

Daniel Webster-Batchelder American Inn of Court Presentation
Table 7 Presentation: *Shout - Trial Publicity and Transparency in the Courts*

Executive Summary: Public Access Rights & Motions to Seal
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ATTACHMENTS

Fact Pattern - Harvey Jones & Northeast Media hypothetical.

New Hampshire Rules of Professional Conduct, Rule 3.6, with comments - *Trial Publicity*.

New Hampshire Rules of Professional Conduct, Rule 3.8, with comments –
Special Responsibilities of a Prosecutor.

Public Comments from the Criminal Bureau: Navigating the Uncharted Waters of Professional Conduct 3.6, (NH Bar Journal, Spring 2004, M Delaney).

Report of the New Hampshire Supreme Court Task Force on Public Access to Court Records (February 2006).

¹ The Table 7 materials and presentation were prepared by: Hon. William Delker, attorneys Nicholas Abramson, Mark Attorri, Matthew Burrows, Matthew Delude, Jennifer Foley, Lisa Rick, Sarah Warecki, and UNH Law student Jaclyn Fisher.

Attorney General's Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A (March 20, 2015), Appendix F.

Sources for Draft Proposed NH Rules for Seal/Unseal:

- Memorandum to Advisory Committee on Rules, Motions to Seal, # 2016-006 (J. Delker, November 2, 2017). *Attachment includes revised Draft Proposed Rules.*
- Memorandum to Advisory Committee on Rules, Motions to Seal, # 2016-006 (Koegler, May 31, 2016). *Attachments include various 2014 materials.*
- Memorandum to N.H. Supreme Court Advisory Committee on Rules, Motions to Seal, # 2016-006 (J. Delker, May 9, 2017). *Attachment includes Draft Proposed Rules.*

Sealing Court Records and Proceedings: A Pocket Guide, Federal Judicial Center (2010).

Case Law Charts:

- New Hampshire Case Law Chart for Sealing Records
- New Hampshire Case Law Chart for Guidance by Right to Know, 91-A
- New Hampshire Federal District Court Case Law Chart

Executive Summary

INTRODUCTION

The presumption of access to court records and proceedings by the public and news media is powerful and not easily overcome. Mere mutual agreement by the parties of a case is insufficient. A protective order that lays out a process for confidential treatment of documents in case also does not create an ironclad guarantee that all documents and pleadings subsequently so designated by parties will be sealed by the court from public view.

Public access rights are, however, qualified. The presumption of open courts gives way to countervailing interests in appropriate circumstances such as personal privacy. When seeking to shield court filings or proceedings from the public eye, practitioners need to consider both substance and process. This Executive Summary, with accompanying materials, lays out parameters for both. The summary and resources are not exhaustive but meant to provide a jumpstart for a New Hampshire practitioner who needs to wade the waters in live time.

The Executive Summary is arranged according to New Hampshire and Federal resources. It first outlines New Hampshire's existing law on public access rights, including court rules and related case law. Of note, the Advisory Committee on Rules for the New Hampshire Supreme Court currently is considering proposed draft rules for motion to seal and unseal, the features of which also are outlined below. The Executive Summary then identifies a number of federal resources from which practitioners may gain guidance when facing public access issues.

On the whole, there are several *key flags*:

- Burdens of Proof and Standards of Review may fluctuate depending on the source of the public access right at issue and any governing statutes providing protection.
- Public access rights may be less presumptive when the pleadings and documents relate to discovery disputes.
- Protection for pleadings and documents should be forefront in a practitioner's mind in the context of impeachment type factual allegations and evidence. Think in terms of offensive or defensive motions to seal during motions in limine litigation.
- Mutual agreement by the parties does not, standing alone, convince a court to forego public access rights, whether or not nonparties have intervened. The same is true for a protective order put in place at the outset of discovery and litigation.
- The New Hampshire Supreme Court Advisory Committee on Rules is actively considering draft proposed rules on sealing and unsealing that would be generally applicable throughout the state courts. Now is the time for practitioners to consider the varying issues and get involved.

NEW HAMPSHIRE.

Section 1: Background.

