

NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

PUBLIC HEARING NOTICE

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 1:00 p.m. on Wednesday, June 9, 2010, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before June 8, 2010, or may be submitted at the hearing on June 9, 2010. Comments may be e-mailed to the Committee on or before June 8, 2010, at:

rulescomment@courts.state.nh.us

Comments may also be mailed or delivered to the Committee at the following address:

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Any suggestions for rules changes other than those set forth below may be submitted in writing to the secretary of the Committee for consideration by the Committee in the future.

Copies of the specific changes being considered by the Committee are available on request to the secretary of the Committee at the N.H. Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301 (Tel. 271-2646). In addition, the changes being considered are available on the Internet at:

<http://www.courts.state.nh.us/committees/adviscommrules/index.htm>

The changes being considered concern the following rules:

I. New Hampshire Rules of Criminal Procedure

(This proposal would create a separate set of criminal procedure rules governing superior and district courts.)

1. Adopt the New Hampshire Rules of Criminal Procedure, as set forth in Appendix A.

II. New Superior Court Rules

(This proposal repeals and replaces the current Superior Court Rules in a new format, intended to serve as a model for future revisions of the District Court Rules and Probate Court Rules. The proposal contains some substantive changes, including elimination of the distinctions in pleading between actions at law and actions at equity, as well as revisions to the Sentence Division Rules..)

1. Repeal and replace the current Superior Court Rules, including the Sentence Review Division Rules, as set forth in Appendix B.

III. Interest on Lawyers' Trust Accounts Rules

(These proposal would make it mandatory for members of the New Hampshire Bar to create and maintain interest-bearing trust accounts for clients' funds that are nominal in amount, with the interest being remitted to the New Hampshire Bar Foundation.)

1. Amend Supreme Court Rule 50, regarding trust accounts, as set forth in Appendix C.
2. Amend Supreme Court Rule 50-A, regarding certification requirement, as set forth in Appendix D.

IV. Custody and Return of Materials Filed In Camera in Trial Courts

(This proposal governs the custody and return of materials that are filed in camera in trial courts.)

1. Adopt new Supreme Court Rule 57-A, regarding the custody and return of documents and materials filed in camera in trial courts, as set forth in Appendix E.

V. Medical Malpractice Screening Panels

(This proposal adopts rules governing medical malpractice screening panels. See RSA ch. 519-B.)

1. Adopt new Superior Court Medical Malpractice Screening Panel Rules 1 to 13, as set forth in Appendix F.

VI. Withdrawal of Counsel in Criminal Cases

(This proposal would adopt a new rule governing withdrawal of counsel in criminal cases. The placement of the rule will depend upon whether the proposed new New Hampshire Rules of Criminal Procedure set forth above are adopted.)

1. Adopt a new Rule, regarding withdrawal of counsel in criminal cases, as set forth in Appendix G.

VII. Family Division Mandatory Initial Discovery Rule

(This proposal would require initial mandatory self-disclosure/discovery in new actions filed in the family division.)

1. Adopt new Family Division Rule 1.25A, regarding mandatory initial self disclosure, as set forth in Appendix H.

VIII. Temporary Rules – Mediation and Fees in District and Probate Courts

(This proposal would adopt on a permanent basis rules currently in effect on a temporary basis that govern mediation and fees in the district and probate courts. The rules implement legislation that took effect on January 1, 2010. See Laws 2009, chapters 79, 253. No changes are being proposed to the temporary rules now in effect.)

1. Adopt on a permanent basis District Court Rule 3.3, regarding court fees, as set forth in Appendix I.

2. Adopt on a permanent basis District Court Rule 3.28, regarding district court civil writ mediation, as set forth in Appendix J.

3. Adopt on a permanent basis District Court Rule 4.29, regarding district court small claims mediation, as set forth in Appendix K.

4. Adopt on a permanent basis Probate Court Rule 169, regarding court fees, as set forth in Appendix L.

IX. Technical Amendments

1. The Rules Committee is considering recommending to the Supreme Court that all court rules be made gender neutral, and that the term “pro se” be replaced in court rules by the term “self-represented” or a similar term.

New Hampshire Supreme Court
Advisory Committee on Rules

By: Carol A. Conboy, Chairperson
and David S. Peck, Secretary

April 14, 2010

APPENDIX A

Adopt the New Hampshire Rules of Criminal Procedure as follows:

NEW HAMPSHIRE RULES OF CRIMINAL PROCEDURE

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I. SCOPE, INTERPRETATION, ADOPTION AND EFFECTIVE DATE

Rule 1. Scope and Interpretation

(a) *Scope.* These rules govern the procedure in district and superior courts when a person is charged as an adult with a crime or violation.

(b) *Interpretation.* These rules shall be construed to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Comments

These rules apply to all proceedings in which a person is charged as an adult with an offense, whether a crime, such as a felony or a misdemeanor, or a violation. See RSA 625:9. The rules establish a uniform system of procedure for the district and superior courts, except as otherwise specifically provided. The rules do not govern juvenile proceedings or collateral proceedings such as habeas corpus or mandamus. The rules are subject to suspension by the court when the interest of justice so requires. See Rule 37. However, a court's power to suspend a rule may be limited by the state or federal constitution, state statutes or common law.

Rule 2. Adoption and Effective Date

(a) *Adoption.* The Supreme Court adopts these rules pursuant to Part II, Article 73-A of the New Hampshire Constitution.

(b) *Effective Date.* These rules govern all proceedings filed or pending in the district and superior courts on **[insert date]**. In exceptional circumstances, when the court finds that the application of these rules to cases pending as of the effective date would not be feasible or would work an injustice, the court may exempt such cases from the application of these rules or from a particular rule.

Comments

Since these rules are intended to incorporate all current rules and practices, application of the rules to pending cases should not create many problems. In the rare case where application of the new rules to a pending case would work an injustice, a court may exempt that case from application of the rules or a particular rule.

II. PRELIMINARY PROCEEDINGS

Rule 3. Complaint, Arrest Warrant, Arrest, Summons and Release Prior to Arraignment

(a) *Complaint.* The complaint is a written statement of the essential facts constituting the offense charged. A complaint charging a misdemeanor or felony shall be signed under oath. Unless otherwise prohibited by law, the court may permit a

complaint to be amended if no additional or different offense is charged and if substantive rights of the defendant are not prejudiced.

(b) *Issuance of Arrest Warrant.* If it appears from a sworn application for an arrest warrant that there is probable cause to believe that an offense has been committed in the State of New Hampshire, and that the defendant committed the offense, an arrest warrant for the defendant may be issued.

(c) *Arrest.* When a person is arrested with a warrant, the complaint, the affidavit of probable cause and the return form documenting the arrest shall be filed in a court of competent jurisdiction without unreasonable delay. If a person is arrested without a warrant, the complaint shall be filed without delay and, if the person is detained in lieu of bail, a Gerstein affidavit must be similarly filed.

(d) *Summons.* When the complaint charges a felony, a summons may not be issued. In any case in which it is lawful for a peace officer to make an arrest for a violation or misdemeanor without a warrant, the officer may instead issue a written summons in hand to the defendant. In any other case in which an arrest warrant would be lawful, upon the request of the state, the person authorized by law to issue an arrest warrant may issue a summons. A summons shall be in the same form as an arrest warrant except that it shall summon the defendant to appear before a court at a stated time and place. If a defendant fails to appear as required by the summons, a warrant may be issued. A person who fails to appear in response to a summons may be charged with a misdemeanor as provided by statute. Upon issuance of a summons, the complaint and summons shall be filed with a court of competent jurisdiction without unreasonable delay.

(e) *Release Prior to Arraignment.* On application of a person who is arrested for a bailable offense, at any time before arraignment on that offense, any bail commissioner may set bail as provided by law.

Comments

Rule 3(a) follows the procedure in RSA 592-A:7(I) and N.H. Dist Ct. Rule 2.1(B). The committee noted that the statute does not require a private complaint by a law enforcement officer charging a violation to be signed under oath. The committee further noted that the statute is silent regarding complaints filed by private parties.

Rule 3(b) is consistent with RSA 592-A:8 and states the general constitutional requirement of probable cause for arrest. U.S. Const., 4th Amd.; N.H. Const. pt. 1, art 19; *State v. Fields*, 119 N.H. 249 (1979).

Rule 3(c) is consistent with current practice.

Rule 3(d) is based on RSA 594:14, which provides that in any case in which a police officer would be authorized to arrest for a misdemeanor or violation, without warrant, the officer may instead issue a summons. If the summoned party fails to appear, an arrest warrant may be issued. RSA 594:14(II)

provides that a person who fails to appear in response to a summons may be charged with a misdemeanor.

Rule 3(e) is based on RSA 597:18.

Rule 4. Initial Proceedings in District Court

(a) *Initial Appearance; Bail.* Any person who has been arrested and who is not released on bail set by a bail commissioner shall be taken before the district court having jurisdiction over the complaint without unnecessary delay, but in any event within twenty-four hours of arrest, Saturdays, Sundays and holidays excepted. Such persons shall be arraigned and shall be entitled to a bail hearing at that time. If the person is released prior to being taken before the district court, the person shall be directed to appear, without unreasonable delay, in district court for arraignment at a stated time and date. District Court bail orders may be reviewable by the Superior Court as provided by statute.

(b) *Gerstein Determination.* If the defendant was arrested without a warrant and is held in custody, or if the defendant was arrested pursuant to a warrant that was not issued by a judge, the court shall require the state to demonstrate probable cause for arrest. This determination may be made at the district court arraignment, but in any event, must be made within forty-eight hours of the defendant's arrest.

(1) The state may present proof by way of sworn affidavit or by oral testimony. Oral testimony, if submitted, shall be under oath and recorded.

(2) The defendant does not have the right to be present, present evidence or cross-examine witnesses. The proceeding shall be non-adversarial.

(3) The court shall make a written finding on the issue of probable cause. The finding and the affidavit shall become part of the public record, shall be available to the defendant and must be filed with the appropriate court on the next business day.

(4) If a motion to seal the affidavit has been filed with the request for a *Gerstein* determination, the court shall rule on the motion to seal when ruling on the issue of probable cause.

(c) *Copy of Complaint.* No later than at the time of the first appearance in court, the defendant shall be provided with a copy of the complaint.

(d) *Arraignments on Misdemeanors and Violations.* The following procedures apply to arraignments on misdemeanors and violations.

(1) If the defendant is charged with a misdemeanor or violation, the court shall inform the defendant of the nature of the charges, the possible penalties, the right to retain counsel, and in class A misdemeanor cases, the right to have an attorney

appointed by the court pursuant to Rule 5 if the defendant is unable to afford an attorney. The defendant shall be asked to enter a plea of guilty, not guilty or, with the consent of the court, *nolo contendere*. If a defendant refuses to plead or if a court refuses to accept a plea of guilty, the court shall enter a plea of not guilty. Upon entry of a plea of not guilty, the case shall be scheduled for trial.

(2) Violation cases and class B misdemeanors may be continued for arraignment or arraignment and trial without the personal appearance of the defendant where the defendant is not in custody, where timely request is made in writing, and where the court is satisfied with the terms of bail.

(3) Class A misdemeanor cases may be continued for arraignment, or arraignment and trial without the personal appearance of the defendant where the defendant is not in custody and is represented by counsel, and where a timely request is made by counsel in writing, and the court is satisfied with the terms of bail.

(e) *District Court Appearance on Felonies*. If the defendant is charged with a felony, the defendant shall not be called upon to plead. The court shall inform the defendant of the nature of the charges, the possible penalties, the right to retain counsel, and the right to have an attorney appointed by the court pursuant to Rule 5 if the defendant is unable to afford an attorney. The court shall inform the defendant of the right to a probable cause hearing which will be conducted pursuant to Rule 6. If the defendant is represented by counsel, and if the State and defense notify the court that each is satisfied with the terms of bail, the arraignment may be continued until the probable cause hearing.

(f) *Plea by Mail - Time for Filing Complaint*. In all cases where the defendant may enter a plea by mail and a summons has been issued to the defendant, the complaint must be filed with the court not later than fifteen days from the date of the issuance of the summons. Any complaint filed with the court after the filing date has passed shall be summarily dismissed by the court unless good cause is shown.

(g) *Continuance of a Scheduled Trial or Preliminary Hearing*. Once a case is scheduled for trial or preliminary hearing, motions to continue should be filed in writing unless exceptional circumstances necessitate an oral motion in court. A written motion to continue shall state the reasons for the motion, whether the opposing party assents or objects to the motion, and whether either party requests a hearing (if there is not agreement). Every defendant shall be entitled to a reasonable time to prepare for trial.

Comments

Rule 4(a) is derived from the statutory scheme outlined in RSA 594, which requires that a criminal defendant be taken before a district or municipal court within twenty- four hours of arrest if the defendant has been committed to a jail. RSA 594:19-a, 20-a; N.H. Dist. Ct. Rule 2.6A(3), B(1). A person who is released on bail after arrest need not be taken before a judge within the described time limits.

The rule also provides that bail shall be considered at the initial hearing. The availability of bail is determined by statute.

Rule 4(b) provides for a detention hearing to satisfy the Fourth Amendment requirements as set forth in *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991) and *Gerstein v. Pugh*, 420 U.S. 103 (1975). The rule is derived from District Court Administrative Order 91-01, which was enacted by the District Court Administrative Judge in light of the *McLaughlin* decision. Rule 4(c) is consistent with the June 16, 2006 amendments to District Court Administrative Order 91-01.

Rule 4(c) is based on N.H. Dist. Ct. Rule 2.1(C).

Rule 4(d) is based on N.H. Dist. Ct. Rules 2.4 and 2.6(A).

Rule 4(e) is based on N.H. Dist. Ct. Rule 2.6(B) and the committee's belief that defendants should be informed of the nature of the charges, the possible penalties and the right to counsel.

Rule 4(d)(1) and Rule 4(e) do not require a judge to advise a defendant of the constitutional right to remain silent. Although courts do sometimes warn defendants about this right, all committee members agree that there is no statute or rule which requires this warning (or any type of *Miranda* warning from the judge) and that giving such warnings is not a consistent or common practice. Several committee members believe that requiring such a warning is appropriate and suggest that the court add the required warning to the rule. The rule, as rewritten, states current practice. *See generally State v. Williams*, 115 N.H. 437 (1975).

Rule 4(f) is based on N.H. Dist. Ct. Rule 2.5A. *See also* N.H. Dist. Ct. Rule 2.5, RSA 262:44 and RSA 502-A:19-b.

Rule 4(g) is based on N.H. Dist. Ct. Rule 2.6(C), (E) – (H).

Rule 5. Appearance and Appointment of Counsel in District and Superior Court

(a) *Filing of Petition for Appointment.* At any time, if a defendant requests appointed counsel or a determination of eligibility for appointed counsel, the court shall provide the defendant with a petition for assignment of counsel and financial affidavit forms. If the defendant is in custody, the defendant shall be provided a sufficient opportunity to complete the petition and affidavit before the initial appearance or arraignment. The court shall request that the defendant file the form and affidavit on the day of the initial appearance or arraignment, if the defendant has not had an opportunity to do so in advance.

(b) *Determination of Eligibility.* The court shall review and act upon petitions for assignment of counsel without unreasonable delay but in any event not later than three days after receipt of the petition and financial affidavit, Saturdays, Sundays and holidays excepted.

(c) *Withdrawal.* No attorney shall be permitted to withdraw an appearance after the case has been assigned for trial or hearing, except upon motion granted by the court for good cause shown, and on such terms as the court may order. Any motion to withdraw filed by counsel shall set forth the reasons for the motion but shall be effective only upon approval of the court. A factor which may be considered by the

court in determining whether good cause to withdraw has been shown is the client's failure to pay for the attorney's services. Whenever the court approves the withdrawal of appointed defense counsel, the court shall appoint substitute counsel forthwith and notify the defendant of said appointment.

(d) *Multiple Representation*

(1) A lawyer shall not represent multiple defendants if such representation would violate the Rules of Professional Conduct.

(2) A lawyer shall not be permitted to represent more than one defendant in a criminal action unless:

(A) The lawyer investigates the possibility of a conflict of interest early in the proceedings and discusses the possibility with each client; and

(B) The lawyer determines that a conflict is highly unlikely; and

(C) The lawyer notifies the court of the multiple representation and a hearing on the record is promptly held. The court shall inquire into all relevant facts, including, but not limited to, the following:

(i) Evidence of the lawyer's discussion of the matter with each client;

(ii) Evidence of each client's informed consent to multiple representation based on the client's understanding of the entitlement to conflict-free counsel;

(iii) A written or oral waiver by each client of any potential conflict arising from the multiple representation; and

(D) The court finds by clear and convincing evidence that the potential for conflict is very slight.

(e) *Counsel of Record; Bail.* An attorney shall not post bail or assume any bail obligations in a case in which the attorney is counsel of record.

Comments

Rule 5 is consistent with RSA 604-A:2 I, which requires the court to instruct the defendant to complete a financial affidavit upon the defendant indicating a financial inability to obtain counsel. A defendant's right to counsel attaches at the commencement of formal criminal proceedings and applies in all "critical" stages of a criminal proceeding. See N.H. Const. pt. 1, art. 15; *State v. Parker*, 155 N.H. 89 (2007); *State v. Bruneau*, 131 N.H. 104 (1988); *State v. Delisle*, 137 N.H. 549 (1993); *State v. Gibbons*, 135 N.H. 320 (1992).

Rule 5(a) and (b) require prompt action on petitions for appointment of counsel. Currently, there is no three day rule but the committee believes prompt appointment of counsel is reasonable and consistent with the practice of New Hampshire courts.

Rule 5(c) expresses the traditional New Hampshire rule that once an attorney has appeared for a client, the attorney may withdraw only with the permission of the court. See N.H. Dist. Ct. Rule 1.3. The last sentence of 5(c) is based on N.H. District Court Rule 1.3(H) and Superior Court Rule 20.

Rule 5(d) is based on N.H. Dist. Ct. Rule 2.2-A. The rule reflects the requirement of the New Hampshire Rules of Professional Conduct and the New Hampshire Constitution. The rule sets forth both substantive and procedural requirements. Substantively, the rule prohibits multiple representation if it would violate Rule 1.7 of the Rules of Professional Conduct. The committee expressly references the Rules of Professional Conduct because Rule 1.7 is broader than N.H. Dist. Ct. Rule 2.2-A. See generally *Abbott v. Potter*, 125 N.H. 257 (1984); *Hopps v. New Hampshire Board of Parole*, 127 N.H. 133 (1985); *Wheat v. United States*, 486 U.S. 154 (1988).

Rule 5(e) is based on N.H. Dist. Ct. Rule 2.2(D).

Rule 6. District Court Probable Cause Hearing

(a) *Jurisdiction.* A probable cause hearing shall be scheduled in accordance with this rule in any case which is beyond the trial jurisdiction of the district court and in which the defendant has not been indicted.

(b) *Scheduling.* The court shall hold a probable cause hearing within ten days following the arraignment if the defendant is in custody. The court shall hold the hearing within twenty days of the arraignment if the defendant is not in custody. The probable cause hearing shall not be held if the defendant is notified before the hearing of an indictment on the charge which would have been the subject of the hearing. A probable cause hearing may be adjourned for reasonable cause.

(c) *Notice to Defendant.* The court shall inform the defendant of the complaint, the right to counsel, and the right to a preliminary examination. The court shall also tell the defendant that there is no obligation to make a statement and that any statement may be used against the defendant.

(d) *Evidence.* The Rules of Evidence shall not apply at the hearing. The defendant may cross-examine adverse witnesses, testify and introduce evidence. If the defendant elects to be examined, the defendant shall be sworn, but it shall always be a sufficient answer that the defendant declines to answer the question; and if at any time the defendant declines to answer further, the examination shall cease. The parties may request sequestration of the witnesses.

(e) *Finding of Probable Cause.* If the court determines that there is probable cause to believe that a charged offense has been committed and the defendant committed it, the court shall hold the defendant to answer in superior court.

(f) *Finding of no Probable Cause.* If the court determines that there is no probable cause to believe that a charged offense has been committed or that the defendant committed it, the court shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense or another offense.

(g) *Waiver.* A defendant may waive the right to a probable cause hearing. The waiver shall be in writing.

Comments

A preliminary examination allows a defendant to challenge the decision of the prosecuting authorities to limit the defendant's liberty pending consideration of the matter by a grand jury. *State v. Arnault*, 114 N.H. 216 (1974); *Jewett v. Siegmund*, 110 N.H. 203 (1970). The preliminary examination is not a trial on guilt or innocence. It is merely an examination to determine if the State can establish if there is enough evidence to proceed to trial. In essence, it is a hearing to determine whether probable cause exists.

This rule is generally based on RSA 596-A.

Rule 6(a) recognizes that preliminary examinations are held only in cases in which a defendant is charged with an offense beyond the jurisdiction of the district court and the defendant has not been indicted. Rule 6(b) requires that a hearing be scheduled in accordance with New Hampshire District Court Order 91-03. If a person is indicted before the date of the preliminary examination, no preliminary examination will be held. See N.H. Dist. Ct. Rule 2.16; *State v. Gagne*, 129 N.H. 93 (1986).

Rule 6(c) is derived from RSA 596-A:3.

Rule 6(d) recognizes that the Rules of Evidence are not applicable at a probable cause hearing. N.H. Rule of Evidence 1101(d)(3); *State v. Arnault*, 114 N.H. 216 (1974). A defendant may testify at the hearing, however, the defendant's testimony may be introduced by the State in subsequent proceedings. *State v. Williams*, 115 N.H. 437 (1975). Courts and parties should note that RSA 596-A:3 requires the court to caution a defendant about the right to counsel and the right to remain silent. In addition RSA 596-A:5 provides for limited testimony by the defendant and RSA 596-A:6 provides for sequestration of witnesses.

Rule 6(e) and (f) are based on RSA 596-A:7. There are two issues in a probable cause hearing. The first issue is whether probable cause exists to believe that a charged offense has been committed. The second issue is whether there is probable cause to believe that the defendant committed the offense. RSA 596-A:7; *State v. Arnault*, 114 N.H. 216 (1974). If probable cause is found, the defendant is bound over until a meeting of the grand jury. During the bindover period, the defendant may be admitted to bail as provided by statute.

Rule 6(g) simply provides that a defendant may waive the right to a probable cause hearing in writing. The language of New Hampshire District Court Rule 2.19 has not been incorporated because the procedure described in that rule is not commonly followed.

III. CHARGING DOCUMENTS IN SUPERIOR COURT

Rule 7. Definitions

(a) *Indictment.* Misdemeanors punishable by a term of imprisonment exceeding one year and felonies shall be charged by an indictment. Misdemeanors punishable by a term of imprisonment of one year or less may be charged in an indictment. An indictment shall be returned by a grand jury and shall be prosecuted in superior court.

(b) *Information.* An information charges a misdemeanor punishable by a term of imprisonment of one year or less. An information is filed by the prosecuting authority and shall be prosecuted in superior court.

(c) *Misdemeanor Complaint.* When a misdemeanor conviction is appealed to superior court, the charging document is the complaint which was filed in the district court.

Comments

Part I, Article 15 of the New Hampshire Constitution has been interpreted to require that criminal defendants have the right to indictment by a grand jury before they may be tried for any offense punishable by more than one year. *State v. Canatella*, 96 N.H. 202 (1950). See also RSA 601:1. For that reason, an indictment may be amended in form, but not in substance. *State v. Erickson*, 129 N.H. 515 (1987). An accused person may only be tried for a misdemeanor in which the State is seeking an extended term of imprisonment when the accused has been indicted by a grand jury. *State v. Ouelette*, 145 N.H. 489, 491 (2000). When a misdemeanor complaint is appealed to superior court, the State may amend the complaint unless otherwise prohibited by law.

Rule 8. The Grand Jury

(a) *Summoning Grand Juries.* The superior court shall order a grand jury to be summoned and convened at such time and for such duration as the public interest requires, in the manner prescribed by law. The grand jury shall consist of no fewer than twelve nor more than twenty-three members. The grand jury shall receive, prior to performing its duties, instructions relative thereto and shall be sworn in accordance with law. Such instructions may be given by a justice of the superior court, by utilization of a prerecorded audio or video presentation created for this purpose, or by a combination of use of a recording and instruction by a justice.

(b) *Conduct of Proceedings.*

(1) State's counsel or the foreperson of the grand jury shall swear and examine witnesses. The State shall present evidence on each matter before the grand jury.

(2) The grand jury's role is to diligently inquire into possible criminal conduct. The grand jury may also consider whether to return an indictment on a felony or misdemeanor.

(3) Upon request, a grand jury witness shall be given reasonable opportunity to consult with counsel.

(4) If twelve or more grand jurors find probable cause that a felony or misdemeanor was committed, the grand jury should return an indictment.

(5) Upon application of the Attorney General or upon the court's own motion, a justice of the superior court may authorize a stenographic record of the testimony of any witness before a grand jury to be taken by a sworn and qualified reporter. Disclosure of such testimony may be made only in accordance with Supreme Court Rule 52.

(6) A grand juror, interpreter, stenographer, typist who transcribes recorded testimony, attorney for the State, or any person to whom disclosure is made under paragraph (C) below, shall not disclose matters occurring before the grand jury, except:

(A) As provided by the Supreme Court rules;

(B) To an attorney for the State for use in the performance of such attorney's duties;

(C) To such state, local or federal government personnel as are deemed necessary by an attorney for the State to assist in the performance of such attorney's duty to enforce state criminal law;

(D) When so directed by a court in connection with a judicial proceeding;

(E) When permitted by the court at the request of an attorney for the State, when the disclosure is made by an attorney for the State to another grand jury in this state; or

(F) When permitted by a court at the request of an attorney for the State upon a showing that such matters may disclose a violation of federal criminal law or the criminal law of another state, to an appropriate official of the federal government or of such other state or subdivision of a state, for the purpose of enforcing such law.

