

MEMORANDUM

To: The Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2016-014. *In Camera* Review of Documents. Proposed Rules for the Circuit Court.
Date: December 1, 2017

The Circuit Court has requested that the Committee consider (when it considers the proposals to amend the Superior Court to codify the procedure to be used when conducting the *in camera* review of confidential records) whether the Circuit Court rules should be amended as well. The Circuit Court asks that the Committee consider the attached alternative proposals, set forth at Appendix A and Appendix B, but also reserves the right to suggest changes that might arise through the public hearing and deliberation process.

To facilitate review of the attached Circuit Court proposals, I provide in section I below some background information about the two alternative proposals to amend the Superior Court rules to provide a procedure for *in camera* review of documents. In section II I summarize the attached proposals and explain how they relate to the proposals to amend the Superior Court Rules that have been put out for public hearing. In section III, I note some issues to be considered regarding the placement of any new Circuit Court rule(s).

I. General Background Regarding the *In Camera* Review Issue

As you know, the proposal to amend the trial court rules was first made in a December 5, 2016 letter from Chief Appellate Defender Chris Johnson. At that time, the proposal was to amend only the criminal rules. After concerns were expressed about the proposal at the December 2016 meeting, a subcommittee was convened which included attorney Johnson, as well as Committee members Superior Court Clerk Abigail Albee, Representative Paul Berch and Judge N. William Delker.

At the March 2017 meeting the Committee considered a March 6, 2017 letter attorney Johnson submitted on behalf of the subcommittee. The March 6 letter included an attached proposal to amend Criminal Procedure Rule 54 which, according to the letter, would simply codify the case law and current practice. At the March meeting, Justice Lynn expressed concern about the fact that the new proposal did not include involving counsel in a phase of *in camera* review. He asked Attorney Johnson to provide the Committee with more information about the approaches taken in other states and the extent to

which any have adopted procedures that involve the lawyers in a phase of *in camera* review.

At the June meeting, the Committee considered an April 3, 2017 letter from attorney Johnson providing information about the approaches to this issue that have been taken in other states. The letter notes that a majority of states employ a procedure similar to the one currently used in New Hampshire, but that in at least two states – Iowa and Massachusetts- the courts have adopted a procedure that involves counsel in a phase of the *in camera* review of records. There was a great deal of discussion about this issue and the Committee agreed to consider two documents at the September meeting: (1) the rule set forth in the attachment to attorney Johnson’s March 6 letter (which does not involve a participation by counsel piece); and (2) a proposal Justice Lynn planned to submit for consideration, which would involve a participation by counsel piece.

At the September meeting, the Committee considered both the March 6 letter and a July 17, 2017 letter from attorney Johnson. Both letters include as attachments proposals to adopt a new Criminal Procedure Rule 54. The proposal attached to the July 17, 2017 letter includes a participation by counsel piece. Judge Delker expressed concern about the fact that the proposal attached to the July 17 letter lowers the threshold to breach a privilege, to the detriment of the privilege holder. Discussion at the meeting focused on the tension between the statutory right of privilege and a criminal defendant’s due process rights. Judge Delker noted that the July 17 proposal would modify the existing standard, and expressed support for the March 6 proposal.

Following some discussion, the Committee members agreed to put the following out for public hearing: (1) the text of the March 6 proposal (to apply to both civil and criminal cases); and (2) a new proposal in which the text of the March 6 proposal (with some additions proposed by Justice Lynn) would apply in civil cases and in criminal cases except those cases in which the party seeking the records is a criminal defendant, in which case the text of the July 17 proposal would apply.

Following the meeting, I circulated to the Committee draft appendices to the Public Hearing Notice designed to implement the Committee’s decision. The draft appendices proposed alternative amendments to the Superior Court and Supreme Court Rules, but did not include proposals to amend the Circuit Court Rules (although the proposed new Criminal Procedure Rule 54 would apply to the Circuit Court).

II. Summary of the Attached Proposals

Attached please find two different sets of proposed rules which would amend the Circuit Court Rules to codify the procedure used by the Circuit Court when conducting the *in camera* review of confidential records. The text of the proposal set forth in Appendix A is identical to the text of Appendix G(1) of the public hearing notice proposing amendments to the Superior Court rules. The text of the proposal set forth in Appendices B(1) and B(2) is identical to the text of Appendices H(1) and H(2) of the public hearing notice proposing an alternative amendment to the Superior Court rules.

The proposal set forth in Appendix A is identical to the proposal set forth in a March 6, 2017 letter from Chief Appellate Defender Christopher M. Johnson and would apply in both civil and criminal cases. The proposal set forth in Appendix B establishes different *in camera* review procedures depending upon who is seeking access to the confidential records. One set of procedures would apply to civil litigants and the prosecution in criminal cases. A separate set of procedures would apply to cases in which a criminal defendant seeks access to confidential records.

