

## MEMORANDUM

To: Advisory Committee on Rules  
From: Carolyn Koegler  
Re: # 2018-010. New Hampshire Rules of Criminal Procedure.  
Confidential Documents and Confidential Information  
Date: November 26, 2018

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As you may recall, a subcommittee chaired by Judge Delker had recommended a set of proposed rules regarding the filing of confidential documents and documents containing confidential information. A May 9, 2017 memo from Judge Delker stated, "the same set of rules should be incorporated in the superior court rules of civil and criminal procedure. . . . and the rules applicable to all case types in Circuit Court that are not governed by electronic filing." However, Committee discussions about the proposal seemed to focus on Superior Court filings and the August 1, 2018 report to the Court included a proposal to amend only the Superior Court Civil Rules.

When the Court requested comment on the proposals made in the August 1, 2018 report, it requested comment only on the proposal to amend the Superior Court Civil Rules to adopt the rules relating to the filing of confidential documents and documents containing confidential information.

On November 5, the Court amended the Superior Court Civil Rules, effective January 1, 2019. The Court also amended the New Hampshire Rules of Criminal Procedure and adopted the rules relating to the filing of confidential documents and documents containing confidential information for criminal cases filed in Superior Court, on a temporary basis. As you can see from the order (attached), these amendments are also effective January 1, 2019, but have been referred back to this Committee for its recommendation as to whether they should be adopted on a permanent basis.

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT OF NEW HAMPSHIRE

ORDER

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51, the Supreme Court of New Hampshire adopts the following amendments to court rules.

**I. Supreme Court Rule 41. Limited Liability Entities.**

*(This amendment deletes Supreme Court Rule 41.)*

1. Delete Supreme Court Rule 41, as set forth in Appendix A.

**II. Superior Court (Civ.) Rules. Confidential Documents and Confidential Information.**

*(This amendment delineates the procedure for the filing of documents which are confidential in their entirety or contain confidential information, and for seeking access to documents or information that have been determined to be confidential.)*

1. Adopt Superior Court (Civ.) Rule 13B, Confidential Documents and Confidential Information, as set forth in Appendix B.
2. Delete Superior Court (Civ.) Rule 203, Access to Confidential Records – Fees and Notice, as set forth in Appendix C.

**III. Superior Court (Civ.) Rule 36. Standing Trial Orders – Procedures.**

*(This amendment establishes when a party is required to notify the opposing party that he or she intends to subpoena the opposing party's lawyer as a witness.)*

1. Amend Superior Court (Civ.) Rule 36, as set forth in Appendix D.

**IV. Superior Court (Civ.) Rule 55. Appeal from Municipal Actions.**

*(This amendment adopts a rule that requires a party who submits, in an appeal to the superior court from the action of a state or municipal government body, an audio or video recording of the proceedings below, to provide the court with a transcript of the relevant portion of the proceedings.)*

1. Adopt Superior Court (Civ.) Rule 55, Appeal from Municipal Actions, as set forth in Appendix E.

**V. New Hampshire Rule of Criminal Procedure 50. Confidential Documents and Confidential Information.**

*(This amendment, applicable to criminal cases filed in Superior Court, delineates the procedure for the filing of documents which are confidential in their entirety or contain confidential information, and for seeking access to documents or information that have been determined to be confidential.)*

1. Amend New Hampshire Rule of Criminal Procedure 50, as set forth in Appendix F.

**VI. New Hampshire Rule of Evidence 404(b). Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.**

*(This amendment codifies the three-part test adopted by this Court for admitting evidence under Rule 404(b), but changes the second prong of the test to define what the "clear proof" prong means.)*

1. Amend New Hampshire Rule of Evidence 404(b), as set forth in Appendix G.

**VII. Technical Amendments. New Hampshire Rules of Criminal Procedure 8(d) and 10(c).**

*(These amendments adopt on a permanent basis amendments made by the Court on a temporary basis to New Hampshire Rules of Criminal Procedure 8(d) and 10(c) and also make additional technical amendments to Rule of Criminal Procedure 8(d) to make clear that a case need not be dismissed and a bail order vacated in situations in which an indictment has not been returned within ninety days, where the State has chosen to proceed only on misdemeanors.)*

1. Amend New Hampshire Rule of Criminal Procedure 8(d), as set forth in Appendix H.

2. Amend New Hampshire Rule of Criminal Procedure 10(c), as set forth in Appendix I.

**Effective Date**

The amendments shall take effect on January 1, 2019. The amendment set forth in Appendix F shall be adopted on a temporary basis and shall be referred to the Advisory Committee on Rules for its recommendation as to whether it should be adopted on a permanent basis.

