

#2017-018

The State of New Hampshire
ADMINISTRATIVE OFFICE OF THE COURTS

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November 22, 2017

Associate Justice Robert J. Lynn
State of New Hampshire Supreme Court
Advisory Committee on Rules
One Charles Doe Drive
Concord, NH 03301

Re: New Hampshire Supreme Court Rule 37. Attorney Discipline System.

Dear Justice Lynn:

On behalf of the New Hampshire Judicial Branch's Administrative Council, I respectfully submit an issue regarding New Hampshire Supreme Court Rule 37 to the Advisory Committee on Rules for consideration.

As part of the New Hampshire Supreme Court's oversight of attorneys and the practice of law in New Hampshire, Supreme Court Rule 37 established the Attorney Discipline Office, including Disciplinary Counsel, to review, investigate, and prosecute complaints of professional misconduct. The Rule specifically authorizes attorneys from the Attorney Discipline Office to issue subpoenas and provides for the right to conduct discovery such as interrogatories and depositions. The Rule is silent as to the Attorney Discipline Office's right to have access to confidential court records.

The New Hampshire Judicial Branch is cognizant of the vital role that the Attorney Discipline Office serves in reviewing complaints, protecting citizens from attorney misconduct, and maintaining confidence in our judicial system as a whole. In 2006, the administrative judges from both the Superior Court and the Probate Court issued memos to the clerks of their respective courts to ensure that attorneys of the Attorney Discipline Office received prompt access to court records and/or recordings. *See attached* Memos from Chief Justice Lynn and Judge Maher. Both memos reference having "complete access" to files; however, it is the Administrative Council's belief that this reference was not intended to refer to confidential records as such authority could not be provided in this manner.

Recently, in the course of investigating a complaint, the Attorney Discipline Office sought access to documents in a guardianship case. The records in the matter were confidential pursuant to RSA 464-A:8, VI. The Clerk provided Disciplinary Counsel with a case summary of pleadings in the case. Disciplinary Counsel then requested 22 documents from the file. The Court required the Attorney Disciplinary Office to file a motion setting forth the grounds for the request. By Order, the Court allowed access to the majority of records requested, however, it denied access to five requested documents relating to the ward's psychiatric and medical information. The Court concluded that Disciplinary Counsel had not demonstrated how those documents related to its investigation into financial irregularities on the part of the attorney for the ward.

The Administrative Council respectfully believes that Rule 37, as presently drafted, does not allow the Attorney Discipline Office to have access to confidential court records without filing a motion with the Court and establishing good cause. In such instances, the Court has to assess the need for the records and the appropriate manner to maintain the confidentiality of the records. As the Rule presently exists, if the Attorney Discipline Office were provided access without a Court Order, the documents would become subject to public inspection upon dismissal of the complaint or when notice of charges are brought unless someone specifically requested a Court Order to seal before those events occurred. The only documents presently exempt from public inspection under Rule 37 are work product, internal memoranda, and deliberations.

Prior to the submission of this letter, the Administrative Council provided Attorney Janet DeVito from the Attorney Discipline Office with a copy for input. She informed us that, although Rule 37 does not discuss records being confidential, in 2012, the Professional Conduct Committee issued a standing order which is attached. This order provides that general counsel and/or disciplinary counsel can redact certain materials after providing notice to the complainant and responding attorney.

The Administrative Council requests that the Advisory Committee on Rules review New Hampshire Supreme Court Rule 37 and whether a procedure should be specifically outlined within it for when, and in what manner, the Attorney Discipline Office may access confidential court files as well as the confidential manner in which such records are to be maintained throughout the entire process. The Administrative Council believes that the Committee must balance the Attorney Discipline Office's access to relevant investigatory materials within a confidential court file with the Legislature's intent to protect personal individual information within court records.

The Administrative Council respectfully requests that, as part of its review of this issue, the Rules Committee assess whether the Professional Conduct Committee's standing order is the proper manner to allow for redactions. It is important to note that the Order, if able to provide such authority, does not mandate redaction but rather permits it. The Order further provides that the list of items allowed to be redacted is not inclusive of all information that can be redacted without specifying what limits, if any, exist.

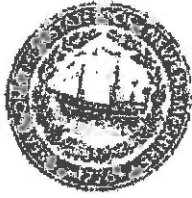
Finally, the Administrative Council believes that the Committee's review of Rule 37 and the possible establishment of a defined procedure for confidential records within the Rule can provide meaningful guidance to both the Judicial Branch as well as the Attorney Discipline Office. Please let me know if you require any additional information to address this matter.

