THE STATE OF NEW HAMPSHIRE

SUPREME COURT OF NEW HAMPSHIRE

O R D E R

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51(A)(7), the Supreme Court of New Hampshire adopts the following amendments to court rules.

Superior Court PAD Pilot Rules – Proportional Discovery/Automatic Disclosure Pilot Project for Carroll And Strafford County Superior Courts

1. Adopt Superior Court PAD Pilot Rules 1 through 5, regarding pleadings allowed, case structuring orders, and discovery procedures in Carroll and Strafford County Superior Courts, on a temporary basis, as set forth in Appendix A.

Effective Date

These rules shall take effect October 1, 2010, and shall be referred to the Advisory Committee on Rules for its recommendation as to whether they should be adopted on a permanent basis.

Date: April 6, 2010

ATTEST: _____

Eileen Fox , Clerk of Court
Supreme Court of New Hampshire

APPENDIX A

Adopt Superior Court PAD Pilot Rules 1 through 5, on a temporary basis, as follows:

SUPERIOR COURT PAD PILOT RULES

(Proportional Discovery/Automatic Disclosure Pilot Project for Carroll And Strafford County Superior Courts)

Pursuant to the authority conferred by Part II, Article 73-a of the New Hampshire Constitution, the Court hereby adopts on a temporary basis the attached PAD Pilot Rules 1 through 5. These rules shall take effect on October 1, 2010, and shall be applicable to all civil and equity actions filed on or after October 1, 2010, in the Superior Courts for Carroll and Strafford Counties.

Insofar as these rules conflict with any existing rules of the Superior Court, these rules shall supersede such existing rules during the time and in the courts in which these rules are in effect. All existing rules of the Superior Court not in conflict with these rules shall remain in full force and effect.

PAD PILOT RULES (PR)

PR 1. PLEADINGS

(a) Pleadings Allowed. The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses There shall be a complaint and an answer; an answer to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint pursuant to Rule 27; a third-party answer, if a third-party complaint is served; and a reply, if an affirmative defense is set forth in an answer and the pleader wishes to allege any matter constituting an avoidance of the defense.

(b) Claim for Relief. Except as may be more specifically provided by these rules in respect of specific actions, a pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim or third-party

claim, shall contain a statement of the material facts known to the pleading party on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement. Relief in the alternative or of several different types may be demanded.

(c) Answer; Defenses; Form of Denials. An answer or other responsive pleading shall be filed with the court within thirty (30) days after the person filing said pleading has been served with the pleading to which the answer or response is made. It shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder. The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs.

COMMITTEE NOTES

Changes in New Hampshire's current system of writs to one more similar to the federal system and also including a requirement of fact-based pleading will require several changes in the Superior Court Rules. For example, Rules 1, 2, 2-A, 3 (first paragraph only), 8 (but this should be amended to require that the demand for jury trial be set out in the Complaint or the Answer), 10, 23 and 29-32 would be eliminated by a general requirement of the filing of a complaint and answer and a third-party practice more similar to the federal court practice.

The Committee believes that pleadings which notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses will better define the issues of fact and law to be adjudicated. This definition should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should assist in setting practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case.

PR 2. CASE STRUCTURING ORDER

(a) Within 20 days of the answer date counsel, or parties if unrepresented, shall confer to discuss the claims, defenses and counterclaims and to attempt to reach agreement on the following matters: (1) a statement as to whether or not a jury trial, if previously demanded, is waived; (2) a proposed date for trial and the estimated length of trial; (3) dates for the disclosure of expert reports; (4) status of waiver of RSA 516:29-b requirements; (5) deadlines for the parties to propound interrogatories; (6) deadlines for the completion of all depositions; (7) deadlines for the completion of all discovery; (8) deadline for filing all dispositive motions, which shall not be less than 90 days prior to the trial date; (9) deadlines for filing all other pre-trial motions, which shall be filed not later than 14 days prior to trial; (10) the type of alternative dispute resolution (ADR) procedures that shall be utilized and the deadline for completion of ADR; and (11) deadline for filing witness and exhibit lists, which shall not be later than the final pre-trial.