Public access rights are grounded, at least partly, in the State Constitution. Part 1, Article 8 provides:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

N.H. Const. Pt 1, Art. 8 (June 2, 1784; amended 1976 by providing right of access to governmental proceedings and records). Additionally, Part I, Article 22 provides: *Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.*

The New Hampshire Judiciary underscores the importance of the constitutional commands: the Introduction section to the *New Hampshire Court Rules: Guidelines for Public Access to Court Records* states:

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.

Since at least 1998, the New Hampshire Judiciary began grappling with developing a public access protocol for the electronic age of the internet. A 2006 *Report of the New Hampshire Supreme Court Task Force on Public Access to Court Records* tracks some of this history and provides an excellent and comprehensive resource for delving public access rights in this state. This Report was the culmination of about two years of committee work by a range of stakeholders during the emergence of state court e-filing. Some features of the extensive Report include a survey of case law on public access rights, including benchmarks established by the United States Supreme Court and the New Hampshire Supreme Court. The Appendices themselves are invaluable:

- *Appendix A - Memorandum on Right of Access Law* (Dan Lynch to Honorable L. Smukler, October 2, 1998).

Outlining federal and NH law to include:

- qualified public access rights under federal constitution and federal common law
 - state constitutional rights to privacy for the individual and to access of governmental proceedings for the public
 - meaning of “court record”
 - New Hampshire case law on balancing privacy interests and on aggregate data.
- *Appendix B - Memorandum on Right of Access Law* (Anne Nuttelman to Honorable L. Smukler, August 25, 2004).

Outlining federal and NH law, updating the 1998 Memorandum, to include:

- qualified public access right extends to criminal trials and trial-like pretrial proceedings, civil proceedings, criminal and civil records.
 - federal law - criminal proceedings & records, civil proceedings & records, legal standard for balancing competing interests and constitutional rights; constitutional/common law/statutory right of access.
 - state case law - definition of “court record”; cameras in the courtroom; criminal investigation and proceedings; financial affidavits in divorce proceedings; Right to Know law.
- *Appendix C - Chart of New Hampshire Statutes Possibly Impacting Right of Public Access to Courts and/or Court Records* (as of 2006).
 - *Appendix D - Categories for Access to Court Records.*

Note: This document tracks the committee’s then-recommendations for a three-tier system of public access: (1) records deemed “public” and available electronically on the internet; (2) records deemed “public” and available only at the particular courthouse; and (3) records deemed “private” or “confidential” and thus shielded from public access. The latter category flags the kinds of information that generally should be the subject of a motion to seal, including:

- ➔ Documents with statutory protection - juvenile delinquency, abuse/neglect, financial affidavits in divorce, presentence investigation reports, termination of parental rights, adoption proceedings, guardianship proceedings, mental health records.
- ➔ Case management fields that depict personal information: telephone numbers, social security numbers, state identification numbers, driver’s license, fingerprint number, financial account information, place of employment, name of a nonparty.

The 2006 *Task Force Report* is attached to this Executive Summary in its entirety. Meanwhile, the next section identifies developments in New Hampshire case law since that Report was issued in 2006 and also sets forth governing state court rules.

Section 2: Current Rules & Related Case Law.

New Hampshire state courts lack the robust, formal rules that exist at the federal level. Despite this, administrative orders and other general rules provide practitioners with an idea of how courts will address these issues. Below identifies the existing New Hampshire court rules that address public access issues. Certain features of the rules are highlighted, and a complete form of the cited rules are attached.

Administrative Orders/General Rules:

Both the New Hampshire Superior Court and the New Hampshire Circuit Court have identical administrative orders that broadly address the particular format when submitting a pleading under seal. The orders, which contain identical language, read:

Whenever a party files a pleading under seal, the party filing the pleading shall caption the pleading in a manner that provides sufficient information to identify the general subject matter of the pleading without disclosing the specific information the party is seeking to maintain as confidential. The caption of the pleading as written by the party filing the pleading shall be docketed on the public index and shall be available to the public. The pleading itself shall remain under seal and unavailable to the public unless ordered unsealed by a judge.