III. Placement of New Rule(s)

It would be helpful to have the Committee's guidance regarding where any new rule(s) should be placed within existing Circuit Court Rules. For example, if Appendix A is adopted, this would mean adding a Rule 1.28 to the "General Rules" of the District Division Rules, so it would apply to all cases in the District Division – Criminal, Civil, Small Claims, Landlord Tenant, etc. If Appendix B is adopted, this would mean adding a Rule 1.28 to the "General Rules," and it would apply to all cases in the District Division except (as the title indicates), criminal cases. If the rules are not to apply to all cases in the district division, then the placement of the new rule would be different.

APPENDIX A

Adopt a new Circuit Court – District Division Rule 1.28 (if adopted as Rule 1.28, this would apply to both civil and criminal cases and to all other cases in the District Division), a new Circuit Court – Probate Division Rule 59B, and a new Circuit Court – Family Division Rule 1.33 (if adopted as Rule 1.33, this rule would apply to all cases in the Family Division):

Rule **[insert appropriate number]**. Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records.

(a) *Triggering in camera review of confidential records.*

(1) A party seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is material to the party's case.

(2) Upon finding that a party has made the requisite showing, the court shall order the custodian of the records in question to produce them to the court for an *in camera* review.

(3) Unless the court orders otherwise, the moving party, or the prosecution in a criminal case, is required:

(A) to serve the order on the custodian of the records; and

(B) to obtain the records for *in camera* review from the custodian of records and deliver them to the court in a sealed envelope or container. The party delivering the records is prohibited from opening the sealed records.

(4) the custodian of the records shall 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.

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

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

(2) The parties may provide the court with memoranda describing the kinds of information that would be essential and reasonably necessary 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 and reasonably necessary 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 and reasonably necessary 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.

APPENDIX B(1)

Adopt a new Circuit Court – District Division Rule 1.28 (if adopted as Rule 1.28, this would apply to all cases in the District Division except, as the title of the proposed rule makes clear, criminal cases), a new Circuit Court – Probate Division Rule 59B, and a new Circuit Court – Family Division Rule 1.33 (if adopted as Rule 1.33, this rule would apply to all cases in the Family Division):

Rule **[insert appropriate number]**. Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records In Non-Criminal Cases.

(a) *Triggering in camera review of confidential records.*

(1) A party seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is material to the party's case.

(2) Upon finding that a party has made the requisite showing, the court shall order the custodian of the records in question to produce them to the court for an *in camera* review.

(3) Unless the court orders otherwise, the moving party is required:

(A) to serve the order on the custodian of the records, unless the custodian waives service; and

(B) to obtain the records for *in camera* review from the custodian of records and deliver them to the court in a sealed envelope or container. The party delivering the records is prohibited from opening the sealed records.

(4) the custodian of the records shall 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.

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

(1) Upon receiving records produced under paragraph (a), the court shall review the records *in camera* in order to determine whether, in fact, they contain any information that is reasonably necessary to the requesting party's case. Information that is "reasonably necessary" means information that would: (1) constitute compelling evidence supporting the requesting party's position in the litigation; and (2) is not reasonably available from other non-privileged sources.

(2) The parties may provide the court with memoranda describing the kinds of information that would be reasonably necessary 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 do not contain information that is reasonably necessary to the requesting party's 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 reasonably necessary to the requesting party's case, the court shall disclose one copy of such records to each party in the case and such records shall, subject to the Rules of Evidence, be available for use at trial.

(5) If the court orders disclosure of any records under Rule 209(b)(4), the court shall preserve in its file, under seal and not subject to public disclosure, one complete copy of all the records submitted for in camera review and a separate copy of all records it has ordered disclosed to the parties.

(c) *Protective Orders*. Whenever the court orders disclosure of records pursuant to Rule 209(b)(4), the court shall issue a protective order that provides as follows:

(1) no party may make any further copies of the single copy disclosed to that party without express prior written approval of the court;

(2) the parties may use such records only for the prosecution or defense of the litigation in connection with which they were disclosed;

(3) no party shall disclose such records to any other person except as necessary in connection with the prosecution or defense of the litigation. Any person to whom disclosure is made shall acknowledge in writing prior to the disclosure that s/he has been made aware of and agrees to comply with the protective order; and

(4) at the conclusion of the litigation, each party shall return to the court that party's copy of the records, whereupon the court shall destroy said records.

The court may modify the foregoing terms of a protective order, or impose such additional terms, as may be necessary in a particular case. A violation of the protective order may be sanctioned as contempt of court.

APPENDIX B(2)

Adopt New Hampshire Rule of Criminal Procedure 54 (if adopted, this would apply only to criminal cases in the District Division):

Rule 54. Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records In Criminal Cases.

(a) *Cases in Which Access To Confidential Records is Sought by the Prosecution in a Criminal Case.*

(1) *Triggering in camera review of confidential records.*

(A) A prosecutor seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is material to the prosecution's case.

(B) Upon finding that the prosecutor has made the requisite showing, the court shall order the custodian of the records in question to produce them to the court for an *in camera* review.

