MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2016-006. Motions to Seal
Date: May 31, 2016

Justice Lynn recently received an email attorney William Chapman sent to Public Information Officer Carole Alfano (attached) in which attorney Chapman proposes that the Court consider adopting a rule establishing time limits for documents filed under seal.

I have read attorney Chapman's email and it is not clear to me where in the existing rules the Court would add a rule (or rules) of the type that attorney Chapman describes. I believe only Supreme Court Rule 12(2) and the Circuit Court Electronic Filing Rules address how a party may request that the court seal a case record or a portion of a case record.

As some of you may recall, the Advisory Committee on Rules recommended that the Court adopt rules regarding motions to seal for the superior and circuit courts in its August 14, 2014 report to the Court (excerpt attached). The Court decided not to adopt the recommended rules at that time. I believe this was because comments were submitted expressing concern about the proposed rules (attached). Among other things, concerns were expressed about how the rule might apply to cases filed electronically.

Justice Lynn and I have discussed attorney Chapman's proposal and believe that if the Committee is going to consider the issue raised by attorney Chapman the Committee should also revisit the question of whether to again recommend the adoption of rules addressing how a party may request that the court seal a case record or a portion of a case record. This is because it seems a little odd to have a rule setting out the procedure to be followed by the court after a party has requested that a record be sealed without first setting out the procedure a party must follow when requesting that a record be sealed.

Justice Lynn recommends that the Committee form a subcommittee to consider this issue and make another proposal to amend the rules to add a provision regarding motions to seal. He believes that it would make sense for the subcommittee to include representatives of the superior and circuit courts, attorney Chapman, a representative of the Attorney General's Office and the criminal defense bar, and an attorney in private practice. He also believes that the subcommittee should consider whether it makes sense to have different rules for when the party seeking to seal materials is a private litigant and when it is a governmental body.

#2016-006

Carolyn A. Koegler

To: Justice Robert J Lynn
Subject: RE: Sending Follow Up re Bill Chapman 's ideas on Sealed Records

From: Chapman, William L. [mailto:WChapman@orr-reno.com]
Sent: Friday, May 13, 2016 3:29 PM
To: Carole A. Alfano
Subject: Eollow Up on Sealed Records

Carole-

At the May 6th meeting I agreed to outline the elements of a rule to address court records that have been sealed to minimize the likelihood that they remain sealed longer than necessary. Following the meeting, I discussed this concept with Justice Lynn and Dan Lynch. What follows incorporates thoughts they raised as well as the discussion at the meeting. It is not drafted in the form of a rule. Rather, it is an outline of the elements.

I believe Justices Lynn and Bassett expressed an interest in reviewing this proposal. Would you send it to them.

The current situation: Today, no court rule of general application requires the court to specify how long a record can be sealed. Usually when a court record is sealed, the order does not state how long it is to remain sealed. A typical example is an affidavit in support of an arrest or search warrant. As a result, the record can remained sealed for the entirety of the case and thereafter, unless a motion to unseal is filed. The closed status of the record is difficult to reconcile with New Hampshire's tradition and commitment to open judicial proceedings and records. *See, e.g., Thomson v. Cash*, 117 N.H. 653 (1977); *Petition of Keene Sentinel*, 132 N.H. 121 (1992); Guidelines for Public Access to Court Records, Part I, Introduction ("It is the express policy of the Judicial Branch of New Hampshire to allow public access to court records. This policy is intended to recognize and effectuate the public's rights to access proceedings under the New Hampshire Constitution").

Proposal: The Judicial Branch should adopt a rule that court records may be sealed only for a specified period of time, unless the court otherwise rules, in which event it would set a shorter or longer period. For illustration in this proposal I will use 45 days. The elements of the rule are:

1. Unless a party requests otherwise in filing a record under seal, it would be sealed no longer than 45 days. During the 45 days the party could request the sealed status be extended, but for no longer than an additional 45 days.
2. During the sealed period, nothing would prevent another party in the case or a non-party (e.g., member of the press) from challenging the sealed status of the record.
3. At the conclusion of the sealed period, the court clerk would have the authority to unseal the record.* Before doing so, however, the clerk would have the discretion to consult with the judge to ensure that the sealed information can be made public without prejudicing the rights of any party.
4. Any record not unsealed under (3) hereof at the expiration of the sealed period, may be unsealed by the court clerk upon request. For the reason set forth in (3), the clerk would have the discretion to have the record reviewed by a judge to determine whether it should be unsealed.
5. In the event the judge determines that a record whose seal period has expired should, nevertheless, remain sealed, the clerk would schedule a hearing on the status of the record at the earliest practicable time.

- The court clerk would not be obligated to monitor the court docket to identify records whose sealed period have expired.

Bill

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#2016-006

THE STATE OF NEW HAMPSHIRE
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Carolyn Koegler, Secretary

August 14, 2014

Eileen Fox
Clerk of Court
New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Dear Ms. Fox:

Pursuant to Supreme Court Rule 51, I hereby submit on behalf of the Supreme Court Advisory Committee on Rules ("Committee") the Committee's annual report, which contains the final draft of proposed rules and amendments recommended for adoption by the Committee. Not included in this submission are proposals that were previously submitted to the Court during the past year. The Committee held meetings on September 20, 2013, December 13, 2013, March 14, 2014 and June 6, 2014. The Committee held public hearings on December 13, 2013 and June 6, 2014. The Committee also held a public information session on the proposed electronic filing rules on March 14, 2014.

The Committee voted to recommend adoption of the following proposed rules and amendments.

A. <u>IOLTA and Title Companies</u>

Supreme Court Rules 50 and 50-A. These proposed amendments would

make the services performed by attorneys who work for or own title companies subject to the requirements of Supreme Court Rules 50 and 50-A.

