MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2016-014, In Camera Review
Date: March 5, 2018

As I am sure you recall, the proposal to adopt a rule governing the *in camera* review of materials by the Superior Court was put out for public hearing in December. The Committee heard from a number of members of the public about the proposals. Because the public hearing was so lengthy, detailed notes about the testimony are not included in the minutes from the December meeting. However, a CD is available at the Supreme Court for anyone who wishes to listen to the testimony. I have listened to the CD and taken notes. I provide those notes here because I believe the Committee might find them helpful as it moves forward with discussion about this issue.

I have done my best to accurately summarize the public hearing testimony here, and hope that you will bring to the Committee's attention any omissions or inaccuracies. I have also provided notes about the discussion about the issue at the public meeting following the public hearing.

I. Summary of Public Hearing Testimony

- The Committee had requested comment on two sets of proposed rules which would amend the Superior Court AND the Circuit Court Rules to codify the procedure to be used by the Courts when conducting *in camera* review of confidential records.
- Attorney Jeffrey Kaye addressed the Committee. He:
    - Expressed concern about the proposed rule, particularly with respect to a defendant's ability to access the personnel files of police officers.
    - Believes that New Hampshire should have a rule similar to the rule in Massachusetts.
    - Believes that a defense attorney should have access to the records in certain circumstances because defense counsel knows the case.
    - Is comfortable with an approach that would prohibit defense counsel from sharing information contained in those records with his or her client (*i.e.*, a "gag order" or partial "gag order").
    - Expressed concern about the interplay between the proposed rules and Superior Court Rule 12 (Discovery), which requires the prosecutor to turn over all exculpatory evidence to defense counsel. He does not understand why the proposed rules have a

triggering mechanism. In his view, the filing of the charge is the trigger.

- Lyn Schollett, Executive Director, NH Coalition Against Domestic and Sexual Violence, addressed the Committee. She:
  - Stated that the Coalition supports the adoption of a rule that codifies the existing procedure for accessing confidential information, provided that it: (1) does not lower the current standard for accessing confidential records in civil and criminal cases; and (2) provides for *in camera* review, rather than a review by counsel.
  - Spoke at length regarding the significant impact the disclosure of private information in a public court proceeding has on crime victims.
  - Stated that a rule with a specific standard is important to victims because it allows them to make informed decisions about their care and to know what may happen to the records in their case.
  - Does not support a proposal that would allow defense counsel to review records, but if there is a way for the judge to know what the defendant's possible defense theory is from the defense lawyer so that the judge understands when reviewing the records whether information is the records is relevant, she does not object to that.
  - Does not support a proposal that would allow defense counsel access to the records, even if a gag order were to prohibit defense counsel from sharing that information with his or her client.
  - Stated that based upon her experience, when victims seek help, they are not just seeking advice about the narrow issue of the crime that occurred - they are talking about many aspects of their lives.
- Attorney Kaye Drought, Litigation Director, New Hampshire Legal Assistance, addressed the Committee. She:
  - Stated that even having confidential mental health records reviewed in camera by a judge who makes a decision that the records are off-limits, *i.e.*, not discoverable, even that process is very intrusive involving the disclosure to a judge of very deeply personal information.
  - Has concerns that the standards set forth in the proposed rules are inconsistent with the New Hampshire Supreme Court's existing case law about what it takes before a New Hampshire trial judge will decide that a requestor of privileged or confidential records is entitled to review those records. She believes that the standards are inconsistent, for example, with the five pages of guidance that are provided in *Desclos v. Southern New Hampshire Medical Center*, 153 N.H. 607 (2006). She asks the Committee to take a careful look at the *Desclos* decision.

- She does not take a position on whether there should be separate criminal or civil procedures, but notes that she is really most familiar with what the civil law procedures are for the *in camera* review of privileged information.

