#2016-014

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

December 7, 2017

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Re: Proposed rules for review and evaluation for admissibility of information in confidential records

To the New Hampshire Supreme Court Advisory Committee on Rules:

After review of the proposed rules regarding the "Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records"—contained in appendixes G(1), G(2), H(1), and H(2) of the committee's public hearing notice of October 23, 2017—the Attorney General's Office favors adoption of the rules set out in appendixes G(1) and G(2) in criminal cases, but with a few reservations.

As an initial matter, this office does not favor the adoption of the proposed rules regarding the "Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records" in civil cases. On their face, the proposed rules in appendices G(1) and H(1) would establish a single standard of review to determine whether a document, over which a party has claimed a privilege, must be disclosed to the requesting party. *See* App. G(1) ¶ (b)(4) ("essential and reasonably necessary to the requesting party's case"); App. H(1) ¶ (b)(4) ("reasonably necessary to the requesting party's case"). In the civil context, however, the standards for determining whether a party may properly withhold a document as privileged and/or confidential can vary depending on the specific privilege claimed, and those standards are governed by an established body of statutory and decisional law. As such, it would not be appropriate to adopt a one-size-fits-all standard in civil cases.

In respect of criminal cases, the rule in appendix G(1) seems to be largely a codification of current practice. Currently, in order to obtain *in camera* review in criminal cases, a "defendant must establish a reasonable probability that the records contain

information that is material and relevant to his defense." *State v. Gagne*, 136 N.H. 101, 105 (1992). However, subparagraph (a)(1) says that the party must show "a reasonable probability" that the records contain information that is merely "*material* to the party's case," not "material and relevant." This office favors retaining the language "material and relevant" from *Gagne*. Materiality and relevance are both important considerations, and the requirement that information be "material and relevant" has served parties well.

In subparagraph (a)(3), the rule would require the prosecution in a criminal case to serve the order for production on the keeper of the records, and to serve as the courier by delivering the sealed records to the court. This office does not endorse having prosecutors serve this function because of the additional time demands and the exposure to claims of improper handling of sealed records. Rather, we suggest an amendment to the rule requiring that court orders be issued directly to the keeper, and that records be sent directly to the court without the involvement of either party.

If the court orders the production of the records for *in camera* review, the proposed rule would require the court to "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." "Essential and reasonably necessary" is the familiar standard from *State v. Gagne*,136 N.H. at 104. We therefore favor retaining this standard.

Finally, we also favor subparagraph (b)(4), which requires that admissibility be governed by the Rules of Evidence if the court discloses any records to the parties under the "essential and reasonably necessary" standard. However, we suggest that any hearing on the admissibility of the evidence be conducted outside the presence of anyone but the parties, in order to protect and maintain the confidentiality of any information that the trial court ultimately deems to be inadmissible.

The office favors the rule set out in appendix G(2) as it is. That rule seems to codify current practice in the New Hampshire Supreme Court, but simply dispenses with the need for a motion from one of the parties.

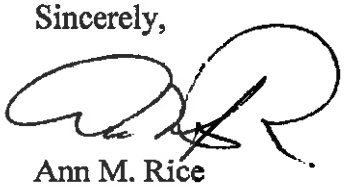
The office does not favor the rules set out in appendixes H(1) and H(2), because they deviate from established New Hampshire Supreme Court case law, setting out different standards depending on the party requesting the records. In H(2), subparagraph (a)(2)(A), information would be disclosed at the State's request if the court determined it was "reasonably necessary." Information is "reasonably necessary if it would: (1) constitute compelling evidence supporting the [party's] position in the litigation; and (2) is not reasonably available from other non-privileged sources." However, the manner in which the proposed rule is written suggests that in subparagraph (b)(2)(A), the court would apply a less stringent standard when conducting an *in camera* review at the defendant's request—whether the records contain any "exculpatory information."

In criminal cases, the records requested by defendants are often the medical or counseling records of their victims. The confidentiality of these records is essential to the treatment and recovery of many victims, especially victims of sexual assault and domestic violence. By seeming to lower the threshold for disclosure of such records to a defendant, records that would not have met the "reasonably necessary" standard will be turned over, thereby compromising the privacy rights of victims in cases where no information from the records will ultimately be admitted at trial. Because the privacy of victims' medical and counseling records should be protected to the greatest extent that is consistent with a defendant's right to due process, this office does not favor the scheme laid out in H(2).

There are also other concerns with H(2). The rule provides for an *in camera* hearing on admissibility, but only under subparagraph (b)(3), which concerns a request for the records by the defendant, but not by the prosecution. Furthermore, the provision providing for protective orders is in subparagraph (a)(3), which concerns requests by the prosecution, but not by the defendant. Regardless of which party is making the request, it pertains to confidential information that is otherwise protected. Procedures to protect that confidentiality should be made available to both parties.

Finally, we assume that these rules do not apply to subpoenas and search warrants during the investigative phase of a case, as described in *In re Grand Jury Subpoena for Med. Records of Payne*, 150 N.H. 436 (2004). Also, the rules apply to "privileged and confidential records." By their plain language, therefore, they could also apply to records held by attorneys. We would suggest that the committee make it explicit if the rules are not meant to apply so as to pierce attorney-client confidentiality.

Sincerely,



Ann M. Rice
Deputy Attorney General