(c) *Notice to Defendant.* If the grand jury returns a no true bill after consideration of a charge against a defendant who is incarcerated or is subject to bail conditions, the court shall immediately notify the defendant or the defendant's attorney. If the grand jury returns an indictment, the defendant shall be notified by mail unless the court issues a *capias* for the defendant's arrest.

(d) *Indictment within 90 Days.* The superior court will dismiss without prejudice and vacate bail orders in all such cases in which an indictment has not been returned 90 days after the matter is bound over, unless, prior to that time, the prosecution files a motion seeking an extension of time and explaining why the extension is necessary.

Comments

This rule is based on RSA 600, 600-A, common law, current practice and Supreme Court Rule 52.

Rule (b)(6) restates the traditional rule of grand jury secrecy. This paragraph is based on Federal Rule of Criminal Procedure 6 and prohibits grand jurors, interpreters, stenographers, typists who transcribe recorded testimony or an attorney for the State, or any person to whom disclosure is made under the rule, from disclosing information received except under a few narrow circumstances. It is

important, however, to note that this rule does not bar a witness from later revealing the substance of the witness's testimony before a grand jury.

Rule 9. Waiver of Indictment

An offense which is not punishable by death or a term of imprisonment exceeding one year may be prosecuted by a complaint with a waiver of indictment. If the charge proceeds by a waiver of indictment, the defendant shall be informed of the nature of the charge and the right to have the charge presented to a grand jury. The waiver must be in open court and on the record. If a defendant waives indictment as to a charge punishable by death or a term of imprisonment exceeding one year, the complaint shall not be amended substantively without the defendant's consent.

Comments

Since the right to trial upon an indictment exists to benefit a defendant, it may be waived by a defendant. *State v. Albee*, 61 N.H. 423 (1881); RSA 601:2.

IV. ARRAIGNMENT, PLEAS AND PRETRIAL PROCEEDINGS

Rule 10. Arraignment in Superior Court

(a) *Arrest on a Charge Originating in Superior Court.* Any person who is arrested on a warrant or capias issued pursuant to an indictment or information shall be taken before the superior court for arraignment without unreasonable delay but in any event within twenty-four hours of arrest, Saturdays, Sundays, and holidays excepted.

(b) *Arraignment on Felonies.* Arraignment shall be conducted in open court. The court shall read the indictment or information to the defendant or state to the defendant the substance of the charge. If the defendant appears *pro se*, the court shall inform the defendant of the possible penalties, the right to retain counsel, and the right to have an attorney appointed by the court pursuant to Rule 5 if the defendant is unable to afford an attorney. The defendant shall be called upon to plead to the charge, unless unrepresented by counsel, in which case a plea of not guilty shall be entered on the defendant's behalf. The defendant shall be given a copy of the charge.

(c) *Waiver of Arraignment.* A defendant who is represented by an attorney may enter a plea of not guilty and waive formal arraignment as follows. Before the arraignment hearing, the attorney shall file a written statement signed by the defendant certifying that the defendant has reviewed a copy of the indictment or information. The attorney shall further certify that the defendant read the indictment or information or that it was read to the defendant, and that the defendant understands the substance of the charge and the possible penalties, waives formal arraignment, and pleads not guilty to the charge.

(d) *Arraignment on Misdemeanor Appeal.* No arraignment shall be held on a misdemeanor appeal. Upon the filing of a misdemeanor appeal in superior court, a trial schedule consistent with these rules shall be issued. The date of the issuance of the trial schedule shall be the equivalent of an arraignment and entry of not guilty plea for the purpose of determining deadlines.

Comments

Rule 10(a) is derived from section I of RSA 594:20-a, entitled “Place and Time of Detention,” which requires that, following an arrest, the arrestee be taken before a district court to answer for the offense within twenty-four hours of arrest, Saturdays, Sundays, and holidays excepted.

Rule 10(b) obligates the superior court at arraignment to advise a *pro se* defendant of the possible penalties for the offense and of the defendant’s constitutional right to counsel.

Rule 10(c) is derived from present Superior Court Rule 97, entitled “Entry of Not Guilty Plea and Waiver of Formal Arraignment,” which allows a defendant who is represented by counsel to waive formal arraignment and plead not guilty upon certifying that the defendant: (1) has reviewed a copy of the indictment; (2) has read it or had it read or explained; (3) understands the substance of the charge; (4) waives formal arraignment; and (5) pleads not guilty to the charge.

Rule 10(d) specifically provides that no arraignment shall be held on a misdemeanor appeal to superior court. Current practice among the superior courts is not uniform on this issue. At present, some superior courts hold an initial hearing on misdemeanor appeals, which is treated as the equivalent of an arraignment; other superior courts do not hold such a hearing. Where Rule 12, derived from current Superior Court Rule 98, uses the date of arraignment as a starting point for the scheduling of certain pretrial deadlines, it is desirable to have a rule establishing a uniform starting point for purposes of discovery and other deadlines in misdemeanor appeal cases. Rule 10(d) designates the date of the issuance of the trial notice by the superior court as the equivalent of an arraignment and entry of not guilty plea for purposes of Rule 12 deadlines.

Rule 11. Pleas

(a) *District Court*

(1) *Violations.* A plea of guilty or *nolo contendere* to a violation may be accepted by the court without formal hearing unless the violation carries a statutorily enhanced penalty upon a subsequent conviction subjecting the defendant to incarceration.

(2) *Plea by Mail.* In all cases in which a defendant may enter a plea by mail pursuant to RSA 262:44, the defendant may enter a plea by mail in accordance with the procedures provided by RSA 502-A:19-b.

(3) *Plea by Mail – Time for Filing Complaint.* In any and all cases whereby the defendant may enter a plea by mail and a summons has been issued to the defendant, the complaint must be filed with the designated court not later than fifteen days from the date of the issuance of the summons. Any complaint filed with the

court after the filing date has passed shall be summarily dismissed by the court unless good cause is shown.

(4) *Misdemeanors and Enhanced Violations*. Before accepting a plea of guilty or, with the consent of the court, a plea of *nolo contendere*, to any misdemeanor, or to a violation that carries a statutorily enhanced penalty upon a subsequent conviction, the court shall personally address the defendant and determine on the record that:

(A) There is a factual basis for the plea;

(B) The defendant understands the crime charged and the factual basis of that charge;

(C) The defendant's plea is knowing, intelligent and voluntary;

(D) The defendant's plea is not the result of any unlawful force, threats or promises; and that

(E) The defendant understands and waives the statutory and constitutional rights as set forth in the Acknowledgement and Waiver of Rights.

(5) *Acknowledgment and Waiver of Rights Forms*. The appropriate Acknowledgment and Waiver of Rights form shall be read and signed by the defendant, counsel, if any, and the presiding justice.

(b) *Superior Court*

(1) *Deadlines for Filing Plea Agreements*. The court may establish deadlines for the filing of plea agreements.

(2) *Pleas*. Before accepting a plea of guilty or, with the consent of the court, a plea of *nolo contendere*, to any felony, misdemeanor, or violation that carries a statutorily enhanced penalty upon a subsequent conviction, the court shall personally address the defendant and determine on the record that:

(A) There is a factual basis for the plea;

(B) The defendant understands the crime charged and the factual basis of that charge;

(C) The defendant's plea is knowing, intelligent and voluntary;

(D) The defendant's plea is not the result of any unlawful force, threats or promises; and that

(E) The defendant understands and waives the statutory and constitutional rights as set forth in the Acknowledgment and Waiver of Rights.

(3) *Acknowledgment and Waiver of Rights Forms.* The appropriate Acknowledgment and Waiver of Rights form shall be read and signed by the defendant, counsel, if any, and the presiding justice.

(c) *Negotiated Pleas – District and Superior Courts*

(1) *Permissibility.* If the court accepts a plea agreement, the sentence imposed by the court shall not violate the terms of the agreement.

(2) *Court's Rejection of Negotiated Plea.* If the court rejects a plea agreement, the court shall so advise the parties, and the defendant shall be afforded the opportunity to withdraw the plea of guilty or *nolo contendere*.

(3) *Sentence Review.* When a defendant is sentenced to more than one year in state prison pursuant to a plea agreement, both the defendant and the state have the right to have the sentence reviewed by the sentence review division, unless the plea agreement includes a waiver of this review. As a condition of acceptance of the plea agreement, the court may require a written waiver of sentence review from the defendant and the state.

Comments

This rule should be read in conjunction with Rule 29 regarding sentencing.

Rule 11(a)(1) permits the district court, without formal hearing, to accept guilty and *nolo contendere* pleas to violations that do not carry enhanced penalties upon a subsequent conviction subjecting the defendant to incarceration. Such a rule promotes timely resolution of cases where incarceration is not possible, and the rule is consistent with current practice.

Rule 11(a)(2) is derived from current District Court Rule 2.5, entitled "Plea By Mail." Current District Court Rule 2.5 cites RSA 262:44 ("Waiver in Lieu of Court Appearance") which permits pleas by mail in certain motor vehicle cases. Rule 11(a)(2) further provides that in the case of motor vehicle offenses covered by RSA 262:44, the defendant may enter a plea by mail in accordance with the detailed procedures outlined in RSA 502-A:19-b, entitled "Pleas by Mail; Procedure." As the two cited statutes have been amended several times over the years, the Committee decided it is appropriate to simply reference the two laws in this rule.

Rule 11(a)(3) is derived from current District Court Rule 2.5A entitled "Plea By Mail – Time For Filing Complaint." The rule states that in cases where the defendant may plea by mail and where a summons was issued to the defendant, a complaint must be filed in the appropriate court within 15 days of the summons being issued. If this filing provision is not met, the complaint may be summarily dismissed by the court unless good cause is shown by the state.

Rule 11(a)(4) and (a)(5), applicable to district court pleas, and Rule 11(b)(2) and (b)(3), applicable to superior court pleas, address the colloquy required between the court and defendant in cases where incarceration upon conviction is possible. In sum, these provisions require the record to reflect that a factual basis for the charge exists; the defendant understands the crime charged and its factual basis;

the plea is knowing, intelligent, and voluntary; the plea is not the result of threats or promises; and the defendant appreciates the constitutional rights being waived as part of the plea. In practice, the factual basis for the charge referred to in Rule 11(a)(4)(A) and (b)(2)(A) is provided by the state in its offer of proof during the plea hearing.

The rule reflects the constitutional requirement that the trial court affirmatively inquire, on the record, into the defendant's volition in entering the plea. *Boykin*, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); *Richard v. MacAskill*, 129 N.H. 405 (1987). For a plea to be knowing, intelligent, and voluntary, the defendant must understand the essential elements of the crime to which a guilty plea is being entered. *Thornton*, 140 N.H. 532, 537 (1995). To find that a plea has been intelligently made, the court must fully apprise the defendant of the consequences of the plea and the possible penalties that may be imposed. *State v. Ray*, 118 N.H. 2 (1978); *State v. Manoly*, 110 N.H. 434 (1974). A defendant need not be apprised, however, of all possible collateral consequences of the plea. *State v. Elliot*, 133 N.H. 190 (1990); see *State v. Chace*, 151, N.H. 310, 313 (2004) (defendant need not be advised that loss of license will be collateral consequence of pleading guilty to DWI). If the record does not reflect that a plea is voluntarily and intelligently made, it may be withdrawn as a matter of federal constitutional law. *Boykin*, 395 U.S. at 238.

Rule 11(c) addresses negotiated pleas. Rule 11(c)(2) provides that if a court rejects the plea agreement, the defendant has the right to withdraw the negotiated plea. This provision is consistent with practice and case law. *State v. Goodrich*, 116 N.H. 477 (1976). As a guilty plea must be "voluntary" to be valid, a defendant cannot be forced to plead guilty even if the defendant has reached an unexecuted plea agreement with the state. *State v. LaRoche*, 117 N.H. 127 (1977). Similarly, in the ordinary course, neither the state nor federal constitutions bar a prosecutor from refusing to perform an executory plea agreement. *State v. O'Leary*, 128 N.H. 661 (1986); *Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2543 81 L.Ed.2d 437 (1984). N.H. Rule of Evidence 410 provides that a plea of guilty or *nolo contendere* which was later withdrawn, and statements made in the course of plea proceedings or plea discussions, are generally inadmissible. Rule 11(c)(3) provides that in cases where a defendant is sentenced to more than one year in state prison, both the defendant and the state have the right to seek review of the disposition by the sentence review division, unless such a review is waived as part of the plea agreement. Additionally, the court may require written waivers of sentence review from the parties as a condition of accepting the plea agreement. Rule 29(k) addresses sentence review procedures in more detail.

Rule 12. Discovery

(a) District Court

(1) Upon request, the prosecuting attorney shall furnish the defendant's attorney, or the defendant, if *pro se*, with the following:

(A) a copy of records of statements or confessions, signed or unsigned, by the defendant, to any law enforcement officer or agent;

(B) a list of any tangible objects, papers, documents or books obtained from or belonging to the defendant; and

(C) a statement as to whether or not the foregoing evidence, or any part thereof, will be offered at the trial.

(2) Not less than fourteen days prior to trial, the state shall provide the defendant with a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, it anticipates introducing at trial.

(3) Not less than seven days prior to trial, the defendant shall provide the state with a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, the defendant anticipates introducing at trial.

(b) *Superior Court.* The following discovery and scheduling provisions shall apply to all criminal cases in the superior court unless otherwise ordered by the presiding justice.

(1) *Pretrial Disclosure by the State*

(A) Within ten calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with a copy of all statements, written or oral, signed or unsigned, made by the defendant to any law enforcement officer or the officer's agent which are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(B) Within thirty calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with the materials specified below:

(i) Copies of all police reports; statements of witnesses; results or reports of physical or mental examinations, scientific tests or experiments, or any other reports or statements of experts, as well as a summary of each expert's qualifications.

(ii) The defendant's prior criminal record.

(iii) Copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(iv) All exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995).

(v) Notification of the state's intention to offer at trial pursuant to N.H. Rule of Evidence 404(b) evidence of other crimes, wrongs or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the state will rely on to prove the commission of such other crimes, wrongs or acts.

(2) *Pretrial Disclosure by the Defendant*

Not less than thirty calendar days prior to jury selection or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the defendant shall provide the State with copies of or access to (i) all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the defendant as evidence at the trial or hearing and (ii) all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by experts which the defendant anticipates calling as a witness at the trial or hearing, as well as a summary of each such expert's qualifications.

(3) *Exchange of Information Concerning Trial Witnesses*

(A) Not less than twenty calendar days prior to jury selection or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the State shall provide the defendant with a list of the names of the witnesses it anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to paragraph (b)(1)(B)(i) of this rule the State shall also provide the defendant with all statements of witnesses the State anticipates calling at the trial or hearing. At this same time, the State also shall furnish the defendant with the results of New Hampshire criminal record checks for all of the State's trial or hearing witnesses other than those witnesses who are experts or law enforcement officers.

For each expert witness included on the list of witnesses, the State shall provide a brief summary of the expert's education and relevant experience, state the subject matter on which the expert is expected to testify, state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.

(B) Not later than the final pretrial conference or ten calendar days before jury selection, whichever occurs first, or, in the case of a pretrial evidentiary hearing, not less than two calendar days prior to such hearing, the defendant shall provide the State with a list of the names of the witnesses the defendant anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the defendant shall also provide the State with all statements of witnesses the defendant anticipates calling at the trial or hearing. Notwithstanding the preceding sentence, this rule does not require the defendant to provide the State with copies of or access to statements of the defendant. For each expert witness included on the list of witnesses, the defendant shall provide a brief summary of the expert's education and relevant experience, state the subject matter on which the expert is expected to testify, state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.

(C) For purposes of this rule, a “statement” of a witness means:

(i) a written statement signed or otherwise adopted or approved by the witness;

(ii) a stenographic, mechanical, electrical or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement; and

(iii) the substance of an oral statement made by the witness and memorialized or summarized within any notes, reports or other writings or recordings, except that, in the case of notes personally prepared by the attorney representing the state or the defendant at trial, such notes do not constitute a “statement” unless they have been adopted or approved by the witness or by a third person who was present when the oral statement memorialized or summarized within the notes was made.

(4) *Protection of Information not Subject to Disclosure.* To the extent either party contends that a particular statement of a witness otherwise subject to discovery under this rule contains information concerning the mental impressions, theories, legal conclusions or trial or hearing strategy of counsel, or contains information that is not pertinent to the anticipated testimony of the witness on direct or cross examination, that party shall at or before the time disclosure hereunder is required submit to the opposing party a proposed redacted copy of the statement deleting the information which the party contends should not be disclosed, together with (i) notification that the statement or report in question has been redacted and (ii) (without disclosing the contents of the redacted portions) a general statement of the basis for the redactions. If the opposing party is not satisfied with the redacted version of the statement so provided, the party claiming the right to prevent disclosure of the redacted material shall submit to the court for in camera review a complete copy of the statement at issue as well as the proposed redacted version, along with a memorandum of law detailing the grounds for nondisclosure.

(5) *Motions Seeking Additional Discovery.* Subject to the provisions of paragraph (b)(7), the discovery mandated by paragraphs (b)(1), (b)(2), and (b)(3) of this rule shall be provided as a matter of course and without the need for making formal request or filing a motion for the same. No motion seeking discovery of any of the materials required to be disclosed by paragraphs (b)(1) through (b)(3) of this rule shall be accepted for filing by the clerk of court unless said motion contains a specific recitation of: (A) the particular discovery materials sought by the motion, (B) the efforts which the movant has made to obtain said materials from the opposing party without the need for filing a motion, and (C) the reasons, if any, given by the opposing party for refusing to provide such materials. Nonetheless, this rule does not preclude any party from filing motions to obtain additional discovery. Except with respect to witnesses or information first disclosed pursuant to paragraph (b)(3), all motions seeking additional discovery, including motions for a bill of particulars and for depositions, shall be filed within sixty calendar days after the defendant enters a plea

of not guilty. Motions for additional discovery or depositions with respect to trial witnesses first disclosed pursuant to paragraph (b)(3) shall be filed no later than seven calendar days after such disclosure occurs.

(6) *Continuing Duty to Disclose.* The parties are under a continuing obligation to supplement their discovery responses on a timely basis as additional materials covered by this order are generated or as a party learns that discovery previously provided is incomplete, inaccurate or misleading.

(7) *Protective and Modifying Orders.* Upon a sufficient showing of good cause, the court may at any time order that discovery required hereunder be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing of good cause, in whole or in part, in the form of an *ex parte* written submission to be reviewed by the court in camera. If the court enters an order granting relief following such an *ex parte* showing, the written submission made by the party shall be sealed and preserved in the records of the court to be made available to the Supreme Court in the event of an appeal.

(8) *Sanctions for Failure to Comply.* If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including but not limited to: (A) ordering the party to provide the discovery not previously provided, (B) granting a continuance of the trial or hearing, (C) prohibiting the party from introducing the evidence not disclosed, and (D) assessing costs and attorneys fees against the party or counsel who has violated the terms of this rule.

Comments

Rule 12(a) is derived from current District Court Rule 2.10, entitled "Discovery." Rule 12(b) is derived from current Superior Court Rule 98, also entitled "Discovery." The Committee recognizes that these rules are well established in New Hampshire criminal practice and provide clear directives concerning discovery obligations of the parties and the timing of discovery. For this reason, in Rule 12, the respective courts' rules have been unaltered by the Committee with the exception of two sections of current Superior Court Rule 98 relating to pretrial motions and motions in limine. These sections are addressed in Rule 15, entitled "Pretrial Motions."

Rule 13. Discovery Depositions

(a) *By Agreement.* In criminal cases either party may take the deposition of any witness, other than the defendant, by agreement of the parties, except as prohibited by statute.

(b) *Finding by Court.* The court in its discretion may permit either party to take the deposition of any witness, except the defendant, in any criminal case upon a finding by a preponderance of the evidence that such deposition is necessary:

(1) to preserve the testimony of any witness who is unlikely to be available for trial due to illness, absence from the jurisdiction or reluctance to cooperate; or

(2) to ensure a fair trial, avoid surprise or for other good cause shown.

In determining the necessity, the court shall consider the complexity of the issues involved, other opportunities or information available to discover the information sought by the deposition, and any other special or exceptional circumstances which may exist.

(c) *Expert Witness*. In any felony case either party may take a discovery deposition of any expert witness who may be called by the other party to testify at trial.

(d) *Witnesses Under Sixteen Years of Age*. No party in a criminal case shall take the discovery deposition of a victim or witness who has not achieved the age of sixteen years at the time of the deposition.

(e) *Fees for Lay Witnesses*. Deposition witnesses under subpoena shall be entitled to witness fees as in any official proceeding unless expressly waived by the parties.

(f) *Scope of Depositions*. The deponent in a deposition shall ordinarily be required to answer all questions not subject to privilege or excused by the statute relating to depositions, and it is not grounds for refusal to answer a particular question that the testimony would be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege.

Comments

Rule 13 is derived from New Hampshire RSA 517:13. Paragraph (a) authorizes discovery depositions by agreement of the parties, except where prohibited by statute. Paragraph (d) is consistent with RSA 517:13, V which prohibits the taking of a discovery deposition of a victim or witness who has not achieved the age of 16 at the time of the deposition. Paragraph (c) reflects that, in felony cases, experts may be deposed without the need for court approval. Under Paragraph (b), upon a finding of necessity by a preponderance of the evidence, the trial court may order a deposition over a party's objection. The New Hampshire Supreme Court has addressed trial courts' application of the necessity standard in several reported cases. See, e.g., *State v. Sargent*, 148 N.H. 571 (2002); *State v. Howe*, 145 N.H. 41 (2000); *State v. Hilton*, 144 N.H. 470 (1999); *State v. Ellsworth*, 142 N.H. 710 (1998); *State v. Chick*, 141 N.H. 503 (1996); *State v. Rhoades*, 139 N.H. 432 (1995).

Rule 13(e) provides that deposition witnesses under subpoena are entitled to a witness fee as in other official proceedings, unless the fee is expressly waived by the parties. Paragraph (f) is derived from current Superior Court Rule 44 and provides guidance as to the proper scope of discovery deposition questioning and the witness's obligation to answer all questions not subject to privilege or excused by statute.

Rule 14. Notices

(a) *District Court.* In addition to the notice requirements in (c), affirmative defenses must be raised by written notice at least five days in advance of trial.

(b) *Superior Court.* In addition to the notice requirements in (c), the following notice requirements apply in Superior Court.

(1) *The State's Notice Obligations*

(A) *Evidence of Other Crimes, Wrongs or Acts.* Within thirty calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with notification of the State's intention to offer at trial pursuant to N.H. Rule of Evidence 404(b) evidence of other crimes, wrongs or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the state will rely on to prove the commission of such other crimes, wrongs or acts.

(B) *Extended Term Sentences.* Notice that an extended term of imprisonment may apply pursuant to RSA 651:6 shall be provided to the defendant at least 21 days prior to the commencement of jury selection.

(C) *Psychiatric Reports.* Within three days after an order under RSA 135:17 for a psychiatric evaluation of a defendant in a criminal proceeding, the attorney for the State shall furnish a brief written statement of the factual background of the incident to the clerk of the superior court of the county in which the State is brought, who shall then forward a copy of the statement to the psychiatric personnel performing the evaluation. The defense counsel shall also have the opportunity to provide the clerk with such a statement, which shall then similarly be forwarded. The State shall also furnish to the clerk a copy of the defendant's criminal record as reasonably soon as the same can be obtained, and the clerk shall forward a copy of said record to the psychiatric personnel. The statements and criminal record so provided are for the purpose of the psychiatric evaluation only and may not be used for any other purpose without permission of the court.

(D) *Alibi.* The state may have further notice obligations under Rule 14(b)(2)(C) regarding alibi witnesses.

(2) *The Defendant's Notice Obligations*

(A) *General Notice Obligations.* If the defendant intends to rely upon any defense specified in the criminal code, the defendant shall within thirty calendar days after the entry of a plea of not guilty file a notice of such intention setting forth the grounds therefore with the court and the prosecution, or within such further time as the court may order for good cause shown. If the defendant fails to comply with this rule, the court may exclude any testimony relating to such defense or make such other order as the interest of justice requires.

(B) *Prior Sexual Activity of Victim.* Not less than forty-five days prior to the scheduled trial date, any defendant who intends to offer evidence of specific prior sexual activity of the victim with a person other than the defendant shall file a motion setting forth with specificity the reasons that due process requires the introduction of such evidence and that the probative value thereof to the defendant outweighs the prejudicial effect on the victim. If the defendant fails to file such motion, the defendant shall be precluded from relying on such evidence, except for good cause shown.

(C) *Alibi.* If a defendant intends to rely upon the defense of alibi, notice shall be provided to the State in writing of such intention within thirty calendar days of the plea of not guilty and a copy of such notice shall be filed with the clerk. The notice of alibi shall be signed by the defendant and shall state the specific place where the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Within ten days after the receipt of such notice of alibi from the defendant, the prosecution shall furnish the defendant, or counsel, in writing with a list of the names and addresses of the witnesses upon whom the prosecution intends to rely to establish the defendant's presence at the scene of the alleged offense. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information required by this rule, the party shall forthwith notify the other party, or counsel, of the existence and identity and address of such additional witness. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify concerning the alibi notwithstanding the failure to give notice. The court may waive the requirements of this rule for good cause shown.

(3) *Notice of Use of Criminal Record During Trial.* If a party plans to use or refer to any prior criminal record during trial, for the purpose of attacking or affecting the credibility of a party or witness, the party shall first furnish a copy of the same to the opposing party, or to counsel, and then obtain a ruling from the court as to whether the opposing party or a witness may be questioned with regard to any conviction for credibility purposes. Evidence of a conviction under this rule will not be admissible unless there is introduced a certified record of the judgment of conviction indicating that the party or witness was represented by counsel at the time of the conviction unless counsel was waived.

(c) *Special Notice Requirements.* The following notice requirements apply in all criminal proceedings in either district or superior court.

(1) In any case in which a road or way is alleged to be a "way," as defined in RSA 259:125, or a public highway, a party shall notify the opposing party or counsel at least ten days prior to trial if said "way" or public highway must be formally

proved; otherwise, the need to formally prove said “way” or public highway will be deemed to be waived.