Admin. Order No. 2014-007 (Nadeau, C.J. July 8, 2014); Admin. Order 2014-55 (Kelly, J. Oct. 23, 2014).

In addition to these administrative orders, the superior court, circuit court district division, circuit court probate division and circuit court family division all have rules that generally discuss access to confidential information. For example, Superior Court Civil Rule 203 provides:

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

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

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

In closed cases, the court shall order that the petitioner notify the parties of the petition to grant access by certified mail to the last known address of each party, return receipt requested, restricted delivery, signed by the addressee only, unless the court expressly determines that another method of service is necessary in the circumstances.

Other rules that convey comparable language include the following: District Division Rule 1.26, Family Division Rule 1.30; Probate Division Rule 169-A; and Superior Court Criminal Rule 50.

New Hampshire Circuit Court E-Filing Pilot Rules:

Rules 11, 12 and 13 of the E-Filing Pilot Rules help provide guidance regarding filing confidential documents and also filing motions to seal.

E-Filing Pilot Rule 11 governs filing a document that is entirely confidential. The rule defines a “confidential document” as “documents that are not to be accessible to the public pursuant to state law, administrative or court rule, court order or case law” The rule provides a non-exhaustive list of documents that are considered “confidential.”

E-Filing Pilot Rule 11 further delineates the process by which confidential documents as contemplated by the rule shall be filed and the extent to which a motion to seal needs to accompany such confidential documents. The comment related to E-Filing Pilot Rule 11 assists in understanding its purpose:

These provisions are intended to ensure that confidential documents are accessible, upon filing, only to the court and its staff, to the parties and their attorneys or the parties' authorized representatives, and to others authorized to perform service of process. Any person or entity not otherwise entitled to access may file a motion or petition to gain access to any sealed or confidential court record. *See, e.g., Associated Press v. State of N.H.*, 153 N.H. 120 (2005); *Petition of Keene Sentinel*, 136 N.H. 121 (1992); *see also* District Division Rule 1.26; Family Division Rule 1.30; Probate Division Rule 169-A; Superior Court Rule (Civil) 203; Superior Court Rule (Criminal) 169-A.

E-Filing Pilot Rule 12 governs filing a document that contains some confidential information but is not confidential in its entirety. Like E-Filing Pilot Rule 11, E-Filing Pilot Rule 12 provides a non-exhaustive list of what constitutes confidential information to assist practitioners in understanding that concept.

The rule provides procedures for filing documents that may contain confidential information. Specifically, the rule provides guidelines for when a practitioner is filing system-generated forms that may contain confidential information through the e-filing system (Rule 12(d)), filing court created forms containing confidential information (Rule 12(e)), and filing uploaded party-created documents or exhibits or attachments containing confidential information (Rule 12(f)).

It is important to note that “[i]f a party knowingly files documents that contain or disclose confidential information in violation of these rules, the court may, upon its own motion or that of any other party or affected person, impose sanctions against the filing party.”

Finally, **E-Filing Pilot Rule 13** governs motions to seal. Rule 13(a) specifically provides:

A motion to seal a confidential document or an unredacted version of a document containing confidential information shall state the authority for confidentiality, *i.e.*, the statute, administrative order or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal with the unredacted version of the document, the unredacted version of the document shall be kept confidential pending a ruling on the motion. The court shall review the motion to seal and any objection to the motion to seal that may have been filed and determine whether the unredacted version of the document shall be confidential. An order will be issued setting forth the court's ruling on the motion to seal.

Section (b) of the rules states that “[a] party or person with standing may move to seal or redact confidential documents or confidential information that is contained or disclosed in the filing of any other party and may request an immediate order to seal the document pending the court's ruling on the motion.”

