Comment on Subcommittee's Proposed Changes on
Proposal #2022-001 regarding Rule 37(20) AND on Proposal #2022-013 regarding Rule 51

Honorable Patrick E. Donovan, Chair
Advisory Committee on Rules
New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Dear Rules Committee (hereinafter "Committee"):

Objection to Certain Proposed Changes to Rule 37(20)

1. The subcommittee has now proposed certain changes to NH Supreme Court Rule 37(20)(hereinafter "Rule 37(20)"), as follows:

> "Attached hereto are the subcommittee's proposed amendments to Rule 37(20). Broadly, the proposed amendments would:
>
> > (1) Increase public access to the public file by making it available not only for inspection, but also for copying at the expense of the member of the public. This increases transparency and access, and mirrors the access that a member of the public would have to court records;
> > (2) Expressly exclude from the public file "confidential information" relating to an attorney's client(s) where the grievance against the respondent attorney is initiated by a non-client (for example, the disciplinary matter is initiated by an opposing party or a judicial referral).
>
> The Committee also considered the fact that reprimands and public censures may, in rare instances, ultimately be annulled at the request of a Respondent attorney. That notwithstanding, until the matter is annulled, the subcommittee agreed that such a file is public. It is true that a member of the public might come to the ADO, make a copy of an Order reprimanding an attorney, and 5 years later, that attorney may succeed in having the reprimand annulled. Once annulled, of course, such records would not be available, but just as is true in criminal matters in Superior Court, until such time as an annulment is in effect, the matter is public and can be accessed by the public. A rule to the contrary would require that the ADO keep all public censure and reprimand cases non-public on the chance that Respondents might one day seek to annul them. Overall, the subcommittee believes the proposed rule changes balance the ADO's duty to perform a public function transparently with the legitimate confidentiality concerns of clients who were not the initiating party of a grievance."

2. I provide the following objection.
    a. Regarding the part of the subcommittee proposal that states: ***"(2) Expressly exclude from the public file "confidential information" relating to an attorney's client(s) where the grievance against the respondent attorney is initiated by a non-client (for example, the disciplinary matter is initiated by an opposing party or a judicial referral)"***, please note the following:
        i. First, this is redundant. The ADO's redaction policy already takes care of any "confidential information".
        ii. The term "confidential information" in the context of this proposed change is vague, and it may be overbroad if it is intended to expand the ADO's redaction policy. NB: There is no evidence or argument advanced by anyone to suggest that the ADO's redaction policy is inadequate to address this issue.
        iii. The proposed change by the subcommittee appears intended to address concerns raised by a respondent attorney about grievances initiated by a third party. But this argument is a non-sequitur fallacy and is misplaced. If an opposing party initiates an ADO grievance, it first has to be screened by the ADO and then the Complaint Screening Committee (CSC). If it is frivolous or unmerited, it will be dismissed. If it is not frivolous or unmerited,

it will be docketed as a complaint. Only after docketing, and during initial investigation by the ADO, will a respondent attorney be required to turn over any documents relevant to the complaint, including but not limited to those that may pertain to confidential client information. In that case, again, if an opposing party (in another court case) is the actual complainant in an ADO matter, he/she will have access to the files in the confidential proceeding of the ADO, which will remain confidential from the public, until one of three triggering events (mandating public disclosure) occurs (such as dismissal, etc.). It serves no purpose to add the above language to rule 37(20) regarding the public file. If the rationale for adding this language is to prevent an opposing party (who is an ADO complainant) from obtaining access to confidential information in a grievance initiated by that opposing party, then the respondent attorney can request a protective order specific to the precise information or documents believed to be protected by attorney client privilege. Either way, if the objective of this added language above is to limit access by an opposing party to confidential client information provided by a respondent, then that turns the ADO rules and procedures on its head but more importantly that has nothing to do with the public's access to such case files after the proceeding is no longer confidential. In either case, if the grievance is dismissed after initial docketing and investigation by the ADO, the case files that include information protected by attorney client privilege would be subjected automatically to redaction by the ADO upon the closing of the case. In addition, the respondent attorney is given an opportunity to make further suggestions for redactions after the case is closed but before the files are made public. Therefore, it is unnecessary, redundant and potentially counterproductive to add language about confidential information being excluded from the public file. It runs the risk that any information about the case files provided by the respondent attorney will be deemed confidential simply because it came from the respondent attorney. Further, where information was obtained from sources outside of the respondent attorney, this would/could create a conflict in the rules if the respondent also provides the same information that the ADO obtained elsewhere. The rules of the ADO and the redaction policy already provide for the exclusion of confidential information from the public file. It is well established that information that ordinarily would be classified under attorney-client confidentiality would be deemed confidential for purposes of exclusion from the public file.

iv. Similarly, the definition of what constitutes "confidential information", as provided for in the above language, is vague and undefined. By adding this redundant undefined language, it could be construed as intending to go beyond the normal exclusions of the ADO's redaction policy, to mean something more. For example, the respondent could argue that the very name of the client is confidential (as was done in a respective underlying matter associated with the proposed changes to Rule 37(20) but which was rejected by the ADO and PCC and declined by the NH supreme court upon appeal by the respondent).