(2) Whenever a party intends to proffer in a criminal proceeding a certificate executed pursuant to RSA 318-B:26-a(II), notice of an intent to proffer that certificate and all reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least twenty days before the proceeding begins. An opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection within ten days upon receiving the adversary's notice of intent to proffer the certificate. A failure to comply with the time limitations regarding the notice of objection required by this section shall constitute a waiver of any objection to the admission of the certificate. The time limitations set forth in this section shall not be relaxed except upon a showing of good cause.

(3) If counsel has a bona fide question about the competency of a defendant to stand trial, counsel may notify the court, or the court may raise the issue on its own. When such a bona fide question arises, the court shall proceed in accordance with RSA 135:17, RSA 135:17-a and any other applicable statutes.

Comments

Rule 14(a) derives from current District Court Rule 2.8 B, entitled “Motions.”

Rule 14(b)(1)(A), requiring the state to provide notice of its intent to introduce evidence of prior bad acts under N.H. Rule of Evidence 404(b), derives from current Superior Court Rule 98(A)(2)(v).

Rule 14(b)(1)(B), requiring the state to provide notice that it may seek an extended term of imprisonment under RSA 651:6, derives from current Superior Court Rule 99-A.

Rule 14(b)(1)(C) derives from current Superior Court Rule 102, entitled “Furnishing Background Material To Psychiatric Personnel Performing An Evaluation.” This rule does not reflect current practice. In cases where a psychiatric evaluation has been ordered under RSA 135:17, the prosecution and defense do not customarily provide written information to the clerk of court for the purpose of forwarding such documents to the psychiatric evaluator. Rather, under current practice, the clerk is not contacted, and the parties provide information directly to the professional tasked with conducting the evaluation.

Rule 14(b)(2)(A) derives from current Superior Court Rule 98(B)(1) and current Superior Court Rule 101, entitled “Notice of Criminal Defense.”

Rule 14(b)(2)(B) derives from current Superior Court Rule 98(B)(2) and current Superior Court Rule 100-A, entitled “Prior Sexual Activity.”

Rule 14(b)(2)(C) derives from current Superior Court Rule 98(B)(1) and current Superior Court Rule 100, entitled “Notice of Alibi.”

Rule 14(b)(3) governing use of prior criminal records derives from current Superior Court Rule 68.

Rule 14(c)(1) derives from current Superior Court Rule 89, entitled “Formal Proof of Highway Waived Unless Demanded (Civil And Criminal).”

Rule 14(c)(2), governing introduction of chemical analyses certificates, derives from RSA 318-B:26-a(II). However, the committee has not included the language which was declared unconstitutional in *State v. Christensen*, 135 N.H. 583 (1992). See also *State v. Coombs*, 149 N.H. 319 (2003).

Rule 15. Pretrial Motions

(a) District Court

(1) General

(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) 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.

(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) 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.

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

(2) Motions to Suppress.

(A) Whenever a motion to suppress evidence is filed before trial in any criminal case, the court will determine, in its discretion, whether to hear the motion in advance of trial or at the trial when the evidence is offered.

(B) If a hearing is held in advance of trial, neither the prosecution nor the defendant shall be entitled to a further hearing by the court on the same issue at the trial. If the evidence is found to be admissible in advance of trial, it will be admitted at the trial without further hearing as to its admissibility. If the evidence is found to be inadmissible, it will not be admitted at the trial and the prosecution shall not refer to such evidence at any time thereafter. The justice presiding at the pretrial hearing need not be disqualified from presiding at the trial. Objections to the court's ruling in advance of trial admitting the evidence shall be noted by the court and the trial shall proceed as scheduled.

(C) All motions to suppress evidence filed in advance of trial shall be in writing and shall specifically set forth all the facts and grounds in separate numbered paragraphs upon which the motions are based. Such motions shall be filed before the commencement of the trial. The court, in its discretion, may grant such a motion after trial commences.

(D) Upon request of any party, the court shall make sufficient findings and rulings to permit meaningful appellate review.

(3) *Motions to Continue.*

(A) All motions for continuance shall be in writing and signed by the moving party. The motion shall state the reasons for the continuance and the position of the opposing party or that a good faith attempt was made to ascertain the position of the opposing party.

(B) A court may rule on a contested motion to continue without a hearing provided that both parties have had an opportunity to inform the court of their respective positions on the motion.

(C) The court shall rule on assented to motions to continue expeditiously. Notwithstanding the agreement of the parties, the court shall exercise its sound discretion in ruling on such motions.

(D) In exceptional situations, motions to continue may be made orally in accordance with these rules and shall be effective as such, but it shall be the burden of the moving party to establish a record thereof by confirming such request in writing. Only attorneys, police prosecutors, or parties *pro se*, shall be permitted to orally move for a continuance.

(E) Where a trial has been scheduled in one case prior to the scheduling of another matter in another court where an attorney or 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:

(i) A subsequently scheduled case involving trial by jury in a superior or federal district court, or argument before the Supreme Court.

(ii) The court finds the subsequently scheduled case should take precedence due to the rights of a victim under RSA 632-A:9.

(iii) The court finds that the subsequently scheduled case should take precedence due to a defendant's rights to speedy trial or other constitutional rights.

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

(F) Other grounds for continuance may be illness of a defendant, defense attorney, or prosecutor; want of material testimony, documents, or other essential evidence; unavoidable absence of an essential witness; and such other exceptional grounds as the court may deem to be in the interest of justice.

(b) *Superior Court*

(1) *Pretrial Motions.* The parties shall file all pretrial motions other than discovery related motions, including but not limited to motions to dismiss, motions to suppress, and motions to sever charges or defendants, no later than forty-five days prior to the scheduled jury selection date.

(2) *Motions to Suppress.* Except for good cause shown, motions to suppress shall be heard in advance of trial. If a hearing is held in advance of trial, neither the prosecution nor the defendant shall be entitled to a further hearing by the court on the same issue at the trial. If the evidence is found to be admissible in advance of trial, it will be admitted at the trial without further hearing as to its admissibility. If the evidence is found to be inadmissible on behalf of the prosecution, the prosecution shall not refer to such evidence at any time in the presence of the jury, unless otherwise ordered by the court. Objections to the court's ruling in advance of trial admitting the evidence shall be transferred on appeal after trial and not in advance of trial except in the discretion of the court in exceptional circumstances. Every motion to suppress evidence:

(A) shall be filed in accordance with section (b)(1) of this rule;

(B) shall be in writing and specifically set forth all the facts and grounds in separate numbered paragraphs upon which the motion is based; and

(C) shall be signed by the defendant or counsel and verified by a separate affidavit of the defendant or such other person having knowledge of the facts upon which the affidavit is based. Upon request of any party, the court shall make sufficient findings and rulings to permit meaningful appellate review.

(3) *Motions in Limine.* The parties shall file all motions in limine no less than five calendar days prior to jury selection. For purposes of this paragraph, a motion which seeks to exclude the introduction of evidence on the ground that the manner in which such evidence was obtained was in violation of the constitution or laws of this state or any other jurisdiction shall be treated as a motion to suppress and not a motion in limine.

(4) *Motions to Continue*

(A) All requests for continuances or postponements by the defendant in a criminal case shall be in writing signed by the defendant and counsel. The request shall include an express waiver of the defendant's right to a speedy trial as it relates to the motion.

(B) A court may rule on a contested motion to continue without a hearing provided that both parties have had an opportunity to inform the court of their respective positions on the motion.

(C) The court shall rule on assented to motions to continue expeditiously. Notwithstanding the agreement of the parties, the court shall exercise its sound discretion in ruling on such motions.

(D) In exceptional situations, motions to continue may be made orally in accordance with these rules and shall be effective as such, but it shall be the burden of the moving party to establish a record thereof by confirming such request in writing.

(E) Where a trial has been scheduled in one case prior to the scheduling of another matter in another court where an attorney or 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:

(i) A subsequently scheduled case involving trial by jury in a superior or federal district court, or argument before the Supreme Court.

(ii) The court finds the subsequently scheduled case should take precedence due to the rights of a victim under RSA 632-A:9.

(iii) The court finds that the subsequently scheduled case should take precedence due to a defendant's rights to speedy trial or other constitutional rights.

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

(F) Other grounds for continuance may be illness of a defendant, defense attorney, or prosecutor; want of material testimony, documents, or other essential evidence; unavoidable absence of an essential witness; and such other exceptional grounds as the court may deem to be in the interest of justice.

(5) *Requirements Relating to Motions.* 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. Any party filing a motion shall certify to the court that a good faith attempt was 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. Any answer or objection to a motion must be filed within ten days of filing of the motion. Failure to object shall not, in and of itself, be ground for granting a motion.

Comments

The committee reviewed prior District Court and Superior Court rules regarding continuances. Rule 15 is consistent with those prior rules except as otherwise noted.

Rule 15(a)(1) addresses motions in district court and derives from current District Court Rule 1.8.

Rule 15(a)(2) governing motions to suppress in district court derives from current District Court Rule 2.8(c).

Rule 15(a)(3) addresses motions to continue in criminal cases. The committee has not followed prior District Court Rules 1.8-A and 1.8-B because the committee does not believe those prior rules are followed in practice. The new language written by the committee describes current practice and attempts to account for the concerns of the court and the parties regarding continuances.

Rule 15(b)(1) governing pretrial motions in superior court derives from current Superior Court Rule 98(F), entitled "Other Pretrial Motions."

Rule 15(b)(2) addresses motions to suppress in superior court and derives from current Superior Court Rule 94, entitled "Criminal Proceedings, Motions To Suppress Evidence." The committee modified the rule to reflect the current practice of hearing motions to suppress before trial.

Rule 15(b)(3) governs motions in limine in superior court and derives from current Superior Court Rule 98(G), entitled "Motions in Limine."

Rule 15(b)(4) governs motions to continue in superior court and derives from current Superior Court Rule 96, entitled "Requests For Continuances or Postponements" and current Superior Court Rule 49-A.

Rule 15(b)(5) addresses requirements relating to motions and derives from current Superior Court Rules 57, 57A, and 58. While the current superior court rules do not explicitly establish ten days as the time in which a party must object to a motion, such a deadline is recognized in current practice and is consistent with the deadline for responding to motions to reconsider under current Superior Court Rule 59A.

Rule 16. Videotape Trial Testimony

(a) The state may move to take videotape trial testimony of any witness, including the victim, who was sixteen years of age or under at the time of the alleged offense. Any victim or other witness who was sixteen years of age or under at the time of the offense may also move to take videotape trial testimony. The court shall order videotape trial testimony if it finds by a preponderance of the evidence that:

(1) The child will suffer emotional or mental strain if required to testify in open court; or

(2) Further delay will impair the child's ability to recall and relate the facts of the alleged offense.

(b) Videotape trial testimony taken pursuant to this rule shall be conducted before the judge at such a place as ordered by the court in the presence of the prosecutors, the defendant and counsel, and such other persons as the court allows. Examination and cross examination of the child shall proceed in the same manner as permitted at trial. Such testimony shall be admissible into evidence at trial in lieu of any other testimony by the child.

(c) Unless otherwise ordered by the court for good cause shown, no victim or witness whose testimony is taken pursuant to this section shall be required to appear or testify at trial.

(d) The attorney general or a county attorney conducting the prosecution in a criminal case may take the deposition of any witness the prosecution intends to call at the trial, if it is determined by a justice of the superior court that:

(1) The defendant in the case in which the deposition is sought has been arrested or bound over to the grand jury or has been indicted, and

(2) There is reason to believe the life or safety of the witness is endangered because of the witness's willingness or ability to testify, and the testimony expected from the witness is material to the prosecution of the case.

Comments

Rule 16 derives from RSA 517:13-a which permits the state, under certain circumstances, to take the videotaped trial testimony of any witness, including the victim, who is 16 years of age or under at the time of the alleged offense. Under this rule, the court shall order videotaped trial testimony if it finds by a preponderance of the evidence that: (1) The child will suffer emotional or mental strain if required to testify in open court; or (2) Further delay will impair the child's ability to recall and relate the facts of the alleged offense. Rule 16 reflects the requirement under RSA 517:13-a, II that the videotaped proceeding be conducted in the same manner as would an examination at trial.

The New Hampshire Supreme Court has held that once a videotaped trial deposition has been taken under RSA 517:13-a, it is not *per se* admissible at trial; rather, the court must make a specific finding at the time of trial that the deponent continues to be “unavailable” to testify for Confrontation Clause purposes. *State v. Peters*, 133 N.H. 791 (1986). In current practice, this rule is rarely utilized by prosecutors. The status of this rule is uncertain in light of the new standards relative to confrontation clause rights as articulated by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. (2004) and its progeny.

Rule 17. Subpoenas

(a) *For Attendance of Witnesses; Form; Issuance.* A subpoena for court hearings, depositions or trials may be issued by the clerk of any court or any justice as defined by statute. A notary may issue a subpoena for depositions only. A subpoena shall comply with the form required by statute and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(b) *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein at the time and place specified therein.

(c) *Service.* Service of a subpoena shall be made by reading the subpoena to the person named or by giving that person in hand an attested copy thereof, and by paying or tendering to that person the fee for one day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the State or court-appointed counsel. Witnesses subpoenaed by court-appointed counsel shall be paid and reimbursed through the clerk's office. Witnesses subpoenaed by the State shall be paid and reimbursed directly by the State. A subpoena may be served by any person who is 18 years of age or older.

(d) *Subpoena for Out-of-State Witnesses.* A subpoena for witnesses located outside the state shall be requested by application to the court with subject matter jurisdiction, which may be made *ex parte*, and shall be issued in accordance with the terms and provisions of law.

(e) *Pro se Defendants Unable to Pay.* The court may order that a subpoena be issued for service upon a named witness on an *ex parte* application of a *pro se* defendant upon a satisfactory showing that the *pro se* defendant is financially unable to pay the fees of the witness. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid through the clerk's office.

(f) *Contempt.* Failure to obey a subpoena without adequate excuse may be punishable by contempt of court.

(g) *Motions to Quash.* An individual may request that the court quash a subpoena on the grounds of improper service, hardship, or otherwise as provided by law. Notice

of the motion must be served on all parties. The court shall notify all parties of any hearing on the motion and the decision.

Comments

Rule 17(a) derives from RSA 516:1-3. RSA 516:3 provides in pertinent part that any justice may issue writs for witnesses in any pending New Hampshire case. Under this statute, a justice of the peace may issue a subpoena for witnesses, even if the justice is an attorney for one of the parties. See *Hazelton Company v. Southwick Construction Company*, 105 N.H. 25 (1963).

Rule 17(b) permits a party to seek production of books, papers, documents or other objects through the service of a subpoena *duces tecum*.

The first sentence of paragraph (c) sets forth the appropriate methods of service and is a consistent restatement of RSA 516:5. This paragraph reflects the state's statutory exemption from the requirement of tendering witness fees in advance of trial or hearing. *State v. Tebetts*, 54 N.H. 240 (1874). Paragraphs (c) and (e) extend this principle to cases in which counsel has been appointed for the defendant or in which a defendant demonstrates an inability to pay the fees and mileage allowed by law.

Rule 17(d) addresses the summoning of witnesses located outside the state and reflects the procedure for summoning out-of-state witnesses established by the Uniform Act, RSA 613. The rule recognizes the current practice whereby applications to summon out-of-state witnesses may be made *ex parte*. A party is not required by law or rule to give notice of its intent to summon a witness regardless of whether the witness is located in the state.

V. TRIAL PROCEDURES

Rule 18. Venue

(a) *Venue Established*. Every offense shall be prosecuted in the county or judicial district in which it was committed. If part of an offense is committed in one county, and part in another, the offense may be prosecuted in either county.

(b) *Change of Venue*. If a court finds that a fair and impartial trial cannot be had in a county or judicial district in which the offense was committed, it may, upon the motion of the defendant, transfer the case to another county or judicial district where a fair and impartial trial may be had.

Comments

In accordance with Part I, Article 17 of the New Hampshire Constitution and RSA 602:1, paragraph (a) provides that if some aspect of an offense is committed in one county and other parts of the crime are committed in another, the offense may be prosecuted in either county. Also in accordance with N.H. Const. pt. I, art. 17, paragraph (b) provides that upon a defendant's request, venue may be changed on the grounds that a fair and impartial trial cannot be held in the county where the offense was allegedly committed.

Venue is an element of every offense and a court must, upon the request of a defendant, instruct the jury concerning the state's burden of proving venue beyond a reasonable doubt. *State v. Wentzell*, 129 N.H. 151 (1988).

Rule 19. Transfer of Cases

When any party files a motion in any superior or district court requesting the transfer of a case, or of a proceeding therein, there pending to another court, the presiding judge may, after giving notice and an opportunity for a hearing to all parties, order such transfer.

Comments

Rule 19 derives from current Superior Court Rule 113 entitled, "Consolidation of Actions," discussed in *Barnard v. Elmer*, 128 N.H. 386, 387-88 (1986). Superior Court Rule 113 deals with the scheduling of multi-county cases for trial in one county. Rule 19 more broadly contemplates the transfer of whole cases, or of particular proceedings in cases, even in the absence of a related pending case or proceeding in the county to which transfer is sought.

The rule provides a method whereby a party may ask a court to transfer cases for a plea as well as for trial. After notice has been provided to all parties involved in the case, the presiding judge may order such a transfer. This rule should be distinguished from Rule 18 which provides for change of venue to insure a fair and impartial trial.

Such a rule promotes the interest of judicial economy. The transfer of a case or proceeding therefore does not imply the disqualification of any judge or prosecutor from further participation in that case.

Rule 20. Joinder of Offenses and Defendants

(a) Joinder of Offenses

(1) *Related Offenses*. Two or more offenses are related if they:

(A) Are alleged to have occurred during a single criminal episode; or

(B) Constitute parts of a common scheme or plan; or

(C) Are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

(2) *Joinder of Related Offenses for Trial*. If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice.

(3) *Joinder of Unrelated Offenses*. Upon written motion of a defendant, or with the defendant's written consent, the trial judge may join for trial two or more charges of unrelated offenses upon a showing that failure to try the charges together would constitute harassment or unduly consume the time or resources of the parties. The

trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interest of justice.

(4) *Relief from Prejudicial Joinder.* If it appears that a joinder of offenses is not in the best interests of justice, the court may upon its own motion or the motion of either party order an election of separate trials or provide whatever other relief justice may require.

(b) *Joinder of Defendants.* If two or more defendants are charged with related offenses as defined in Rule 20(a)(1), the court may order joinder of the trials of the defendants so long as joinder does not violate the constitutional rights or otherwise unduly prejudice any of the defendants.

Comments

Rule 20(a) was drafted by a special committee created by the New Hampshire Supreme Court after the decisions in *State v. Ramos*, 149 N.H. 118 (2003) and *State v. Abram*, 153 N.H. 619 (2006) (noting the need for revision of the rule by committee). See also *Petition of State of N.H. (State v. San Giovanni)*, 154 N.H. 671 (2007).

Rule 20(b) adopts the same definitions and principles with respect to joinder of defendants, allowing for exceptions as in *Bruton v. United States*, 391 U.S. 123 (1968).

Rule 21. Trial by the Court or Jury

(a) *District Court*

(1) *Trial.* A defendant shall be tried in the district court by a judge unless otherwise provided by law. In all prosecutions for misdemeanors in which appeal for trial *de novo* is allowed, the court, in its discretion, may allow the defendant, upon advice of counsel, to plead not guilty, waive the presentation of evidence by the State and the presentation of a defense. The court shall require the prosecution to make an offer of proof. The court may find the defendant guilty and impose sentence. The defendant may appeal to the superior court. The court's sentence is vacated pending appeal except as otherwise provided by statute.

(2) *Appeal to Superior Court.* Where permitted by statute an appeal to the superior court may be taken by the defendant by giving notice in open court after the court pronounces its verdict or sentence, or by filing written notice with the clerk of the district court within three days of the verdict. A defendant who was prevented from appealing through mistake, accident, or misfortune, and not from neglect, may, within thirty days, request the superior court to allow an appeal. The motion shall set forth the reason for appealing and the cause of the delay. The court may make such order thereon as justice may require. In the event of an appeal, the court may review the defendant's bail status, at the request of either party. If, upon appeal to the superior court, the defendant waives the right to a jury trial, the court shall remand the matter to the district court for imposition of the originally imposed sentence.

(3) *Appeal to Supreme Court.* A person sentenced by a district court for a class A misdemeanor may, if no appeal for a jury trial in superior court is taken, appeal therefrom to the Supreme Court at the time the sentence is declared or within thirty days after the sentence is declared. The Supreme Court's review shall be limited to questions of law.

(4) *Transcripts.* Whenever a party desires to use a sound recording of district court proceedings on appeal, a written transcript of the sound recording will be required.

(b) *Superior Court.*

Trial shall be before a jury of twelve persons unless the defendant, on the record, waives this right. If two or more defendants are to be tried together, the trial shall be before a jury unless all defendants waive the right to a jury trial. The consent of the State is not necessary for the defendant to waive the right to trial by jury.

Comments

Rule 21(a) derives from the present New Hampshire District Court Rules, including Rule 2.14, and from the statutes codified at RSA 502-A:12 and at RSA 599:1 through 599:1-b. The rule provides that a defendant may, with the court's permission, plead not guilty, waive the presentation of evidence by the state, and the presentation of a defense, and accept the finding of guilty and be sentenced. This allows the defendant to proceed to trial in the superior court in misdemeanor cases which allow for trial *de novo*. Paragraph (a)(4) of the rule is derived from superior court Rule 93-B. The effect of an appeal is to vacate any sentence. See State v. Flynn, 110 N.H. 451 (1970). However, there are statutorily established exceptions. See, e.g., 265-A:26. Furthermore, the district court sentence is re-imposed if the case is remanded. See RSA 599:1.

Rule 21(b) derives from RSA 606:7, which provides that a defendant may, in a criminal case other than a capital case, at any time before the jury is impaneled, waive the right to trial by jury by signing a written waiver thereof and filing the same with the clerk of court. It has long been assumed in New Hampshire that the prosecutor's assent to the waiver of jury need not be obtained by a defendant and the state cannot compel the defendant to be tried by a jury in a non-capital case. This assumption seems to have its genesis in the case of *State v. Albee*, 61 N.H. 423, 428 (1881), in which the court stated that:

The benefit of statutory and constitutional protections, both in civil and criminal jurisprudence, may be waived by the party interested.

See also State v. Foote, 149 N.H. 323, 325 (2003) (finding valid waiver of right to jury trial in actions of defendant and defense counsel).

Rule 22. Selection of Jury

(a) *Juror Questionnaires.* The clerk of the superior court for each county shall maintain a list of jurors presently serving, together with copies of their completed questionnaire forms, which shall be available for inspection by attorneys and parties representing themselves. The clerk's office shall permit attorneys who have jury cases

scheduled for trial to have a photocopy of the questionnaires which have been completed by the jurors presently serving. An attorney shall not exhibit such questionnaire to anyone other than the attorney's client and other lawyers and staff employed by the attorney's firm. Violation of this rule may be treated as contempt of court.

(b) *Examination.* In all cases, the court shall have the responsibility to ensure that each empanelled juror is qualified, fair, and impartial. In capital cases or first degree murder cases, the court shall allow counsel to conduct individual *voir dire*. In other cases, *voir dire* may be conducted by counsel in the discretion of the court. When the court conducts the examination, it shall permit the defendant or the defense attorney and the attorney for the state to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions formulated by the parties or their attorneys as it deems proper. All proceedings relating to the examination of prospective jurors shall be recorded and should be conducted in the presence of counsel.

(c) *Peremptory Challenges.* For offenses punishable by death, the defendant shall be accorded, in addition to challenges for cause, no fewer than twenty peremptory challenges; and, the state shall be afforded, in addition to challenges for cause, no fewer than ten peremptory challenges. In first degree murder cases, both the state and the defendant shall be afforded, in addition to challenges for cause, fifteen peremptory challenges. In all other criminal cases the defendant and the state shall, in addition to challenges for cause, be entitled to no fewer than three peremptory challenges. In trials involving multiple charges, the number of peremptory challenges shall be the number of challenges allowed for the most serious offense charged.

(d) *Alternate Jurors.* Upon request by either the state or the defendant, or *sua sponte*, the court may direct that alternate jurors be chosen. The number of peremptory challenges allotted to both the state and the defendant for selection of the alternate panel shall be in accordance with the following schedule:

1-3 alternates -- 1 peremptory challenge
4-6 alternates -- 2 peremptory challenges

Comments

Paragraph (a) of the rule, relating to the collection and release of juror questionnaires, is derived from Superior Court Rule 61-A.

The court must allow counsel to ask questions on *voir dire* in capital or first degree murder cases. See *State v. Fernandez*, 152 N.H. 233, 239 (2005); *State v. Saucier*, 128 N.H. 291, 295 (1986); *State v. Colby*, 116 N.H. 790, 793 (1976). Superior court judges may allow counsel to conduct *voir dire* in other cases. In all cases, the court has an obligation to ensure the fairness and impartiality of the selected jurors.

In all cases, RSA 500-A:12 requires the court to ask a number of questions of the panel. The court may supplement those statutory questions as the court believes necessary. *State v. Cere*, 125 N.H. 421

(1984); *State v. Wright*, 126 N.H. 643 (1985); *State v. Colbath*, 133 N.H. 708 (1990). A court has great discretion in determining what questions should be asked on *voir dire*. *State v. Vandebogart*, 136 N.H. 365 (1992).

The rule requires that all communication with the panelists be recorded, and further provides that all communications should be conducted in the presence of counsel. *State v. Bailey*, 127 N.H. 416 (1985); *State v. Brodowski*, 135 N.H. 197, 201 (1991). The rule does not absolutely foreclose the possibility that the court could communicate with potential jurors outside the presence of counsel, in recognition of the fact that, in relatively rare instances, the interest in full disclosure by jurors of sensitive, but relevant, matters may be advanced by allowing the court to inquire into those matters in private with the juror. Those communications, though, like all other communications with jurors, must be recorded.