- Attorney David Rothstein, Deputy Director, New Hampshire Public Defender addressed the Committee. He stated:
  - This is a very serious issue, but it impacts a relatively small number of cases.
  - Regarding the "gag rule" question, attorney Rothstein understands why this would allay some concerns and that there may be circumstances in which disclosure need only be made to defense counsel. But he can also foresee circumstances in which he might need to argue to the judge that he needs to talk to his client about something that is in the records.
  - Attorney Rothstein noted that judges do not often know a lot about the case. He believes that the judge can, in most cases, make a better decision in a private, closed conference, and after hearing the arguments of the parties.
  - Attorney Rothstein acknowledges that it would be a break with past practice to involve counsel, but he believes that the rule that attorney Johnson proposed is more beneficial than detrimental, and he asks the Committee to recommend adoption of that rule.
  - Attorney Rothstein, stated, in response to Judge Delker's inquiry, that the "any exculpatory evidence" standard would include *Giglio* materials. *Giglio* materials include information that is not directly related to the crime, but which may reflect on other aspects of the victim's life where victim may not have been entirely truthful or where the victim may have done things that reflect poorly on him or her so that the defense could use these collateral matters to try to attack the victim's credibility in the case. He stated that as defense counsel he would want to have the opportunity to argue that he should be able to use this evidence. But he noted that there is a difference between discoverability and admissibility. He believes that he should be able to see the material (discoverability), but that the judge would then have to determine whether he could use it at trial (admissibility).
  - Attorney Rothstein agreed with Justice Lynn that in the determination of whether something is admissible, the fact that it might be constitutionally required to be admitted if it wasn't privileged might be a different question than whether it is constitutionally required to be admitted if it is privileged. In other words, the analysis could be, it is exculpatory, but in the balance of privileged versus exculpatory, the evidence does not come in, even if other *Giglio* material that was not privileged would come in. Attorney Rothstein noted that as a defense lawyer, he is

accustomed, in cases involving rape shield evidence, for example, to having to meet a higher bar for relevance and a higher bar for potentially probative value on cross-examination if the evidence is privileged, and he can see this principle attaching to this type of information as well.

- Attorney Rothstein stated, in response to Judge Delker's inquiry about whether using a detailed *ex parte* memo articulating the defense theory of the case would address the concerns that have been raised, that this is *an* answer. He noted that this is something that has existed, but it has not been codified, and he is not sure that all judge would accept such a document *ex parte*. The disadvantage to defense counsel is that if defense counsel is writing a pleading and has no idea what is in the records, he or she is going to have to consider maybe five different possibilities. If counsel is able to see the records, he or she can be more concise and can be a more effective advocate for his or her client and can more effectively guide the Court. But codifying this – the right to submit an *ex parte* document, would be helpful. It is not as valuable to defense counsel, but it is one possible solution to address defense counsel's concerns.
- Attorney Rothstein stated, in response to Justice Lynn's inquiry, that while it is not ideal to have a rule that prohibits defense counsel from sharing information found in confidential records with the client, if it provides a measure of relief or accommodation to the other side, then he believes it is workable.

II. Written Comments Submitted

- A comment was submitted by the Attorney General's Office expressing concern about the proposals. *See* 12/07/17 letter from Deputy Attorney General Ann Rice.

- A comment was submitted by the new Hampshire Coalition Against Domestic and Sexual Violence. *See* 12/08/17 letter from Lyn M. Schollett, Executive Director of the Coalition Against Domestic and Sexual Violence

III. Public Meeting – Decisions Made About How to Proceed

- Members seemed to agree that the Committee should focus its work now on crafting a rule to apply in criminal cases.
- There are two proposed rules to consider:
  - Appendix G (the "Delker Proposal")(keeps current standard for defendant gaining access to confidential information)

    - Appendix H (the "Lynn Proposal")(changes standard to "exculpatory.")
- Justice Lynn noted that he is concerned about a situation in which a victim goes to counseling and talks about substantially the same thing that he or she would testify to at trial, and then the victim goes to trial and says something different. There is a strong argument that the defendant should not have access to records if the victim has talked about other things, but when it is the same topic, it is more complicated. Justice Lynn noted that lawyers may see *Giglio* material, but it is rare for it to go further if it involves a collateral matter.
- Judge Delker spoke in support of his proposal but believes the Committee should discuss making explicit the defendant's right to submit a memo explaining his or her defense prior to the judge's *in camera* review of the documents. Representative Berch stated that any proposal of this kind should include language making it clear that defense counsel would be entitled to change how the defense proceeds after the hearing.