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New Hampshire Appellate Defender Program

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NH SUPREME COURT

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

RE: Proposed Rule relating to procedure for *in camera* review of confidential records

To the Supreme Court Advisory Committee on Rules:

I write on behalf of the committee tasked with exploring the proposed rule relating to the procedure for *in camera* review of confidential records. The principal innovation of the initially proposed rule involved its creation of an intermediate phase of the review in which counsel participated. Thus, there would be, as under current law, an initial triggering inquiry as to whether the requesting party had made a sufficient showing to require the court to conduct an *in camera* review at all. Second, in cases in which the court found it necessary to conduct an *in camera* review, the court would alone conduct an initial *in camera* review, screening out irrelevant information. Third, to the extent that the court found the privileged records to contain relevant information, the court would convene a second phase of *in camera* review, in which counsel would participate, as the parties litigated the extent to which the information previously found by the court to be relevant met the higher "essential and reasonably necessary" standard for making the information available for use at trial (subject to the Rules of Evidence).

The committee's discussions with respect to the innovation of involving counsel in a phase of *in camera* review centered on the question of the balance of two competing interests. On the one hand, the involvement of counsel would bring to bear the clarifying force of adversary process on close questions about whether information in the privileged records met the "essential and reasonably necessary" standard. On the other hand, the prospect of having counsel for the opposing party see otherwise confidential records would be experienced by the patient/witness in question as a significant additional invasion of privacy. Although I adhere to the views expressed in the memo accompanying the initial proposal, the other members of the exploratory committee ultimately all concluded that the additional invasion of privacy associated with counsel's

access to the privileged materials could not be justified by the anticipated benefits to the court's analysis of the "essential and reasonably necessary" question. Also, the committee expressed concern that the proposed rule's assumption – that counsel could keep from the client the content of information meant to be disclosed only to counsel – might often in practice prove unrealistic. The majority of the committee therefore recommends the rejection of the principal innovation embodied in the proposed rule.

However, the committee saw some value in declaring in the form of a court rule the current doctrine in this area, now found only in case law and customary practice. Accordingly, the committee proposes the adoption of the attached rules. It is the sense of the committee that the attached rule of criminal procedure could be adapted without any essential modification as a rule of civil procedure.

In the course of the committee's discussions, some time was spent considering whether the adoption of these rules might afford an opportunity to clarify a few areas of potential confusion in current doctrine. One such area concerns the "relevant and material" standard applied to the question of whether the requesting party had made a sufficient showing to trigger *in camera* review. The committee unanimously agreed that the concept of "materiality" is a wholly included subset within the broader concept of "relevance," such that any fact that is "material" is, by definition, also "relevant," while there could be facts that are "relevant" without being "material." For the reasons stated in my prior letter and memorandum, I continue to adhere to the view that "relevance" is a more appropriate standard in this context than "materiality." If the proposed rule were, though, simply to clarify current doctrine, given the use of the conjunction "and" in the "relevant and material" standard, the words "relevant and" are superfluous. The rule could just say "material." Accordingly, the proposal below replaces the "relevant and material" standard with the word "material." Alternatively, to the extent that the Advisory Committee prefers to keep intact the precise formulation of present doctrine, it would amend this proposal so as to include the phrase "relevant and material" wherever the proposal uses the word "material."

A second such area involves the procedure for obtaining the records from their custodians. The original proposal said nothing about this. In the attached proposal, new sections (a)(3) and (a)(4) have been added to address that matter.

A third area of potential confusion involves the "essential and reasonably necessary" standard, which under present doctrine governs the court's analysis of what information found in confidential records must be disclosed to the parties for potential use at trial. Insofar as the terms "essential" and "reasonably necessary" are understood both to address the question of the relative importance to a party's case of information found in confidential records, the use of both terms together in a single standard would be

susceptible to the same criticism described above with respect to the phrase "relevant and material." Viewing the terms in that light, I argued in the initial proposal that "reasonably necessary" is preferable in this context to "essential." During the committee's discussions, it was suggested that the terms "essential" and "reasonably necessary" could address two distinct questions, and thus not be needlessly and confusingly duplicative. On that view, "essential" refers to the question of whether the party has an alternative and non-confidential source for the same information found in the confidential records, while "reasonably necessary" describes the measure of importance the information must have in order to be disclosed to the parties. It has to be said that if the term "essential" refers to the concept of "otherwise unavailable," the governing standard could more accurately be rephrased as "otherwise unavailable and reasonably necessary." Nevertheless, on the understanding that "essential and reasonably necessary" is a term of art meaning "otherwise unavailable and reasonably necessary," the committee left the standard unchanged in the proposed rule.

Please let us know if we can provide any further information of use with respect to the proposed rule.

Sincerely,

Christopher M. Johnson
Chief Appellate Defender

CC (by email): Hon. N. William Delker
Hon. Michael H. Garner
Helen Honorow, Esq.
Geoffrey Ward, Esq.

FINAL DRAFT OF PROPOSED RULES

Rule 54. 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

(i) to serve the order on the custodian of the records; 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.

(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.

B. Supreme Court

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 Rule 54(b)(3) of the Rules of Criminal Procedure, 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 the records.