New Hampshire Supreme Court Rule 12:

Supreme Court Rule 12 is entitled “Requests for Confidentiality of Case Records; Access to Case Records.” As a general matter, “[i]n all cases in which relief is sought in the supreme court, all pleadings, docketed entries, and filings related thereto (hereinafter referred to as “case records”) shall be available for public inspection unless otherwise ordered by the court

in accordance with this rule.” Supreme Court Rule 12(a). There are a number of exceptions to this general rule, which include the following:

- (1) records of juvenile cases, including cases of delinquency, abuse or neglect, children in need of services, termination of parental rights, and adoption, which by statute are confidential;
- (2) records of guardianship cases filed under RSA chapter 463, but only to the extent that such records relate to the personal history or circumstances of the minor and the minor's family, see RSA 463:9;
- (3) records of guardianship cases filed under RSA chapter 464-A, but only to the extent that such records directly relate to alleged specific functional limitations of the proposed ward, see RSA 464-A:8;
- (4) applications for a grand jury and grand jury records, which by statute and common law are confidential;
- (5) records of other cases that are confidential by statute, administrative or court rule, or court order.

The rule indicates that “[t]he burden of proving that a case record or a portion of a case record should be confidential rests with the party or person seeking confidentiality.”

Finally, the rule provides that “[n]otwithstanding anything in this rule to the contrary, the supreme court may make public any order or opinion of the supreme court dismissing, declining, summarily disposing of, or deciding any case. Information which would compromise the court's determination of confidentiality, *e.g.*, the name of a juvenile, shall be omitted or replaced by a descriptive term.”

The rule also contains a procedure for requesting confidentiality of a case record or a portion of a case record at the New Hampshire Supreme Court:

- When a case record or a portion of a case has already been determined to be confidential, the following applies:
 - 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, unless and until the court determines on its own motion or the motion of a party that there is no statute, administrative or court rule, or other compelling interest

that requires that the case record or portion of the case record be kept 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.
- For a case in which there has been not prior determination of confidentiality, the following procedures shall be applied “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”:
 - “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.”
 - “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.”
 - An order will be issued setting forth the ruling on the motion to seal.

The rule further articulates the steps when court action is required to preserve confidentiality. Notably, “[t]he 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.” Before sealing a case or any record or portion of a record contained therein, the court will determine whether there is a basis to keep the case record confidential. “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.”

Finally, the rule provides a procedure for obtaining access to case records that have been determined to be confidential.

- “A person who is neither a party nor counsel in a case and who seeks access to a case record or portion of a case record that has been determined to be confidential shall file a petition with the court requesting access to the record in question.”

- Once the petition is received, the court will issue an order to all parties and anyone else who may have standing in the case.
- “A single justice of the supreme court or a judicial referee appointed by the court shall examine the case record in question to determine whether there is a basis for nondisclosure.”
- “An order shall be issued setting forth the justice's or referee's ruling on the petition, which shall be made public. In the event that the justice or referee determines that the records are confidential, the order shall include findings of fact and rulings of law that support the decision of nondisclosure.”
- “Within 10 days of the date of the clerk's notice of the justice's or referee's decision, any party or person with standing aggrieved by the decision may file a motion for review by the full court.”

Section 3: Proposed Court Rules: Sealing and Unsealing Case Records

Efforts have been underway since at least 2013 for the development of state court rules to broadly govern the process for sealing court papers. No existing rules are generally applicable system-wide. The Advisory Committee on Rules conducted several meetings on the topic in 2013 and 2014, and also held public hearings and a public information session during that time. The Committee voted to recommend adoption of sealing rules for each court division, but the Supreme Court ultimately did not adopt them due to various concerns raised.

Draft rules were again resurrected in 2016. The Advisory Committee on Rules devised a Subcommittee to consider appropriate provisions to propose. The current *draft* Proposed Rules for motions to seal and unseal, as of November 2017, include features summarized in the following section. The related drafting history and materials are attached to this Executive Summary, including the draft Proposed Rules currently under consideration. While the rulemaking continues, the draft proposal under consideration provides much conventional wisdom for a New Hampshire practitioner to use now.

Some key features for the November 2017 draft are highlighted:

- “**Case Records**” are available for public inspection, unless a statute or court rules dictates otherwise.
 - *Court Records* include pleadings, attachments, exhibits at hearings/trials, other docket entries.
 - The rule does not apply to confidential or privileged materials submitted for *in camera* review under statute, court rule, or case law
- Case Records may either contain **Confidential Information** or may be a **Confidential Document** and the filing procedure accounts for the distinction.

