforms with the responsibilities of the court outlined in *State v. MacDonald*, 162 N.H. 64 (2011) where the New Hampshire Supreme Court ruled that it was the court's responsibility to conduct an *in camera* review and determine whether medical privileges should be abrogated. The Court discussed in its opinion the compelling interest to confidentiality of medical records to "encourage full disclosure by the patient for the purpose of receiving complete medical and psychiatric treatment." *See id* at 67. The committee's proposed rule may be interpreted by some courts to allow for dissemination of information not deemed essential to either party if there is also information in a file that is essential. This portion of the rule clarifies that all non-essential information should be redacted by the court and not disseminated to either party.

Anecdotally, in a recent case where the court granted *in camera* review of records, the court found some of the information in the file was relevant to the case. The court then decided to make the entire file available to State's counsel. The court requested that State's counsel

redact the file for information relating to where the victim resided. The court then made the redacted version available for both parties, including many pages of information irrelevant to the State's case or the defendant. All standards for *in camera* review, and this entire rule, become moot if courts disseminate irrelevant privileged information due to a lack of understanding regarding their duty to redact.

In another case I prosecuted, the trial court deemed the *in camera* records too voluminous to review. Post *Macdonald*, the released the entire file of confidential records to defense counsel to peruse and decide which records to use at trial. Defense counsel located many items in the file that were irrelevant to the case, but could be used to attack the victim's character. Defense counsel then filed a motion to admit all of those documents. The case was dismissed by the case for unrelated reasons to be brought forth at another time. The victims in that case have been hesitant to cooperate knowing that their character would be under attack regarding unrelated and irrelevant incidents of conduct. That case involved sexual abuse of minors in a residential facility.

As for section (c)(5), a protective order is commonly used in the Superior Court when confidential information is disseminated to parties. We do not currently have a standard protective order, but adding such language to this rule might make it unnecessarily complicated as I am not aware of issues that have arisen with the protective orders currently used in practice.