(b) If the parties reach agreement as to all information required by PR 2(a) above, they shall file a completed written stipulation setting forth their agreement on all of the required matters within the said 20 days. Upon review by the court, if those stipulations are deemed acceptable, they shall become the structuring conference order of the court pursuant to Rule 62.

(c) If the parties are unable to reach agreement as to any of the matters set forth in PR 2(a), or if the court rejects their proffered stipulations, the matter shall be scheduled for a telephonic hearing between the court and counsel, or parties if unrepresented. The hearing shall be held no later than 75 days after the answer is filed. The court may order the parties to appear in court for the hearing if the court deems this necessary for the efficient progression of the case. Should counsel, or parties if unrepresented, be unable to reach an acceptable agreement as to any of the required matters, the court shall issue such orders as it deems appropriate. The fact that a structuring conference has not yet been held or a structuring conference order has not yet

been issued does not preclude any party from pursuing discovery and does not constitute grounds for any party to fail to comply with its discovery obligations.

COMMITTEE NOTES

This rule is substantially similar to existing Superior Court Rule 62, but does contain several provisions which the Committee believes improves the present rule. First, like the present rule it contains a "meet and confer" requirement that mandates that, within 20 days after the answer to the complaint is filed by the defendant, the parties must meet to discuss and attempt to reach agreement on all important issues regarding scheduling, discovery and the management of the litigation through the time of the trial. However, unlike present Rule 62, PR 2 provides that if the parties are able to reach agreement and execute a stipulation regarding all such matters, this stipulation shall presumptively become the pretrial structuring conference order, thus eliminating the need for a pretrial structuring conference. This change is designed to remedy the frequently-heard complaint that the practice of routinely holding structuring conferences requiring the personal appearance of counsel, or parties if unrepresented, in every case is expensive and unproductive. In addition, PR 2 also provides that even where the parties are unable to reach agreement on all issues or where the court finds the agreement unacceptable, the structuring conference will be held telephonically unless the court specifically orders that counsel and/or the parties appear in court for the conference. This aspect of the new rule reverses the current practice under which structuring conferences are held at the courthouse unless a party or counsel files a motion requesting that he or she appear telephonically. Again, the purpose of the change is to reduce costs and increase efficiency.

Subsection (c) of this rule also changes the current Rule 62 in two other significant ways. First, it changes the date for holding the structuring conference from 45 days after the return date, as now provided in Rule 62. Under PR 2, the structuring conference must be held within 75 days after the answer is filed. Given the automatic disclosure requirements established by PR 3, the Committee believes that 75 days after the answer is reasonable and will give the parties time to digest the disclosures made pursuant to PR 3 and to formulate reasoned positions in cases where they have been unable to reach agreement on all pretrial management issues. This time limit also is realistic in light of current superior court resource limitations. The second significant change accomplished by subsection (c) of PR 2 is the provision stating that discovery can be initiated before the structuring conference is held and before a structuring conference order has been issued and that a responding party is required to comply with its discovery obligations notwithstanding the fact that a structuring order has not yet been issued. This provision is intended to address the complaint often heard from lawyers that court scheduling issues which result in delay in holding a structuring conference are used as an excuse to delay responding to entirely legitimate discovery requests.

With respect to PR 2's requirement that the parties' stipulation and the court's structuring conference order address the issues of expert disclosures, the Committee felt it important to note that current Superior Court Rule 35(f) must be read in conjunction with RSA 516:29-b. To the extent an expert is retained, RSA 516:29-b provides additional requirements. Superior Court Rule 35(f) is applicable to all witnesses from whom a party expects to elicit expert testimony. This includes retained and non-retained witnesses.

While the Superior Court Rule does not require reports, testimonial history, and detailed curriculum vitae, it still carries an obligation to make a reasonable disclosure of the facts and opinions which the expert is expected to address as well as the grounds for such opinions. To the extent non-retained experts have generated investigative records or other written documentation in the course of conducting their activities, such records should be provided to opposing counsel. To the extent the non-retained expert's opinions are not contained within such documents, but are fairly inferred from the documents, Rule 35(f) would call for a disclosure of anticipated opinions a party expects the non-retained expert will conclude from such records.

