

### 3MEMORANDUM

To: Advisory Committee on Rules  
From: Subcommittee of the N.H. Supreme Court Advisory Committee on Rules  
Re: # 2017-018. Supreme Court Rule 37. Attorney Discipline System. Access to Confidential Records.  
Date: November 19, 2018

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At the September meeting, the Committee created a subcommittee to draft a proposal to amend Supreme Court Rule 37 to set out a procedure outlining when, and in what manner, the Attorney Discipline Office may access confidential court files. The subcommittee was charged with addressing the concerns raised by the Administrative Council and outlined in a November 22, 2017 letter from attorney Mary Ann Dempsey. Those concerns include:

- whether the rule should be amended to make clear that in order to access confidential court records, the attorney discipline office (“ADO”) must first file a motion with the court and establish good cause; and
- whether there should be a rule governing how confidential records are to be treated once they are turned over to the ADO.<sup>1</sup>

At the September meeting, Attorney Sara Greene, disciplinary counsel at the ADO, volunteered to serve on a subcommittee to propose amendments to Supreme Court Rule 37 to address the concerns raised in the November 22 letter. Committee member Abigail Albee volunteered to work with attorney Greene and Carolyn Kogler on this project. The Committee also suggested that the subcommittee reach out to members of the bar who practice before the Professional Conduct Committee, to inquire whether they would like to serve on the subcommittee.

Attorneys Russell Hilliard and William Saturley, both of whom have represented clients appearing before the Professional Conduct Committee, agreed to serve on the subcommittee. The subcommittee met on October 17 to consider a draft rule attorney Greene had proposed to address the issues raised in the November 2017 letter. Attorney Greene made changes to the draft to implement decisions made at the meeting and recirculated the draft to the group. Members of the group offered comments, and changes were made based upon those comments. The subcommittee also sought and received comment on the draft from attorney David Rothstein, Chair of the Professional Conduct Committee. The draft of a proposed rule amendment (attached to this draft at appendix A) reflects careful consideration by the members of the subcommittee of a number of different issues. Please note, in particular:

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<sup>1</sup> The Administrative Council’s concern seems to be that records held by the ADO are at some point in the process subject to public inspection, and Rule 37 does not exempt from public inspection any records except work product, internal memoranda and deliberations.

- The proposal is to amend existing Rule 37(8). No proposal is being made to amend Rule 37A.
- The proposal includes, as subsection (1) a “General Rule” provision regarding access to Court records that are not confidential. This provision is included for several reasons: (a) so that the rule structure is similar to the rule the Advisory Committee on Rules recently recommended to the Court and which the Court has adopted in civil and criminal cases in Superior Court, effective January 1, 2019; (b) to codify (with slight modification) the language in the Superior Court’s 9/22/06 memo stating that the ADO should be given “immediate and complete access to the records”; and (c) to provide some context for the rule that follows in subsection (2).
- Subsection (2) of the proposal:
  - Requires the ADO to file a written request to gain access to confidential documents and information, and requires the ADO to explain how the records are relevant in a pending disciplinary action;
  - Makes clear that the ADO need not file a motion to intervene;
  - Allows parties in the underlying action ten days to object to disclosure;
  - States that if there is no objection filed within ten days of the filing of the written request, as long as the production of records does not contravene any statutes governing the production of confidential materials (this was added in response to a concern raised by attorney David Rothstein), the court shall disclose the materials;
  - States that if there is an objection, the court shall schedule a non-public hearing during which the ADO must demonstrate good cause for access;
  - Makes clear that confidential documents and information obtained by the ADO pursuant to the rule shall not be part of the public file;
  - Makes clear that if the confidential documents and information obtained by the ADO are used during a disciplinary hearing or other proceeding, the relevant portion of the proceeding shall be closed to the public. This language was added in a response to a concern raised by attorney David Rothstein.

Amend Supreme Court Rule 37(8) as follows (new material is in **brackets**)

(8) *Discovery and Subpoena Power.*

(a) At any stage prior to the filing of a notice of charges, attorneys from the attorney discipline office may issue subpoenas and subpoenas duces tecum to summon witnesses with or without documents.

(b) At any stage after the filing of a notice of charges, attorneys from the attorney discipline office, counsel for respondent attorneys and respondent attorneys representing themselves may issue subpoenas and subpoenas duces tecum to summon witnesses with or without documents, and may conduct additional discovery, including, but not limited to, interrogatories and depositions. Notice of the issuance of any such subpoena shall be served on the opposing party.

**[(c) Access to Court Records**

**(1) General Rule. At any stage, attorneys from the attorney discipline office may submit a written request seeking access to records relevant to its investigation into a pending disciplinary matter to a clerk of court. If the records requested by the attorney discipline office do not include any confidential documents or confidential information, the clerk shall provide prompt and complete access to the records, and if requested, copies of the relevant documents. If the records requested by the attorney discipline office include any confidential documents or confidential information, the attorney discipline office shall follow the procedures set forth in section (2).**

**(2) Access to Confidential Documents and Confidential Information.**

**(A) If the attorney discipline office seeks access to confidential or sealed records, the attorney discipline office shall:**

**(i) file a written request to gain access to the records explaining how the records are relevant in a pending disciplinary action;**

**(ii) file a motion to seal along with the written request;**

**(iii) serve the written request and motion to seal, via first class mail, upon all parties in the underlying court action.**

**(B) No motion to intervene by the attorney discipline office shall be necessary for the purposes of this section.**

**(C) The parties in the underlying court action shall have 10 days to file a written objection to the disclosure of the requested materials.**

**(D) If none of the parties in the underlying court action object to the disclosure of the requested materials within 10 days of the filing of the written request and if the production of records pursuant to this rule does not contravene any statutes governing the production of confidential materials, the court shall disclose the materials to the attorney discipline office.**

**(E) If one or more parties in the underlying court action object to the disclosure of the requested materials, the court shall promptly schedule a non-public**

hearing, at which the attorney discipline office must demonstrate good cause for access to the records.

**(F) Any and all confidential documents and confidential information obtained by the attorney discipline office pursuant to this rule shall be available to the respondent in a disciplinary matter, to the adjudicatory bodies of the attorney discipline system, and to the attorney discipline office's and respondent's potential or actual witnesses, including those witnesses designated as experts, as part of formal and informal disciplinary proceedings. To the extent confidential documents or confidential information obtained pursuant to this rule are utilized during a disciplinary hearing or other proceeding, such hearing or proceeding shall be closed to the public during any disclosure of, testimony or discussion involving the confidential document or confidential information. Such confidential records shall otherwise remain sealed and shall not, absent further court order, become part of the public file maintained by the attorney discipline office.]**