- **Confidential Information** would be defined to capture information (1) deemed nonpublic by law (statute, rule, court order); (2) implicating privacy interests, business/financial/commercial interests, and fair adjudication of a case; (3) otherwise warrants confidential treatment.
 - There are burdens of proof associated with Items 1 and 2: “substantially impair”; “specific and substantial interest . . . that outweighs the strong presumption”
 - Confidential Information has an ordinary scope of non-exhaustive examples that relate to information pertaining to: children, juveniles, parental rights, adoption, mental health, grand jury (or similarly nonpublic) proceedings, financial information (like account and PIN numbers), personal identifying information (like date of birth and driver’s license). *This is a summary of the kinds of examples given in the draft proposed rule.*
- **Confidential Document** would be defined as a document that contains confidential information with no practicable means of filing a redacted version and thus the case record is confidential in its entirety.
- **Filing of a Court Record** containing Confidential Information or a Confidential Document would be subject to different procedures depending on whether the confidential information or document is “required to be included for filing” and “material to the proceeding.”
 - If the Confidential Information or Confidential Document is *not* “required to be included for filing” *nor* “material to the proceeding,” then the filing party *must* omit or redact that information “from the filing” and file only the redacted version (or in the event of a Confidential Document, not file the material at all). The proposed rule requires certain formatting as well, such as a clear indication of the omission/redaction on the filing or in a cover letter.
 - If the Confidential Information or Confidential Document *is* “required for filing and/or is material to the proceeding,” then it must be included in the case record. Accordingly, the filing party must submit a motion to seal and two versions of the filing—redacted and unredacted versions of the case record. Again, there are formatting requirements, and for a Confidential Document document, the filing party must publicly the document filed under seal with sufficient detail to allow a party seeking access to file a motion to unseal.

- ***Motion to Seal is Essential.*** If a party files a pleading or document *merely labeled* as “confidential” or “under seal” or with a *mere request* for such relief—without an accompanying motion to seal—this “will result in the case record being filed as part of the public record in the case.”
- ***Standing.*** For materials that are part of a publically available case record, a party “with standing” may file a motion to seal or redact confidential information or documents and request an immediate order to seal the document pending a court ruling.
- ***Cited Authority is Essential.*** A motion to seal must include legal authority for the confidentiality designation, or identify the germane privacy interests or circumstances. Mere agreement of the parties, standing alone, is insufficient.
 - The party seeking confidential (non-public) treatment of a Case Record bears the burden of proof.
- ***Duration is Essential.*** The filing party must identify in the motion to seal the duration of the sealing requested.
- **Court Process.**
 - Materials filed under seal will be kept confidential pending a court ruling on the accompanying motion to seal.
 - A motion to seal is itself “automatically” placed under seal “without separate motion” to facilitate full arguments and advocacy.
 - A court order granting a motion to seal must include the duration that the confidential information document will be kept under seal.
 - A party “with standing” has ten (10) days from a court order denying a motion to seal to seek reconsideration or an interlocutory appeal. The case record will remain confidential during the pendency of such process.
- **Motion to Unseal.**
 - The filing party must establish that ***notice*** of the motion to unseal was provided to parties “with standing in the case.” Actual notice is required unless the moving party demonstrates that all “reasonable efforts” to provide actual notice have been “exhausted.”
 - The court may, but is not required to, conduct a hearing on the motion to unseal.
 - The court’s ruling on the motion to unseal must be public:
 - A ruling denying the motion to unseal must “include findings of fact and rulings of law that support the decision of nondisclosure.”

- After a ruling granting the motion to unseal, the record will not be made public for ten (10) days to allow time for an aggrieved party with standing to seek reconsideration or an interlocutory appeal.
- **Sanctions.** Knowingly filing documents publicly that contain or disclose confidential information subjects the disclosing party to court sanctions.