v. I realize this language may be intended to appease the underlying respondent attorney but it serves no real purpose other than facial appeasement. It is not substantive but superficial unless it is intended to expand the ADO's redaction policy and if it is so intended, the committee should make that explicitly clear and should articulate why the ADO's redaction policy is not adequate.

vi. NB: The underlying respondent's argument about annulment is inapposite as it is not about whether to allow copies or not, but is really an argument to not allow any access at all to the files, since the public would still be able to view the files but not copy it. If the annulment argument is intended to block access from the public to confidential aspects of the case file, then there is no need to prohibit copies of the public file (since the confidential information would have already been redacted from the public file). So, in

that case, why would anyone oppose allowing copies of the redacted public files to be given to the public? If the argument is to simply block or make it harder for the public to access the redacted public files by forcing them to have to physically view them at the ADO office, then that does not prevent at least some members of the public (particular the most ardent and resourced ones) from knowing or seeing the contents of the redacted public files. But to block access to or to make access harder to public files constitutes unreasonable restriction to access which is a constitutional violation.

b. Regarding the part of the subcommittee proposal that states ***"(1) Increase public access to the public file by making it available not only for inspection, but also for copying at the expense of the member of the public. This increases transparency and access, and mirrors the access that a member of the public would have to court records"***, please note the following:
    i. I object to the part that requires without any qualification "copying at the expense of the member of the public".
    ii. The subcommittee has not addressed the issues raised in my December 8, 2022 petition regarding this point.
    iii. If the records already exist in electronic format, and if the member of the public requests an electronic copy, there should be no cost to the public. Where there is no additional copying cost incurred by the ADO because they already prepared a redacted copy of the records in electronic format, then there should be no cost passed on to the public.
    iv. NB: There should also be some facility or accommodation for such cost to be waived for indigent members of the public.
    v. It is a fact that by the time the ADO completes its redaction of ADO cases that are to become public, the redacted public files will likely exist in an electronic format, as that will be sent electronically to the respondent and complainant for redaction review and suggestions. If the respondent and complainant will not be charged for such copies in an electronic format, then neither should members of the public. This is an eminently reasonable point.
    vi. NB: It would be like asking the public to pay for copies of court records that already exist in electronic format online. If court records exist in an electronic format, the courts do not charge the public for access or electronic copies.

c. Similarly, regarding the part of the subcommittee proposal that repeats the redefinition of the public file as was originally proposed by the ADO, the subcommittee has not addressed the issues raised in my December 8, 2022 petition regarding the point that the ADO public file should not be redefined to just a few limited documents as that would undermine the public's right to access and public accountability of government, which are enshrined under the NH constitution. The public files of ADO cases should include all of the records and materials that have not been redacted for confidentiality, in the ADO case, which is how it is as it currently stands and has been that way previously. There is no reason to now limit the definition of the public file, when there is a redaction policy that allows for private, sensitive or protected material to be redacted. These materials in any ADO case also show the exchanges between the ADO and the participants which are critical to understanding how any case was handled by the ADO. It allows the public to scrutinize whether the ADO is doing things in a fair way and allows the public to criticize the ADO as a public body by seeing the materials and records that make the process transparent and not hidden. By unnecessarily limiting the public file, this infringes on the public's first amendment right to criticize government or to keep government accountable, as this redefinition of the public file could hide information that the ADO may not want the public to know about. All records and materials in an ADO file include materials that inform what was done by the ADO and the basis for the decisions.

The limitations on what constitutes a public file of the ADO, as imposed by the subcommittee's proposal on #2022-001, do not necessarily capture that.

3. I request that I be heard on this matter at the next public hearing in June 2023. I am an author of a related proposal or modification of the proposal). I would like an opportunity to speak publicly on these proposals/issues in the next June 2023 meeting. I understand that the rules committee may decide, at tomorrow's meeting on March 10, 2023, on whether to have a public hearing on these matters at the June 2023 meeting. I encourage the committee to do so, as it signaled it would likely do (in the December 9, 2022 meeting).

Objection to Certain Proposed Changes to Rule 51

4. Regarding proposed changes to Rule 51, the subcommittee has not addressed the issues raised in my December 9, 2022, comment regarding this issue.
5. In particular, the subcommittee has not addressed the objection to the removal of Rule 51(d)(2)(B) (which allows for a process for ensuring that, at a minimum, parties most affected by a proposal can be identified and contacted) where there is no other promotion or announcement made by the rules committee, other than by email to the NH bar list and that by removing this requirement, it would effectively consign the provision of input on rule changes to a very elite group of people.
6. The subcommittee has not addressed the suggestion that, to further makes it easier, the drafters of rule proposals (who submit proposals to the committee) could be required to include, as part of any proposal, a list of potential affected parties, to assist the committee in identifying such parties as maybe relevant or necessary. Thus, there are several ways to streamline this responsibility to make it more efficient and easier to accomplish. It does not need to be stricken. It should not be stricken.
7. I also request that this matter be allowed to be addressed in a public hearing and that I be allowed an opportunity to be heard on this matter at the next public hearing in June 2023.

Thank you for your consideration.

Sincerely,
/s/Andre Bisasor
Andre Bisasor
679 Washington Street #8-206
Attleboro MA 02703
Dated: March 9, 2023