Paragraph (c) governs the exercise of peremptory challenges. A party may exercise its peremptory challenges as the party sees fit, subject of course to the state and federal constitutional requirements of equal protection of the laws. See generally *Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

Rule 22 reflects current practice in New Hampshire as set forth in RSA 606:3, 4 with respect to the number of peremptory challenges available to each party. Paragraph (c) also provides that in trials adjudicating multiple charges, the number of peremptory challenges available to the parties depends on the most serious charge. Paragraph (c) does not provide for cases of multiple defendants, thus leaving intact the traditional practice in New Hampshire of allowing each defendant the full number of challenges provided by the law. *State v. Doolittle*, 58 N.H. 92 (1877). Paragraph (c) allows the trial court discretion with regard to control of the manner, order and timing of the parties' peremptory challenges. *State v. Farrell*, 118 N. H. 296, 307 (1978); *State v. Prevost*, 105 N.H. 90 (1963).

Paragraph (d), regarding alternate jurors, derives from current practice and RSA 500-A:13.

Rule 23. Juror Notes and Written Questions

(a) *Note-Taking by Jurors*. It is within the court's discretion to permit jurors to take notes. If the court permits note-taking, after the opening statements the court will supply each juror with a pen and notebook to be kept in the juror's possession in the court and jury rooms, and to be collected and held by the bailiff during any recess in which the jurors may leave the courthouse and during arguments and charge. After a verdict, the court will immediately destroy all notes.

(b) *Questioning of Witnesses by Jurors*. With the consent of all parties, the trial judge may permit jurors to pose written questions. If a trial judge decides to permit jurors to pose written questions at trial, the court shall use the following procedure:

(1) At the start of the trial, the judge will announce to the jury and counsel the decision to allow jurors to pose written questions to witnesses. At this time the judge will instruct the jurors on taking notes and, as to the scope of questioning, the procedure to be followed.

(2) Trial will proceed in the normal fashion until questioning of the first witness has been completed by both counsel.

(3) When questioning of the first witness is completed, the court will allow jurors to formulate any questions they may have, in writing. Jurors will be asked to put their seat number on the back of the question. The judge is the only person who will see the number.

(4) The bailiff will collect the anonymous questions and deliver them to the judge.

(5) At the bench, the judge and counsel will read the proposed questions. Counsel will be given the opportunity to make objections on the record to any proposed question after which the judge will decide if they are appropriate and whether, under the circumstances of the case, the judge will exercise discretion to permit the questions.

(6) Questions may be rephrased by the judge, or the judge may ask the question in a way mutually agreeable to the parties. The question should, however, attempt to obtain the information sought by the juror's original question.

(7) After all the chosen questions are answered, each counsel will have an opportunity to re-examine the witness. The party who called the witness will proceed first. The judge should allow only questions which directly pertain to questions posed by the jurors. The judge may also impose a time limit. If the judge does plan to impose a time limit, counsel should be notified and given an opportunity to object to the length outside the hearing of the jury.

(8) The judge shall instruct the jury substantially as follows.

(A) *Instructions to the Jury at Beginning of Trial:*

Ladies and gentlemen of the jury, I have decided to allow you to take a more active role in your mission as finders of fact. I will permit you to submit written questions to witnesses under the following arrangements.

After each witness has been examined by counsel, you will be allowed to formulate any questions you may have of the witness. Please remember that you are under no obligation to ask questions, and questions are to be directed only to the witness. The purpose of these questions is to clarify the evidence, not to explore your own legal theories or curiosities.

If you do have any questions, please write them down on a pad of paper. Do not put your name on the question, and do not discuss your questions with fellow jurors. The bailiff will collect the questions, and I will then consider whether they are permitted under our rules of evidence and are relevant to the subject matter of the witness' testimony. If I determine that the question or questions may be properly

asked of the witness pursuant to the law, I will ask the question of the witness myself.

It is extremely important that you understand that the rejection of a question because it is not within the rules of evidence, or because it is not relevant to the witness' testimony, is no reflection upon you. Also, if a particular question cannot be asked, you must not speculate about what the answer might have been.

(B) *Instructions to the Jury when Decision Whether to Ask Questions is Made:*

Ladies and gentlemen of the jury, I remind you of my earlier remarks regarding juror questions. Some questions cannot be asked in a court of law because of certain legal principles. For this reason there is the possibility that a question you have submitted has been deemed inappropriate by me and will not be asked. I alone have made this determination, and you should not be offended, or in any way prejudiced by my determination.

(C) In its discretion, the court may add additional instructions.

Comments

The note-taking provision derives from New Hampshire Superior Court Rule 64-A. The provision authorizing a court to allow the jurors to ask questions of witnesses derives from Superior Court Rule 64-B.

Rule 24. Trial Procedure

(a) *District Court*

(1) *Opening Statements.* Opening statements are not permitted in district court trials except with permission of the court for good cause shown. When opening statements are permitted, the prosecution shall make an opening statement prior to presenting evidence. At its option in such a case, the defense may open immediately thereafter or after the prosecution has concluded its case-in-chief and before presenting defense evidence. Opening statements shall not be argumentative, and except by prior leave of the court, shall be no longer than thirty minutes.

(2) *Order of Evidence.* The prosecution shall present evidence first in its case-in-chief. During the case-in-chief, the defense may introduce evidence through the prosecution's witnesses. After the prosecution has rested, the defense may present evidence.

(3) *Rebuttal Evidence.* Evidence that is strictly rebutting may be permitted at the discretion of the court upon good cause shown.

(4) *Attorneys Examining.* Only one attorney for each party is permitted to examine or cross-examine each witness.

(5) *Objections; Offers of Proof.* When objecting or responding to an objection, counsel shall state the basis for the objection or response. Upon request, the court shall permit counsel to present offers of proof in support of the objection or response. Only the attorney examining or cross-examining a witness may raise objections or respond to objections regarding that witness.

(6) *Re-Examining and Recalling Witnesses.* Redirect examination shall be limited to topics covered on cross-examination except for good cause shown. Prior to being dismissed, a witness is subject to recall by either party. After being dismissed, a witness may be recalled with the court's permission.

(7) *Testimony of Witnesses.* In all proceedings, the testimony of witnesses shall be given, by oath or affirmation, orally in open court, unless otherwise provided by law.

(8) *Closing Argument*

(A) Only one attorney shall argue for each party, except by leave of the court.

(B) After the close of evidence, the defense shall argue first and the prosecution shall argue last. In cases in which the defense of insanity has been raised and the case has been bifurcated for trial, the defense shall have the right to argue last on the issue of insanity.

(C) Before any attorney shall in closing argument read any excerpt of testimony prepared by the court reporter, the attorney shall furnish opposing counsel with a copy thereof prepared by the reporter.

(9) *Motions to Dismiss; Motions for Mistrial.* Motions to dismiss or for a mistrial shall be made on the record.

(10) *Reopening Evidence.* Prior to submission of the case to the court, a party may reopen evidence for good cause shown. After submission of the case, but before the return of a verdict, a party may reopen evidence after showing good cause, in the discretion of the court.

(b) *Superior Court*

(1) *Opening Statements.* Prior to presenting evidence, the prosecution shall make an opening statement. At its option, the defense may make an opening statement. The defense may open immediately thereafter or after the prosecution has concluded its case-in-chief and before presenting defense evidence. Opening

statements shall not be argumentative, and except by prior leave of the court, shall be no longer than thirty minutes.

(2) *Order of Evidence.* The prosecution shall present evidence first in its case-in-chief. During the case-in-chief, the defense may introduce evidence through the prosecution's witnesses. After the prosecution has rested, the defense may present evidence.

(3) *Rebuttal Evidence.* Evidence that is strictly rebutting may be permitted at the discretion of the court upon good cause shown.

(4) *Attorneys Examining.* Only one attorney for each party is permitted to examine or cross-examine each witness.

(5) *Objections; Offers of Proof.* When objecting or responding to an objection before the jury, counsel shall state only the basis, without elaboration, for the objection or response. Upon request, the court shall permit counsel a reasonable opportunity, on the record and outside the hearing of the jury, to present additional grounds, argument, or offers of proof in support of the objection or response. Only the attorney examining or cross-examining a witness may raise objections or respond to objections regarding that witness.

(6) *Re-Examining and Recalling Witnesses.* Redirect examination shall be limited to topics covered on cross-examination except for good cause shown. Prior to being dismissed, a witness is subject to recall by either party. After being dismissed, a witness may be recalled with the court's permission.

(7) *Testimony of Witnesses.* In all proceedings, the testimony of witnesses shall be given, by oath or affirmation, orally in open court, unless otherwise provided by law.

(8) *Closing Argument*

(A) Each party shall be limited to one hour of argument unless otherwise ordered by the court in advance. Only one attorney shall argue for each party except by leave of the court.

(B) After the close of evidence, the defense shall argue first and the prosecution shall argue last. In cases in which the defense of insanity has been raised and the case has been bifurcated for trial, the defense shall have the right to argue last on the issue of insanity.

(C) Before any attorney shall in closing argument read to the jury any excerpt of testimony prepared by the court reporter, the attorney shall furnish opposing counsel with a copy thereof prepared by the reporter.

(9) *Jury Instructions*

(A) Prior to the selection of the jury, or at such other time during the trial as the court may reasonably permit, any party may request specific jury instructions.

(B) The court shall inform counsel of its intended jury instructions prior to counsel's closing arguments. All objections to the charge should be taken on the record before the jury retires. Opportunity shall be given to make objections outside of the hearing of the jury.

(10) *Motions to Dismiss; Motions for Mistrial.* Motions to dismiss or for mistrial shall be made on the record outside the hearing of the jury.

(11) *Reopening Evidence.* Prior to submission of the case to the fact-finder, a party may reopen evidence for good cause shown. After submission of the case, but before the return of a verdict, a party may reopen evidence after showing good cause, in the discretion of the court.

Comments

Rule 24(a) describes a trial procedure generally similar to that prescribed for superior court trials in 24(b). The rule, thus, draws upon the same sources as does the superior court version. In recognition of the distinct nature of district court trials, the rule omits any reference to a jury, and allows the court discretion as to whether to permit opening statements.

Rule 24(b) derives from current practice and from Superior Court Rules 65, 66, 67, 69, 70, and 71.

Rule 24(b)(1) explicitly recognizes that a defendant may open after the State's opening or may wait until the start of the defendant's case-in-chief.

Rule 24(b)(5) contemplates that counsel making an evidentiary objection will state only a basis for the objection unless requested to provide further argument by the court. The rule specifically provides that counsel should be afforded the opportunity to approach the bench when discussing evidentiary rulings. This rule, as does prior Superior Court Rule 66, recognizes that jurors cannot be expected to decide cases on admissible evidence alone if they have heard offers of proof and arguments on objections to inadmissible evidence that the court ultimately excludes. *State v. Brown*, 128 N.H. 606, 616-7 (1986).

Rule 24(b)(6) recognizes that the trial judge has a great deal of discretion in determining whether or not to allow a party to recall a dismissed witness. *See, e.g., State v. Smart*, 136 N.H. 639 (1993).

Rule 24(b)(7) allows witnesses to affirm rather than swear in accordance with the provisions of RSA 516:20. *See generally State v. Sands*, 123 N.H. 570 (1983).

Rule 24(b)(8) is derived from Superior Court Rule 71 and reflects traditional practice. The New Hampshire Supreme Court has held that, while a court has discretion to alter the order of closing argument, a criminal defendant has no right to present the last closing argument, even if the defendant bears the burden of proof with respect to an affirmative defense where the State still has the burden of proof on other issues. *State v. Sundstrom*, 131 N.H. 203 (1988). However, the Court has

indicated that a defendant does have the right to present the last closing argument in the insanity phase of a bifurcated trial. *State v. Blomquist*, 153 N.H. 216, 220 (2006).

Rule 24(b)(9) provides that a court has discretion to require the attorneys to file jury instruction requests in advance of the actual charge so that the trial court has an adequate opportunity to consider them. The rule requires the court to inform counsel of its actions on the request prior to charge so that counsel may fashion a closing argument accordingly.

Rule 24(b)(9) and (10) are designed to effectuate the New Hampshire Rules of Evidence by insuring that a jury is not influenced by inadmissible evidence or irrelevant argument. *See State v. Brown*, 126 N.H. 606, 616-617 (1986).

Rule 24(b)(11) reflects the principle stated by the Court in *State v. Thomas*, 133 N.H. 360, 363 (1990), which allows a party to re-open a case prior to submission of the jury on “good cause shown.” When a motion to re-open is filed during jury deliberations, the court has discretion whether to permit re-opening.

Rule 25. Verdict

(a) *Non-Jury Cases*. The court shall return its verdict within a reasonable time after trial.

(b) *Jury Cases*. The verdict shall be unanimous and shall be returned by the jury in open court.

(c) *Poll of Jury*. When a verdict is returned and before it is recorded the jury may be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(d) *Bail*. After a verdict, either party may request a change in bail as provided by law.

(e) *Motion to Set Aside Verdict*. A motion to set aside a jury verdict shall be filed within ten days after its rendition, and a motion to set aside any other verdict or decree shall be filed within ten days from the date on the clerk's written notice with respect to same, which shall be mailed by the clerk on the date of the notice. In each case, the motion shall fully state all reasons and arguments relied on.

Comments

Rule 25(a) reflects present practice and permits a judge in a non-jury case to take a case under advisement and return a verdict at a later time. The rule does provide that verdicts be returned within a reasonable time.

Rule 25(c) leaves to the discretion of the court the decision whether to poll the jury. *See generally State v. Kenna*, 117 N.H. 305, 309 (1977).

Rule 25(e) derives from Superior Court Rule 73.

Rule 26. Presence of Counsel

After a case has been submitted to the jury and the jury has retired for deliberations, counsel shall not leave the courthouse without permission of the court. The court may permit counsel to leave the courthouse upon appropriate conditions. If counsel is absent from the courthouse without permission when a jury requests additional instructions, such absence shall constitute a waiver of the right to be present during instructions given in response to the request.

Comments

Rule 26 is derived from Superior Court Rule 114. The committee has deleted the words “with or” in the opening clause of the last sentence of Rule 114. As Rule 26 reflects, the committee believes that if counsel has left the courthouse with the court’s permission, counsel has not waived the right to be present when an instruction is to be given in response to a jury’s question. Counsel should only be deemed to have waived that right when counsel has left the courthouse without the court’s permission.

Rule 27. Disability of Judge

If by reason of death or serious disability the judge before whom a jury trial has commenced is unable to proceed with the trial or post-verdict duties, another judge may perform those duties. If a manifest necessity requires it, a new trial shall be ordered.

Comments

The New Hampshire Supreme Court has recognized that circumstances may arise that unavoidably preclude a trial judge from continuing to preside over an already-started trial. *State v. Donovan*, 120 N.H. 603, 605-606 (1980). The committee has taken the view, embodied in the rule, that mid-trial substitutions of judges should take place only in unusual circumstances, when substitution is necessitated by the death or serious disability of the presiding judge. *Donovan* recognizes that a substitute judge may then preside “for the purpose of ruling on a variety of motions.” *Id.* The rule also acknowledges that, under some circumstances, the loss of a presiding judge will require the declaration of a mistrial or the grant of a new trial.

Rule 28. Communication with Jurors

(a) *Before and During Trial.* Before and during trial, no attorney, party or witness shall personally or through any agent converse or otherwise communicate with any juror or any member of the venire from which the jury will be selected. During trial, when the judge must communicate with any juror or any member of the venire before the jury is excused, the communication shall be on the record.

(b) *Post Trial.* For thirty days after discharge of the jury venire on which a juror has served, no attorney or party shall personally or through an agent interview, examine or question any juror or family member with respect to the trial, verdict or deliberations. At no time, however, shall an attorney, party or any person acting for either of them ask questions of or make comments to a juror that are calculated to

harass or embarrass the juror or to influence the juror's actions in future jury service.

(c) *Protective Order*. Upon application of any person the court may issue appropriate protective orders and/or sanctions as justice may require.

Comments

Rule 28 derives from present Superior Court Rule 77-B. The rule is designed to ensure that jurors are protected from embarrassment and harassment. The rule does not affect any substantive rights of a defendant, since the testimony of a juror to impeach a verdict is generally inadmissible. *State v. Brown*, 132 N.H. 321 (1989).

VI. SENTENCING AND POST-SENTENCE PROCEDURES

Rule 29. Sentencing Procedures

(a) *General*

(1) Following a finding or verdict of guilty the court shall hold a sentencing hearing and impose sentence without unreasonable delay. Sentencing hearings in misdemeanor cases shall take place immediately following the finding or verdict of guilty unless the court orders otherwise. In felony cases, the sentencing hearing shall be scheduled for a later date unless the court orders otherwise.

(2) At all sentencing hearings, the defendant has the right to counsel, to present witnesses and evidence, and to testify with regard to the sentence to be imposed. As provided in New Hampshire Rule of Evidence 1101(d)(3), the Rules of Evidence do not apply at the hearing.

(b) *Pre-Sentence Report*

(1) Upon a judgment of conviction or the filing of a notice of intent to plead to a felony, the court shall order the department of corrections to conduct a pre-sentence investigation unless both parties agree or the court indicates that a pre-sentence investigation report may be waived. Such waiver by both parties or the court shall be placed on the record. Upon judgment of conviction or the filing of a notice of intent to plead to a misdemeanor, the court may order the department of corrections to conduct a pre-sentence investigation pursuant to RSA 651:4.

(2) The contents of and any attachments to the pre-sentence report shall be confidential and shall not be disclosed to anyone except as required by statute or ordered by the court. Either party may refer to the contents, recommendations and attachments of the pre-sentence report in any sentence related hearing, except where the court has ordered otherwise on the motion of a party or *sua sponte*. The defendant and the state shall be provided a reasonable opportunity to review the contents of the pre-sentence report and any attachments before sentencing.

(c) *Sentencing Hearing*

(1) Both the defendant and the state will be afforded the opportunity to address the court, call witnesses, and present evidence relevant to sentencing. The court shall review the pre-sentence report and afford the defendant and state a reasonable opportunity to challenge, rebut or correct factual material contained within the report which might bear on the sentence.

(2) The victim or next of kin of the victim shall be afforded the opportunity, where provided by law, to address the court prior to the imposition of sentence. No person who gives a victim impact statement shall be subject to questioning by counsel. The prosecutor shall be responsible for informing the victim or next of kin of the right to so address the court.

(d) *Extended Term.* Prior to imposition of an extended term of imprisonment, the court shall hold a hearing to determine if the jury or the court has made the necessary factual findings.

(e) *Monetary Assessments*

(1) If, at the time of sentencing, the defendant asserts a present inability to pay fines, restitution or penalty assessments imposed, the court shall hold a hearing inquiring into the defendant's finances. A defendant shall not be incarcerated if the failure to pay is a result of a present inability to pay.

(2) Upon finding of present inability to pay the monies due, either in whole or in part, the court shall establish a reasonable payment schedule. The court may, in its discretion and if allowable by law, suspend all or part of any fines, restitution or penalty assessments.

(3) If payment is not made as required, the defendant shall appear on a date set by the court and show cause why incarceration in lieu of payment should not be ordered. If a defendant fails to appear after proper notice, the court may issue a *capias* for the arrest of the defendant.

(f) *Probation.* The terms and conditions of probation, unless otherwise prescribed, shall be as follows. The probationer shall:

(1) Report to the probation or parole officer at such times and places as directed, comply with the probation or parole officer's instructions, and respond truthfully to all inquiries from the probation or parole officer;

(2) Comply with all orders of the court, board of parole or probation or parole/probation officer, including any order for the payment of money;

(3) Obtain the probation or parole officer's permission before changing residence or employment or traveling out of state;

(4) Notify the probation or parole officer immediately of any arrest, summons or questioning by a law enforcement officer;

(5) Diligently seek and maintain lawful employment, notify probationer's employer of probationer's legal status, and support dependents to the best of probationer's ability;

(6) Not receive, possess, control or transport any weapon, explosive or firearm, or simulated weapon, explosive, or firearm;

(7) Be of good conduct and obey all laws;

(8) Submit to reasonable searches of probationer's person, property and possessions, as requested by the probation or parole officer, and permit the probation or parole officer to visit probationer's residence at reasonable times for the purpose of examination and inspection in the enforcement of the conditions of probation or parole;

(9) Not associate with any person having a criminal record or with other individuals as directed by the probation or parole officer unless specifically authorized to do so by the probation or parole officer;

(10) Not indulge in the illegal use, sale, possession, distribution, or transportation, or be in the presence, of controlled drugs, or use alcoholic beverages to excess;

(11) Agree to waive extradition to New Hampshire from any state in the United States or any other place and agree to return to New Hampshire if directed by the probation or parole officer; and

(12) Comply with such of the following, or any other, special conditions as may be imposed by the court, the parole board or the parole/probation officer:

(A) Participate regularly in Alcoholics Anonymous to the satisfaction of the probation or parole officer;

(B) Secure written permission from the probation or parole officer prior to purchasing and/or operating a motor vehicle;

(C) Participate in and satisfactorily complete a specific designated program;

(D) Enroll and participate in mental health counseling on a regular basis to the satisfaction of the probation or parole officer;

(E) Not be in the unsupervised company of minors, or minors of a specific gender, at any time;

(F) Not leave the county without permission of the probation or parole officer;

(G) Refrain totally from the use of alcoholic beverages;

(H) Submit to breath, blood or urine testing for abuse substances at the direction of the probation or parole officer; and

(I) Comply with designated house arrest provisions.

(g) *Conditional Discharge.* The terms of conditional discharge under RSA 651:2, VI, unless otherwise prescribed, shall be the same as Rule 29(f)(1), (5), (6), (7), (8), (9), and (11). Other terms or conditions may be imposed by the court and shall be presumed to be in addition to the foregoing.

(h) *Subdivision of Suspended Sentences.* Whenever a sentence, or any part thereof, is suspended, the court may thereafter subdivide said suspended sentence into two or more parts, and the defendant may be required to serve any part thereof, with the balance remaining suspended, until further order of the court, and the defendant may be required to serve the sentence in installments or by intermittent incarceration.

(i) *Correction of Sentence.* The court has the discretion to correct an illegal or illegally imposed sentence as provided by law.

(j) *Reduction, Suspension or Amendment of Sentence.* A party may seek reduction, suspension or amendment to a sentence as provided by law. Whenever any petition to suspend, amend, reduce or otherwise change the custody status of any person incarcerated in New Hampshire state prison is filed with the court, a copy thereof shall be forwarded by counsel for the defendant to the prosecutor and the warden of the state prison. In the event that the defendant files such petition *pro se*, the clerk shall forward a copy thereof to the prosecutor and the warden of the state prison. The prosecutor and the warden of the state prison shall have a period of thirty days in which to file a response thereto with copies thereof furnished to petitioner, or petitioner's counsel, if represented. This rule does not apply to petitions for habeas corpus. The victim of the crime or next of kin shall have an opportunity to address the court prior to the court reaching its decision where provided by law. The prosecutor shall be responsible for informing the victim or next of kin of the right to so address the court.

(k) *Sentence Review*

(1) In any prosecution where a defendant is sentenced to a term of one year or more in the state prison, whether or not it is suspended, deferred or otherwise modified, except in any case in which a different sentence could not have been imposed, oral and written notice shall be given to the State and the person sentenced of their right to apply for a review of the sentence before the sentence review board. This notice shall include a statement that review of the sentence may result in the affirmation of the sentence or a decrease or increase of the minimum or maximum term within the limits fixed by law. An application form shall accompany the notice. Defendant's trial counsel shall protect the defendant's interest in this respect. Defense counsel shall further ensure that the defendant understands that sentence review may result in an increase, decrease or affirmation of the sentence. All completed applications filed with the court shall be forwarded forthwith by the court to the review division. The review division shall provide notice of application to the defendant, defendant's attorney of record, the State's attorney of record, the chief justice of the superior court and sentencing judge. The sentencing judge may transmit a statement of reason(s) to the review division. The sentencing judge shall submit such a statement if requested to do so by the review division within seven days of such a request.

(2) The defendant or the State shall file an application for sentence review within thirty days of the date of sentencing and not thereafter but for good cause shown. The filing of an application shall not stay execution of the sentence.

(3) Upon acceptance of an application for sentence review, the sentence review board shall schedule a hearing with notice to the defendant and the State. The defendant has the right to appear and be represented by counsel at a hearing held by the sentence review board. After hearing, the board may increase, decrease, otherwise modify or affirm the sentence. The sentence review board will issue a written decision with reason(s) for any change in sentence stated within the decision. The decision of the sentence review board shall be a final order on sentencing.

Comments

Rule 29 has been edited to comport with current practice, Superior Court Rules, the New Hampshire Rules of Evidence and state statutes.

Rule 29(a) notes that the New Hampshire Rules of Evidence are not applicable at sentencing hearings. N.H. Rule of Evidence 1101(d)(3).

Rule 29(b) allows a waiver of the pre-sentence report and the review of the report by the defendant and state prior to sentencing consistent with RSA 651:4 and Superior Court Rule 112. The rule does not include the current practice of the court of proceeding to sentencing without the benefit of a pre-sentence report after the defendant and/or state has requested that one be completed.

Rule 29(b)(2) makes the pre-sentence report confidential as it was under Superior Court Rule 112. The intent of the rule is to allow the parties to make use of the presentence report as needed in sentencing related matters while preventing access to or use of the report in other proceedings. For example, use of the pre-sentence report in civil proceedings involving the defendant or crime victim is not permitted under this rule except as permitted by statute. *See, e.g.*, RSA 135-E.

Rule 29(c) notes that the victim/next of kin of certain crimes has the right by law to address the sentencing judge and the judge may consider such statements prior to the imposition of sentence. Section (c) also reflects present practice and current statutory law.