This issue was first raised in a December 22, 2011 letter from attorney Middleton to Chief Justice Dalianis, in which attorney Middleton proposed that the Annual Trust Accounting Compliance Certificate be amended to include questions relative to whether the attorney completing the form has an interest in a title or closing company that handles real estate closings. Because the Court had some concerns about whether title companies are "practicing law," the Court referred the issue to the Advisory Committee on Rules. At its March 2012 meeting, the Committee briefly discussed the issue and voted to refer it to a subcommittee.

At its June 2013 meeting, the Committee reviewed a March 21, 2013 letter from Attorney Herbert Cooper, Co-Chair of the IOLTA & Title Companies Subcommittee. The subcommittee concluded that "the activities surrounding the purchase or refinance of New Hampshire real estate . . . do, in our opinion, constitute the practice of law." The subcommittee proposed that Supreme Court Rules 50 and 50-A be amended to include the services performed by attorneys who work for or own title companies. Following brief discussion, the Committee voted to put the proposal out for public hearing in December 2013.

Following the June meeting, at Justice Lynn's request, I updated the Court about the pending proposal. Thereafter, in an email to me, Clerk Fox stated that she was concerned that the language of the proposed amendment to Rule 50-A would not have the effect the Committee intended. She suggested that the proposed amendment to Rule 50-A be amended to reframe the certification option as a positive statement. She also suggested that the Committee consult Janet DeVito and Craig Calaman at the Attorney Discipline Office about the proposal.

Shortly thereafter, at Justice Lynn's request, I forwarded the Committee's proposal to Janet DeVito and Craig Calaman, for their review and comment. Comments from the Attorney Discipline Office related to Supreme Court Rule 50-A are set forth in a September 13, 2013 letter from Janet DeVito and Craig Calaman.

A number of people, including Attorneys Doug Hill and Rob Howard, and Ms. Carol Brooks, a retired real estate agent, spoke in favor of the proposal at the December 2013 public hearing. One Committee member expressed concern about what the legislature's reaction to the proposed rule amendment would be, and whether the legislature might find that the amendments go beyond the authority of the judicial branch to regulate attorneys. He noted that the issue of when someone is practicing law is not always clear.

Following the December 2013 public hearing, the Committee voted to recommend that the Court adopt amendments to Supreme Court Rules 50 and 50-A to make the services performed by attorneys who work for or own title companies subject to the requirements of the rules, as set forth in Appendices A and B.

B. Motions to Seal

Rule 12 of the Superior Court of the State of New Hampshire Applicable in Civil Actions, Rule 59-B of the Superior Court of the State of New Hampshire Applicable in Criminal Cases, Rule 1.8 of the Rules of the Circuit Court of the State of New Hampshire-District Division, Rule 58-B of the Rules of the Circuit Court of the State of New Hampshire-Probate Division, Rule 1.26 of the Rules of the Circuit Court of the State of New Hampshire – Family Division, Supreme Court Rule 12(2)(b). These proposed amendments would amend trial court rules to address how a party may request that the court seal a case record or a portion of a case record and would amend Supreme Court Rule 12(2)(b) to establish a procedure to allow a party to withdraw documents from the public record if its motion to seal is denied.

In May 2013, the Superior Court requested that the Committee consider whether there should be a system-wide rule similar to Supreme Court Rule 12(2)(b) to address how a party may go about requesting that the court seal a case record or a portion of a case record. The request was prompted by the fact that the Superior Court has seen an increasing number of motions filed "under seal" in both criminal and civil cases.

At the June 2013 meeting, the Committee requested that I draft rules for the trial courts similar to Supreme Court Rule 12(2)(b) to address how a party may go about requesting that the court seal a case record or portion of a case record. I submitted a set of draft rules in a September 12, 2013 memorandum to the Committee. They did not include a proposal to amend the criminal rules, or a proposal to amend Supreme Court Rule 12(2)(b) to allow a party to withdraw documents if its motion to seal is denied. At its September 2013 meeting, the Committee voted to put the proposals out for public hearing in December.

At the December 2013 meeting, following the public hearing, the Committee agreed that: (1) the Superior Court criminal rules should also be amended to include the language regarding the procedure for filing motions to seal; (2) a provision should be added to each of the rules setting out the procedure to allow a party to withdraw documents if its motion to seal is denied; and (3) Supreme Court Rule 12(2)(b) should be amended to include a

provision setting out the procedure to allow a party to withdraw documents if its motion to seal is denied.

Following the December 2013 public hearing, the Committee voted to recommend that the Court amend Rule 12 of the Superior Court of the State of New Hampshire Applicable in Civil Actions, adopt Rule 59-B of the Rules of the Superior Court of the State of New Hampshire Applicable in Criminal Cases, amend Rule 1.8 of the Rules of the Circuit Court of the State of New Hampshire-District Division, adopt Rule 58-B of the Rules of the Circuit Court of the State of New Hampshire-Probate Division, amend Rule 1.26 of the Rules of the Circuit Court of the State of New Hampshire – Family Division out for public hearing in December, and amend Supreme Court Rule 12(2), as set forth in Appendices C, D, E, F, G, and H.

C. Continuity of Counsel in Circuit and Superior Court

Rule 14 of the Rules of the Superior Court of the State of New Hampshire Applicable in Criminal Cases. This proposed amendment would change the rule regarding appointment of counsel in the Superior Court to provide that once an appointment has been made in the Circuit Court in a criminal case, the appointment should continue throughout any appeal to the Superior Court.

Chief Judge Nadeau proposed this change to the Superior Court Criminal Rules in May 2013. At the time the proposal was made, the Public Defender had reviewed it. At its meeting in June, the Committee considered the proposal and asked me to forward it to both attorney Christopher Keating, Executive Director of the Judicial Council, and the Attorney General's Office and to request comment on the proposal. Attorneys Keating and Rice both support the proposed amendment, although Attorney Rice suggested one minor language change.

The proposal was put out for public hearing in December 2013. No comments were submitted regarding the proposal. However, there was some discussion by Committee members following the public hearing about how the fee cap would operate in these circumstances. Justice Lynn inquired whether representation in the appeal would be subject to a separate fee cap. Committee members generally agreed that an appeal to the Superior Court would trigger a new fee. In other words, this new subsection is not intended to alter the practice by which attorneys for indigent defendants are compensated.

