MEMORANDUM

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: February 1, 2019

At the December meeting, the Committee considered a November 19, 2018 memo from this subcommittee proposing 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 had been 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.[1]

At the December meeting, Committee members Judge William Delker and attorney Pat Ryan expressed concerns about the proposal.

Judge Delker's concern related to subsection 2(F) of the proposed rule. He noted that that provision states that the confidential records are to be made available to a very long list of people, including "respondents or actual witnesses" which is a concern. Judge Delker suggested that it might make sense to consider placing some limitations on the point in the proceedings when the materials are disclosed (*e.g.*, perhaps only after the filing of a notice of charges?) and/or having the court remain involved after providing the ADO with access to the records so that it controls, to some degree, to whom the records are made available and/or whether a protective order should be issued at the time the records are made available.

Committee member Pat Ryan's concerns relate to how this rule would apply in the Circuit Court, particularly with respect to three types of juvenile cases: Delinquency, Abuse/Neglect and Children in Need of Services. In a follow-up email on the subject, attorney Ryan pointed to three statutory provisions relating to the confidentiality of juvenile records: RSA 169-B:35, RSA 169-C:25, and RSA 169-D:25. Attorney Ryan notes that while the statutes allow access to the records, the access is permitted only pursuant to a court order. He also notes that the Circuit Court takes the confidentiality of these records very seriously and will not even disclose the

[1] 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.

existence of a juvenile case to a non-party. Attorney Ryan's specific concerns are as follows:

1. Section (2)(iii) of the proposal calls for the ADO to serve its written request for records as well as its motion to seal by first class mail to all of the parties in the underlying court action. The ADO may not have the information surrounding the parties to the case and the court is unlikely to provide it for fear of violating the confidentiality provision in place for the case type involved. A suggested workaround for this is to have the court send the notices to the parties. Attorney Ryan does not envision this occurring that frequently based upon his own limited experience. This could however start the process and not place the court in the position of providing information which it may not be statutorily permitted to provide to the ADO.

2. Section (2)(D) says that if none of the parties object within 10 days and if disclosure does not contravene any statutes governing production of confidential materials, the court shall disclose the materials to the ADO. In many cases, Circuit Court litigants are self-represented (and that's not just in juvenile matters). In addition, even in some of those cases, counsel may have left the case by the time a request of this nature comes in. Of course, counsel may be the subject of the ADO's inquiry as well. Attorney Ryan is concerned that the failure to object, particularly by a self-represented party, could result in a mandate of disclosure. He recognizes that there is the provision in the proposal that references statutory prohibitions. While that alleviates the concern somewhat, it does not do so entirely. In addition, in juvenile cases where counsel for the juvenile may have withdrawn or where the juvenile did not have counsel (which is probably less often) the Court may feel a need to appoint a guardian ad litem for the juvenile to review the request and possibly object. That could take longer than the 10 days. Attorney Ryan suggests that a possible solution to this problem would be to remove the mandate of the rule by replacing "shall" with "may." Attorney Ryan also suggested that a provision be added to (2)(E) which calls for a hearing to be set in the event none of the parties objects but the Court is not inclined to release.

3. Attorney Ryan believes that the Court ought to be able to issue its own protective order as well. These are the records of the trial court and it is ultimately responsible for them.

4. Finally, attorney Ryan echoed Judge Delker's concern and notes that section (2)(F) sets forth a pretty long list of people to whom these otherwise confidential records become available. While the proposed rule does make clear that the hearing would be closed if the confidential information were to be mentioned, and the records would not be public, it is concerning that the list of people who will have access to the information is long.

The revisions to the original proposal, shown in **red** in the attached Appendix A, seek to address the concerns raised by Judge Delker and attorney Ryan.

APPENDIX A

Amend Supreme Court Rule 37(8) as follows (new material is in **[bold and 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 need not file a motion to intervene, but shall:

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

(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.**~~

(B) The court shall promptly provide to all of the parties in the underlying court action notice and copies of the written request and motion to seal.

(C) The parties in the underlying court action shall have 10 days from the date of the notice 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~~ may disclose the materials to the attorney discipline office. If none of the parties object

but the court nevertheless is disinclined to release the records to the attorney discipline office, the court shall hold a non-public hearing, at which the attorney discipline office must demonstrate good cause for access to the records.

(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) *Protective Orders.* Whenever the court discloses records pursuant to this rule, the court shall issue a protective order governing the disclosure and use of the records. The protective order shall provide that:

(i) the attorney discipline office shall not disclose such records to any person except as necessary in connection with the prosecution or defense of the disciplinary matter;

(ii) any person to whom disclosure is made shall acknowledge in writing prior to the disclosure that he or she has been made aware of and agrees to comply with the protective order;

(iii) at the conclusion of the disciplinary proceeding, each party shall return to the attorney discipline office that party's copy of the records, whereupon the attorney discipline office shall destroy said records; and

(iv) thereafter, the attorney discipline office shall submit an affidavit to the court stating that said records have been destroyed.

The Court may modify the foregoing terms of a protective order, or impose such additional terms as may be necessary in a particular case.

~~(F)~~ [(G)] Any and all confidential documents and confidential information obtained by the attorney discipline office pursuant to this rule shall be subject to a protective order, as set forth in section (F) of this rule, and 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.]