Of note, the most recent publicly posted Advisory Committee agenda of December 8, 2017, shows that the draft proposed rules remains a pending item. *March 9, 2018 is the next posted meeting of the Advisory Committee.*²

The discussion points surrounding the sealing/unsealing protocol have involved:

- The method for affecting *notice* of motions to unseal.
- Whether different rules should apply when the party seeking to seal is a *private litigant or a governmental body*.
- The *duration of sealing*; that is, how to minimize the likelihood that sealed records remain sealed longer than necessary, such as requiring that court records may be sealed only for a specified period of time, unless the court orders otherwise.
- Whether the requesting party may have the *opportunity to withdraw* the documents from the public record if the motion to seal is denied, unseen by the opponent or the public.
- How to provide the *opposing party* adequate opportunity to address substance of a document requested to be sealed.
- Whether the *NH e-court system* is technologically and logistically prepared to adequately implement different features of proposed sealing rules.
- How to best account for *efficient case-flow management* by various court divisions.

Section 4: Guidance by Right to Know Law

On a final state law note, the Right to Know exemption under RSA chapter 93-A provides good guidance for the kinds of materials that may appropriately be shielded from public access. While the Right to Know law involves governmental records and not court records, the

² “(a) 2016-006. Motions to Seal. See 5/31/16 memorandum and attachments from Carolyn Koegler emailed to members 5/31/16; 05/9/17 memorandum and attachment from Judge Delker emailed to members 5/19/17; 11/02/17 memorandum and attachment from Judge Delker emailed to members 11/2/17.” <https://www.courts.state.nh.us/committees/adviscommrules/agendas/12-08-17-agenda.pdf>
<https://www.courts.state.nh.us/committees/adviscommrules/meetings.htm#agendas>

categories under the exemptions and related case law at least provide a good touchstone resource. *See* RSA 91-A:5. These categories involve materials such as:

- Records of parole and pardon boards.
- Personal school records of pupils.
- Records pertaining to internal personnel practices; confidential, commercial, or financial information.
- Other files whose disclosure would constitute invasion of privacy.
- Teacher certification records (but not certification status records)
- Unique pupil identification information collected in accordance with RSA 193-E:5.

New Hampshire case law expounds on the meaning of “confidential” records, “invasion of privacy,” and other statutory terms. For example, in balancing public’s interest in disclosure of records under Right-to-Know Law against competing interest of non-disclosure, the emphasis is placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential. *Goode v. New Hampshire Office of Legislative Budget Assistant*, 813 A.2d 381 (N.H. 2002); *see Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 992 A.2d 582 (N.H. 2012).

A chart is attached to this Executive Summary that provides a sample listing of New Hampshire cases interpreting Right to Know exemption provisions.. Also of great help, the *Attorney General’s Memorandum on New Hampshire’s Right-to-Know Law, RSA Chapter 91-A* (March 20, 2015) provides a thorough chart (Appendix F) of state statutes, case law, and court rules that render information confidential or non-public. This resource also is attached.

FEDERAL

Section 1: Federal Judicial Center-Pocket Guide

The Federal Judicial Center issued a fairly comprehensive guide on sealing court records and proceedings in the federal court context. *See Sealing Court Records and Proceedings: A Pocket Guide* (Robert Timothy Reagan, FJC 2010). Although it is growing dated, the 23-page Pocket Guide succinctly covers a myriad of issues for a practitioner to consider when considering public access issues. Some highlights are summarized, and the *Guide* itself is attached.

The Guide explains the common law and constitutional sources (First and Sixth Amendments, US Constitution) of public access rights (both for the public in general and news media in particular) and identifies much federal case law expounding these parameters. The *Guide* also alerts that the source of the public access right at issue may very well implicate the corresponding legal standard to be applied in order for a requesting party to succeed in the request to seal or unseal documents or court records, and also for appellate review of a trial court order. Various federal courts may approach the issues differently, and knowing the distinctions can help New Hampshire practitioners consider the surrounding issues in their own advocacy, especially where currently state case law may otherwise be fairly silent.