Following the December 2013 public hearing, the Committee voted to recommend that the Court amend Rule 14 of the Rules Superior Court of the

APPENDIX C

Amend Rule 12 of the Superior Court of the State of New Hampshire Applicable in Civil Actions as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 12. Motions – Specific

(a) *Motions to Amend.*

(1) No plaintiff shall have leave to amend a pleading, unless in matters of form, after a default until the defendant has been provided with notice and an opportunity to be heard, to show cause why the amendment should not be allowed.

(2) Amendments in matters of form will be allowed or ordered, as of course, on motion; but, if the defect or want of form be shown by the adverse party, the order to amend will be made on such terms as justice may require.

(3) Amendments in matters of substance may be made on such terms as justice may require.

(4) Amendments may be made to the Complaint or Answer upon the order of the court, at any time and on such terms as may be imposed.

(b) *Motions to Consolidate.* Whenever a Motion is filed in any county requesting the transfer of an action there pending to another county for trial with an action there pending, arising out of the same transaction or event or involving common issues of law, and/or fact, the court may, after notice to all parties in all such pending actions and hearing, make such order for consolidation in any one of such counties in which such actions are pending, as justice and convenience require.

(c) *Motions to Continue.*

(1) Continuances may be granted upon such terms as the court shall order.

(2) All motions for continuance or postponement shall be signed and dated by the attorney, non-attorney representative, or self-represented

party filing such motion. Any other party wishing to join in any such motion shall also do so in writing. Each such motion shall contain a certification by the attorney, non-attorney representative, or self-represented party filing such motion that the party so filing the motion has been notified of the reasons for the continuance or postponement, has assented thereto either orally or in writing, and has been forwarded a copy of the motion.

(3) Where a trial has been scheduled in one case prior to the scheduling of another matter in another court, or elsewhere, where an attorney, non-attorney representative or self-represented party has a conflict in date and time, the case first scheduled shall not be subject to a continuance because of the subsequently scheduled matter which is in conflict as to time and date except as follows:

(a) A subsequently scheduled case involving trial by jury in a Superior, or Federal District Court, or argument before the Supreme Court.

(b) Unusual circumstances causing the respective courts to agree that an order of precedence other than the above shall take place.

(d) *Motions to Dismiss.* Upon request of a party, hearings on motions to dismiss shall be scheduled as soon as practicable, but no later than 30 days prior to the date set for trial on the merits, unless the court shall otherwise order in the exercise of discretion. All parties shall be prepared, at any such hearing, to present all necessary arguments.

(e) *Motions to Reconsider.* A Motion for Reconsideration or other post-decision relief shall be filed within 10 days of the date on the written Notice of the order or decision, which shall be mailed by the clerk on the date of the Notice. The Motion shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present; but the motion shall not exceed 10 pages. To preserve issues for an appeal to the Supreme Court, an appellant must have given the court the opportunity to consider such issues; thus, to the extent that the court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal. A hearing on the motion shall not be permitted except by order of the court.

(1) No Answer or Objection to a Motion for Reconsideration or other post-decision relief shall be required unless ordered by the court.

(2) If a Motion for Reconsideration or other post-decision relief is granted, the court may revise its order or take other appropriate action without rehearing or may schedule a further hearing.

(3) The filing of a motion for reconsideration or other post-decision relief shall not stay any order of the court unless, upon specific written request, the court has ordered such a stay.

Commentary:

The third sentence of the first paragraph derives from *N.H. Dep't of Corrections v. Butland*, 147 N.H. 676, 679 (2002), and is not intended to preclude a party from raising an issue on appeal under the plain error rule set forth in Supreme Court Rule 16-A.

(f) *Motions to Recuse.* All grounds for recusal that are known or should reasonably be known prior to trial or hearing shall be incorporated in a written motion for recusal and filed promptly with the court. Grounds for recusal that first become apparent at the time of or during the hearing shall be immediately brought to the attention of the court. Failure to raise a ground for recusal shall constitute a waiver as specified herein of the right to request recusal on such ground. If a record of the proceedings is not available, the court shall make a record of the request, the court's findings, and its order. The court's ruling on the motion shall issue promptly. If the motion is denied, the court's ruling shall be supported by findings of fact with respect to the allegations contained in the motion.

(g) *Motions for Summary Judgment.*

(1) Motions for summary judgment shall be filed, defended and disposed of in accordance with the provisions of RSA 491:8-a as amended. Such motions and responses thereto shall provide specific page, paragraph, and line references to any pleadings, exhibits, answers to interrogatories, depositions, admissions, and affidavits filed with the court in support of or in opposition to the Motion for Summary Judgment. Only such materials as are essential and specifically cited and referenced in the Motion for Summary Judgment, responses, and supporting memoranda shall be filed with the court. In addition, except by permission of the court received in advance, no such motion, response, or supporting memorandum of law shall exceed 20 double-spaced pages. The purpose of this rule is to avoid unnecessary and duplicative filing of materials with the court. Excerpts of documents and discovery materials shall be used whenever possible.

(2) The non-moving party shall have 30 days to respond to a motion for summary judgment, unless another deadline is established by agreement of the parties or order of the court.

(3) Where a plaintiff successfully moves for summary judgment on the issue of liability or a defendant concedes liability and the case proceeds to trial by jury, the parties must provide the trial judge with a statement of agreed facts sufficient to explain the case to the jury and place it in a proper context so that the jurors might more readily understand what they will be hearing in the remaining portion of the trial. The court shall present the jury with the agreed statement of facts. Absent such an agreement on facts, the court shall provide such a statement.

[(h) *Motions to Seal.*

The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the superior court:

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal, the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

(2) Within 30 days of filing, the court shall review the motion to seal and determine whether the case record or the portion of the case record that is the subject of the motion shall be confidential.

