



#2016-014

December 8, 2017

Eileen Fox
Clerk of Court
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH, 03301

RE: Proposed Rules for Review and Evaluation for Admissibility of Information in Confidential Records

The New Hampshire Coalition Against Domestic and Sexual Violence recommends adoption of a rule codifying the existing procedure for requesting and releasing confidential information, provided that the rule does not lower the standard for access to confidential records in civil or criminal cases, and that the rule provide for an in camera review, rather than review by counsel. We write today to emphasize the significant impact on crime victims when their private information is disclosed in a public court proceeding and to the person who harmed them.

Adopting a single, rules-based standard both for parties to request that a court review confidential records and for a court to release the documents insures that crime victims' privacy rights are balanced with the due process rights of the defendant, and provides a roadmap to victims to understand what may happen with the confidential information they have shared in a protected setting such as a doctor or therapist's office.

Victims of crime, especially victims of domestic and sexual violence, experience an extreme loss of control during an assault. A rape victim has lost the ability to control one of the most fundamental parts of being alive – her own body. The ability to seek medical care, mental health care and advocacy in a safe, protected setting is key to many victims returning to a sense of normalcy, regaining their health, and moving forward as a productive member of our community.

Therefore, the protections provided to a victim who goes to a hospital, to a therapist or to a crisis center should not be removed absent a careful analysis and weighing of interests by the court. Having a process that weeds out information that is not "material" or "relevant" to a case is necessary to insure that a defendant does not simply seek to gather irrelevant and sensitive information about a victim to harass the victim.

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Crime victims in New Hampshire currently are guaranteed the “right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process” in NH’s Rights of Crime Victims statute. NH RSA 21-M:8-k II (a). Similarly, victims whose families have been torn apart by domestic violence rely on the confidential relationship they have with their attorney or their advocate as they navigate issues of custody, visitation and safe housing in a civil case. For victims of interpersonal violence, whose lives and bodies have been violated in the most invasive ways, these rights are paramount to healing and seeking justice. A rape victim who seeks counseling or advocacy services does so dependent on the promise that her conversations will stay within the walls of that private room. A rape victim had no choice in being raped. When her privacy is violated and those most confidential communications are released, this feels like a second violation, a second rape.

Accused rapists and batterers frequently use information about victims to threaten, demean or berate victims. Such behavior is a common tactic of offenders, and it does not stop once a court case starts. In fact, such information is frequently used by defendants to dissuade victims from engaging in a legal proceeding at all. Victims of sexual assault and domestic violence are particularly frequent targets for such harassment. The fact that this information is often sought in an effort to silence these specific victims is confirmed by the fact that victims of other crimes, such as a hit and run accident or robbery, are much less frequently asked for their private counseling records. If information that a victim shared in confidence is going to be released to someone who has already violated that victim, it must be done only after specific showings and a careful weighing by the court, if at all. We oppose any proposal that would utilize review by counsel of confidential records. Such a process would cause significant additional harm to victims.

Unfortunately, information about victims has long been used by defendants and courts to question the credibility of victims or to minimize the harm caused by rape or battering. For example, suggestions are sometimes made that a victim who reports a second rape is not telling the truth, when in fact a prior assault is a leading risk factor for being raped again. Mental health and medical records will contain information about a victim beyond that related to the crime. In fact, much of what rape victims talk about in therapy is *not* about the facts of the crime, and instead is about the challenges of piecing their lives back together after an assault, about how to sleep through the night, to parent without fear, to return to public spaces, to live a routine life. Specific statutes protect the victim’s interactions in each of these settings, and every day victims in New Hampshire – and we served over 15,000 of them last year alone – tell us that having a safe, private place to heal is integral to their sense of safety and well-being.

Adopting a specific standard both for a party to request and for a court to review confidential documents is important for another reason for victims. It allows victims to make informed decisions about their care, and to know what may happen with the records of that care. Victims frequently ask advocates whether their confidential records are discoverable in a court case.

When we tell victims that they are, some victims chose to forego the only critical help that is available to them, to avoid public disclosure of private issues in their lives. This heartbreaking choice only magnifies the injuries they have suffered. By codifying a standard for accessing victim records, advocates, therapists and physicians will have a roadmap to explain to victims what might happen with their records. Some states have gone the route of completely removing an *in camera* review provision, leaving the full decision making about private records in the hands of domestic violence and sexual assault victims. We urge this committee to adopt a rule that helps crime victims, and all New Hampshire residents, retain as much of the privacy already guaranteed to them under the law as possible.

Thank you for your consideration.

Best,

A handwritten signature in black ink, appearing to read "Lyn M. Schollett". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lyn M. Schollett
Executive Director