The *Guide* identifies and summarizes federal case law for the following categories:

- National Security
- Grand Jury proceedings
- Juveniles
- False Claims Act
- Criminal Justice Act
- Personal Identifiers
- Search Warrants
- Discovery
- Pleas
- Voir Dire
- Trial Evidence
- Sentencing
- Settlement Agreements

A couple of points to emphasize. First, public access implications are different for discovery pleadings and documents, as opposed to dispositive motions and trial evidence. For the former, the public right to access is substantially diminished. Second, as for Personal Identifiers, various federal court rules (bankruptcy, civil, criminal, appellate) *require* redaction of certain information such as identifying juveniles by initials only and using the last four digits of financial account numbers. Also outlined are federal rules that provide an *option* for additional redaction through various methods.

The *Guide* concludes with a helpful Checklist to include:

1. Unless confidentiality or sealing is governed by statute or court rule, permission to seal must be given by a judicial officer.
2. Motions to seal should be publicly docketed to give the public, news media, interested parties the opportunity to be heard.

3. It is common for courts to allow non-parties, such as news media, to intervene to challenge the requested sealing or closure.
4. The court order sealing information also should be public, along with some description of what is sealed and why.
5. Sealing should be limited in scope to the necessity of protection at hand.
6. The court process underlying a sealing order court must be sufficient to allow for meaningful appellate review
7. Records should be unsealed when the temporary need expires.

Again, the legal citations throughout the Pocket Guide are fixed to 2010 as a time marker; practitioners can use the guide as a jump-start for updating the research.

Section 2: Federal Court Rules & Cases

New Hampshire Federal District Court

As for *process*, the New Hampshire federal district court (and likely all federal district courts) has a local rule that governs filings of motions to seal. Prior to the adoption of broadly applicable New Hampshire court rules for motions to seal, the federal local rule may provide some guidance for New Hampshire practitioners. Under Local Rule 83.12(a), “All filings, orders, and docket entries shall be public unless: (1) a filing, order, or docket entry must be sealed pursuant to state law, federal law, the Federal Rules of Criminal or Civil Procedure, or these rules; (2) a filing, order or docket entry has been sealed by order of another court or agency; or (3) this court issues an order sealing a filing, order, or docket entry.” Local Rule 83.12(a)(1)-(3).

Some features of Local Rule 83.12 include:

- A motion to seal must be filed conventionally together with the item to be sealed and both will be accepted provisionally under seal, pending court order on the motion. If the court denies the motion to seal, any materials tendered under provisional seal will be returned to the movant.
 - **Of note, the default status of returning provisionally sealed materials is not part of the draft proposed New Hampshire rules currently under consideration.**
- The motion must explain the basis for sealing, specify the proposed date on which the requested seal order shall expire, and designate whether the material is to be sealed at Level I or Level II. (The rule differs for Departure Motions.)
 - Level I refers to “filings, orders, and docket entries [that] may be reviewed by any attorney or pro se party appearing in the action without prior leave of court.”

- Level II refers to “filings, orders, and docket entries [that] may be reviewed only by the filer or, in the case of an order, the person to whom the order is directed without prior leave of court.”
- The local rule dictates a particular format and process for submitting provisionally sealed materials, also referencing Administrative Procedure for Electronic Case Filing 3.3.
- If a party is requesting that only certain portions of a document be sealed, the party must provide a full copy of the document clearly displaying the portions sought to be sealed.
- The party shall designate the envelope with a conspicuous notation such as “DOCUMENTS UNDER SEAL,” “DOCUMENTS SUBJECT TO PROTECTIVE ORDER,” or the equivalent. If the basis for the document’s sealed status is not apparent, an explanatory cover letter should also be attached to alert the clerk’s staff of its special status.
- Parties cannot seal otherwise public documents merely by agreement or by labeling them “sealed.”

As for *substance*, Federal Rule of Civil Procedure 5.2, as an example, requires that documents containing certain information—social security number, taxpayer-identification number, birthdate, name of a minor, or financial account numbers—may be redacted in full or in part to omit the sensitive information.

Additional guidance on how information is sealed and what information is appropriately sealed in New Hampshire federal district court may be found in the *attached case law chart*, representing non-exhaustive research.