Extended term may be imposed upon a defendant if notice is lawfully provided and the court or jury finds that the prerequisites have been met. *See, Apprendi v. New Jersey*, 530 U.S. 466 (2000). Rule 29(d) reflects the developments in this area of the law. Rule 29(d) provides that in every case in which a prosecutor may seek the imposition of an extended term of imprisonment pursuant to RSA 651:6, the prosecutor must give notice to the defendant prior to the commencement of the trial. In any case in which there exists the possibility that the court may *sua sponte* impose an extended term, notice must be given by the trial judge prior to the commencement of the trial. *State v. Toto*, 123 N.H. 619 (1983). Regarding required notice of extended term, *see* Rule 14.

Rule 29(e) does not address the issue of attorney fees and obligations to the Office of Cost Containment. This section permits the suspension of the payment of certain obligations where allowed by law in consideration of minimum mandatory fines prescribed by statute.

Rule 29(i) indicates that an illegal or illegally imposed sentence may be corrected as provided by law to cover the possibility that the discovery of the illegal order may be immediate or many years later. *See, State v. Stern*, 150 N.H. 705, 713 (2005) which identifies the due process limitations on correction of a sentence. The court has inherent authority to correct an error inadvertently made in its record of sentence. *Doyle v. O'Dowd*, 85 N.H. 402 (1932). Even if a defendant wanted to agree to the imposition of a particular illegal sentence, it is still illegitimate, as a "defendant cannot by agreement confer on the court the authority to impose an illegal sentence." *State v. Burgess*, 141 N.H. 51, 54 (1996) citing to *Williams v. State*, 500 So. 2d 501, 503 (Fla. 1986). *See also*, Federal Rules of Criminal Procedure, Rule 35(a) which limits the correction of erroneous sentences resulting from arithmetical, technical, or other clear error to seven (7) days after sentencing and New Hampshire Supreme Court Rule 16-A which allows the court to consider errors not brought to the attention of the trial court. Sup. Ct. Rule 16-A is for use in "circumstances in which a miscarriage of justice would otherwise result." *State v. McInnes*, 151 N.H. 732, 736-37 (2005).

Rule 29(j) is a reference to RSA 651:20 and the jurisprudence interpreting that statute. Rule 29(j) further notes that certain victims have the right to input at a hearing to consider the reduction, suspension or amendment of a sentence as provided in RSA 651:4-a and RSA 21-M:8-k.

Rule 29(k) is generally an embodiment of RSA 651:57-61 and the Rules of the Sentence Review Division as adopted by the Superior Court and amended in 1985. This section clarifies that the state has the authority to apply for review and that application for review does not stay a sentence. The committee has not attempted to resolve certain dilemmas in current law. For example, Sentence Review Division Rule 17 provides that "No sentence may be increased, however, without the personal appearance by the defendant and his attorney." Since the state has the discretion to appeal a sentence to the review division, a defendant could preempt board decision to increase sentence by failing to attend the hearing.

Even though RSA 651:59 states that the sentence review division has the "jurisdiction to consider an appeal with or without a hearing," Rule 29(k)(3) affords a right to a hearing in conformance with Sentence Review Division Rule 17 and current practice.

The rule does not include provisions to explain that the sentence review board will not consider an appeal of a negotiated sentence but will review a “capped plea sentence” and will not be bound by the terms of the “capped plea.” Although those principles are part of current practice, no current rule or statute addresses these issues.

Rule 30. Probation Revocation

(a) *Arraignment.* Arraignment on a violation shall be scheduled within ten days of the filing of the violation with the court. If the probationer is incarcerated as a result of arrest for violating the terms of probation, a preliminary hearing, conducted by the department of corrections, shall be held within seventy-two hours of the time of arrest, excluding weekends and holidays. Unless prohibited by statute, a person charged with a probation violation shall be entitled to bail.

(b) *Hearing.* A final, public, violation hearing before a judge shall be held without unreasonable delay. The probationer shall be afforded:

(1) Prior written notice of the conduct which triggers the filing of the violation;

(2) Prior disclosure to the probationer of the evidence which will be offered to prove the violation and all related exculpatory evidence;

(3) Prior notice of the right to representation by counsel, to be appointed by the court if the probationer is indigent;

(4) The opportunity to be heard in person and to present witnesses and evidence;

(5) The right to see, hear and question all witnesses;

(6) The right to compulsory process; and

(7) If a finding of chargeable is entered, a statement on the record by the court indicating in substance the evidence relied upon in reaching its determination.

(c) *Burden of Proof.* The burden of proof by preponderance of the evidence with respect to all elements of the charge shall be upon the state.

(d) *Hearing on Plea of Chargeable.* Before a plea of chargeable is accepted, the court must ensure the defendant understands that if the court accepts the plea of chargeable, a finding of chargeable will be entered against the defendant and by pleading chargeable the defendant is giving up the following:

(1) The right to a speedy and public hearing before a judge;

(2) The right to see, hear and question all witnesses;

(3) The right to present evidence and call witnesses;

(4) The right to testify at the contested probation violation hearing;

(5) The right to remain silent, to the extent such right is applicable in the proceeding;

(6) The right to compulsory process;

(7) The right to have legal representation at the contested probation violation hearing and the appointment of counsel if deemed eligible;

(8) The right to not be convicted except by proof of all elements of the charge by preponderance of the evidence; and

(9) The right to appeal.

(e) *Sentencing*. At all sentencing hearings on probation violations, the defendant has the right to counsel, to present witnesses and evidence, and to testify with regard to the sentence to be imposed. The court may impose any sentence that could have been imposed by the original sentencing judge for the crime which is the subject of the probation term. If the plea is negotiated, the defendant shall have the right to withdraw the plea of chargeable and go to hearing if the court intends to exceed the sentence agreed to by the parties.

Comments

Rule 30 tracks the due process rights established in *Stapleford v. Perrin*, 122 N.H. 1083 (1982) and its progeny. Once an individual is placed on probation, it may not be revoked without due process of law. *State v. Field*, 132 N.H. 760 (1990). The New Hampshire Rules of Evidence do not apply at such hearings. N.H. Rule of Evidence 1101(d)(3). The exclusionary rule may not apply at probation revocation hearings. *State v. Field, supra*. The rule is consistent with Superior Court Rules 98 and 99 as well as *Brady v. Maryland*, 373 U.S. 83 (1963), *State v. Lucius*, 140 N.H. 60 (1978), and *State v. Laurie*, 139 N.H. 325 (1995).

In current practice, the term “chargeable” is synonymous with an admission to the violation of probation.

Probation may not be revoked for failure to pay a fine or make restitution absent evidence and findings that the defendant was somehow responsible for the failure. *Bearden v. Georgia*, 461 U.S. 660 (1983); *State v. Fowlie*, 138 N.H. 234 (1994).

Rule 30(a) generally reflects current practice and statutory changes in the bail statute (RSA 597). The committee could not find any case law or statutory reference indicating that a probationer is entitled to legal representation; however, the provision was included as it is current practice. *See State v. Matey*, 153 N.H. 263 (2006).

Rule 30(d) reflects the current practice of the court which allows for the filing of an agreement stating the terms of the negotiated disposition and generally referencing the due process rights afforded a probationer under *Stapleford*. The rule allows for the imposition of the maximum allowable

sentence for the underlying offense at a probation violation hearing if the defendant received notice of this possibility at the defendant's sentencing on the underlying offense as provided by *State v. White*, 131 N.H. 555 (1989).

The committee noted that current practice does not require probationers to adhere to any notification rule or burden of proof on affirmative defenses.

Rule 31. Annulments

(a) *General.* As provided by law, a defendant who has been convicted of a crime capable of being annulled may apply to the court in which the defendant was convicted to annul the conviction. The same procedure may be followed to annul a record of arrest when a charge has been *nol prossed*, dismissed, the defendant was not prosecuted or has been found not guilty. It is within the discretion of the court to grant a petition for annulment. Notwithstanding the annulment of a conviction or arrest, records of annulled offenses may be utilized in accordance with the law.

(b) *Application.* The application shall identify: the defendant; the offense charged; the sentence imposed; and the docket number of the case. Each application shall specify in detail the facts upon which the applicant relies in requesting the annulment. The application shall be signed and sworn to by the defendant. A filing fee shall be assessed which may be waived by the court when, upon review of an executed affidavit of assets and liabilities, the court determines that the applicant is indigent or has been found not guilty, or the case was dismissed or not prosecuted.

(c) *Notice.* The clerk shall issue an order of notice directed to the appropriate parties who shall respond in accordance with the statutory provisions.

(d) *Hearing.* The court may waive the presence of the parties and/or counsel, and grant the application without hearing if there is no opposition. If a hearing is held, the defendant and the state shall be permitted to address the court regarding the petition. Any petition for annulment which does not meet the requirements as set forth by statute shall be dismissed without a hearing but without prejudice to the defendant's right to re-apply as permitted by law.

Comments

Rule 31 is derived from RSA 651:5, Superior Court Rule 108 and District Court Rule 2.18 which govern applications for annulment. The rule is consistent with current New Hampshire law and practice.

The rule contemplates that the clerk of the court issue an order of notice directed to the appropriate parties who respond in accordance with the statutory provisions. The notice is not served by the petitioning party, but sent directly to the appropriate state officer by the court.

VII. APPEALS

Rule 32. Bail Pending Appeal

(a) *Bail Permitted.* When there is an appeal after a conviction in either district court or superior court, or when either party appeals prior to or during trial, the trial court may authorize the defendant's release on bail pending the appeal as provided by statute.

(b) *Bail Denied.* In any case where release is denied pending appeal, the presiding judge shall provide for the record the reasons for such denial.

Comments

Rule 32 simply provides that bail pending appeal may be granted when a person is statutorily eligible to obtain bail. The rule requires, as does the present bail statute, that a presiding judge denying bail provide for the record the reasons for such denial. This requirement aids a reviewing court in the event that either the defendant or the state appeals a bail order. *State v. Blum*, 132 N.H. 396 (1989). See RSA 597:1-a.

Rule 33. Transcripts.

In any appeal, the appealing party shall make transcript requests in accordance with New Hampshire Supreme Court Rule 15 and all other applicable rules of the Supreme Court.

Rule 34. Deadline for Criminal Appeals

The time for filing a notice of appeal shall be within thirty days from the date of sentencing or the date of the clerk's written notice of disposition of post-trial motions, whichever is later, provided, however, that the date of the clerk's written notice of disposition of post-trial motion shall not be used to calculate the time for filing a notice of appeal in criminal cases if the post-trial motion was filed more than ten days after sentencing.

Comments

This rule is based on the second paragraph of New Hampshire Supreme Court Rule 7(1)(C).

VIII. RULES APPLICABLE IN ALL CRIMINAL PROCEEDINGS

Rule 35. Filings with the Court

(a) All pleadings and forms filed shall be upon 8 1/2 x 11 inch paper and shall be either typewritten or hand-printed and double-spaced so that they are clearly legible. No pleading, motion, objection, or the like, which is contained in a letter, will be accepted by the clerk, or acted on by the court.

(b) A party filing a pleading shall certify that a copy of the pleading and all attachments was mailed first class or delivered to all opposing counsel and any *guardian ad litem*. This rule shall not apply to *ex parte* pleadings and shall not require

a party to provide duplicate copies of documents already in another party's possession.

(c) A no contact order in a domestic violence, stalking, or similar matter shall not prevent either party from filing appearances, motions, and other appropriate pleadings. At the request of the party filing the pleading, the court shall forward a copy of the pleading to the party or counsel specified in the request. Furthermore, the no contact provisions shall not be deemed to prevent contact between counsel when both parties are represented.

(d) For the purpose of compliance with any time deadlines or statutes of limitation, the terms "filing" and "entry" shall have the same meaning and shall be used interchangeably. Whenever any document is received by the court and time-stamped as received, or the receipt is entered on the court's database, the earlier of the two shall be accepted as the filing date.

(e) In computing any period of time prescribed or allowed by these rules, by order of court, or by applicable law, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, or a legal holiday as specified in RSA 288.

(f) All pleadings and the appearance and withdrawal of counsel shall be signed by the attorney of record or the attorney's associate or by a *pro se* party. Names, addresses, New Hampshire Bar Association member identification numbers, and telephone numbers shall be typed or stamped beneath all signatures or papers to be filed or served. No attorney or *pro se* party will be heard until an appearance is so entered.

(g) By signing a pleading, an attorney certifies that the attorney has read the pleading, that to the best of the attorney's knowledge, information and belief there is a good ground to support it, and that it is not interposed for delay.

Comments

Rule 35(a) is based on Superior Court Rule 4. Rule 35(b) is based on Superior Court Rule 21. Rule 35(c) is based on Superior Court Rule 21. Rule 35(d) is based on Superior Court Rule 3. Rule 35(e) is based on Superior Court Rule 21. Rule 35(g) is based on Superior Court Rule 15.

Rule 36. Conduct of Attorneys

(a) Lawyers shall stand when addressing the court or examining a witness. The rule may be waived if the lawyer is physically unable to stand or for other good cause.

(b) An attorney may not participate in a trial in which the attorney has testified unless permitted by the Rules of Professional Conduct.

(c) No lawyer shall be compelled to testify in any case in which the lawyer represents a party unless the lawyer has been notified in writing at least thirty days in advance of trial in superior court and at least five days in advance of trial in district court. The attorney shall be provided an opportunity to be heard prior to the start of trial.

Comments

Rule 36 is consistent with existing New Hampshire practice and with Superior Court Rules 16, 17 and 18 and District Court Rule 1.3.

The issuance of a subpoena to an attorney of record is a matter also addressed by the Rules of Professional Conduct. *New Hampshire Rule of Professional Conduct* 4.5; *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984).

The committee recognized that physical disability may prevent or make difficult the requirement to stand during proceedings before the court.

Rule 37. Suspension of Rules; Violations of the Rules of Court

(a) When allowed by law and as justice may require, the court may waive the application of any rule.

(b) Upon the violation of any rule of court, the court may take such action as justice may require. Such action may include, without limitation, the imposition of monetary sanctions against either counsel or a party, which may include fines to be paid to the court, and reasonable attorney's fees and costs to be paid to the opposing party.

(c) 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.

Comments

Rule 37 is consistent with existing New Hampshire law and makes explicit the discretionary authority of the presiding justice to waive an applicable rule when justice so requires. *See State v. Dukette*, 145 N.H. 226, 229 (2000); *Exeter Hospital v. Hall*, 137 N.H. 397, 399-400 (1993).

The rule also adopts the provisions of District Court Rule 1.2 and Superior Court Rule 59 in holding that the court may impose sanctions for a violation of a rule or the frivolous or unreasonable conduct by a party to an action.

Rule 38. Plain Error

Plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Comments

This rule is based on Supreme Court Rule 16-A and Superior Court Rule 102-A.

Rule 39. Assignment to Specific Judges

(a) District Court

(1) *Special Assignments.* The chief judge of the district court or a presiding judge in a court may specially assign a case to a specific judge.

(2) *Motion for Special Assignment.* If an attorney of record seeks a special assignment to a judge, a motion for special assignment shall be filed. The motion shall set forth the grounds justifying the request and shall state whether or not counsel of record join in or object to the motion. Thereafter, the chief judge or the presiding judge shall rule on the motion.

(b) Superior Court

(1) *Murder Cases.* Upon the return of an indictment alleging murder or, on information alleging a murder with a waiver of indictment filed with the clerk of the superior court, the chief justice thereof shall assign the case to a specific judge.

(2) *Complex Cases.* Those cases which are of a complex nature, or are potentially of prolonged duration, may be assigned to a specific judge by the chief justice of the superior court *sua sponte*, or upon a motion for special assignment filed by any party. A party seeking special assignment shall file a motion setting set forth the grounds justifying the request and shall state whether or not counsel of record join in or object to the motion. Thereafter, the chief justice shall rule on the motion.

(3) *Assigned Docketing.* In the event that the case is brought in a superior court which uses a system of assigned docketing, the clerk shall assign the case to a particular judge.

Comments

Rule 39 reflects the present practice in the superior and district court even though there are no statutes, rules or case law authorizing such established methods with the exception of the recusal policy. See Sup. Ct. Rule 38. Requests for special assignments of district court judges are not common. Recusal of a district court judge, however, may justify special assignment. The rule is also available in particularly complex district court cases.

Rule 39(b) relating to the superior court provides that a murder case must be assigned to a specific judge and that complex cases may be assigned to a specific judge by the chief justice of the superior court *sua sponte* or upon motion for special assignment filed by an attorney of record.

The rule does not contemplate allowing parties to request a particular judge by name.

Rule 40. Recusal

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 judge. 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 trial judge shall make a record of the request, the court's findings, and its order.

Comments

This rule is based on District Court Rule 1.8-A(H) and Superior Court Rule 50-A.

Rule 41. Immunity

(a) Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide information in a proceeding before, or ancillary to, a district or superior court or a grand jury, a prosecutor may, with the prior written approval of the attorney general or county attorney for the jurisdiction where offenses are alleged to have occurred, request an order from the court requiring such individual to give testimony or provide other information which the individual refuses to give or provide on the basis of the privilege against self-incrimination, when in the judgment of the attorney general or county attorney:

(1) The testimony or other information from such individual may be necessary to the public interest.

(2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

(b) Whenever the court communicates on the record to the witness an order issued under paragraph (a), the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. No testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case or forfeiture. However, the witness may be prosecuted or subject to penalty or forfeiture for any perjury, false swearing, or contempt committed in answering or failing to answer, or in producing or failing to produce evidence in accordance with the order.

(c) The defense may request the court to confer immunity to a witness. The court shall grant immunity if required by state or federal constitutional law. Such an order shall be enforceable as provided in part (b).

Comments

Rule 41 is based on RSA 516:34, which allows a prosecutor to request an order of immunity. See *Kastigar v. United States*, 406 U.S. 441 (1972); *State v. Roy*, 140 NH 478 (1995); *State v. Winn*, 141 NH 812 (1997); *State v. Monsalve*, 133 NH 268 (1990); *State v. Kivlin*, 145 NH 718 (2001).

The Rule contemplates that an invocation of privilege should take place outside the presence of the jury. New Hampshire Rule of Evidence 512(b). A party may not call a witness simply to have the witness take the Fifth Amendment in front of a jury, because a jury is not entitled to draw any inference from the invocation of the privilege and the defendant's right to cross-examine will be violated. *State v. Breest*, 115 N.H. 504 (1975); *Abbott v. Potter*, 125 N.H. 257 (1984). The Rule is consistent with New Hampshire Rule of Evidence 512(b). *State v. Richards*, 129 N.H. 669 (1987) details the procedures trial courts should follow.

Regarding defense requests for immunity, see *State v. Kivlin*, 145 N.H. 718, 721 (2001). See also "Right Of Criminal Defendant To Have Immunity Granted To A Defense Witness," 4 ALR 4th 617.

Rule 42. Non-Members of the New Hampshire Bar

(a) *Non-attorneys*. New Hampshire certified police officers who are not members of the New Hampshire Bar may prosecute misdemeanors and violation offenses on behalf of the state in the district court.

(b) *Pro Hac Vice*

(1) An attorney, who is not a member of the Bar of this State, shall not be allowed to engage in the trial or hearing in any case, except on application to appear *pro hac vice*, which will not ordinarily be granted unless a member of the Bar of this State is associated with the non-member attorney and the member attorney is present at the trial or hearing.

(2) An attorney who is not a member of the Bar of this State seeking to appear *pro hac vice* shall file a verified application with the court, which shall contain the following information:

(A) The applicant's residence and business address;

(B) The name, address and phone number of each client sought to be represented;

(C) The courts before which the applicant has been admitted to practice and the respective period(s) of admission;

(D) Whether the applicant:

(i) Has been denied admission *pro hac vice* in this state;

(ii) Had admission *pro hac vice* revoked in this state; or

(iii) Has otherwise formally been disciplined or sanctioned by any court in this state.

If so, the applicant shall specify the nature of the allegations; the name of the authority bringing such proceedings; the caption of the proceedings, the date filed, and what findings were made and what action was taken in connection with those proceedings;

(E) Whether any formal, written disciplinary proceeding has ever been brought against the applicant by any disciplinary authority in any other jurisdiction within the last five years and, as to each such proceeding: the nature of the allegations; the name of the person or authority bringing such proceedings; the date the proceedings were initiated and finally concluded; the style of the proceedings; and the findings made and actions taken in connection with those proceedings;

(F) Whether the applicant has been formally held in contempt or otherwise sanctioned by any court in a written order in the last five years for disobedience to its rules or orders, and, if so: the nature of the allegations; the name of the court before which such proceedings were conducted; the date of the contempt order or sanction, the caption of the proceedings, and the substance of the court's rulings (a copy of the written order or transcript of the oral rulings shall be attached to the application); and

(G) The name and address of each court or agency and a full identification of each proceeding in which the applicant has filed an application to appear *pro hac vice* in this state within the preceding two years; the date of each application; and the outcome of the application.

(H) In addition, unless this requirement is waived by the superior court, the verified application shall contain the name, address, telephone number and bar number of an active member in good standing of the Bar of this State who will be associated with the applicant and present at any trial or hearing.

(3) The court has discretion as to whether to grant applications for admission *pro hac vice*. An application ordinarily should be granted unless the court finds reason to believe that such admission:

(A) May be detrimental to the prompt, fair and efficient administration of justice;

(B) May be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent;

(C) One or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk; or

(D) The applicant has engaged in such frequent appearances as to constitute common practice in this state.

Comments

Rule 42(a) is founded on common law. See *State v. Urban*, 98 N.H. 346, 348-49 (1953); *State v. LaPalme*, 104 N.H. 97 (1962); *State v. Aberizk*, 115 N.H. 535 (1975); *State v. Whippie*, 115 N.H. 608 (1975); *Bilodeau v. Antal*, 123 N.H. 39, 45 (1983). Rule 42(b) derives from Superior Ct. Rule 19 and District Court Rule 1.3.

Rule 43. Motions for Reconsideration

(a) A motion for reconsideration or other post-decision relief shall be filed within ten 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 pages. A hearing on the motion shall not be permitted except by order of the court.

(b) 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 days of notification of the motion.

(c) 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.

(d) 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.

Comments

This rule is based on Superior Court Rule 59-A.

Rule 44. Special Procedures in Superior Court Regarding Sex Related Offenses Against Children

(a) In any superior court case alleging a sex-related offense in which a minor child was a victim, the court shall allow the use of anatomically correct drawings and/or anatomically correct dolls as demonstrative evidence to assist the alleged victim or minor witness in testifying, unless otherwise ordered by the court for good cause shown.

(b) In the event that the alleged victim or minor witness is nervous, afraid, timid, or otherwise reluctant to testify, the court may allow the use of leading questions during the initial testimony but shall not allow the use of such questions relating to any essential element of the criminal offense.

(c) The clerk shall schedule a pretrial conference, to be held within forty-five days of the filing of an indictment, for the purpose of establishing a discovery schedule and trial date. At such conference, the court shall consider the advisability and need for the appointment of a *guardian ad litem* to represent the interests of the alleged victim.

(d) In the event that a *guardian ad litem* is appointed to represent the interests of a minor victim or witness, the role and scope of services of the *guardian ad litem* shall be explicitly outlined by the trial judge prior to trial.

(e) The *guardian ad litem* appointed under this rule shall be compensated at the same hourly rate and shall be subject to the same case maximums as set forth for defense counsel in misdemeanor cases under the provisions of Supreme Court Rule 47. The *guardian ad litem* shall also be reimbursed for the guardian's investigative and related expenses, as allowed under Rule 47, upon a finding of necessity and reasonableness by a justice of the appropriate court, made prior to the said expenses being incurred.

Comments

This rule is based on Superior Court Rule 93-A.

Rule 45. Criminal Contempt

(a) *Summary Disposition.* A direct criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the presence of the judge. Oral notice of the conduct observed must be given by the judge. The contemnor must be given an opportunity to speak and present a defense. The order of contempt shall recite the adjudication and sentence and shall be signed by the judge and entered of record. The disposition, when imposed, shall also be entered on a separately numbered State v. (The Contemnor) file.

(b) *Disposition Upon Notice and Hearing.* An indirect criminal contempt shall be prosecuted with notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of an attorney for the state or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided by statute. In a proceeding under this rule, if the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding

at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment.

Comments

This rule is based on Superior Court Rule 95.

Rule 46. Photographing, Recording and Broadcasting

(a) *General Principles.* The presiding judge should permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public. The presiding judge may limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequence. Except as specifically provided in this rule, or by order of the presiding judge, no person shall within the courtroom take any photograph, make any recording, or make any broadcast by radio, television or other means in the course of any proceeding.

(b) *Court Reporters and Authorized Recorders.* Official court reporters and authorized recorders are not prohibited by section (a) of this rule from making voice recordings for the sole purpose of discharging their official duties.

(c) *Proposed Limitations on Coverage by the Electronic Media.* Any party to a court proceeding – or any other interested person – shall notify the court at the inception of a matter, or as soon as practicable, if that person intends to ask the court to limit electronic media coverage of any proceeding that is open to the public. Failure to notify the court in a timely fashion may be sufficient grounds for the denial of such a request. In the event of such a request, the presiding judge shall either deny the request or issue an order notifying the parties to the proceeding and all other interested persons that such a limitation has been requested, establish deadlines for the filing of written objections by parties and interested persons, and order an evidentiary hearing during which all interested persons will be heard. The same procedure for notice and hearing shall be utilized in the event that the presiding judge *sua sponte* proposes a limitation on coverage by the electronic media. A copy of the court's order shall, in addition to being incorporated in the case docket, be sent to the Associated Press, which will disseminate the court's order to its members and inform them of upcoming deadlines/hearing.

(d) *Advance Notice of Requests for Coverage.* Any requests to bring cameras, broadcasting equipment and recording devices into a New Hampshire courtroom for coverage of any court proceedings shall be made as far in advance as practicable. If no objection to the requested electronic coverage is received by the court, coverage shall be permitted in compliance with this rule. If an objection is made, the media will be so advised and the court will conduct an evidentiary hearing during which all interested parties will be heard to determine whether, and to what extent, coverage by the electronic media or still photography will be limited. This rule and procedures

also apply to all court proceedings conducted outside the courtroom or the court facility.

