

# New Hampshire Appellate Defender Program

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NEW HAMPSHIRE  
SUPREME COURT  
2017 JUL 17 P 3:21

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 Rules Committee:

I write to offer an alternative version of the previously proposed rule, modified in an effort to accommodate the objection that, in the prior version, a witness-patient's confidential records are made available to defense counsel on an insufficiently demanding showing.

The prior proposal structured the analysis in three phases. In the first or "threshold" phase, a party seeking to discover information contained in privileged records must demonstrate a reasonable probability that the records contain relevant information. If that threshold showing is made, the matter advances to a second phase in which the trial court collects and examines the privileged records *in camera*. The modification embodied in the attached proposal relates to the standard by which a court decides what records, if any, shall proceed to a third phase of the process.

Specifically, the prior proposal suggested that the appropriate standard for the second phase was "relevance." Thus, if the trial court during its *in camera* review found any information in the records relevant to the case, the court would disclose that information to counsel for the parties, subject to appropriate protective orders, for the purpose of enabling counsel to participate in a third phase of the process.

The modified version of the rule submitted with this letter changes that second-phase "relevance" standard to an "exculpatory" standard. Because information can be "relevant" without being "exculpatory," this modification sets a higher bar, and thereby more narrowly defines the category of records that would be disclosed to counsel for purposes of the third phase.

Today's proposal leaves intact the initial proposal's version of the third phase. In that third phase, the parties litigate, in a non-public and sealed setting, the extent to which the defense can satisfy the high showing of need required to gain the right to have information in the records made available for

use at trial.

Enclosed with this letter is a draft of the proposed rule modified as described above. For the sake of clarity, I note that this represents the third version of the idea submitted to the Rules Committee. The first version was submitted by me in December 2016. A second version was submitted in March 2017, and embodied the views of the majority of a specially-appointed ad hoc subcommittee. The present third proposal incorporates that committee's creation of paragraphs (a)(3) and (a)(4), which relate to the procedure for gathering privileged records for *in camera* review. Because the majority of the March 2017 committee did not endorse the idea of a three-phase process, this proposal does not otherwise incorporate the March 2017 changes. The attached proposed Supreme Court rule is unchanged from the December 2016 version.

Please let me know if I can provide any further information of use to the Rules Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Johnson", with a long horizontal flourish extending to the right.

Christopher M. Johnson  
Chief Appellate Defender

CC: Attorney General's Office

## A. Trial Court

### 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 relevant to the case.

(2) Upon finding that a party 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.

(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 initial *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 exculpatory information.

(2) 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.

(3) To the extent that the court finds that the records, or parts of the records, contain information that is not exculpatory, the court shall, without revealing the content of the non-exculpatory 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 non-exculpatory 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 exculpatory, the court shall disclose that information to counsel for the parties, subject to an appropriate protective order shielding the records from further disclosure.

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

(1) After disclosing to counsel for the parties the information found to be exculpatory, the court shall permit counsel to be heard on the question of whether the disclosed content of the records shall be available for use at trial.

(2) Counsel for 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.

(3) To the extent that the court finds that the disclosed records, or parts thereof, are not reasonably necessary to any party's case, the court shall order that such information will not be available for use at trial. In order to enable appellate review of that 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 not be commingled with any records maintained under seal in accordance with paragraph (b)(3).

(4) 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.

(d) Alternative procedure in certain cases.

(1) In all cases, the court shall follow the procedure defined in paragraphs (a) and (b)(1) – (3) of this rule. However, in either of the circumstances

described in paragraph (d)(2) of this rule, the court shall employ the alternative process described in paragraph (d)(3) in place of the process defined in paragraphs (b)(4) and (c).

(2) The court shall employ the alternative procedure in any case in which either:

(i) the defendant has chosen self-representation in lieu of representation by counsel; or

(ii) although represented by counsel, the defendant declines to waive the right to insist that counsel reveal or otherwise share with the defendant access to the confidential records prior to a finding by the court that those records shall be available for use at trial.

(3) When using the alternative procedure, the court shall examine the records *in camera*. A party may provide the court with memoranda describing the kinds of information that would be reasonably necessary to the party's case. However, in conducting its review of the records, the court shall maintain the confidentiality of the records, and shall 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. Upon making a finding that the records, or parts thereof, are reasonably necessary to a party's case at trial, the court shall disclose such records to counsel. With respect to records the court reviews but finds not to be reasonably necessary to a party's case at trial, the court shall maintain a copy of those records under seal, not subject to review by counsel, the parties, or the public. Records maintained under seal because found not to be subject to disclosure under this rule shall not be commingled with records maintained under seal in accordance with the process defined in paragraph (b)(3).

## B. Supreme Court

Rule 12-A: Procedure in Appeals Alleging Error in connection with *in camera* review of Privileged Records.

(1) 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.

(2) In all cases in which relief is sought in the Supreme Court on the ground that the trial court erred in failing to make available for use at trial information contained in confidential records reviewed *in camera* by the court and held under seal pursuant to Rule 54(c)(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 or the public. However, to the extent that trial counsel had access to the records for the purpose of arguing their availability for use at trial, appellate counsel shall likewise have access for the purpose of discussing the content of the sealed information in the briefs on appeal. Briefs containing references to materials held under seal in the Supreme Court shall likewise be filed under seal. Nothing in this paragraph shall prevent the Court from enlisting the assistance of court staff in its review of the records.

(3) If a party is proceeding *pro se* on appeal, or if a represented party declines to consent to the procedure described in paragraph (2) with respect to documents sealed under Rule 54(c)(3), the sealed record shall not be made available to counsel, and shall instead be reviewed by the Court *in camera* in accordance with the procedure described in paragraph (1).