(3) An order will be issued setting forth the ruling on the motion to seal.

(4) If the court denies the motion to seal in whole or in part,

(a) Within 7 days after entry of the order denying the motion, the moving party may withdraw the temporarily sealed document by filing a notice of withdrawal.

(i) if the document is withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must make the document inaccessible to the parties and the public.

(ii) if the document is not withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must unseal the document.

(b) A document that is withdrawn is not part of the record and will not be considered by the court unless the document is refiled as a public document.]

APPENDIX D

Adopt Rule 59-B of the Rules Superior Court of the State of New Hampshire Applicable in Criminal Cases as follows:

The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the superior court:

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal, the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

(2) Within 30 days of filing, the court shall review the motion to seal and determine whether the case record or the portion of the case record that is the subject of the motion shall be confidential.

(3) An order will be issued setting forth the ruling on the motion to seal.

(4) If the court denies the motion to seal in whole or in part,

(a) Within 7 days after entry of the order denying the motion, the moving party may withdraw the temporarily sealed document by filing a notice of withdrawal.

(i) if the document is withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must make the document inaccessible to the parties and the public.

(ii) if the document is not withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must unseal the document.

(b) A document that is withdrawn is not part of the record and will not be considered by the court unless the document is refiled as a public document.

APPENDIX E

Amend Rule 1.8 of the Rules of the Circuit Court of the State of New Hampshire-District Division as follows (additions are in **[bold and in brackets]**):

Rule 1.8. Motions.

A. Any request for action by the Court shall be by motion. All motions, other than those made during trial or hearing, shall be made in writing unless otherwise provided by these rules. They shall state with particularity the grounds upon which they are made and shall set forth the relief or order sought.

B. In any case, other than small claims cases filed in district division locations in which the electronic filing pilot program has been implemented, *see* http://www.courts.state.nh.us/circuitcourt/efilingcourts.htm, the Court will not hear any motion grounded upon facts unless they are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed to and stated in writing signed by the parties or their attorneys; and the same rule will be applied as to all facts relied on in opposing any motion.

In small claims cases filed in district division locations in which the electronic filing pilot program has been implemented, *see* http://www.courts.state.nh.us/circuitcourt/efilingcourts.htm, the Court will not hear any motion grounded upon facts, unless the moving party indicates in writing an understanding that making a false statement in the pleading may subject that party to criminal penalties, or the facts are apparent from the record or from the papers on file in the case, or are agreed to and stated in writing signed by the parties or their attorneys; and the same rule will be applied as to all facts relied on in opposing any motion.

C. Any party filing a motion shall certify to the Court that a good faith attempt to obtain concurrence in the relief sought has been made, except in the case of dispositive motions, motions for contempt or sanctions, or comparable motions where it can be reasonably assumed that the party or counsel will be unable to obtain concurrence.

D. In any case, other than small claims cases filed in district division locations in which the electronic filing pilot program has been implemented,

see http://www.courts.state.nh.us/circuitcourt/efilingcourts.htm, unless the opposing party requests a hearing upon any motion and sets forth the grounds of the objection by a pleading and, if required, an affidavit within ten days after the filing of the motion, that party shall be deemed to have waived a hearing and the court may act thereon.

In small claims cases filed in district division locations in which the electronic filing pilot program has been implemented, see http://www.courts.state.nh.us/circuitcourt/efilingcourts.htm, unless the opposing party requests a hearing upon any motion and sets forth the grounds of the objection by a pleading and, if required, a written statement indicating an understanding that making a false statement in the pleading may subject that party to criminal penalties, within ten days after the filing of the motion, that party shall be deemed to have waived a hearing and the court may act thereon.

E. Any motion which is capable of determination without the trial of the general issue shall be raised before trial, but may, in the discretion of the Court, be heard during trial.

F. The Court may assess reasonable costs, including reasonable counsel fees, against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion.

G. Motions to dismiss will not be heard prior to the trial on the merits, unless counsel shall request a prior hearing, stating the grounds therefor; all counsel shall be prepared, at any such hearing, to present all necessary evidence.

[(H) Motions to Seal. The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the circuit court-district division:

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal, the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

(2) Within 30 days of filing, the court shall review the motion to seal and determine whether the case record or the portion of the case record that is the subject of the motion shall be confidential.

(3) An order will be issued setting forth the ruling on the motion to seal.

(4) If the court denies the motion to seal in whole or in part,

(a) Within 7 days after entry of the order denying the motion the moving party may withdraw the temporarily sealed document by filing a notice of withdrawal.

> **(i) if the document is withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must make the document inaccessible to the parties and the public.**
>
> **(ii) if the document is not withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must unseal the document.**

(b) A document that is withdrawn is not part of the record and will not be considered by the court unless the document is refiled as a public document.]

APPENDIX F

Adopt Rule 58-B of the Rules of the Circuit Court of the State of New Hampshire-Probate Division as follows:

58-B. MOTIONS TO SEAL

The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the circuit court-probate division:

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal, the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

(2) Within 30 days of filing, the court shall review the motion to seal and determine whether the case record or the portion of the case record that is the subject of the motion shall be confidential.

(3) An order will be issued setting forth the ruling on the motion to seal.

(4) If the court denies the motion to seal in whole or in part,

(a) Within 7 days after entry of the order denying the motion, the moving party may withdraw the temporarily sealed document by filing a notice of withdrawal.

(i) if the document is withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must make the document inaccessible to the parties and the public.

(ii) if the document is not withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must unseal the document.

(b) A document that is withdrawn is not part of the record and will not be considered by the court unless the document is refiled as a public document.]

APPENDIX G

Amend Rule 1.26 of the Rules of the Circuit Court of the State of New Hampshire-Family Division as follows:

1.26 Motions:

A. Parties may not address written communications directly to the judge. All requests shall be by properly filed motion with certification of delivery of a copy of the motion to the other party, unless jointly filed. No exhibits shall be attached to motions unless necessary to support an affidavit.