Typically, medical providers are exempt from statutory disclosure, as such witnesses are recognized as non-retained experts. If a medical provider is expected to render opinions beyond information contained in, or reasonably inferred from the medical records, disclosure of such opinions and foundational information should be provided under Superior Court Rule 35(f).

PR 3. AUTOMATIC DISCLOSURES

(a) Materials that Must Be Disclosed. Except as may be otherwise ordered by the court for good cause shown, a party must without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment, and, unless such information is contained in a document provided pursuant to PR 3(a)(2), a summary of the information believed by the disclosing party to be possessed by each such person;

(2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Time for Disclosure. Unless the court orders otherwise, the disclosures required by PR 3(a) shall be made as follows:

(1) by the plaintiff, not later than thirty (30) days after the defendant to whom the disclosure is being made has filed its answer to the complaint; and

(2) by the defendant, not later than sixty (60) days after the defendant making the disclosure has filed its answer to the compliant.

(c) Duty to Supplement. Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.

(d) Sanctions for Failure to Comply. A party who fails to timely make the disclosures required by this rule may be sanctioned as provided in Rule 35.

COMMITTEE NOTES

This rule accomplishes a major change from current New Hampshire practice in that it requires both the plaintiff and the defendant to make automatic initial disclosures of certain information without the need for a discovery request from the opposing party. Although there is a similar but not identical requirement in the so-called "fast-track" section of current Superior Court Rule 62, see Rule 62(II), that rule has been used very little since its adoption, and therefore does not provide a significant base of experience for this rule. Nonetheless, such a base of experience can be found in federal court practice, where an automatic disclosure regimen in some form has been in existence since 1993, and appears to have worked reasonably well. The Committee believes that requiring parties to make prompt and automatic disclosures of information concerning the witnesses and evidence they will use to prove their claims or defenses at trial will help reduce "gamesmanship" in the conduct of litigation, reduce the time spent by lawyers and courts in

resolving discovery issues and disputes, and promote the prompt and just resolution of cases.

Subsection (a) of PR 3 is taken largely from Rule 26(a)(1) of the Federal Rules of Civil Procedure. It differs from the federal rule, however, in that, unlike the federal rule, this rule does not permit the disclosing party to merely provide "the subjects" of the discoverable information known to individuals likely to have such information, Fed. R. Civ. P. 26(a)(1)(A)(i), and "a description by category and location" of the discoverable materials in the possession, custody or control of the disclosing party, Fed. R. Civ. P. 26(a)(1)(A)(ii). Rather, the rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, PR 3(a)(2), and also requires that the disclosing party provide a summary of the information known to each individual identified under PR 3(a)(1) unless that information is contained in the materials disclosed under PR 3(a)(2). The Committee believes that this more comprehensive discovery obligation does not impose an undue burden on either plaintiffs or defendants and will help to insure that information and witnesses that will be used by each party to support its case will be disclosed to opposing parties shortly after the issues have been joined.

Subsection (a)(3) of the rule also differs somewhat from the language of comparable Fed. R. Civ. P. 26(a)(1)(A)(iii), in that the rule eliminates reference to "privileged or protected from disclosure" information as being excepted from the disclosure obligation imposed by the subsection. By so doing, the Committee does not mean to eliminate the ability of a party to object on privilege or other proper grounds to the disclosures relating to the computation of damages or the information on which such computations are based. However, the Committee believes that genuine claims of privilege as a basis for avoiding disclosure of information pertinent to the computation of damages will be rare and that, to the extent such claims do exist, the ability to assert the privilege is preserved elsewhere in the rules. The Committee saw no need to make a specific reference to privileged or otherwise protected materials in this rule.

The Committee believes that the time limits established in subsection (b) of the rule are reasonable and will promote the orderly and expeditious progress of litigation. The Committee notes that the proposed rule differs from the initial disclosure proposal embodied in the Pilot Project Rules of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), in that, unlike ACTL/IAALS Rule 5.2, the rule does not require the plaintiff to make its initial disclosures <u>before</u> the time when the defendant is required to file its answer. The Committee felt that the plaintiff should have the benefit of the defendant's answer before making its initial disclosure since the answer will in all likelihood inform what facts are in dispute and therefore will need to be proved by the plaintiff.