(e) *Pool Coverage.* The presiding judge retains discretion to limit the number of still cameras and the amount of video equipment in the courtroom at one time and may require the media to arrange for pool coverage. The court will allow reasonable time prior to a proceeding for the media to set up pool coverage for television, radio and still photographers providing broadcast quality sound and video.

(1) It is the responsibility of the news media to contact the clerk of court in advance of a proceeding to determine if pool coverage will be required. If the presiding judge has determined that pool coverage will be required, it is the sole responsibility of the media, with assistance as needed from the court clerk, to determine which news outlet will serve as the “pool.” Disputes about pool coverage will not ordinarily be resolved by the court. Access may be curtailed if pool agreements cannot be reached.

(2) In the event of multiple requests for media coverage, because scheduling renders a pool agreement impractical, the court clerk retains the discretion to rotate media representatives into and out of the courtroom.

(f) *Live Feed.* Except for good cause shown, requests for live coverage should be made at least five days in advance of a proceeding.

(g) *Exhibits.* For purposes of this rule, access to exhibits will be at the discretion of the presiding judge. The court retains the discretion to make one “media” copy of each exhibit available in the court clerk’s office.

(h) *Equipment.* Exact locations for all video and still cameras and audio equipment within the courtroom will be determined by the presiding judge. Movement in the courtroom is prohibited, unless specifically approved by the presiding judge.

(1) Placement of microphones in the courtroom will be determined by the presiding judge. An effort should be made to facilitate broadcast quality sound. All microphones placed in the courtroom will be wireless.

(2) Video and photographic equipment must be of professional quality with minimal noise so as not to disrupt the proceedings; flash equipment and other supplemental lighting or sound equipment is prohibited unless otherwise approved by the presiding judge.

(i) *Restrictions.* Unless otherwise ordered by the presiding judge, the following standing orders shall govern.

(1) No flash or other lighting devices will be used.

(2) Set up and dismantling of equipment is prohibited when court is in session.

(3) No camera movement during court session.

(4) No cameras permitted behind the defense table.

(5) Broadcast equipment will be positioned so that there will be no audio recording of conferences between attorney and client or among counsel and the presiding judge at the bench. Any such recording is prohibited.

(6) During their term of jury service, jurors will not be photographed in connection with said service.

(7) Photographers and videographers must remain a reasonable distance from parties, counsel tables, alleged victims, witnesses and families unless the trial participant voluntarily approaches the camera position.

(8) All reporters and photographers will abide by the directions of the court officers at all times.

(9) Broadcast or print interviews will not be permitted inside the courtroom before or after a proceeding.

(10) Photographers, videographers and technical support staff covering a proceeding shall avoid activity that might distract participants or impair the dignity of the proceedings.

(11) Appropriate dress is required.

Comments

This rule is based on District Court 1.4 and Superior Court Rule 78.

As the New Hampshire Supreme Court stated in *Petition of WMUR Channel 9*, 148 N.H. 644 (2002), a presiding judge should permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public. A judge may limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequence. Closure of proceedings to the electronic media, however, should occur only if four requirements are met: (1) closure advances an overriding interest that is likely to be prejudiced; (2) the closure ordered is no broader than necessary to protect that interest; (3) the judge considers reasonable alternatives to closing the proceedings; and (4) the judge makes particularized findings to support the closure on the record.

It is the presiding judge's responsibility to ensure that trials are conducted in a fair and impartial manner, free from undue pressures and outside influences. Similarly, the presiding judge has a responsibility to the public and the press to provide reasonable access to judicial proceedings. Above all, trials must be conducted in an atmosphere of dignity and decorum.

In *Petition of WMUR Channel 9*, the New Hampshire Supreme Court held, among other things, that the presiding judge can limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequences. The Supreme Court required that trial court orders restricting coverage be: (1) based on clearly articulated findings of fact; (2) made after an evidentiary hearing during which all interested parties are entitled to be heard; (3) drawn narrowly to address a particular problem; and (4) imposed only when no other practical alternative is available.

Rule 47. Interpreters for Proceedings in Court

(a) Whenever any party reasonably believes that a defendant requires the assistance of an interpreter in order to understand proceedings in court, that party shall notify the court of that belief. Upon receipt of such notice, or *sua sponte* upon discovery by the court of grounds to believe that a defendant requires the assistance of an interpreter to understand proceedings in court, the court shall inquire into the matter. Upon determining that the belief is well founded, the court shall arrange for the presence and participation of an interpreter who meets the qualifications set forth in paragraph (e).

(b) Whenever, in the case of an indigent defendant, the defense reasonably believes that a defense witness requires an interpreter to give testimony, the defense shall notify the court of that belief. Upon receipt of such notice, or *sua sponte* upon discovery by the court of grounds to believe that a defense witness in such a case requires the assistance of an interpreter to give testimony, the court shall inquire into the matter. Upon determining that the belief is well founded, the court shall arrange for the presence and participation of an interpreter who meets the qualifications set forth in paragraph (e).

(c) Whenever the defense in a case involving a non-indigent defendant reasonably believes that a defense witness requires an interpreter to give testimony, the defense shall notify the court of that belief, and shall arrange for the presence and participation of an interpreter who meets the qualifications set forth in paragraph (e).

(d) Whenever the state reasonably believes that a prosecution witness requires an interpreter to give testimony, the state shall notify the court of that belief and shall arrange for the presence and participation of an interpreter who meets the qualifications set forth in paragraph (e).

(e) The court may appoint as an interpreter any person duly certified by the state, or nationally registered as such, or appropriately qualified. Upon such proper determination being made, an interpreter shall take oath to make true and accurate translations in an understandable form for the defendant and to the court. No person, who has assisted in the preparation of a case, or who is related to a person who is a witness, victim, or defendant in a case, shall act as interpreter at the trial thereof, if objection is made.

Comments

The Committee found relatively little extant discussion in statutes or court rules about the use of interpreters. Rule 47(e) is derived in part from Superior Court Rule 109 governing interpreters. In other respects, the Committee drew upon its sense of current best practices in fashioning a system for the appointment of interpreters. The rule is intended to address the need for non-English language interpreters as well as interpreters for the hearing impaired.

Rule 47(a) places upon the court the responsibility for determining whether the defendant requires the assistance of an interpreter for the purpose of translating court proceedings into a language understood by the defendant. In the event that a defendant requires an interpreter for that purpose, the court has the responsibility for procuring and compensating an interpreter to translate the court proceedings.

Rule 47(b) places upon counsel for an indigent defendant the responsibility for bringing to the court's attention an apparent need, on the part of a defense witness, of an interpreter to assist that witness in giving testimony in court. Upon finding that the witness does need an interpreter for that purpose, the court has the responsibility for procuring and compensating an interpreter for the translation of court proceedings as necessary to enable the testimony of the witness.

Rule 47(c) applies to cases involving non-indigent defendants who wish to present the testimony of a defense witness who requires the assistance of an interpreter in order to testify. In such cases, defense counsel has the responsibility for procuring and compensating a qualified interpreter as necessary to enable such a witness to testify.

Rule 47(d) puts on the prosecution the burden of procuring and compensating a qualified interpreter, as necessary to present the testimony of a prosecution witness.

Rule 47(e), referenced by all of the other paragraphs, describes the qualifications an interpreter must possess in order to translate court proceedings.

The rule covers only the circumstance of an interpreter called upon to translate court proceedings for an official purpose. The rule does not preclude the defense from employing an interpreter to assist in the preparation of a case, or for the purpose of assisting counsel in communicating with a defendant-client during court proceedings.

Rule 48. Clerk's Office; Judge's Chambers; Communications with the Court

(a) No witnesses, police personnel, prosecutors or defendants shall be permitted into a clerk's office or judge's chambers, except when necessary and as authorized by the court.

(b) Official business should be transacted in an area set aside as being accessible to the public for that purpose.

(c) No person shall make any statement with regard to the merits of that person's case, orally or in writing, to any judge in whose court or before whom any suit, petition or other proceeding is pending or to be heard or tried except in open court or in the presence of all parties thereto.

Comments

This rule is based on District Court Rule 1.6.

Rule 49. Untimely-Filed Guardian ad Litem Reports

(a) A guardian ad litem who, without good cause, fails to file a report required by any court or statute by the date the report is due may be subject to a fine of not less than \$100 and not more than the amount of costs and attorneys fees incurred by the parties to the action for the day of the hearing. The guardian ad litem shall not be subject to the fine under this rule if, at least ten days prior to the date the report is due, he or she files a motion requesting an extension of time to file the report.

(b) The court clerk shall report to the guardian ad litem board all guardians ad litem who fail to file a report by the date the report is due. However, the report shall clearly indicate all such guardians for whom the court has found good cause for the late filing. The court clerk shall make such report available to the public.

Rule 50. Access To Confidential Records -- Fees And Notice

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.

Rule 51. Juror Orientation

When a new panel of prospective jurors is first summoned for service, the panel shall be given preliminary instructions regarding the terms and conditions of jury service, the role of the jury in the justice system, and the legal principles applicable to the cases the jurors may hear. Such instructions may be given by a justice of the superior court, by utilization of a prerecorded audio or video presentation created for this purpose, or by a combination of use of a recording and instruction by a justice. Juror orientation sessions shall be

open to the public. Except during periods when an audio or video recording is being played, all proceedings involving the judge giving preliminary instructions and taking and responding to juror questions shall be conducted on the record. The record of juror orientation sessions shall be preserved for a period of ten (10) years.

APPENDIX B

Repeal the current Superior Court Rules, including the Sentence Review Division Rules, and adopt in their place the following:

RULES OF THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE

These rules are adopted by the New Hampshire Supreme Court pursuant to the authority established in Part II, Article 73-A of the New Hampshire Constitution. They take effect on _____, and apply to actions filed or pending on that date. In exceptional circumstances, when the court finds that the application of these rules to cases pending as of the effective date would not be feasible or would work an injustice, the court may exempt such cases from the application of these rules or from a particular rule.

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A. CIVIL RULES

I. General Principles

Rule 1. Scope, Purpose, Enforcement, Waiver and Substantial Rights

(a) These rules govern the procedure in New Hampshire superior courts in all suits of a civil nature whether considered cases at law or in equity with the exception of those actions subject to specific procedures established by statute.

(b) The rules shall be construed and administered to secure the just, speedy, and cost-effective determination of every action.

(c) Upon the violation of any of these rules, the court may take such action as justice requires, which action may include, without limitation, the imposition of monetary sanctions against either counsel or a party, fines to be paid to the court, and reasonable attorney's fees and costs to be paid to the opposing party.

(d) As good cause appears and as justice may require, the court may waive the application of any rule.

(e) A plain error that affects substantial rights may be considered and corrected by the court of its own initiative or on the motion of any party.

(f) The clerk may refuse to accept any pleading or motion that the clerk determines does not comply with these rules. In the event an objection is made to such determination, a written motion may be made to the court to rule on such determination.

Source

- (a) New
- (b) New. Derived from Rule 1, Fed.R.Civ.P.
- (c) Superior Court Preface
- (d) Superior Court Preface
- (e) Superior Court Rule 102-A (modified)

(f) Superior Court Rule 5

Comments

(a) A court may deviate from or modify a rule as justice requires.

(e) The language in Rule 1(e) is taken from Superior Court Rule 102-A which reads as follows: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

Rule 2. Computation of Time

In computing any period of time prescribed or allowed by these rules, by order of court, or by applicable law, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, or a legal holiday as specified in RSA ch. 288, as amended.

Source

Superior Court Rule 12

Rule 3. Filing and Service

(a) Copies of all pleadings filed and communications addressed to the court shall be furnished to all other counsel and any self-represented party on the same day as the pleadings and communications are filed with the court. All such pleadings and communications shall contain a statement of compliance herewith.

(b) When an attorney has filed a limited appearance under Rule 17(c) on behalf of an opposing party, copies of pleadings filed and communications addressed to the court shall be furnished both to the opposing party who is receiving the limited representation and to the limited representation attorney. After the limited representation attorney files that attorney’s “withdrawal of limited appearance” form, as provided in Rule 17(e), no further service need be made upon that attorney.

(c) A no contact order in a domestic violence, stalking, or similar matter shall not be deemed to prevent either party from filing appearances, motions, and other appropriate pleadings, through the

court. At the request of the party filing the pleading, the court shall forward a copy of the pleading to the party or counsel on the other side of the case. Furthermore, the no contact provisions shall not be deemed to prevent contact between counsel, when both parties are represented.

Source

- (a) Superior Court Rule 21
- (b) Superior Court Rule 21
- (c) Superior Court Rule 21

II. Commencement of Action

Rule 4. Preliminary Process

(a) There shall be one form of action to be known as a “civil action.”

(b) To initiate a civil action, including an action authorized by law to be initiated by writ or petition, the plaintiff files with the court: (i) the Summons, (ii) the Complaint, (iii) an Appearance (indicating the plaintiff’s representative by name, address, and New Hampshire Bar Association identification number, (iv) the Civil Cover Sheet, and (v) the filing fee. See Rule 201. For purposes of complying with the statute of limitations, an action shall be deemed commenced on the date the Complaint is filed.

(c) Upon receipt of the Complaint, Civil Cover Sheet, and filing fee, the court will process the action and provide plaintiff with the completed Summons for service. The Summons will identify two dates: (i) the date the Complaint is filed, and (ii) the date plaintiff selects to file proof of service of the Complaint on the defendant (the Return Date). Plaintiff will cause the Summons together with a copy of the Complaint to be served on defendant at least 14 days before the return date (but no later than 120 days after the filing date), service to be made as specified in RSA 510, or as otherwise allowed by law. If a defendant is not served within 120 days after the Complaint is filed, the court shall dismiss the action with or without prejudice, as justice may require.

(d) In all cases of notice by publication where the time may be fixed by the Court, the order shall be for publication in some paper or papers named by the court in general or special orders, once a week for 3 successive weeks, the last publication to be not less than fourteen (14) days before the Return Date.

(e) Appearances and Answers, including Special Appearances accompanied by Motions to Dismiss, are due within 30 days after the Return Date.

Source

(a) New. Rule 4(a) eliminates the distinction between actions at law and actions in equity. It is styled after Rule 2, Fed.R.Civ.P. The elimination of the two forms of action is not intended to eliminate or change any remedy currently available through the courts.

(b) New first sentence. Second sentence: Superior Court Rule 2 (modified to be consistent with use of complaint rather than writ).

(c) Superior Court Rules 2 and 3 (amended); Rule 4(a), Fed.R.Civ.P.

(d) Superior Court Rule 128.

(e) New; consistent with existing practice.

Rule 5. Structuring Conference

(a) The court may schedule a Structuring Conference for any case, to establish discovery and trial schedules and discuss any other issues involved in processing of the case.

(b) Ten days prior to the Structuring Conference the parties shall submit a Scheduling Statement identifying proposals for discovery deadlines and a trial schedule. The Scheduling Statement shall make note of any disagreements by counsel about scheduling so that the court can resolve the matter expeditiously. At the same time, all parties shall file summary statements to advise the court of the nature of the claims, defenses, and legal issues likely to arise. Summary statements are not admissible at trial.

Also at the same time, if the case is subject to Alternative Dispute Resolution (ADR) under Rule 301, the parties shall file a proposed agreement relating to ADR, including an agreement upon the ADR process, the neutral to be used, and the schedule for mediation. If the parties are unable to reach an agreement on ADR, the specifics of the ADR process shall be determined in accordance with Rule 301(B).

Unless otherwise ordered by the court, structuring conferences shall be held at the courthouse and shall require the personal attendance

of counsel, or parties if unrepresented. However, any counsel, or party if unrepresented, desiring to participate in the structuring conference telephonically may file a motion to do so at least fifteen (15) days prior to the structuring conference, indicating in said motion whether or not a record is requested. Although such motions should generally be granted, the court may consider the following factors, among others, in ruling on a request for telephonic participation: the complexity of the case; whether there has been an objection to the request for telephonic participation; whether the parties have reached agreement on all matters specified in the Scheduling Statement; whether any party is unrepresented; the distance counsel, or parties if unrepresented, must travel to attend the conference in person; and the potential for successful resolution or settlement of the case at the initial screening conference. The record, if any, for any telephonic conference will be taken by electronic recording device or such other method as may be approved by the court.

(c) Following the Structuring Conference, the court will issue an Order identifying discovery and trial schedules.

(d) *Fast Track Discovery.* In those cases selected for fast track discovery, the parties shall file disclosure statements with the court within ninety (90) days of the date of such selection. The disclosure statements shall contain the following:

(1) the factual bases of the claim or defense;

(2) the legal theories upon which the claim or defense is based;

(3) identification of witnesses and other persons known to have information relevant to the action and a brief summary of their expected testimony or information;

(4) copies of any written or recorded statements made by those persons listed in response to subparagraph (c) above;

(5) the names and addresses of experts, which shall be limited to one expert per side, together with the disclosures required by RSA 516:29-b;

(6) a list of all exhibits intended to be used at trial; and

(7) a list of all documents and things known by a party to exist and which the party believes may be relevant to the case, whether or not such documents or things are in the party's possession or are intended to be offered in evidence at trial.

Interrogatories shall be limited to thirty (30) per side and each subpart of an interrogatory shall be counted as an interrogatory.

Requests for admissions shall be limited to twenty-five (25) per side.

Requests for production of documents shall be limited to ten (10) per side.

Depositions shall be limited to the parties and their experts and no such deposition shall exceed four (4) hours.

The court may vary the requirements governing fast track discovery for good cause shown.

Source

New. This rule codifies existing procedure.

III. Pleadings and Motions

Rule 6. Pleadings Defined

(a) There shall be allowed 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, if a person who was not an original party is summoned to appear in an action; and a Third-Party Answer, if a Third-Party Complaint is served. No other pleading shall be allowed as a right, except that the Court may allow a Reply to an Answer or a Third-Party Answer.

(b) Demurrers, Pleas, and Exceptions for insufficiency of a pleading shall not be used.

Source

(a) Rule 7(a), Fed.R.Civ.P.

(b) Rule 7(c), Fed.R.Civ.P.

Comment

Rule 6(a) is part of the restructuring of the civil rules intended to eliminate the distinction between law and equity.

Rule 7. Pleadings and Motions, General

(a) No pleading, motion, objection, or the like, which is contained in a letter, will be accepted by the clerk, as such, or acted on by the court. All pleadings and forms filed shall be upon 8 1/2 x 11 inch paper and shall be either typewritten or printed double space so that they are clearly legible.

(b) All pleadings and motions shall set forth the factual allegations in numbered paragraphs.

(c) All pleadings, motions, and the Appearance and Withdrawal of counsel shall be signed by the attorney of record, authorized non-attorney representative, or by a pro se party. Names, street addresses, mailing addresses, New Hampshire Bar Association member identification numbers, and telephone numbers shall be typed or stamped beneath all signatures or papers to be filed or served. No attorney, non-attorney representative, or pro se party will be heard until his/her Appearance is so entered.

(d) The signature of an attorney, non-attorney representative, or pro se party to a pleading or motion constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is a good ground to support it; and that it is not interposed for delay. If a pleading is not signed, or is signed with an intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading had not been filed.

(e) No attorney, non-attorney representative or party to litigation shall directly address himself by pleading or motion to any judge but shall file such pleading or motion with the clerk.

(f) The Court may in all cases order either party to plead and also to file a statement in sufficient detail to give to the adverse party and to the Court reasonable knowledge of the nature and grounds of the action or defense.

(g) Papers shall not be withdrawn from the court files except by leave of court and upon the filing of a receipt therefor.

Source

- (a) Superior Court Rule 4
- (b) Superior Court Rule 121
- (c) Superior Court Rule 15(a)
- (d) Superior Court Rule 15(b)
- (e) Superior Court Rule 6
- (f) Superior Court Rule 29
- (g) Superior Court Rule 56

Rule 8. Complaint

(a) All Complaints shall contain (1) a short and plain statement of the claim showing entitlement to relief and (2) a demand for judgment sought within the jurisdictional limits of the court.

(b) Relief in the alternative or of several different types may be demanded.

(c) A plaintiff entitled to a trial by jury and desiring a trial by jury shall so indicate upon the first page of the Complaint at the time of filing, or if there is a counterclaim at the time plaintiff files an Answer to such counterclaim. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the plaintiff thereof.

Source

- (a) Rule 8(a), Fed.R.Civ. P. (modified)
- (b) Rule 8(a), Fed.R.Civ. P. (modified)
- (c) Superior Court Rule 8

Rule 9. Answer

(a) Answers shall be filed within 30 days after the Return Date, unless defendant files a Motion to Dismiss within that time period. If a Motion to Dismiss is submitted and denied, an Answer will be required

within 20 days after the date on the Notice of the Decision denying the motion.

(b) Answers to a pleading shall (i) state in short and plain terms the defenses to each claim asserted, and (ii) admit or deny or otherwise respond to each factual allegation.

(c) To preserve the right to a jury trial, a defendant entitled to a trial by jury must indicate his request for a jury trial upon the first page of the Answer at the time of filing. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the defendant thereof.

(d) The defendant, in answering the allegations in the Complaint shall not do so evasively but shall answer fully and specifically every material allegation in the Complaint and set out his defense to each claim asserted by the Complaint. If the defendant is without knowledge or information sufficient to form a belief as to any particular factual allegation, he shall so state and this will be treated as a denial. The Answer of the defendant may state as many defenses as the defendant deems essential to his defense. The defendant may allege any new or special matter in his Answer with a demand for relief. An Answer, to the effect that an allegation is neither admitted nor denied, will be deemed an admission. All facts well alleged in the Complaint, and not denied or explained in the Answer, will be held to be admitted.

(e) Failure to plead as affirmative defenses and/or file a Motion to Dismiss based on the statute of limitations, lack of personal jurisdiction, improper venue and/or insufficient process or service of process within the time allowed in subsection a of this rule will constitute waiver of such defenses.

(f) The Answer to an Amended Complaint must be filed within 20 days after an amended Complaint is filed.

Source

(a) Superior Court Rules 14 and 131 (modified).

(b) Rule 8(b), Fed.R.Civ.P.

(c) Superior Court Rule 8

(d) Superior Court Rule 133

- (e) Superior Court Rule 28 and Fed.R.Civ.P 12(m)
- (f) Superior Court Rule 131 (modified)

Comment

Answers are to comply with statutory requirements that pertain to brief statements of defense. See RSA 515:3, 524:2, 565:7, and 547-C:10.

Rule 10. Counterclaims, Cross-claims and Third-Party Claims

(a) A pleading shall state as a counterclaim any claim which at the time of serving the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

(b) A pleading may state as a cross-claim any claim by one party against a co-party which arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim therein.

(c) Unless otherwise provided by law, whenever a third party may be liable to a defendant in any pending action for any of the plaintiff's claim against said defendant, or if said defendant may have a claim against a third party depending upon the determination of an issue or issues in said pending action, said defendant may bring an action against said third party and, unless otherwise ordered on motion of any party, such action will be consolidated for trial with the pending action or, if justice requires, said third party may be made a party to the pending action, for the purpose of being bound by the determination of any common issues. However, except for good cause shown to prevent injustice and upon such terms as the court may order, no such action will be consolidated with or said third party joined in said pending action, unless suit is brought against said third party within 60 days following filing of the defendant's Answer in said pending action.

(d) A third party against whom an action is brought in accordance with this rule and a plaintiff against whom a counterclaim has been filed may, under the same circumstances prescribed by this rule, use the same procedure with respect to another person and the same time limitation shall apply, except that as to a plaintiff the sixty days will begin to run on the date the counterclaim is filed.

(e) This rule shall not be construed to limit or abridge in any way the existing common law practice of joining parties in pending actions

whenever justice and convenience require, or the giving of notice to third parties to come in and defend any pending action or be bound by the outcome thereof.

(f) This rule does not apply to a defendant who contends that a third party is solely liable to the plaintiff or by a defendant in a tort action as to a possible joint tortfeasor against whom said defendant has no right to contribution or reimbursement.

Source

(a) Rule 13(a), Fed.R.Civ.P. The language from this federal rule is consistent with existing New Hampshire practice.

(b) Rule 13(g), Fed.R.Civ.P. The language from this federal rule is consistent with existing New Hampshire practice.

(c) Superior Court Rule 27 (Modified: consistent with current Superior Court practice). This rule does not apply to contribution claims which are governed by RSA 507:7-e, f and g.

(d) Superior Court Rule 27

(e) Superior Court Rule 27

(f) Superior Court Rule 27

Rule 11. Motions -- General

(a) A request for court order must be made by motion which must (i) be in writing unless made during a hearing or trial, (ii) state with particularity the grounds for seeking the order, and (iii) state the relief sought.

(b) The Court will not hear any motion grounded upon facts, unless such facts 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, their attorneys, or non-attorney representatives; 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 he has made a good faith attempt 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) 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.

Source

(a) New, derived from Rule 7(b)(1), Fed.R.Civ.P. The language from this federal rule is consistent with existing New Hampshire practice.

(b) Superior Court Rule 57

(c) Superior Court Rule 57-A

(d) Superior Court Rule 59

Comments

Motions relating to discovery are addressed in section V of these civil rules.

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.

Source

- (1) Superior Court Rule 24
- (2) Superior Court Rule 25
- (3) Superior Court Rule 26
- (4) Superior Court Rule 135

(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.

Source

Superior Court Rule 113

(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 pro se 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 certificate by the attorney, non-attorney representative, or pro se 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 pro se 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.

Source

(1) Superior Court Rule 48

(2) Superior Court Rule 49

(3) Superior Court Rule 49-A (modified to delete reference to District Court trials)

(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.

Source

Superior Court Rule 58 (modified)

(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. 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.

Source

Superior Court Rule 59-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.

Source

Superior Court Rule 50-A

(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 court shall present the jury with a statement of facts sufficient to explain the case to the jury and place it in a proper context so that the trier of fact might more readily understand what they will be hearing in the remaining portion of the trial. Absent such an agreement on facts, the matters of liability and damages cannot be severed.