B. The court will not hear any motion based upon facts unless the facts are verified by affidavit, or are already contained in the court record. No exhibits shall be attached to motions unless necessary to support an affidavit. The same rule will be applied as to all facts relied upon in objections to any motions.

C. Any party filing a motion shall certify to the court that a good faith attempt has been made to obtain concurrence in the relief sought, except in the case of dispositive motions, motions for contempt or sanctions, or comparable motions where it can be reasonably assumed that the party or counsel will be unable to obtain concurrence.

D. Motions to which all parties assent or concur will be ruled upon as court time permits.

E. Motions that are not assented to will be held for 10 days from the filing date of the motion to allow other parties time to respond, unless justice requires an earlier Court ruling.

F. *Motions to Reconsider:* A motion for reconsideration or other post-decision relief shall be filed within ten (10) days of the date on the Clerk's written notice of the order or decision, which shall be mailed by the Clerk on the date of the notice. The motion shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present; but the motion shall not exceed ten (10) pages. To preserve issues for an appeal to the Supreme Court, an appellant must have given the Court the opportunity to consider such issues; thus, to the extent that the Court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve

such issues for appeal. A hearing on the motion shall not be permitted except by order of the Court.

No answer to a motion for reconsideration or other post-decision relief shall be required unless ordered by the Court, but any answer or objection must be filed within ten (10) days of notification of the motion.

If a motion for reconsideration or other post-decision relief is granted, the court may schedule a further hearing.

The filing of a motion for reconsideration or other post-decision relief shall not stay any order of the Court unless, upon specific written request, the Court has ordered such a stay.

Commentary:

The third sentence of paragraph [1] derives from *N.H. Dep't of Corrections v. Butland*, 147 N.H. 676, 679 (2002), and is not intended to preclude a party from raising an issue on appeal under the plain error rule set forth in Supreme Court Rule 16-A.

[G. *Motions to Seal.* The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the circuit court-family division:

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal, the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

(2) Within 30 days of filing, the court shall review the motion to seal and determine whether the case record or the portion of the case record that is the subject of the motion shall be confidential.

(3) An order will be issued setting forth the ruling on the motion to seal.

(4) If the court denies the motion to seal in whole or in part,

(a) Within 7 days after entry of the order denying the motion, the moving party may withdraw the temporarily sealed document by filing a notice of withdrawal.

(i) if the document is withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must make the document inaccessible to the parties and the public.

(ii) if the document is not withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must unseal the document.

(b) A document that is withdrawn is not part of the record and will not be considered by the court unless the document is refiled as a public document.]

APPENDIX H

Amend Supreme Court Rule 12(2) as follows (additions are in **[bold and in brackets]**:

(2) **Procedure For Requesting Confidentiality of a Case Record or a Portion of a Case Record in a Supreme Court Case.**

(a) Case Record or Portion of Case Record That Has Already Been Determined to be Confidential. The appealing party shall indicate on the notice of appeal form or in the appeal document, e.g., appeal from administrative agency, that the case record or a portion of the case record was determined to be confidential by the trial court, administrative agency, or other tribunal, and shall cite the authority for confidentiality, e.g., the statute, administrative or court rule, or court order providing for confidentiality. Upon filing, the portion of the case record determined to be confidential by the trial court, administrative agency, or other tribunal shall remain confidential. Whenever a party files a pleading or other document that is confidential in part or in its entirety, the party shall identify, by cover letter or otherwise, in a conspicuous manner, the portion of the materials filed that is confidential.

(b) Cases in Which There Has Been No Prior Determination of Confidentiality. The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the supreme court:

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal, the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

(2) Within 30 days of filing, a motion to seal will be reviewed by a single justice of the court who shall determine whether the case record or the portion of the case record that is the subject of the

motion shall be confidential or who may refer the motion to the full court for a ruling.

(3) An order will be issued setting forth the ruling on the motion to seal.

[(4) If the court denies the motion to seal in whole or in part,

(a) Within 7 days after entry of the order denying the motion, the moving party may withdraw the temporarily sealed document by filing a notice of withdrawal.

(i) if the document is withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must make the document inaccessible to the parties and the public.

(ii) if the document is not withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must unseal the document.

(b) A document that is withdrawn is not part of the record and will not be considered by the court unless the document is refiled as a public document.]

(c) Court Action When Confidentiality is Required.

(1) The failure of a party or other person with standing to request that a case record or a portion of a case record be confidential shall not preclude the court from determining on its own motion that a statute, administrative or court rule, or other compelling interest requires that a case record or a portion of a case record proceeding be kept confidential.

(2) Before sealing a case record or a portion of a case record other than a case record or a portion of a case record that was determined to be confidential by the trial court, administrative agency, or other tribunal, a single justice or the court shall determine that there is a basis for keeping the case record confidential.

(3) If a single justice or the court determines that a case record or a portion of a case record should be confidential, an order will be issued setting forth the ruling.

(d) Access to Supreme Court Orders On Confidentiality. Every order of the supreme court that a case record or a portion of a case record is confidential shall be available for public inspection. Information which would compromise the court's determination of confidentiality, e.g., the name of a juvenile, shall be redacted.

#2016-006

The State of New Hampshire
Trial Court Center

Edwin W. Kelly
Administrative Judge

David D. King
Deputy Administrative Judge

Tina L. Nadeau
Chief Justice of Superior Court

October 23, 2014

New Hampshire Supreme Court
Advisory Committee on Rules
One Charles Doe Drive
Concord, NH 03301

Dear Justice Lynn, Secretary Koegler, and the Rules Committee members,

Thank you very much for including us in the discussion of the recent recommendations of the Advisory Committee on Rules. We appreciate the opportunity to participate in the comment process for the recommendations, as well as the notice to enable us to suggest any amendments to Electronic Filing Pilot Rule 13 that these recommendations would engender.