Sincerely,



Mary Ann Dempsey

Cc: Chief Justice Linda S. Dalianis
Chief Justice Tina L. Nadeau
Administrative Judge Edwin W. Kelly
Deputy Administrative Judge David D. King
Director Chris Keating
Janet Devito, General Counsel



State of New Hampshire Probate Court

Honorable John R. Maher
Administrative Justice
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September 21, 2006

TO: ALL PROBATE COURT JUDGES & REGISTERS

FR: JUDGE MAHER

RE: Providing Access to workspace

COPY

On occasion, Attorney Tony McManus, Executive Secretary of the Judicial Conduct Committee and Attorney James L. DeHart, general counsel for the Professional Conduct Committee, have the need to visit various courthouses in order to review files or recordings. When, in the course of their investigations, they or any other representative of JCC or PCC, ask to review files or listen to recordings, they should be given immediate and complete access. Additionally, they may need private workspace located in a nonpublic area of the court. Please extend every courtesy to these folks if they have a need to review files in your court. Thank you.

C: Marty Wagner, Probate Administrative Coordinator
Janelle Laylagian, Staff Attorney



Robert J. Lynn
Chief Justice

The State of New Hampshire
Superior Court

MEMORANDUM

Superior Court Center
17 Chenell Drive, Suite 1
Concord, N.H. 03301
Tel. (603) 271-2030

R.J.L.
TO: Superior Court Clerks
FROM: Chief Justice Lynn
DATE: September 22, 2006
RE: Making Files Available to the Judicial Conduct Committee and
the Attorney Discipline Office

From time to time, Attorney Anthony McManus, the Executive Director of the Judicial Conduct Committee or representatives of the Attorney Disciplinary Office may have occasion to visit various courthouses in order to review files or recordings of court proceedings. When, in the course of their investigations, officials from the JCC or the Attorney Discipline Office ask to review files or ask to listen to recordings, they should be given immediate and complete access to such materials. Additionally, insofar as possible, they should be given access to a work space in the nonpublic area of the court, i.e. clerk's office, empty chambers, etc., to review said materials.

If you have any questions concerning this matter, please do not hesitate to give me a call.

Thank you for your cooperation.

R.J.L.

ha

Pc: Superior Court Justices
Anthony McManus, Esq.
James DeHart, Esq.

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

Margaret H. Nelson, Chair
Benette Pizzimenti, Vice Chair
Toni M. Gray, * Vice Chair
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Holly B. Fazzino, Administrator

STANDING ORDER CONCERNING FILE REDACTION

On May 15, 2012, the Professional Conduct Committee voted in favor of the following policy:

In lieu of requiring General Counsel and/or Disciplinary Counsel to file requests for protective orders, pursuant to New Hampshire Supreme Court Rule 37(21)(c), in all cases where the files that are about to become public contain "...confidential, malicious, personal, privileged information or materials submitted in bad faith," the Professional Conduct Committee hereby delegates to General Counsel and/or Disciplinary Counsel the authority to redact such information from files before they become public, provided that the following steps are taken:

a. General Counsel and/or Disciplinary Counsel will provide both the complainant and the responding attorney(s) with notice of their intended redaction of materials in the file to be made public. Materials and information to be redacted may include (but is not necessarily limited to) the following:


- records pertaining to delinquency and abuse and neglect proceedings
- financial affidavits in divorce proceedings
- pre-sentence investigation reports
- reports of guardians ad litem
- records pertaining to termination of parental rights proceedings
- records pertaining to adoption proceedings
- records pertaining to guardianship proceedings
- records pertaining to mental health proceedings

- records sealed by the court
- social security numbers
- dates of birth
- juror questionnaires
- driver's license numbers
- financial account numbers
- medical records

b. Copies of the proposed redacted materials will be provided to, or made available to at the Attorney Discipline Office, both the complainant and the responding attorney(s), with a notice that unless a written objection is filed within ten days of the date of that notice, the file will be made public with the intended redactions.

c. In the event that an objection to the intended redaction is filed, the intended redaction will be treated by the Professional Conduct Committee as a request for a protective order pursuant to New Hampshire Supreme Court Rule 37(21)(c) and the provisions of that rule will govern further proceedings concerning the material in question.

May 22, 2012


Margaret H. Nelson
Chair

Distribution:

Thomas V. Trevethick, Acting General Counsel
Janet F. DeVito, Assistant General Counsel
Julie A. Introcaso, Disciplinary Counsel
James L. Kruse, Assistant General Counsel
All Legal Assistants
File