

#2017-009



AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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VIA EMAIL (rulescomment@courts.state.nh.us)

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

Re: 2017-009. Proposed Supreme Court Rule Addressing Identification of Crime Victims

Dear Chief Justice Lynn and the members of the Advisory Committee on Rules:

I write on behalf of the ACLU of New Hampshire concerning item 2017-009, which is a proposed New Hampshire Supreme Court rule addressing the identification of crime victims. This rule, as written, conflicts with the principle in Part I, Article 8 of the New Hampshire Constitution that the public's right to access official proceedings is necessary to ensure that the government and the courts are accountable.

Under this proposed rule, which is in Appendix B, "[n]o party shall disclose a crime victim's name, address, place of employment or other personal information in any petition, motion, brief, memorandum, or other pleading unless filed under seal or authorized by the Court for good cause." This proposed rule's applicability is generally limited to felony cases heard on appeal. This rule contradicts Article 8's presumption in favor of transparency by assuming that, in *all* felony cases, the victim has a privacy interest that is compelling enough to overcome the public's right to know.

Under Part I, Article 8 of the New Hampshire Constitution, the government "should be open, accessible, accountable and responsive," and therefore "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." In interpreting Article 8, the New Hampshire Supreme Court has stated the following:

We hold that under the constitutional and decisional law of this State, there is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records.

See Petition of Keene Sentinel, 136 N.H. 121, 128 (1992); *see also In re N.B.*, 169 N.H. 265, 270-71 (2016) ("[W]e have held that when public access to sealed court documents is sought, 'Part I, Articles 8 and 22 of the State Constitution require: (1) that the party opposing disclosure of the document demonstrate that there is a sufficiently compelling reason that would justify preventing public access to that document; and (2) that the court determine that no reasonable alternative to nondisclosure exists and use the least restrictive means available to accomplish the purposes sought to be achieved.'" (quoting *Associated Press v. State of N.H.*, 153 N.H. 120, 130 (2005))). This principle is also memorialized in New Hampshire Supreme Court Rule 12(2), which states that, for information to be sealed, the Court must determine that there is a "statute, administrative or court rule, or other compelling interest that requires that the case record or portion of the case record be kept confidential." *See* N.H. Sup. Ct. R. 12(2).

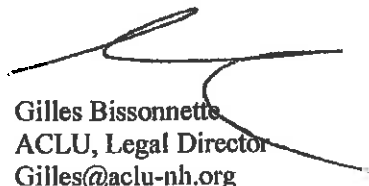
Article 8's language was included upon the recommendation of the Bill of Rights Committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire then (and now) already had a statute addressing the public's right to access information—Chapter 91-A—the committee argued that the right was “extremely important and ought to be guaranteed by a constitutional provision.” Lawrence Friedman, *The New Hampshire State Constitution* 53 (2d ed. 2015). Article 8 must be read in conjunction with the preceding Article 7, which states, in part, that “‘The people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state.’ These sections express the American theory of government that ‘the state being sovereign, the people being the state, and all magistrates and public officers being their substitutes and agents’ they are accountable to the people.” *Opinion of the Justices*, 111 N.H. 175, 177 (1971) (quoting *Attorney General v. Taggart*, 66 N.H. 362, 369 (1890)). Thus, the right to access official proceedings grows out of the need for government accountability. *Associated Press*, 153 N.H. at 124-25; *State v. DeCato*, 156 N.H. 570, 574-75 (2007). It is therefore unsurprising that the right of public access predates both the New Hampshire and United States Constitutions. See *Associated Press*, 153 N.H. at 125. Under Article 8, the public should have the greatest possible access to the actions of all public bodies. Put another way, there is a presumption in favor of disclosure to the public.

The proposed rule is too broad, is not the least restrictive means to addressing privacy concerns, and does not conform to the Part I, Article 8 principles in *Petition of Keene Sentinel*. Under the proposed rule, a litigant must omit victims' names in pleadings in any felony case before the Supreme Court regardless of whether that case creates a “compelling interest” in privacy. Put another way, under the proposed rule, no showing is required that, based on the unique circumstances of that case, there is a “compelling interest” for protecting the victim's privacy, and overriding the public's right to know. However, such a showing is required for information to be removed from public access under Article 8 and *Petition of Keene Sentinel*. It is overbroad for the proposed rule to assume that, in all felony cases (including financial and white-collar crimes), the victim has a privacy interest that is compelling enough to overcome the public's right to know.

Of course, in some unique cases there may be a compelling privacy interest held by the victim that outweighs the public's right of access to the victim's identity. In those cases, the State or the victim may file a request explaining why that case's facts create a compelling privacy interest. In many cases, it may be prudent for the State or the victim to make such a request at the Superior Court level at or after sentencing, as the Superior Court is better positioned to make findings given its familiarity with the case. Additionally, it enables trial counsel, which is often much better informed than appellate counsel, to handle the request, and better ensures the presence and participation of defense counsel.

Thank you for your time and consideration.

Very truly yours,



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