Date: November 5, 2018

ATTEST:



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Eileen Fox, Clerk  
Supreme Court of New Hampshire

## APPENDIX F

Amend New Hampshire Rule of Criminal Procedure 50, on a temporary basis, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

### **Rule 50. ~~Access to Confidential Records—Fees and Notice~~ [Confidential Documents and Confidential Information].**

#### **[(a) Circuit Court – District Division. Access to Confidential Records – Fees and Notice.]**

Any person or entity not otherwise entitled to access may file a motion or petition to gain access to: (1) a financial affidavit kept confidential under RSA 458:15-b, I; or (2) any other sealed or confidential court record. *See Petition of Keene Sentinel*, 136 N.H. 121 (1992).

**Filing Fee:** There shall be no filing fee for such a motion or petition.

**Notice:** In open cases, the person filing such a motion shall provide the parties to the proceeding with notice of the motion by first class mail to the last mail addresses on file with the clerk.

#### **[(b) Superior Court.]**

##### **(1) Access to Documents.**

**(A) General Rule.** Except as otherwise provided by statute or court rule, all pleadings, attachment to pleadings, exhibits submitted at hearings or trials, and other docket entries (hereinafter referred to collectively as “documents”) shall be available for public inspection. This rule shall not apply to confidential or privileged documents submitted to the court for *in camera* review as required by court rule, statute or case law.

**(B) Burden of Proof.** The burden of proving that a document or a portion of a document should be confidential rests with the party or person seeking confidentiality.

**(C)** The following provisions govern a party’s obligations when electronically filing a “confidential document” or documents containing “confidential information” as defined in this rule.

##### **(2) Filing a Document Which Is Confidential In Its Entirety.**

**(A) The following provisions govern a party's obligations when filing a "confidential document" as defined in this rule. A "confidential document" means a document that is confidential in its entirety because it contains confidential information and there is no practicable means of filing a redacted version of the document.**

**(B) A confidential document shall not be included in a pleading if it is neither required for filing nor material to the proceeding. If the confidential document is required or is material to the proceeding, the party must file the confidential document in the manner prescribed by this rule.**

**(C) A party filing a confidential document must also file a separate motion to seal pursuant to subsection (b)(4) of this rule.**

**(D) A party filing a confidential document shall identify the document in the caption of the pleading so as not to jeopardize the confidentiality of the document but in sufficient detail to allow a party seeking access to the confidential document to file a motion to unseal pursuant to subsection (b)(5) of this rule.**

***(3) Documents Containing Confidential Information.***

**(A) The following provisions govern a party's obligations when filing a document containing "confidential information" as defined in this rule. If a document is confidential in its entirety, as defined in subsection (b)(2) of this rule, the party must follow the procedures for filing a confidential document set forth in subsection (b)(2).**

**(B) "Confidential Information" means:**

**(i) Information that is not public pursuant to state or federal statute, administrative or court rule, a prior court order placing the information under seal, or case law; or**

**(ii) Information which, if publicly disclosed, would substantially impair:**

**(a) the privacy interests of an individual; or**

**(b) the business, financial, or commercial interests of an individual or entity; or**

**(c) the right to a fair adjudication of the case; or**

**(iii) Information for which a party can establish a specific and substantial interest in maintaining confidentiality that outweighs the strong presumption in favor of public access to court records.**

**(C) The following is a non-exhaustive list of the type of information that should ordinarily be treated as "confidential information" under this rule:**

**(i) information that would compromise the confidentiality of juvenile delinquency, children in need of services, or abuse/neglect, termination of parental rights proceedings, adoption, mental health, grand jury or other court or administrative proceedings that are not open to the public; or**

**(ii) financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit card numbers or Personal Identification Numbers (PINs) of individuals including parties and non-parties; or**

**(iii) personal identifying information of any person, including but not limited to social security number, date of birth (except a defendant's date of birth in criminal cases), mother's maiden name, a driver's license number, a fingerprint number, the number of other government-issued identification documents or a health insurance identification number.**

***(D) Filing Documents Containing Confidential Information.***

**(i) When a party files a document the party shall omit or redact confidential information from the filing when the information is not required to be included for filing and is not material to the proceeding. If none of the confidential information is required or material to the proceeding, the party should file only the version of the document from which the omissions or redactions have been made. At the time the document is submitted to the court the party must clearly indicate on the document that the document has been redacted or information has been omitted pursuant to Rule 50(b)(3)(D)(i).**