Source

- (1) Superior Court Rule 58-A
- (2) RSA 491:8-a
- (3) Superior Court Rule 58-A (modified)

Comments

This is not an exclusive list of the motions that can be filed in New Hampshire courts, but instead represents a sampling of the motions most commonly filed and opposed in the course of traditional New Hampshire litigation.

Rule 13. Objections

(a) A non-moving party may object or otherwise respond to a motion within 14 days after filing thereof unless (1) the party is responding to a Motion for Summary Judgment, *see* RSA 491:8-a, or (2) another deadline is established by court order.

(b) Except for motions that fall within Rules 13(a)(1) and (2) above, unless a party requests oral argument or an evidentiary hearing on any motion filed by the party or on any objection thereto by another party within 14 days after the filing of the motion, setting forth by memorandum, brief statement or written offer of proof the reasons why the oral argument or evidentiary hearing will further assist the court in determining the pending issue(s), no oral argument or evidentiary hearing will be scheduled and the court may act on the motion on the basis of the pleadings and record before it. Failure to object shall not, in and of itself, be grounds for granting the motion.

Source

Superior Court Rule 58 (modified to conform to existing New Hampshire practice), and adding 4 days to the period for objecting to accommodate responses where service is by mail.

IV. Parties and their Representatives

Rule 14. Third Parties

In addition to the participation of plaintiffs and defendants, a civil action may also involve third parties whenever third parties may be liable

to a defendant in any pending action for all or part of the plaintiff's claim against said defendant or if said defendant may have a claim against third parties, depending upon the determination of an issue or issues in said pending action.

Source

Superior Court Rule 27

Comments

For pleadings related to third parties, see Rule 10.

Rule 15. Intervention

Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his relation to the cause; or, upon motion of any party, such person may be made a party by order of court notifying him to appear therein. If a party, so notified, neglects to file an Appearance and Answer on or before the date established by the court, that party shall be defaulted. No such default shall be set aside, except by agreement or by order of the court upon such terms as justice may require.

Source

Superior Court Rule 139

Rule 16. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all if:

- (1) The class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
- (2) There are questions of law or fact common to the class which predominate over any questions affecting only individual members;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) The representative parties will fairly and adequately protect the interests of the class;

(5) A class action is superior to other available methods for the fair and efficient adjudication of the controversy; and

(6) The attorney or non-attorney representative for the representative parties will adequately represent the interests of the class.

(b) *Order Allowing Class Action.* As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under subdivision (a) of this rule have been satisfied.

(c) *Satisfaction of Jurisdictional Damages Limit.* For purposes of satisfying the jurisdictional damages limit of the court, the claims of the members of the class shall be aggregated.

(d) *Description of Class.* The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within the specified time after notice.

(e) *Notice of Class Action.* Following the court's order maintaining the class action, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude that party from the class if that party so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; (C) any member who does not request exclusion may, if that party desires, enter an Appearance through that party's counsel; and contain such other information that the court deems appropriate. Unless the court orders otherwise, the representatives of the class shall bear the expense of notification and be responsible for the giving of the notice to members of the class.

(f) *Exclusion.* Any member of the plaintiff class who files an election to be excluded in the manner and in the time specified in the notice, is excluded from and not bound by the judgment in the class action. A member of a defendant class may not elect to be excluded.

(g) *Judgment.* The judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

(h) *Methods of Payment of Damages.* If the court renders judgment in favor of a plaintiff class, the court may, in its discretion, order the defendant to pay damages into the court and require each member of the class to file a claim with the court, or order payment of damages in any other manner it deems appropriate.

(i) *Actions Conducted Partially as Class Actions.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class. The provisions of this subdivision shall then be construed and applied accordingly.

(j) *Orders in Conduct of Class Actions.* In the conduct of class actions the court may make and alter appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) Requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action; or

(3) Dealing with similar procedural matters.

(k) *Dismissal, Discontinuance or Settlement.* A class action shall not be dismissed, discontinued or settled without the approval of the court. Notice of the proposed dismissal, discontinuance or settlement shall be given to all members of the class in such manner as the court directs.

Source

Superior Court Rule 27-A

Rule 17. Appearance and Withdrawal

(a) An Appearance in an action shall be made by filing a typed or handwritten Appearance form containing the name, street address, mailing address, New Hampshire Bar Association member identification number, and telephone number of the person entering the Appearance, and the complete name, street address, and telephone number of the party on whose behalf the appearance is filed. The clerk shall be notified of any changes of address of any of the parties. A separate Appearance is to be filed by counsel or non-attorney representative with respect to each case in which counsel or non-attorney representative appears, whether or not such cases are consolidated for trial or other purposes.

(b) The Appearance and Withdrawal of counsel or non-attorney representative shall be signed by that person. Names, street addresses, mailing addresses, New Hampshire Bar Association member identification numbers, and telephone numbers shall be typed or stamped beneath all signatures or papers to be filed or served. No attorney, non-attorney representative, or pro se party will be heard until his Appearance is so entered.

(c) *Limited Appearance of Attorneys.* To the extent permitted by Rule 1.2 of the New Hampshire Rules of Professional Conduct, an attorney providing limited representation to an otherwise unrepresented litigant may file a Limited Appearance in a non-criminal case on behalf of such unrepresented party. The Limited Appearance shall state precisely the scope of the limited representation, and the attorney's involvement in the matter shall be limited only to what is specifically stated. The requirements of Rule 7(c), and (d) of these Rules shall apply to every pleading and motion signed by the limited representation attorney. An attorney who has filed a Limited Appearance, and who later files a pleading or motion outside the scope of the limited representation, shall be deemed to have amended the Limited Appearance to extend to such filing. An attorney who signs a Pleading or Motion, or any amendment thereto which is filed with the court (with the exception of a Special Appearance and motion challenging the court's jurisdiction over the defendant), will be considered to have filed a General Appearance and, for the remainder of that attorney's involvement in the case, shall not be considered as a limited representation attorney under these rules; provided, however, if such attorney properly withdraws from the case and the withdrawal is allowed by the court, the attorney could later file a Limited Appearance in the same matter.

(d) An attorney or non-attorney representative may withdraw from an action by serving a Notice of Withdrawal on the client and all other parties and by filing the notice, provided that (1) there are no motions

pending before the court, (2) a Trial Management Conference has not been held, and (3) no trial date has been set. Unless these conditions are met, an attorney or non-attorney representative may withdraw from an action only by leave of court. Whenever an attorney or non-attorney representative withdraws from an action, and no other Appearance is entered, the court shall notify the party by mail of such withdrawal. If the party fails to appear by himself or attorney by a date fixed by the court, the court may take such action as justice may require.

(e) Other than limited representation by attorneys as allowed by Rule 17(d) and Professional Conduct Rule 1.2(f), no attorney or non-attorney representative shall be permitted to withdraw his/her Appearance in a case after the case has been assigned for trial or hearing, except upon motion to permit such withdrawal granted by the court for good cause shown, and on such terms as the court may order. Any motion to withdraw filed by counsel or non-attorney representative shall set forth the reason therefore but shall be effective only upon approval by the court. A factor which may be considered by the court in determining whether good cause for withdrawal has been shown is the client's failure to meet his or her financial obligations to pay for the attorney's services.

(f) *Automatic Termination of Limited Representation.* Any Limited Representation Appearance filed by an attorney, as authorized under Rule 17(d) and Professional Conduct Rule 1.2(f), shall automatically terminate upon completion of the agreed representation, without the necessity of leave of court, provided that the attorney shall provide the court a "withdrawal of limited appearance" form giving notice to the Court and all parties of the completion of the limited representation and termination of the limited appearance. Any attorney having filed a Limited Appearance who seeks to withdraw prior to the completion of the limited representation stated in the Limited Appearance, however, must comply with Rule 17(e).

(g) *Pleading prepared for Unrepresented Party.* When an attorney provides limited representation to an otherwise unrepresented party, by drafting a document to be filed by such party with the court in a proceeding in which (1) the attorney is not entering any appearance, or (2) the attorney has entered a Limited Appearance which does not include representation regarding such document, the attorney is not required to disclose the attorney's name on such pleading to be used by that party; any pleading drafted by such limited representation attorney, however, must conspicuously contain the statement "***This pleading was prepared with the assistance of a New Hampshire attorney.***" The unrepresented party must comply with this required disclosure. Notwithstanding that the identity of the drafting attorney need not be required to be disclosed under this rule, by drafting a pleading to be used

in court by an otherwise unrepresented party, the limited representation attorney shall be deemed to have made those same certifications as set forth in Rule 7(d) despite the fact the pleading need not be signed by the attorney.

Source

- (a) Superior Court Rule 2-A and 14 (modified)
- (b) Superior Court Rule 15
- (c) Superior Court Rule 14(d)
- (d) Superior Court Rules 15 and 20 (modified)
- (e) Superior Court Rule 15(d)
- (f) Superior Court Rule 15(e)
- (g) Superior Court Rule 15(f)

Rule 18. Counsel

(a) When either party shall change attorneys or non-attorney representatives during the pendency of the action, the name of the new attorney or non-attorney representative shall be entered on the docket.

(b) No attorney or non-attorney representative will be permitted to take part in a jury trial after he has testified for his client therein unless his acting as an advocate would be permitted by Rule 3.7 of the Rules of Professional Conduct.

(c) No attorney may be surety or guarantor of any bond or undertaking in any proceeding.

Source

- (a) Superior Court Rule 20
- (b) Superior Court Rule 17
- (c) Superior Court Rule 22

Rule 19. Out of State Counsel (*Admission Pro Hac Vice*)

(a) An attorney, who is not a member of the Bar of this State (a "Nonmember Attorney"), shall not be allowed to engage in the trial or hearing in any case, except on application to appear *pro hac vice*, which will not ordinarily be granted unless a member of the Bar of this State (the "In-State Attorney") is associated with him or her and present at the trial or hearing.

(b) A Nonmember Attorney seeking to appear *pro hac vice* shall file a verified application with the court, which shall contain the following information:

(1) the applicant's residence and business address;

(2) the name, address and phone number of each client sought to be represented;

(3) the courts before which the applicant has been admitted to practice and the respective period(s) of admission;

(4) whether the applicant: (i) has been denied admission *pro hac vice* in this State; (ii) had admission *pro hac vice* revoked in this State; or (iii) has otherwise formally been disciplined or sanctioned by any court in this State. If so, the applicant shall specify the nature of the allegations; the name of the authority bringing such proceedings; the caption of the proceedings, the date filed, and what findings were made and what action was taken in connection with those proceedings;

(5) whether any formal, written disciplinary proceeding has ever been brought against the applicant by any disciplinary authority in any other jurisdiction within the last five years and, as to each such proceeding: the nature of the allegations; the name of the person or authority bringing such proceedings; the date the proceedings were initiated and finally concluded; the style of the proceedings; and the findings made and actions taken in connection with those proceedings;

(6) whether the applicant has been formally held in contempt or otherwise sanctioned by any court in a written order in the last five years for disobedience to its rules or orders, and, if so: the nature of the allegations; the name of the court before which such proceedings were conducted; the date of the contempt order or sanction, the caption of the proceedings, and the substance of the court's rulings (a copy of the written order or transcript of the oral rulings shall be attached to the application); and

(7) the name and address of each court or agency and a full identification of each proceeding in which the applicant has filed an application to appear *pro hac vice* in this State within the preceding two years; the date of each application; and the outcome of the application.

(8) In addition, unless this requirement is waived by the superior court, the verified application shall contain the name, address, telephone number and bar number of an active member in good standing of the Bar of this State who will be associated with the applicant and present at any trial or hearing.

(c) The court has discretion as to whether to grant applications for admission *pro hac vice*. An application ordinarily should be granted unless the court finds reason to believe that:

(1) such admission may be detrimental to the prompt, fair and efficient administration of justice;

(2) such admission may be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent;

(3) one or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk; or

(4) the applicant has engaged in such frequent appearances as to constitute common practice in this State.

(d) When a Nonmember Attorney appears for a client in a proceeding pending in this state, either in the role of co-counsel of record with the In-State Attorney, or in an advisory or consultative role, the In-State Attorney who is co-counsel or counsel of record for that client in the proceeding remains responsible to the client and responsible for the conduct of the proceeding before the court or agency. It is the duty of the In-State Attorney to advise the client of the In-State Attorney's independent judgment on contemplated actions in the proceeding if that judgment differs from that of the Nonmember Attorney.

(e) An applicant for permission to appear *pro hac vice* shall pay a non-refundable fee of \$225.00; provided that not more than one application fee may be required per Nonmember Attorney for consolidated or related matters regardless of how many applications are made in the consolidated or related proceedings by the Nonmember Attorney; and

further provided that the requirement of an application fee may be waived to permit pro bono representation of an indigent client or clients, in the discretion of the court.

Source

Superior Court Rule 19

Rule 20. Non-attorney representatives

(a) No person who is not a lawyer will be permitted to appear, plead, prosecute or defend any action for any party, other than himself or herself, unless of good character and until there is on file with the court:

(1) a power of attorney signed by the party for whom s/he seeks to appear, witnessed and acknowledged before a Justice of the Peace or Notary Public, constituting said person his or her attorney to appear in the particular action;

(2) an affidavit under oath in which said person discloses (i) all of said person's misdemeanor and felony convictions (other than those in which a record of the conviction has been annulled by statute), (ii) all instances in which said person has been found by any court to have violated a court order or any provision of the rules of professional conduct applicable to nonlawyer representatives, and (iii) all prior proceedings in which said person has been permitted to appear, plead, prosecute or defend any action for any party, other than himself or herself, in any court; and

(b) Any person who is not a lawyer who is permitted to represent any other person before any court of this State must comply with the Rules of Professional Conduct as set forth in Professional Conduct Rule 8.5, and shall be subject to the jurisdiction of the committee on professional conduct.

(c) A party who appears *pro se* shall so state in the Appearance, and all pleadings and motions.

Source

(a) Superior Court Rule 14 (modified)

(b) Superior Court Rule 14

(c) New

Comment

These rules should be interpreted to be consistent with RSA 311, Attorneys and Counselors.

V. Discovery

Rule 21. General Provisions

(a) *Discovery Methods.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical or mental examinations; and requests for admission.

(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Privilege Log.* When a party withholds materials or information otherwise discoverable under this rule by claiming that the same is privileged, the party shall promptly and expressly notify the opposing party of the privilege claim and, without revealing the contents or substance of the materials or information at issue, shall describe its general character with sufficient specificity as to enable other parties to assess the applicability of the privilege claim. Failure to comply with this requirement shall be deemed a waiver of any and all privileges.

(d) *Discovery Abuse; Sanction.*

(1) The court may impose appropriate sanctions against a party or counsel for engaging in discovery abuse. Upon a finding that discovery abuse has occurred, the court should normally impose sanctions unless the offending party or counsel can demonstrate substantial justification for the conduct at issue or other circumstances that would make the

imposition of sanctions unfair. Discovery abuse includes, but is not limited to, the following:

(A) employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or undue burden or expense;

(B) employing discovery methods otherwise available which result in legal expense disproportionate to the matters at issue;

(C) making, without substantial good faith justification, an unmeritorious objection to discovery;

(D) responding to discovery in a manner which the responding party knew or should have known was misleading or evasive;

(E) producing documents or other materials in a disorganized manner or in a manner other than the form in which they are regularly kept;

(F) failing to confer with an opposing party or attorney in a good faith effort to resolve informally a dispute concerning discovery;

(2) The sanctions which may be imposed for discovery abuse include, but are not limited to, the following:

(A) a monetary sanction in an amount equal to the unnecessary expenses incurred, including reasonable attorney's fees, as the result of the abusive conduct;

(B) an issue sanction that orders that designated facts be taken as established by the party who has been adversely affected by the abuse;

(C) an evidence sanction that prohibits the offending party from introducing certain matters into evidence;

(D) a terminating sanction that strikes all or parts of the claims or defenses, enters full or partial judgment in favor of the plaintiff or defendant, or stays the proceeding until ordered discovery has been provided.

(e) *Trial Preparation.*

(1) A party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable and

prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, non-attorney representative, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(2) A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(f) *Sequence and Timing of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(g) *Supplementation of Responses.* A party, who has responded to a request for discovery with a response that was complete when made, is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of persons having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (a) he knows that the

response was incorrect when made, or (b) he knows that the response, though correct when made, is no longer true.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Source

- (a) Superior Court Rule 35(a)
- (b) Superior Court Rule 35(b)
- (c) Superior Court Rule 35(b)(1)
- (d) Superior Court Rule 35(g)
- (e) Superior Court Rule 35(b)(2)
- (f) Superior Court Rule 35(d)
- (g) Superior Court Rule 35(e)

Rule 22. Written Interrogatories

(a) Any party may serve, by mail or delivery by hand, upon any other party written interrogatories relating to any matters which may be inquired into under Rule 21.

(b) Any party propounding interrogatories shall provide the opponent with notice, substantially as set forth in the following form, of the obligation to answer said interrogatories within thirty days. The notice shall be at the top of the first page and printed in capital, typewritten letters or in ten-point, bold-face print. The form of the notice in substance shall be as follows:

THESE INTERROGATORIES ARE PROPOUNDED IN ACCORDANCE WITH RULE 22 OF THE NEW HAMPSHIRE RULES OF CIVIL PROCEDURE. YOU MUST ANSWER EACH QUESTION SEPARATELY AND FULLY IN WRITING AND UNDER OATH. YOU MUST RETURN THE ORIGINAL AND ONE COPY OF YOUR ANSWERS WITHIN THIRTY (30) DAYS OF THE DATE YOU RECEIVED THEM TO THE PARTY OR COUNSEL WHO SERVED THEM UPON YOU. IF YOU OBJECT TO ANY QUESTION, YOU MUST NOTE YOUR OBJECTION AND STATE THE REASON THEREFORE. IF YOU FAIL TO RETURN YOUR ANSWERS

WITHIN THIRTY (30) DAYS, THE PARTY WHO SERVED THEM UPON YOU MAY INFORM THE COURT, AND THE COURT SHALL MAKE SUCH ORDERS AS JUSTICE REQUIRES, INCLUDING THE ENTRY OF A CONDITIONAL DEFAULT AGAINST YOU.

(c) Interrogatories may be served at any time after service of the action.

(d) The party serving the interrogatories shall furnish the answering party with an original and two copies of the interrogatories. The interrogatories shall be so arranged that after each separate question shall appear a blank space reasonably calculated to enable the answering party to have his answer typed in. The parties may agree to transmit interrogatories electronically or by computer disk, enabling the answering party to provide answers directly after each separate question using the party's available word processing technology. In the event of such an agreement, the requirement of providing space between each question sufficient to manually insert answers is obviated.

(e) Interrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or, if a public or private corporation, a partnership or association, by an officer or agent who shall furnish all information available to the party.

(f) Each question shall be answered separately, fully and responsively in such manner that the final document shall have each interrogatory immediately succeeded by the separate answer.

(g) If, in any interrogatory, copies of papers, documents or electronically stored information are requested, such interrogatory shall be deemed to be a request for production pursuant to Rule 23.

(h) The party, who is served with interrogatories, shall serve his answers thereto, by mail or delivery in hand, upon the party propounding them within thirty days after service of such interrogatories, or within thirty days after the Return Day, whichever date is later. The parties may extend such time by written agreement.

(i) The answers shall be served, together with the original and one copy of the interrogatories upon the propounding party. If copies of papers are annexed to answers, they need be annexed to only one set.

(j) (1) If a party, upon whom interrogatories are served, objects to any questions propounded therein, he may answer the question by objecting and stating the grounds. He shall make timely answer, however, to all questions to which he does not object. The propounder of a question to

which another party objects may move to compel an answer to the question, and, if the motion is granted, the question shall be answered within such time as the court directs.

(2) When objections are made to interrogatories or requests for admissions, before there is any court hearing regarding said objections, counsel for the parties shall attempt in good faith to settle the objections by agreement. It shall be the responsibility of counsel for the objecting party to initiate such attempt and to notify the clerk if the objections are settled by agreement.

(3) If, following such conference, counsel are unable to settle objections, counsel for the objecting party shall notify the clerk and request a hearing on such objections as remain unsettled.

(4) Where an objection to an interrogatory has been withdrawn by agreement of counsel or has been overruled by the court, the answer to such interrogatory shall be served within 10 days thereafter.

(k) A party may file more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed fifty, unless a different number is established by structuring order issued pursuant to Rule 5 of these rules, or the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. 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 dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

(l) The adverse party shall have the same privileges in answering written interrogatories as the deponent in the taking of a deposition.

(m) If a party, who has furnished answers to interrogatories, thereafter obtains information which renders such answers incomplete or inaccurate, amended answers shall be served in accordance with Rule 21(g).

(n) Interrogatories and answers may be used at the trial to the same extent as depositions. If less than all of the interrogatories and answers thereto are introduced or read into evidence by a party, an adverse party may introduce or read into evidence any other of the interrogatories and answers or parts thereof necessary for a fair understanding of the parts read or otherwise introduced into evidence.

(o) Neither the interrogatories nor the answers need be filed with the court unless the court otherwise directs.

Source

Superior Court Rule 36 (modified to allow a party upon whom interrogatories are served thirty days to object to any question propounded therein). Rule 22(j), N.H.R.Civ.P. is the language from a section of current Superior Court Rule 36, modified to be consistent with existing practice.

Comments

The conditional default rule has been moved to the end of this section of the rules, and it applies to both interrogatories and requests for production of documents

Rule 23. Production of Documents

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form, or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 21(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 21(b).

(b) *Procedure.*

(1) The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A

shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.

(3) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Source and Comment

The language contained in this rule is derived from Rule 34(a), Fed.R.Civ.P. It is consistent with New Hampshire practice. See Superior Court Rule 35(a).

Rule 24. Depositions

(a) No notice to the adverse party of the taking of depositions shall be deemed reasonable unless served at least 3 days, exclusive of the day of service and the day of caption, before the day on which they are to be taken. Provided, however, that twenty days' notice shall be deemed reasonable in all cases, unless otherwise ordered by the Court. No deposition shall be taken within 30 days after service of the Complaint, except by agreement or by leave of court for good cause shown.

(b) Every notice of a deposition to be taken within the State shall contain the name of the stenographer proposed to record the testimony.

(c) When a statute requires notice of the taking of depositions to be given to the adverse party, it may be given to such party or the party's representative of record. In cases where the action is in the name of a nominal party and the Complaint or docket discloses the real party in interest, notice shall be given either to the party in interest or that party's attorney of record. Notices given pursuant to this rule may be given by mail or by service in hand.

(d) The interrogatories shall be put by the attorneys or non-attorney representatives and the interrogatories and answers shall be taken in shorthand or other form of verbatim reporting approved by the court and transcribed by a competent stenographer agreed upon by the parties or their attorneys present at the deposition. In the absence of such agreements, the stenographer shall be designated by the Court. Failure

to object in writing to a stenographer in advance of the taking of a deposition shall be deemed agreement to the stenographer recording the testimony.

(e) No deposition, as transcribed, shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies.

(f) The stenographer shall cause to be noted any objection to any interrogatory or answer without deciding its competency. If complaint is made of interference with any witness, the stenographer shall cause such complaint to be noted and shall certify the correctness or incorrectness thereof in the caption.

(g) Upon motion, the court may order the filing of depositions, and, upon failure to comply with such order, the court may take such action as justice may require.

(h) The signature of a person outside the State, acting as an officer legally empowered to take depositions or affidavits, with his seal affixed, where one is required, to the certificate of an oath administered by him in the taking of affidavits or depositions, will be prima facie evidence of his authority so to act.

(i) The deponent, on deposition or on written interrogatory, shall ordinarily be required to answer all questions not subject to privilege or excused by the statute relating to depositions, and it is not grounds for refusal to answer a particular question that the testimony would be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege.

(j) If any deponent refuses to answer any question propounded on deposition, or any party fails or refuses to answer any written interrogatory authorized by these rules, or fails to comply within 30 days after written request to comply, the party propounding the question may, upon notice to all persons affected thereby, apply by motion to the court for an order compelling an answer. If the motion is granted, and if the court finds that the refusal was without substantial justification or was frivolous or unreasonable, the court may, and ordinarily will, require the deponent and the party, attorney, or non-attorney representative advising the refusal, or either of them, to pay the examining or requesting party the reasonable expenses incurred in obtaining the order, including reasonable counsel fees.

If the motion is denied and if the Court finds that the motion was made without substantial justification or was frivolous or unreasonable, the Court may, and ordinarily will, require the examining party or the attorney advising the motion, or both of them, to pay to the witness the reasonable expenses incurred in opposing the motion, including reasonable counsel fees.

(k) *Videotape Depositions.*

(1) The court, within its discretion, may allow the use of videotape depositions that have been taken by agreement; and provided further that, if the parties cannot reach such an agreement, the court may, in its discretion, order the taking and/or use of such depositions. At the commencement of the videotape deposition, counsel representing the deponent should state whose deposition it is, what case it is being taken for, where it is being taken, who the lawyers are that will be asking the questions, and the date and the time of the deposition. Care should be taken to have the witnesses speak slowly and distinctly and that papers be readily available for reference without undue delay and unnecessary noise. Counsel and witnesses shall comport themselves at all times as if they were actually in the courtroom.

(2) If any problem arises as to the admissibility or inadmissibility of evidence, this should be handled in the same manner as written depositions.

(3) A party objecting to a question asked of, or an answer given by, a witness whose testimony is being taken by videotape shall provide the court at the Trial Management conference with a transcript of the videotape proceedings that is sufficient to enable the court to act upon the objection before the trial of the case, or the objection shall be deemed waived.

Source

(a) Superior Court Rule 38 (modified for use with complaint rather than writ)

(b) Superior Court Rule 39

(c) Superior Court Rule 40 (modified for use with complaint rather than writ)

(d) Superior Court Rule 41

(e) Superior Court Rule 39

(f) Superior Court Rule 41

(g) Superior Court Rule 41

(h) Superior Court Rule 42. See RSA 517:5 (Appointment of Special Commissioner)

(i) Superior Court Rule 44

(j) Superior Court Rule 44 (modified to be consistent with Rule 22)

(k)(1) Superior Court Rule 45

(k)(2) Superior Court Rule 45

(k)(3) Superior Court Rule 45-A

Rule 25. Expert Witnesses

(a) Within 30 days of a request by the opposing party, or in accordance with any order of the court following a Structuring Conference held pursuant to Rule 5, a party shall make a disclosure of expert witnesses (as defined in Evidence Rule 702), whom he expects to testify at trial.