Federal Districts of Maine, Massachusetts, and Vermont

Other jurisdictions have separate local rules that address how documents are sealed:

- In the *Vermont* Federal District Court, Local Rule 5.2 provides that “[c]ases or court documents cannot be sealed without a court order. Otherwise, all official files in the court’s possession are public documents.” Local Rule 5.2 further states that “[i]n order to seal a document, a party must: (1) file a separate motion for each document; (2) place the document in a sealed envelope; (3) affix a copy of the document’s cover page (with confidential information redacted) to the outside of the envelope; and (4) conspicuously mark the envelope with ‘SEALED DOCUMENT’ or the equivalent.”

- In the *Massachusetts* Federal District Court, Local Rule 5.3 tracks much of the language contained in Federal Rule of Civil Procedure 5.2. The Local Rule puts responsibility for redacting personal identifiers solely on counsel and the parties. If a party wishes to seal material, it will file a motion to impound. In so doing, the motion must contain a statement regarding the earliest date the impounding order may be lifted or a statement, supported by good cause, that the material should be impounded until further order of the court. Local Rule 7.2.
 - Section (b) of Local Rule 7.2 states “[t]he clerk shall attach a copy of the order to the envelope or other container holding the impounded material.”
 - Under Local Rule 7.2 (c), “If the impoundment order provides a cut-off date but no arrangements for custody, the clerk (without further notice to the court or the parties) shall place the material in the public information file upon expiration of the impoundment period. If the order provides for post-impoundment custody by counsel or the parties, the materials must be retrieved immediately upon expiration of the order, or the clerk (without further notice to the court or the parties) shall place the material in the public file.”
 - Local Rule 7.2 (d) provides that “[m]otions for impoundment must be filed and ruled upon prior to submission of the actual material sought to be impounded, unless the court orders otherwise.”
 - Local Rule 7.2 (e) states that “[t]he court will not enter blanket orders that counsel for a party may at any time file material with the clerk, marked confidential, with instructions that the clerk withhold the material from public inspection. A motion for impoundment must be presented each time a document or group of documents is to be filed.”

- In *Maine*, Local Rule 7A governs sealing documents.
 - The rule provides that “[t]o obtain an order allowing one or more documents or pleadings to be sealed, a party shall electronically file on ECF a motion to seal together with the separate document(s) or pleading(s) sought to be sealed. The motion shall propose specific findings as to the need for sealing and the duration the document(s) should be sealed.” “The motion shall include a statement whether there is agreement of the parties to the sealing.” The rule states that the ECF system will generate a notice of filing to counsel of record that will notify them of the filing but counsel will be unable to view the document. To the extent service is required, it must be done in a manner other than through ECF.
 - Objections are also filed under seal.
 - In rendering its decision, a Court may incorporate by reference the proposed findings in the motion to seal. If the motion is denied, the motion to seal and any supporting documents tendered under provisional seal shall remain in the ECF system, sealed indefinitely, unless the Court orders otherwise. The rules further

state that “[t]he parties should anticipate that the Court’s order granting or denying the motion to seal will not be filed under seal and will be publicly available.”

- There are certain exceptions that apply to the foregoing:
 - No motion or order is required for the filing of a document that has been redacted solely to remove personal identifiers pursuant to Fed. R. Civ. Pro. 5.2 or that is included within a category of pleadings and documents deemed sealed or authorized to be filed ex parte pursuant to a federal statute, the federal rules of procedure, or the local rules of this Court. Any filing of a redacted document shall reference the authority for such redaction.
 - Documents marked confidential pursuant to an existing protective order may not automatically be filed under seal. The parties must confer and attempt to redact the exhibit in order to remove “confidential” material that is not essential for the Court’s use in rendering a decision. If the exhibit cannot be redacted by agreement to remove confidential information, the party claiming that the document should be under seal shall file a motion in compliance with paragraphs (a-b) above.
 - Sealed pleadings and documents, such as deeds, photographs, or bulky exhibits, which cannot be filed electronically, shall be filed in accordance with the provisions of the ECF User Manual.

Conclusion

To reiterate, this Executive Summary is intended to provide a snapshot of existing NH court rules and authorities on public access rights and motions to seal and provide an overview of some guiding resources as well. These materials are intended to provide a head-start for NH practitioners that need to take a deep dive into public access issues in the context of a case.