**(ii) It is the responsibility of the filing party to ensure that confidential information is omitted or redacted from a document before the document is filed. It is not the responsibility of the clerk or court staff to review documents filed by a party to determine whether appropriate omissions or redactions have been made.**

**(iii) If confidential information is required for filing and/or is material to the proceeding and therefore must be included in the document, the filer shall file:**

**(a) a motion to seal as provided in section (b)(4) of this rule;**

**(b) for inclusion in the public file, the document with the confidential information redacted by blocking out the text or using some other method to clearly delineate the redactions; and**

**(d) an unredacted version of the document clearly marked as confidential.**

***(4) Motions to Seal.***

**(A) No confidential document or document containing confidential information shall be filed under seal unless accompanied by a separate motion to seal consistent with this rule. In other words, labeling a document as "confidential" or "under seal" or requesting the court to**

**seal a pleading in the prayers for relief without a separate motion to seal filed pursuant to this rule will result in the document being filed as part of the public record in the case.**

**(B) A motion to seal a confidential document or a document containing confidential information shall state the authority for the confidentiality, i.e., the statute, case law, administrative order or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. An agreement of the parties that a document is confidential or contains confidential information is not a sufficient basis alone to seal the record.**

**(C) The motion to seal shall specifically set forth the duration the party requests that the document remain under seal.**

**(D) Upon filing of the motion to seal with a confidential document or the unredacted version of a document, the confidential document or unredacted document shall be kept confidential pending a ruling on the motion.**

**(E) The motion to seal shall itself automatically be placed under seal without separate motion in order to facilitate specific arguments about why the party is seeking to maintain the confidentiality of the document or confidential information.**

**(F) The court shall review the motion to seal and any objection to the motion to seal that may have been filed and determine whether the unredacted version of the document shall be confidential. An order will be issued setting forth the court's ruling on the motion to seal. The order shall include the duration that the confidential document or document containing confidential information shall remain under seal.**

**(G) A party or person with standing may move to seal or redact confidential documents or confidential information that is contained or disclosed in the party's own filing or the filing of any other party and may request an immediate order to seal the document pending the court's ruling on the motion.**

**(H) If the court determines that the document is not confidential, any party or person with standing shall have 10 days from the date of the clerk's notice of the decision to file a motion to reconsider or a motion for interlocutory appeal to the supreme court. The document shall remain under seal pending ruling on a timely motion. The court may issue additional orders as necessary to preserve the confidentiality of a document pending a final ruling or appeal of an order to unseal.**



***(5) Procedure for Seeking Access to a Document or Information Contained in A Document that has been Determined to be Confidential***

**(A) Any person who seeks access to a document or portion of a document that has been determined to be confidential shall file a motion with the court requesting access to the document in question. There shall be no filing fee for such a motion.**

**(B) The person filing a motion to unseal shall have the burden to establish that notice of the motion to unseal was provided to all parties and other persons with standing in the case. If the person filing the motion to unseal cannot provide actual notice of the motion to all interested parties and persons, then the moving person shall demonstrate that he or she exhausted reasonable efforts to provide such notice. Failure to effect actual notice shall not alone be grounds to deny a motion to unseal where the moving party has exhausted reasonable efforts to provide notice.**

**(C) The Court shall examine the document in question together with the motion to unseal and any objections thereto to determine whether there is a basis for nondisclosure and, if necessary, hold a hearing thereon.**

**(D) An order shall be issued setting forth the court's ruling on the motion, which shall be made public. In the event that the court determines that the document or information contained in the document is confidential, the order shall include findings of fact and rulings of law that support the decision of nondisclosure.**

**(E) If the court determines that the document or information contained in the document is not confidential, the court shall not make the record public for 10 days from the date of the clerk's notice of the decision in order to give any party or person with standing aggrieved by the decision time to file a motion to reconsider or appeal to the supreme court.**

***(6) Sanctions for Disclosure of Confidential Information.***

**If a party knowingly publicly files documents that contain or disclose confidential information in violation of these rules, the court may, upon its own motion or that of any other party or affected person, impose sanctions against the filing party.**

### Comment

**These provisions are intended to ensure that confidential documents and information contained within documents are accessible, upon filing, only to the court and its staff, to the parties and their attorneys or the parties' authorized representatives, and to others authorized to perform service of process. Any person or entity not otherwise entitled to access may file a motion or petition to gain access to any sealed or confidential court record. See, e.g., *Associated Press v. State of N.H.*, 153 N.H. 120 (2005); *Petition of Keene Sentinel*, 136 N.H. 121 (1992).]**