When our team reviewed the recommended rule on the Motion to Seal that, if approved, will govern all of the processes other than e-court, they raised substantive concerns. These concerns were so significant that they were not comfortable proposing modifications to the Electronic Filing Pilot Rule 13, but instead, submitted the attached memorandum explaining their concerns with the current recommended rule. Because we recognize and share these concerns, we are submitting the memorandum as our comment on the recommended rule.

Again, thank you very much for the opportunity to participate in the rule review process.

Sincerely,

Tina L. Nadeau
Chief Justice of Superior Court

Edwin W. Kelly
Circuit Court Administrative Judge

MEMORANDUM

To: **Chief Justice Nadeau, Judge Kelly**

From: Pat Lenz, Gina Apicelli

Dated: October 17, 2014

Re: ***Electronic Filing Rules and Motions to Seal***

We received, on September 23, a request from Carolyn Koegler to review two proposed rule changes in light of their potential impact on the Electronic Filing Rules, and to submit comments before October 20, when the comment period for the 2014 Annual Report closes. (See attached.) A group of us met to review and discuss the proposed rule changes. That group included Kate Corbett, Pat Ryan, Beka Fortess and the two of us. The following is a result of that review.

We reviewed the recommendations through the perspectives of our current electronic process and known technical functionalities, as well as through our current hard-copy paper process. While we recognize that technology should not drive practice or the necessary rules that accompany policy decisions, we seek to be sure we are technologically ready to implement the rules, should they go into effect. Many of our judges, administrators and staff have been working diligently to advance our e-court capabilities, which as you know all too well is an ongoing and intensive undertaking.

To provide background, the following is a description of the current Motion to Seal functionality for the two pathways available in e-court: TurboCourt (for self-represented and non-attorney filers) and File and Serve (for attorney filers). This likely sets forth more details than you need to know, but it seemed important to outline some of the complexities involved in this part of the process before commenting upon the proposed rules.

Self-represented and Non-attorney Filers (TurboCourt):

Several specific documents and categories of information are identified in the NH Circuit Court – District Division Small Claims Electronic Filing Pilot Rules as confidential under Rule 11(c) or Rule 12(c). When a filer requests to keep a document or a portion of a document confidential which is not identified in the aforementioned rules, the filer submits a Motion to Seal after logging into his or her case in TurboCourt. The filer checks a box to indicate that s/he included information in the guided interview or in a separate uploaded document that s/he is requesting to be kept confidential. Checking that box creates a placeholder that requires the filer to upload a Motion to Seal. The filer then drafts and uploads the Motion to Seal and the related document, if not already provided in the guided interview.

When the filer uploads a Motion to Seal, that motion and the information provided in the guided interview or related document identified by the filer as confidential come over into Odyssey locked and labeled as "Non Public (Confidential)." For public access purposes,

the names of the Motion to Seal and the related document or guided interview section confidential information are visible, but the documents themselves cannot be opened.

If the Court denies the Motion to Seal, the staff will manually change the document security in Odyssey. Staff clicks on the appropriate document in the document tab, clicks 'modify document' and selects the document type of 'Public Document Type' and selects the security group of 'Public Security Group.' The document would then be viewable in Public Access.

If the Court grants the Motion to Seal, the staff does not need to make any modifications as the documents are already Non Public (Confidential).

Attorney Filers (File and Serve):

When an attorney filer wants to file a Motion to Seal to cover information beyond that which is already confidential under Rule 11(c) or 12(c), s/he logs into the case in File & Serve. On the Enter Filing Details screen, the attorney selects the filing code, enters the filing description, uploads the document s/he wishes to seal, and then selects the security group setting of "Non Public Document." The filing description becomes the title of document. The attorney then adds another filing and selects the filing code for the Motion to Seal, enters a filing description, uploads the document, and selects the security group setting of "Non Public Document."

Through this process, both documents come over into Odyssey locked and labeled as "Non Public (Confidential)." In Public Access, the names of the documents are visible but the documents themselves cannot be opened.

If the Court denies the Motion to Seal, the staff will manually change the document security in Odyssey. Staff clicks on the appropriate document in the document tab, clicks 'modify document' and selects the document type of 'Public Document Type' and selects the security group of 'Public Security Group'. The document would then be viewable in Public Access.

If the Court grants the Motion to Seal, the staff does not need to make any modifications as the documents are already Non Public (Confidential).

With this background, keeping in mind that these two processes are still in their infancy and have not undergone rigorous real case filing tests since the small claims case type is not replete with confidentiality requests, we have reviewed the recommended rule. The following comments, interspersed with the text of the recommended rule, address the implications of the recommended rule from the perspectives of our e-court process and our current paper process.

Rule 1.8. Motions.

. . .

(H) Motions to Seal.

The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the circuit court - district division:

We bring to your attention both e-court and paper case implications. We were uncertain whether the rule addressed sealing an entire case or a portion of the record, or whether it addressed sealing motions within a case. Sealing motions within a case seems less problematic; to seal portions of the record itself would require consultation with the e-court vendors as to whether this is possible as the system is currently configured and if not, what would be required to get to that point.

E-court implications: We are concerned that it might be very difficult to separate out a portion of a case record for removal from the public eye, especially if the case has been ongoing and interested parties have already accessed the material electronically. In the existing Electronic Filing Rule 13, as well as in part (4) of the recommended rule, the object sought to be sealed is referred to as a "document," which would likely be significantly easier to seal or to retract from the case than a portion of the case record itself.

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal, the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

We again highlight both e-court and paper implications. We have the same question as above regarding sealing motions or the case as a whole.

E-court implications: Again we raise the same question as above regarding the necessity of consulting with vendors to ensure that we could comply with this rule and the timeframe for technological configuration changes, if it is passed as written.

(2) Within 30 days of filing, the court shall review the motion to seal and determine whether the case record or the portion of the case record that is the subject of the motion shall be confidential.

