Objection to NH Rules Committee Proposal on Rule 37(20)

Submitted for Public Comment

June 2, 2023

To NH Advisory Rules Committee:

I object to the proposed changes to NH Supreme Court Rule 37(20), as follows:

- I object to the part 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)", as follows:
    - The ADO's redaction policy already takes care of any "confidential information". 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.[1] The proposed change by the subcommittee appears intended to address concerns raised by a certain respondent attorney about grievances initiated by a third party. This implies that a third party could have frivolous ulterior motives in filing a grievance against an attorney. But this issue, if it intended to be raised as an issue, 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. So, any frivolous attempt to file grievances will go nowhere. It is 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.). Hence, it serves no purpose to add the above language to rule 37(20) regarding the public file. However, 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 attorney, 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

[1] There is no evidence or argument advanced by anyone to suggest that the ADO's redaction policy is inadequate to address this issue.

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.

- 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).
- This language serves no real purpose. It is not substantive, but seems rather 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.
- The annulment argument is inapposite as that argument really goes to not allowing any access at all to the files. 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.

- I also object to the part 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", as follows.
  - I object to the part that requires without any qualification "copying at the expense of the member of the public". 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.[2] 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

[2] NB: There should also be some facility or accommodation for such cost to be waived for indigent members of the public.

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.[3]

- Similarly, regarding the part of the subcommittee proposal that repeats the more limited redefinition of the public file as was originally proposed by the ADO, 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.

- I object also the fact that the ADO proposal is creating more barriers to obtaining public records.
  - On the surface, it may look like what the ADO proposes is a good thing, but yet they are using this occasion to try to slip in things that are not good for the public and that undermine transparency and public accountability. It is reminiscent of toxic "pork barrels" in congressional proposed legislation that undermine the objective of the core legislation.
  - This only allows them to hide more things from public accountability. Who does it help and who does it harm to limit the what is in the public file? The more closed off the ADO is, it is the less balance and accountability there is.
  - This is not a good look for the ADO and the ADO system. It seems like unnecessary red tape and barriers. The public is supposed to trust the institutions of government. This lessens that trust by creating the impression that the ADO is trying to hide something. This committee should not simply rubber stamp what the ADO is doing here.
  - This also goes to the issue of corruption. The ADO wants to limit the light to shine on them. They want to hide from the light and avoid real transparency or accountability. NB: If there was corruption, or favoritism at the ADO, how would the public ever know? It would be left up to a whistleblower to blow the whistle from the inside.
  - See Union Leader Corp. v. N.H. Ret. Sys., 162 N.H. 673, 684 (2011) (noting that public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); See also Prof'l Firefighters of N.H.,

[3] 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.

159 N.H. at 709 (“Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism.”); See also Petition of Brooks, 140 N.H. 813 (1996).

- By not providing these records, it is a harm to the public’s right to know or the public's right of access to keep government accountable.
- There is very limited external accountability of government here with the ADO. There is effectively no public accountability with them. In fact, they go to great lengths to extricate themselves from public accountability mechanisms. They are dismissive of the public. They appear to care only about lawyers and themselves. The public is afforded no rights in the ADO system, and the public has no input regarding anything the ADO does. And to top it off, they do not care about the public’s right to know what is going on with or in the ADO, or with ADO cases. They create policies designed to limit or eliminate the public’s access to its records, while feigning that they are compliant with constitutional imperatives. They do not want the requirements that they must be held accountable to the people to apply to them (which is a basic tenet embedded in the NH constitution). And to the extent that they pay lip service to that, they then orchestrate maneuvers designed to defeat the purpose and spirit of such accountability, as is exemplified by this proposal. Unfortunately this leads to the conclusion that the ADO is really an unaccountable organization that operates as a fiefdom unto itself, with virtually no public accountability or oversight. It is ironic that they are the ones who are supposed to hold lawyers accountable, on behalf of the public. The normal fundamentals of transparency does not apply to them.
- Also, the ADO wants to be able to change their interpretation of the rules at any time whenever it suits them. This is a quirky shape-shifting feature of the ADO. An example of this is regarding the sudden change in policy regarding copying public records to give to the public. For 20 years or more, they gave copies to the public with no problem or consternation that it violate any norms. Then suddenly, the fall of 2020, when a favored well-connected attorney asked them to change the copy policy to “view only/no copy”, the ADO/PCC quickly obliged and acted as though they did not give copies to every member of the public for the past 20 years or more with no problem. There was no rule change that was adopted by the NHSC to cause this; it was simply a change in policy by the ADO/PCC, or a change in interpretation of the same old rule that had allowed them to give copies to the public for many years before. Now the ADO/PCC have quickly come to this committee to ask this committee to overrule their interpretation, in order to allow copies but this time with a deeply unfair and limiting caveat that effectively deprives the public of full and proper access to public records.
- The ADO/PCC evidently cheated with respect to their new interpretation of rule 37(20)(n) prohibiting copying of ADO records. They did not interpret Rule 37 that way for over 20 years but instead gave copies freely to the public upon request for decades until 2020 when a certain favored and well-connected attorney asked them to suddenly reinterpret the same rule that they had interpretated oppositely for decades. The ADO/PCC then obliged this request and favor to this favored attorney and reinterpreted the rule, for the first time in history, to help this favored attorney but as a one-time shot, knowing that such an interpretation was unsustainable. So, the ADO/PCC then immediately, via this rules petition to the rule committee, moved to change it back using similar arguments that I have advanced here, but they did so only after the favored attorney have benefited from the one-shot reinterpretation that was never intended to be the real interpretation. And instead of reversing their erroneous reinterpretation that they

know is not only not correct but not practical, they double down with respect to the files for that case only but at the same engage in maneuvers to get out of it after the underlying case has been annulled. This is the heights of disingenuous subterfuge reinforcing the specter of favoritism, cronyism, and corruption at the ADO with respect to thes powerful or well-connected figures.

- I request that I be heard on this matter at today's hearing.
- I also ask that this public comment be placed on the public docket of the rules committee website and on the public record and that it be distributed to the full committee members.

Sincerely,
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Concerned Citizen
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