Subsection (c) of the rule is taken directly from ACTL/IAALS Pilot Project Rule 5.4 and its substance is generally consistent with Federal Rule 26(e) and present Superior Court Rule 35(e). It should be noted, however, that unlike the current superior court rule, which contains introductory language stating that there is no duty to supplement responses and then sets forth very broad categories of exceptions from this general rule, this rule is worded in positive terms to require supplementation of responses whenever the producing party becomes aware of supplemental information covered by the rule's initial disclosure requirements.

Subsection (d) of the rule references Superior Court Rule 35 and permits the court to impose any of the sanctions specified in that rule if a party fails to make the disclosures required of it by this rule in a timely fashion.

PR 4. WRITTEN INTERROGATORIES & DEPOSITIONS

(a) Interrogatories. A party may propound more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed twenty-five (25), unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed with the court. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependant upon or included in another question, and however the questions may be grouped, combined or arranged.

(b) Limitations on Depositions. A party may take as many depositions as necessary to adequately prepare a case for trial so long as the combined total of deposition hours does not exceed twenty (20) unless otherwise stipulated by counsel or ordered by the court for good cause shown.

COMMITTEE NOTES

This Rule is a major change from current New Hampshire deposition practice and represents a further restriction on the use of interrogatories than that currently imposed by Superior Court Rule 36. The Committee felt that these new limitations were warranted by the adoption of the Automatic Disclosure requirements of PR 3, which itself tracks in part the provision of Fed. R. Civ. P. 26(a)(1). In adopting this limitation the Committee had in mind

the typical case which ordinarily does not consume twenty hours of depositions and recognized that there are others for which twenty hours may not be adequate.

PR 5. DISCOVERY OF ELECTRONICALLY STORED INFORMATION (ESI)

(a) Promptly after litigation is commenced, the parties must meet and confer about preservation of any electronically stored information (ESI). In the absence of an agreement, any party may move for an order governing preservation of ESI. Because the parties require a prompt response, the court must make an order governing preservation of ESI as soon as possible.

(b) The parties have a duty to preserve all potential relevant ESI once the party is aware that the information may be relevant to a potential claim. Counsel for the parties have a duty to notify their clients to place a "litigation hold" on all potentially relevant ESI.

(c) Requests for ESI shall be made in proportion to the significance of the issues in dispute. If the request for ESI is considered to be out of proportion to the issues in the dispute, at the request of the responding party, the court may determine the responsibility for the reasonable costs of producing such ESI;

(d) A party may serve on another party a request for designated ESI, including documents, email messages and other electronically recorded messages and communications, photographs, sound recordings, drawings, charts, graphs and other data or data compilations, including back-up and archived copies of ESI – stored in any medium from which information could be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;

(e) The request must describe with reasonable particularity each item or category of items to be produced. The request must also state the form or forms in which ESI is to be produced;

(f) The responding party must respond to each item or category of items or State an objection to the request including the basis of the objection, within thirty days of the receipt of the request;

(g) The responding party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(h) The responding party need not produce the same ESI in more than one form;

(i) The responding party does not waive privileged information by its inadvertent disclosure under this rule.

(j) Inadvertently disclosed privileged ESI is subject to "claw-back" at the request of the responding party. If agreement is not reached by opposing counsel or the litigants concerning any "claw-back" requests, the Court may decide any disputes.

(k) A party may also serve on another party a request to permit the requesting party and or its representatives to inspect, copy, test or sample the ESI in the responding party's possession or control.

COMMITTEE NOTES

There is currently no rule codifying electronic discovery in New Hampshire. The Committee believes that the discovery of electronically stored information (ESI) stands on equal footing with the discovery of paper documents. It is likely that the growth of ESI and the systems for the creating and storing of such information will continue to be dynamic as technology continues to advance. For that reason, this Rule does not seek to precisely define ESI.

Self-represented persons are also subject to the duty to preserve such ESI.

For a resource to both litigants and judges dealing with the issues of electronically stored information, reference is made to "Navigating the Hazards of E-discovery" published by the Institute of the Advancement of the American Legal System.

This Rule is similar to Fed. R. Civ. P. 34 but with changes based on the Committee's discussion and consensus.