We raise both e-court and paper implications. Because versions of this rule would apply in the superior court (both civil and criminal actions) and the circuit court (all three divisions), the thirty-day rule might be confusing to judges and staff in light of the much shorter substantive rules that govern some case types (such as domestic violence, ex parte petitions, or landlord-tenant cases).

We further note that the recommended rule does not provide for objections, and thus does not give the opposing party an opportunity to explain why the motion to seal should be denied.

E-court implications: Other than the "case record" question above, this should not pose technological problems.

(3) An order will be issued setting forth the ruling on the motion to seal.

This provision should not pose a problem in either e-court or paper systems.

(4) If the court denies the motion to seal in whole or in part,

(a) Within 7 days after entry of the order denying the motion the moving party may withdraw the temporarily sealed document by filing a notice of withdrawal.

We point to both e-court and paper implications.

(I) The use of "document" is clearer than "case record," and that is helpful for the purposes of court administration.

(II) "Notice of withdrawal" already exists as something of a term of art in the attorney context (particularly court-appointed attorneys). This terminology is potentially confusing.

E-court implications: Technologically, this is outside of our current capabilities. We would have to build in technology specifically to do this. Under current procedure, any documents accompanying a motion to seal are presumed to be sealed until the court rules on the motion. There is, therefore, no pathway now in TurboCourt or File and Serve to withdraw a motion, and from experience to date with each vendor it is doubtful that either could do it automatically. Furthermore, a motion to withdraw a pleading would most likely not be granted because the motion — or at least, the fact that a motion was filed, even if its contents are confidential — is part of the official court record. Odyssey similarly does not support withdrawal of a motion; the staff would have to delete it.

> (i) if the document is withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must make the document inaccessible to the parties and the public.

We find both e-court and paper implications: The ability to file something under seal and to withdraw it, unseen by one's opponent or the public, raises some substantive concerns for us. First, because the judge has reviewed the materials but the other party has not, the rule not only allows but condones and fosters ex parte communications between a party and the judge, which are otherwise scrupulously avoided. See N.H. Judicial Code of Conduct Canon 3(B)(7).

Second, to have a document upon which a judicial officer has ruled then be expunged from the record as though it had never existed is contrary to our general rules of transparency.

Third, it offers litigants the chance at a risk-free advisory opinion, at the cost of court efficiency; it incentivizes submitting material for judicial review without regard to how meritorious are the parties' claims to the documents' confidentiality. The recommended rule permits a party to change strategy based upon the judge's ruling on a motion to seal. Under the current rules, where parties are not permitted to withdraw documents once submitted, they are more likely to think through whether the underlying pleading should be filed in the first place, and to thoroughly analyze whether the court would likely seal the document.

E-court implications: As above, this capability does not currently exist in either Turbocourt or File and Serve. The systems may be able to accommodate this rule change, but to determine that, we would need to work with the vendors — first to ascertain whether such a withdrawal is possible, and if so, then to obtain the vendors' timelines and charges to us for the changes.

Paper implications: We are unclear about the logistics of retaining the document with the file but isolating it from parties' and public scrutiny. It would seem that the only way to make it inaccessible is to seal it, which the judge has already ruled is not warranted in the case of that particular document by denying the motion to seal. Additionally, the seven-day requirement is potentially deeply time-consuming, given the number of cases and the number of pleadings filed in any given district or superior court on any given day.

> (ii) if the document is not withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must unseal the document.

Here we see both e-court and paper implications: unsealing documents when a court rules that there is no protection for the documents is an occurrence for which courts are prepared; it is just the additional withdrawal process and its accompanying timeline that we find potentially problematic. For example, if a party were to file a motion to reconsider

the decision that the document was not entitled to confidentiality protection, would that party also have to withdraw the document, defeating the basis of the motion, or risk disclosure of the materials? Or would a motion to reconsider have to include a request to stay the unsealing rule? What would be the effect of the court's failure to rule immediately upon a motion to reconsider?

(b) A document that is withdrawn is not part of the record and will not be considered by the court unless the document is refiled as a public document.]

Again we find both e-court and paper implications: We are unclear about the logistics of retaining yet ignoring and isolating the document, in both the electronic and the paper context.

Carolyn also directed our attention to Superior Court Administrative Order 2014-007, requiring the filer of a pleading filed with a motion to seal to caption the pleading so that its subject matter can be identified without disclosing its content. (We did not see this Administrative Order in the 2014 Annual Report of the Rules Committee, but read it as a companion to the recommended rule as discussed above.) We do not see any paper or electronic challenges with requiring parties or counsel to be specific with the name of the motion. In fact, it would be potentially helpful to have the paper or electronic index clearly indicate the nature of the non-public document or motion filed under seal.

However, the recommended rule discussed above could potentially undermine the transparency benefits of this Administrative Order: We are unsure of the implications of requiring a party to caption a pleading filed under seal, if the entire motion is subsequently expunged from the case record after the motion to seal is denied.

Because some of our concerns relating to the recommended rules are substantive, we have submitted our comments on the recommended rules before and in place of any revised draft of Electronic Filing Rule 13. We are comfortable with the current wording of that rule. In the coming months and as future case types are added into the electronic filing world, we will gain more experience with public adherence to the rule and the supporting technology of the electronic filing systems. Therefore, we hesitate to propose modifications to that rule.

2016-006

Carolyn A. Koegler

From: Timothy Gudas <TGudas@courts.state.nh.us>
Sent: Monday, October 20, 2014 3:42 PM
To: rulescomment@courts.state.nh.us
Subject: Comments re Proposed Rules Amendments
Attachments: TAG 10-20-2014 Comments to Rules Advisory Comment re Supreme Court Rule 12.doc

To Advisory Committee on Rules:

Attached please my comments on certain proposed rules amendments set forth in the 2014 Annual Report of the Advisory Committee on Rules. Please note that my comments have been reviewed and approved by Eileen Fox, Clerk, Supreme Court.

Thank you for your consideration.

Timothy A. Gudas
Deputy Clerk – Legal
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

The following are my comments on certain proposals set forth in the Advisory Committee on Rules 2014 Annual Report.