(C) Unless the court orders otherwise, the prosecutor is required:

(i) to serve the order on the custodian of the records, unless the custodian waives service; and

(ii) to obtain the records for *in camera* review from the custodian of records and deliver them to the court in a sealed envelope or container. The prosecutor or his or her agent delivering the records is prohibited from opening the sealed records.

(D) the custodian of the records shall 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.

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

(A) Upon receiving records ordered produced under paragraph (1), the court shall review the records *in camera* in order to determine whether, in fact, they contain any information that is reasonably necessary to the prosecution's case. Information that is "reasonably necessary" means information that would: (1) constitute compelling evidence supporting the prosecutor's position in the litigation; and (2) is not reasonably available from other non-privileged sources.

(B) The parties may provide the court with memoranda describing the kinds of information that would be reasonably necessary 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.

(C) To the extent that the court finds that the records do not contain information that is reasonably necessary to the prosecutor's 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.

(D) If the court finds that the records, or parts of the records, contain information that is reasonably necessary to the prosecutor's case, the court shall disclose one copy of such records to each party in the case and such records shall, subject to the Rules of Evidence, be available for use at trial.

(E) If the court orders disclosure of any records under Rule 54(a)(2)(D), the court shall preserve in its file, under seal and not subject to public disclosure, one complete copy of all the records submitted for *in camera* review and a separate copy of all records it has ordered disclosed to the parties.

(3) *Protective Orders*. Whenever the court orders disclosure of records pursuant to Rule 54(a)(2)(D), the court shall issue a protective order that provides as follows:

(A) no party may make any further copies of the single copy disclosed to that party without express prior written approval of the court;

(B) the parties may use such records only for the prosecution or defense of the litigation in connection with which they were disclosed;

(C) no party shall disclose such records to any other person except as necessary in connection with the prosecution or defense of the litigation. Any person to whom disclosure is made shall acknowledge in writing prior to the disclosure that s/he has been made aware of and agrees to comply with the protective order; and

(D) at the conclusion of the litigation, each party shall return to the court that party's copy of the records, whereupon the court shall destroy said records.

The court may modify the foregoing terms of a protective order, or impose such additional terms, as may be necessary in a particular case. A violation of the protective order may be sanctioned as contempt of court.

(b) *Cases in Which Access To Confidential Records is Sought by the Defendant in a Criminal Case*.

(1) *Triggering in camera review of confidential records*.

(A) A criminal defendant seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is material to the defendant's case.

(B) Upon finding that the defendant has made the requisite showing, the court shall order the custodian or possessor of the records in question to produce them to the court for an *in camera* review.

(C) Unless the court orders otherwise, the prosecutor is required:

(i) to serve the order on the custodian of the records, unless the custodian waives service; and

(ii) to obtain the records for *in camera* review from the custodian of records and deliver them to the court in a sealed envelope or container. The party delivering the records is prohibited from opening the sealed records.

(D) the custodian of the records shall 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.

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

(A) Upon receiving records ordered produced under paragraph (1), the court shall review the records *in camera* in order to determine whether, in fact, they contain any exculpatory information.

(B) The parties may provide the court with memoranda describing the kinds of information that would be exculpatory. However, in conducting its review of the records for exculpatory 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.

(C) To the extent that the court finds that the records do not contain information that is exculpatory, the court shall, without revealing the content of the information in the records, 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.

(D) If the court finds that the records, or parts of the records, contain information that is exculpatory, the court shall disclose that information to the parties, subject to a protective order as specified in Rule 54(a)(3).

E) If the court orders disclosure of any records under Rule 54(b)(2)(D), the court shall preserve in its file, under seal and not subject to public disclosure, one complete copy of all the records submitted for *in camera* review and a separate copy of all records it has ordered disclosed to the parties.

(3) *Determination regarding the availability for use at trial of information contained in privileged or confidential records.*

(A) After disclosing to the parties the information found to be exculpatory, the court, at an appropriate time prior to or at trial, shall permit the parties to be heard on the question of whether the disclosed content of the records shall be available for use at trial. The hearing may be held *in camera*, but a record of the hearing shall be made.

(B) A party seeking to have information in the records made available for use at trial shall bear the burden of showing that such information is reasonably necessary to that party's case at trial. "Reasonably necessary" has the same meaning here as it does in Rule 54(a)(2)(A).

(C) To the extent that the court finds that the disclosed records, or parts thereof, are not reasonably necessary to the party's case, the court shall order that such records will not be available for use at trial. Records subject to such a ruling shall remain subject to the protective order entered pursuant to Rule 54(b)(2)(D). In order to enable appellate review of the court's decision, the

court shall maintain a copy of such records in the file under seal, not subject to review by the public. Such records shall be maintained separately from any records maintained under seal in accordance with Rule 54(b)(2)(E).

(D) To the extent that the court finds that the records, or parts of the records, contain information that is reasonably necessary to a party's case at trial, the court shall direct that such information shall, subject to the Rules of Evidence, be available for use at trial.