The set of proposals would establish a system-wide rule for the trial courts similar to Supreme Court Rule 12(2)(b) to address how a party may go about requesting that the court seal a case record or a portion of a case record. The proposals would include a provision in each of the rules for the trial courts setting out the procedure to allow a party to withdraw documents if its motion to seal is denied and would also amend Supreme Court Rule 12(2)(b) to add such a new provision. That provision is reproduced below in bold.

[(4) If the court denies the motion to seal in whole or in part,

(a) Within 7 days after entry of the order denying the motion, the moving party may withdraw the temporarily sealed document by filing a notice of withdrawal.

(i) if the document is withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must make the document inaccessible to the parties and the public.

(ii) if the document is not withdrawn within 7 days after entry of the order denying the motion to seal, the clerk must unseal the document.

(b) A document that is withdrawn is not part of the record and will not be considered by the court unless the document is refiled as a public document.]

Comments Concerning Rules Applicable to Trial Courts

With respect to the rules for the trial courts, I have two comments concerning the just-quoted proposal. First, I suggest that subsection (b) be modified to remove the language that a withdrawn document is "not part of the record." Consider the following situation. A party files an objection to a motion and accompanies the objection with a motion to seal because she believes that factual statements in the objection warrant confidential treatment. The trial court denies the motion to seal, and the party then withdraws her objection because she reluctantly concludes that the harm of public disclosure outweighs the benefit of filing the objection. The party does not refile the document as a public document because she believes that the material aspects of her objection contain confidential information and, without that information, an objection is pointless. The trial court then grants her opponent's original motion because the factual assertions in it are "unrebutted." At the conclusion of the case, the party who reluctantly withdrew her objection would like to appeal the trial court's denial of her motion to seal her objection because she seeks to challenge the trial court's grant of her opponent's original motion. In this situation, the withdrawn

document (her objection) must be considered part of "the record" under Supreme Court Rule 13(1), unless the proposed provision is specifically intended to foreclose a party who has withdrawn a document from appealing the trial court's denial of a motion to seal that document. Supreme Court Rule 13(1) states: "The papers and exhibits filed and considered in the proceedings in the trial court or administrative agency, the transcript of proceedings, if any, and the docket entries of the trial court or administrative agency shall be the record in all cases entered in the supreme court."

My second suggestion with respect to the rules for the trial courts is to set a clear deadline for when a party who withdraws a document and who wishes to refile the document as a public document must refile the document as a public document. I suggest that the deadline coincide with the date of the party's withdrawal of her document.

My two suggestions for the rules applicable to trial courts would result in subsection (b) of the proposals reading as follows: "(b) A document that is withdrawn ~~is not part of the record and~~ will not be **further** considered by the court unless the document is refiled as a public document **at the time that the party files the notice of withdrawal**."

Comments Concerning Proposed Amendment to Supreme Court Rule 12

With respect to the proposal to amend Supreme Court Rule 12(2)(b) to include paragraph 4 and the procedure for withdrawing documents in the supreme court, I suggest that no such amendment is warranted. The supreme court has explained: "On appeal, we consider only evidence and documents presented to the trial court. ... We also note that to the extent either party relies upon documents or evidence not presented to the trial court, we do not consider them." Flaherty v. Dixey, 158 N.H. 385, 387 (2009).

As a result of that well-settled principle, materials submitted to the supreme court with a motion to seal fall, almost universally, into one of two categories: (1) materials that were sealed in the trial court, in which case Supreme Court Rule 12(2)(a) continues to treat the materials as confidential; and (2) materials that were public in the trial court and that are now the subject of a motion to seal, in which case Supreme Court Rule 12(2)(b) applies. Although Rule 12(2)(b) authorizes a request in the supreme court for confidentiality when there has been no previous determination of confidentiality, the consequences of a denial by the supreme court of such a request are qualitatively different from the consequences of a trial court's denial of a motion to seal. In the

overwhelming majority of instances in the supreme court, a denial will reflect a conclusion that the requesting party has not adequately demonstrated why previously public documents or information (in the trial court or agency case file) should now be treated for the first time as confidential. In contrast, a trial court that is addressing a motion to seal may be considering documents and information that have never previously been tendered or submitted in the case; the trial court's denial of the motion to seal would make the documents and information part of the court's public file for the first time. Accordingly, a trial court procedure that allows a party to withdraw a document if the party's motion to seal is denied should not, in my view, be imported into the Supreme Court Rules merely for the sake of apparent "consistency."

Moreover, and for similar reasons, I think that any limited benefit that might be achieved by importing such a procedure into the Supreme Court Rules would be substantially outweighed by the problems that it would produce in case-flow management and processing. For example, a standard briefing schedule in a divorce case gives the appellant 30 days to file his brief, the appellee 30 days thereafter to file her brief, and the appellant 20 days after the appellee's brief to file his reply brief. If the appellant files his brief with a motion to seal the brief and/or appendix, the appellee will have 10 ten days to file an objection, after which the court will address the motion to seal. If the motion to seal is denied in whole or in part under the proposed amendment to Supreme Court Rule 12, the appellant will then have 7 days to decide whether to withdraw his brief and/or appendix and to refile it as a public document. In the meantime, the appellee will colorably assert that she has no idea whether the appellant will (1) leave the previously filed brief and/or appendix on file, or (2) withdraw his brief and/or appendix and refile a public version that omits the information claimed to be confidential, or (3) withdraw his brief and/or appendix and then file nothing in its place. Thus, the appellee will claim, it makes no sense to keep the original briefing schedule in place because her briefing deadline is fast approaching as the appellant weighs those 3 options. A likely result, therefore, would be to vacate the briefing schedule and establish a new one after the appellant has made his decision on the 3 options – but this cycle could repeat itself if the appellee then files a motion to seal her brief and/or appendix. The ultimate cost to the supreme court could be months of delay during the briefing process.