(b) Said disclosure shall conform with RSA 516:29-b.

Source

(a) Superior Court Rule 35(f)

(b) RSA 516:29-b.

Rule 26. Requests for Admissions

(a) Any party, desiring to obtain admission of the signature on or the genuineness of any relevant document or of any relevant facts which he believes not to be in dispute, may, after the Return Day of the action without leave of court, file an original request therefor with the court, accompanied by any documents involved, and deliver a copy of such request and documents to the adverse party or his representative. Each of the matters of which an admission is requested shall be deemed admitted unless within thirty days after such delivery the party requested files with the Court and delivers a copy thereof by mail or in hand to the party requesting such admission, or his attorney or non-attorney repre-

sentative, either a sworn denial thereof or a written objection on the ground of privilege or that it is otherwise improper.

(b) If objection is made to part of a request, the remainder shall be answered within the time limit, and when good faith requires that a party qualify his answer or deny only part of a matter, he shall specify so much of it as is true and qualify or deny the remainder.

(c) Any party, who without good reason or in bad faith, denies under this rule any signature or fact which has been requested and which is thereafter proved, or who without good reason or in bad faith requests such admission under this rule and thereafter fails to prove it, may, on motion of the other party, be ordered to pay the reasonable expense, including counsel fees, incurred by such other party in proving the signature or fact or in denying the request, as the case may be.

Source

Superior Court Rule 54

Rule 27. Discovery Motions

(a) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (a) that the discovery not be had; (b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (d) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (e) that discovery be conducted with no one present except persons designated by the court; (f) that a deposition after being sealed be opened only by order of the Court; (g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

(b) If a motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(c) *Conditional Default.* If the party upon whom interrogatories or request for production have been served, shall fail to answer said interrogatories or request for production within 30 days, or any enlarged period, unless written objection to the answering of said interrogatories is filed within that period, said failure will result in a conditional default being entered by the clerk upon motion being filed indicating such failure to answer. The party failing to answer shall receive notice of the conditional default. The conditional default shall be vacated if the defaulted party answers the interrogatories within 10 days of receiving notice thereof and moves to strike the conditional default. If the defaulted party fails to move to strike the conditional default within 10 days of receiving notice thereof, the adverse party may move to have a default judgment entered and damages assessed in connection therewith. If, upon review of an affidavit of damages, the court determines that it does not provide a sufficient basis for determining damages, the court may, in its discretion, order a hearing thereon.

(d) *Motion to Compel.* Before any Motion to Compel discovery may be filed, counsel for the parties shall attempt in good faith to settle the dispute by agreement. If a Motion to Compel regarding requested discovery is filed, the moving party shall be deemed to have certified to the court that he has made a good faith effort to obtain concurrence in the relief sought.

(e) Where a discovery dispute has been resolved by court order in favor of the party requesting discovery by court order, the requested discovery shall be provided within 10 days thereafter or within such time as the court may direct.

(f) Motions for protective order or to compel responses to discovery requests shall include a statement summarizing the nature of the action and shall include the text of the requests and responses at issue.

(g) If the court finds that a motion, which is made pursuant to this rule, was made frivolously or for the purpose of delay or was necessitated by action of the adverse party that was frivolous or taken for the purpose of delay, the court may order the offending party to pay the amount of reasonable expenses, including attorney's fees, incurred by the other party in making or resisting the motion.

Source

(a) Superior Court Rule 35(c)

(b) Superior Court Rule 35(c)

- (c) Superior Court Rule 36
- (d) Superior Court Rule 36-A
- (e) New. Consistent with existing New Hampshire practice.
- (f) New. Consistent with existing New Hampshire practice.
- (g) Superior Court Rule 36

VI. Alternatives to Trial

Rule 28. Mediation

(a) The Court may order the parties in any civil action to participate in mediation.

(b) If the parties agree, they may elect a form of alternative dispute resolution other than mediation (*e.g.* neutral evaluation, non-binding arbitration or binding arbitration).

(c) The parties may agree to engage in private mediation instead of or in addition to the court-ordered mediation.

(d) The parties may also request that the presiding judge assign a complex case for intensive mediation to be conducted by another judge.

(e) Unless the parties agree otherwise, proceedings under this rule are nonbinding and shall not impair the litigants' trial rights.

Source

New (derived from Superior Court Rule 170)

Comment

The umbrella rule set forth here is designed to identify the general parameters of the ADR process, which is the subject of more detailed procedures identified in Superior Court Rules 301-303.

Rule 29. Summary Jury Trial

(a) *Cases for Summary Jury Trial Proceedings.* The parties may request, and the court may order that a summary jury trial be held in any case, provided the following conditions are satisfied:

(1) The case is not one in which the credibility of a witness is likely to be determinative of the outcome of the case.

(2) The decision in the case will not set a precedent but simply requires the application of existing law.

(3) The case shall be in trial readiness when called for summary jury trial and all discovery shall have been completed.

(b) *Objections To Order for Summary Jury Trial.* Specific objections to an order placing a case on the summary jury trial list shall be raised by motion filed within 10 days of the mailing of notice of such order and shall be heard by the presiding judge.

(c) *Summary Jury Trial; When and Where Held; Notice.*

(1) Summary jury trials shall be held at the time and place designated by the presiding judge. The Court shall notify counsel in writing, at least fifteen (15) days before the trial, of the time and place of trial.

(2) Unless excused by order of court, clients or client representatives shall be in attendance at the summary jury trial.

(d) *Jury Panel.* The case shall be heard before a jury of six members or such lesser number as the parties may stipulate, drawn in accordance with usual procedures. Once a juror has served on a summary jury, he or she shall not serve on any regular jury during the same term.

(e) *Jury Instructions.* Unless excused by order of court, counsel shall submit proposed jury instructions to the court and opposing counsel no later than 5 days before the date set for hearing.

(f) *Presentation of Evidence.* All evidence shall be presented through the attorneys, non-attorney representatives or parties (if *pro se*), who may incorporate arguments on such evidence in their presentations. Each representative shall be given one hour to describe to the jury that party's view of the circumstances of the case. Counsel may reserve a portion of the hour for a statement in rebuttal. Only evidence that would be admissible at trial upon the merits may be presented. Counsel may only present factual representations supportable by reference to discovery materials, to a signed statement of a witness, to a stipulation, or to a document or by a professional representation that counsel personally spoke with the witness and is repeating what the witness stated.

Statements, reports and depositions may be read from, but not at undue length. Physical exhibits, including documents, may be exhibited during a presentation and submitted for the jury's consideration.

(g) *Exhibits.* Prior to the summary jury trial, counsel shall mark and exchange copies of all proposed exhibits they plan to offer at said trial and inform the court whether they object to any proposed exhibit, setting forth reasons in support thereof. Failure to exchange a proposed exhibit shall constitute valid grounds for objection to admission. Failure to file an objection to any exchanged proposed exhibit shall constitute a waiver of any objection thereto.

(h) *Objections.* Objections will be received if in the course of a presentation counsel goes beyond the limits of propriety in presenting statements as to evidence or argument thereon.

(i) *The Court's Charge.* After presentations, the jury will be given an abbreviated charge by the presiding judge on the applicable law.

(j) *Verdict.* The jury may return either a consensus verdict or a special verdict consisting of an anonymous statement of each juror's findings on liability and/or damages (each known as the jury's advisory opinion). The jury will be encouraged to return a consensus verdict.

(k) *Transcript.* No record of the proceedings shall be permitted except in extraordinary circumstances, as determined by the court.

(l) *Effect of Verdict.* Counsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits and that judgment be entered thereon by the court, or may stipulate to any other use of the verdict that will aid in the resolution of the case.

(m) *Restoration to Active List; Inadmissibility of Summary Jury Trial Proceedings.* The parties shall notify the court within fifteen (15) days after entry of the summary jury trial verdict whether settlement in the case has been reached. If a settlement agreement or stipulations for docket markings are not filed, the case shall be forthwith restored to the trial docket. In the event that no settlement is reached following the summary jury trial, and the case is restored to the trial docket, no person shall be called as a witness to testify what took place in the summary jury proceeding. In such event, the documents relating to that proceeding and the evidence presented therein shall be sealed and shall not be admissible, except for such evidence as is otherwise admissible at trial under the rules of evidence. The judge who presided at the summary jury proceeding shall not be the trial judge.

Source

Superior Court Rule 171

VII. Trials

Rule 30. Trial Management Conference

Jury Trials

(a) In every case scheduled for jury trial, the court shall schedule a Trial Management Conference which shall take place within 14 days before trial is to begin, or at such other time as the court shall order. At the Conference, parties will be present or available by telephone, prepared to discuss conduct of the trial and settlement.

(b) 14 days prior to the Trial Management Conference, unless another time is directed by the court or agreed to by the parties, all parties shall file with the court and serve on the other parties Pretrial Statements, which shall include, by numbered paragraphs, a detailed, comprehensive, and good faith statement, setting forth the following:

1. A summary of the case that can be read by the court to the jury at the beginning of trial;
2. Disputed issues of fact;
3. Applicable law;
4. Disputed issues of law;
5. Specific claims of liability by the party making the claim;
6. Defendant's specific defenses;
7. Itemized special damages;
8. Specification of injuries with a statement as to which, if any, are claimed to be permanent;
9. The status of settlement negotiations;
10. A list of all exhibits to be offered in the direct case of each party. The parties, or their counsel, shall bring exhibits, or exact copies

of them, to court on the day of the Trial Management Conference for examination by opposing parties or their representatives;

11. A list of all depositions to be read into evidence;

12. A waiver of claims or defenses, if any;

13. A list of the names and addresses of all witnesses who may be called;

14. Whether there will be a request for a view and, if so, who shall pay the cost in the first instance;

15. The names and addresses of the trial attorneys or non-attorney representatives.

(c) Except for good cause shown, only witnesses listed in the Pre-trial Statement will be allowed to testify and only exhibits, so listed, will be received in evidence.

(d) Preliminary requests for instructions about unusual or complex questions of law shall be submitted in writing at the Trial Management Conference. Supplementary requests may be proposed at any time prior to the time the court completes its instructions to the jury.

Bench Trials

(e) The court may direct the parties to attend a Trial Management Conference in non-jury cases. Written pretrial statements are not required in non-jury cases unless ordered by the court. Requests for findings of fact and rulings of law shall be submitted in writing in accordance with a schedule to be determined by the court.

Source

This rule is a simplification of the existing rule, and consistent with current practice.

Rule 31. Standing Trial Orders - Procedures

(a) *Addressing the court.* Anyone addressing the court or examining a witness shall stand. The rule may be waived if the person is physically unable to stand or for other good cause. No one should approach the bench to address the court except by leave of the court.

(b) *Opening statements and Closing Arguments.* Opening statements shall not be argumentative and shall not be longer than 30 minutes unless the Court otherwise directs. Closing arguments shall be limited to 1 hour each, unless otherwise ordered by the court in advance. Before any person shall read to the jury any excerpt of testimony from a transcript prepared by the designated court transcriber, he or she shall furnish the opposing party with a copy thereof.

(c) *Copies of documents for court.* Counsel shall seasonably furnish for the convenience of the court, as he may require, copies of the specifications, contracts, letters or other papers offered in evidence.

(d) *Examination of witnesses.*

(1) Only one counsel on each side will be permitted to examine a witness.

(2) A witness cannot be re-examined by the party calling him, after his cross-examination, unless by leave of court, except so far as may be necessary to explain his answers on his cross-examination, and except as to new matter elicited by cross-examination, regarding which he has not been examined in chief.

(3) After a witness has been dismissed from the stand, he cannot be recalled without permission of the court.

(4) No person, who has assisted in the preparation of a case, shall act as an interpreter at the trial thereof, if objection is made.

(5) *Attorney as Witness.*

(i) *Compelling Testimony.* No attorney shall be compelled to testify in any cause in which he is retained, unless he shall have been notified in writing previous to the commencement of the term of trial that he will be summoned as a witness therein, and unless he shall have been so summoned previous to the commencement of the trial.

(ii) *Participation as Advocate.* An attorney who gives testimony at trial or hearing shall not act as advocate at such trial or hearing unless the attorney's testimony relates to an uncontested issue, or relates to the nature and value of legal services rendered in the case, or unless the court determines that disqualification of the attorney would work unreasonable hardship on the attorney's client.

(e) *Exceptions Unnecessary.* Formal exceptions to non-evidentiary rulings or orders of the court are unnecessary, and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at or before the time the ruling or order of the court is made or sought, makes known to the court by pleading or orally on the record the action which he desires the court to take or his objection to the action requested by a party opponent, provided that in each instance the party has informed the court of the specific factual or legal basis for his position.

(f) *Objections.* When stating an objection, counsel will state only the basis of the objection (e.g., “leading,” “non-responsive,” or hearsay”), provided, however, that upon counsel’s request, counsel shall be permitted a reasonable opportunity to approach the bench to elaborate and present additional argument or grounds for the objection.

(g) *Submission of case.* In all trials, the plaintiff shall put in his whole case before resting and shall not thereafter, except by permission of the court for good cause shown, be permitted to put in any evidence except such as may be strictly rebutting; and the defendant shall, before resting, put in his whole defense, and shall not thereafter introduce any evidence except such as may be in reply to the rebutting evidence.

(h) *Bench motions.* Motions for dismissal or mistrial as well as offers of proof should be made at the bench and out of the hearing of the jury.

(i) *Protection of children in sex-related cases.* In any delinquency proceeding under RSA chapter 169-B alleging a sex-related offense in which a minor child was a victim, the court shall allow the use of anatomically correct drawings and/or anatomically correct dolls as demonstrative evidence to assist the alleged victim or minor witness in testifying, unless otherwise ordered by the court for good cause shown. In the event that the alleged victim or minor witness is nervous, afraid, timid, or otherwise reluctant to testify, the court may allow the use of leading questions.

Source

(a) Superior Court Rule 16

(b) Superior Court Rule 71

(c) Superior Court Rule 64

(d)(1) Superior Court Rule 65

(d)(2) Superior Court Rule 67

(d)(3) Superior Court Rule 69

(d)(4) Superior Court Rule 109

(d)(5)(i) Superior Court Rule 18

(d)(5)(ii) Superior Court Rule 17 modified to incorporate text of Rule 3.7 of the Rules of Professional Conduct

(e) Superior Court Rule 77-A

(f) Superior Court Rule 66(a)

(g) Superior Court Rule 70

(h) Superior Court Rule 66(b)

(i) Superior Court Rule 93-A

Rule 32. Standing Trial Orders – Proof

(a) *Bills.* If, after an action has been entered for 3 months, a party submits copies of bills incurred to opposing counsel, and no objection has been made within 30 days, the bills may be introduced without formal proof.

(b) *Criminal record.*

(1) If a party plans to use or refer to any prior criminal record, for the purpose of attacking or affecting the credibility of a party or witness, he shall first furnish a copy of same to the opposing party, and then obtain a ruling from the court as to whether the opposing party or a witness may be questioned with regard to any conviction for credibility purposes.

(2) Evidence of a conviction under this rule will not be admissible unless there is introduced a certified record of the judgment of conviction indicating that the party or witness was represented by counsel at the time of the conviction unless counsel was waived.

(c) *Documents.* The signatures and endorsements of all written

instruments declared on will be considered as admitted unless the defendant shall file a notice that they are disputed within 30 days after the Return Date.

(d) *Expert files.* All experts, including doctors and law enforcement personnel, who are to testify at a trial, will be advised by counsel to bring their original records and notes to court with them.

(e) *Life expectancy.* The life expectancy tables in textbooks such as C.J.S. and Am. Jur. (2d) are admissible as evidence to prove life expectancy.

(f) *Medical examinations.* In actions to recover damages for personal injuries, the defendant shall have the right to a medical examination of the plaintiff prior to, or during, trial.

(g) *Medical reports.* Copies of all medical reports relating to the litigation, in the possession of the parties, will be furnished to opposing counsel on receipt of the same.

(h) *Medical records.* X-rays and hospital records (which are certified as being complete records) if otherwise admissible and competent may be introduced without calling the custodian or technician. Any party shall have the right to procure from opposing counsel an authorization to examine and obtain copies of hospital records and X-rays involved in the litigation.

(i) *Motor vehicles.*

(1) *Speed.* The issue of speed of a motor vehicle on a public highway, if material, will be submitted on the grounds of reasonableness without regard to statutory provisions relative to rates of speed that are *prima facie* reasonable, unless a party objects thereto at the Trial Management Conference, or files written objection thereto at least seven days before the trial.

(2) *Licensing.* No claim is to be made at any trial that the operator of a motor vehicle involved in the case was not properly licensed, unless the claim has been made at the Trial Management Conference, or unless the claim was filed in writing at least 7 days before the trial.

(j) *Proof of Highway Waived unless Demanded.* In any case in which a road or way is alleged to be a “way” as defined in RSA 259:125 or a public highway, a party shall notify the opposing party at least 10 days prior to trial if said “way” or public highway must be formally proved; otherwise,

the need to formally prove said “way” or public highway will be deemed to be waived.

(k) *Special Damages.* Any party claiming damages shall furnish to opposing counsel, within 6 months after entry of the action, a list specifying in detail all special damages claimed; copies of bills incurred thereafter shall be furnished on receipt. Any party claiming loss of income shall furnish opposing counsel, within six months after the entry of the action, as soon as each is available, copies of the party’s Federal Income Tax Returns for the year of the incident giving rise to the loss of income, and for two years before, and one year after, that year, or, in the alternative, written authorization to procure such copies from the Internal Revenue Service.

(l) *Stipulations.* Unless otherwise expressly provided by these rules, all stipulations affecting a civil action, except stipulations which are made in the presence of the court and entered on the record, or embodied in an order of the court, shall be in writing and shall be signed by attorneys of record, non-attorney representatives of record, or by parties if *pro se*. The court may require handwritten stipulations to be replaced by fully executed, typewritten stipulations within 10 days.

Source

- (a) Superior Court Rule 63C
- (b) Superior Court rule 68
- (c) Superior Court Rule 53 (modified for use of complaint rather than writ)
- (d) Superior Court Rule 63G
- (e) Superior Court Rule 63A
- (f) Superior Court Rule 63D
- (g) Superior Court Rule 63E
- (h) Superior Court Rule 63F
- (i)(1) Superior Court Rule 63H
- (i)(2) Superior Court Rule 63I
- (j) Superior Court Rule 89

(k) Superior Court Rule 63B

(l) Probate Court Rule 150

Rule 33. Jurors

(a) *Juror Questionnaires.*

(1) The clerk of the superior court for each county shall maintain a list of jurors presently serving, together with copies of their completed Questionnaire forms, which shall be available for inspection by attorneys, non-attorney representatives and *pro se* parties.

(2) The clerk's office shall permit attorneys, non-attorney representatives and *pro se* parties who have jury cases scheduled for trial during the term to have a photocopy of the questionnaires which have been completed by the jurors presently serving. No attorney shall exhibit such questionnaires to anyone other than the parties and their representatives.

(3) Violation of this rule may be treated as contempt of Court.

(b) *Voir Dire.* Voir dire of the jury at the start of trial is governed by RSA 500-A:12-a.

(c) *Juror Notetaking.* It is within the court's discretion to permit jurors to take notes on evidence. If notetaking is allowed, after the opening statements the court will supply each juror with a pen and notebook to be kept in the juror's possession in the court and jury rooms, and to be collected and held by the bailiff during any recess in which the jurors may leave the courthouse and during arguments and charge. After verdict, the court will immediately destroy or order the destruction of all notes.

(d) *Juror Questioning of Witnesses at Trial.* In any civil case, it is within the discretion of the trial court to permit jurors to ask written questions. If a trial the court decides to permit jurors to ask written questions at trial, the following procedure shall be utilized:

1. At the start of the trial, the judge will announce to the jury and counsel the decision to allow jurors to ask written questions of witnesses. At this time the judge will instruct the jurors on taking notes and, as to the scope of questioning, the procedure to be followed.

2. Trial will proceed in the normal fashion until questioning of the first witness has been completed by both counsel.

3. When questioning of the first witness is completed, the court will allow jurors to formulate any questions they may have, in writing. Jurors will be asked to put their seat number on the back of the question. The judge is the only person who will see the number.

4. The bailiff will collect the anonymous questions and deliver them to the judge.

5. At the bench, the judge and counsel will read the proposed questions. Counsel will be given the opportunity to make objections on the record to any proposed question after which the judge will decide if they are appropriate, based on the rules of evidence, and whether, under the circumstances of the case, the judge will exercise discretion to permit the questions.

6. Questions may be rephrased by the judge, or the judge may ask the question in a way mutually agreeable to the parties. The question should, however, attempt to obtain the information sought by the juror's original question.

7. After all the chosen questions are answered, each counsel will have an opportunity to re-examine the witness. The party who called the witness will proceed first. The judge should allow only questions which directly pertain to questions posed by the jurors. The judge may also impose a time limit. If the judge does plan to impose a time limit, counsel should be notified and given an opportunity to object to the length outside the hearing of the jury.

8. The judge shall instruct the jury substantially as follows at the beginning of trial:

Ladies and gentlemen of the jury, I have decided to allow you to take a more active role in your mission as finders of fact. I will permit you to submit written questions to witnesses under the following arrangements.

After each witness has been examined by counsel, you will be allowed to formulate any questions you may have of the witness. Please remember that you are under no obligation to ask questions, and questions are to be directed only to the witness. The purpose of these questions is to clarify the evidence, not to explore your own legal theories or curiosities.

If you do have any questions, please write them down on a pad of paper. Do not put your name on the question, and do not discuss your

questions with fellow jurors. The bailiff will collect the questions, and I will then consider whether they are permitted under our rules of evidence and are relevant to the subject matter of the witness' testimony. If I determine that the question or questions may be properly asked of the witness pursuant to the law, I will ask the question of the witness myself.

It is extremely important that you understand that the rejection of a question because it is not within the rules of evidence, or because it is not relevant to the witness' testimony, is no reflection upon you. Also, if a particular question cannot be asked, you must not speculate about what the answer might have been.

9. If the court decides to ask questions during trial, the following instruction will be given before the jury retires to deliberate:

Ladies and gentlemen of the jury, I remind you of my earlier remarks regarding juror questions. Some questions cannot be asked in a court of law because of certain legal principles. For this reason there is the possibility that a question you have submitted has been deemed inappropriate by me and will not be asked. I alone have made this determination, and you should not be offended, or in any way prejudiced by my determination.

(e) *Communication with Jurors.*

(1) Before and during trial no attorney, non-attorney representative, party or witness shall knowingly communicate directly or indirectly, with any member of the venire from which the jury will be selected, or with any juror.

(2) For 30 days after discharge of the jury venire on which a juror has served, no attorney, non-attorney representative or party shall himself or through anyone acting for him directly or indirectly interview, examine or question any juror or member of a juror's family with respect to the trial, verdict or deliberations. At no time shall an attorney, non-attorney representative or party, or any person acting for any of them directly or indirectly ask questions of or make comments to a juror that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service. Upon application of any person the court may issue appropriate protective orders or impose sanctions as justice may require.

(f) *Juror Questions During Deliberations.* After a case has been submitted to a jury, and the jury has retired for deliberations, counsel, non-attorney representatives and pro se parties shall not leave the courthouse without permission of the court. If counsel or non-attorney

representatives are absent from the courthouse, with or without permission, when a jury requests additional instructions, such absence shall constitute a waiver of the right to be present during instructions given in response to the request.

(g) *Loss of a juror.* If any juror or jurors become disabled, or otherwise unavailable, during the course of a trial, the trial will continue with the jurors who remain, unless prior to the selection of the jury, a party notifies the court that he objects to such procedure.

Source

- (a) Superior Court Rule 61-A
- (b) RSA 500-A:12-a
- (c) Superior Court Rule 64-A
- (d) Superior Court Rule 64-B
- (e) Superior Court Rule 77-B(b)
- (f) Superior Court Rule 114
- (g) Superior Court Rule 9

VIII. Judgment

Rule 34. Settlements

(a) Whenever an attorney, non-attorney representative or *pro se* party states orally or in writing to the court that a particular case has been settled and that agreements will be filed, the court shall forthwith notify by mail the parties of record or their representatives of such statement, and, if the agreements and/or docket markings are not filed within thirty days after the mailing of such notice, the court shall take such action as justice may require.

(b) In order that the Court may seasonably make up and complete the court's record, the parties shall seasonably file all papers and documents necessary to make up and enter the judgment and to complete the record of the case and no execution shall issue, or final order or decree be entered, until such papers are filed.

(c) No final order will be entered until the parties have submitted a final civil action disposition sheet.

Source

- (a) Superior Court Rule 51
- (b) Superior Court Rule 55
- (c) New

Rule 35. Approval of Settlement: Minors

(a) All petitions for approval of settlement of actions on behalf of minors shall be signed by the parent, next friend or guardian of the minor.

(b) Court approval is not required for the settlement of any suit or claim brought on behalf of a minor in which the net amount is equal to or less than \$10,000.00. Any settlement of such suit or claim in which the net amount exceeds \$10,000.00 shall require court approval.

(c) In any suit or claim on behalf of a minor if the amount to be paid to the minor before the age of majority exceeds \$10,000.00, the court shall require proof in the form of a certified statement from the Court of Probate that the guardian ad litem, parent, next friend, or other person who receives money on behalf of the minor whether through settlement, judgment, decree or other order, has been appointed guardian of the estate of such minor and is subject to the duties prescribed under RSA 463:19. In the event of a structured settlement where an amount will be paid to the minor both before and after the minor reaches the age of majority, no guardian of the estate of such minor is required if the amount to be paid to the minor before the age of majority is \$10,000.00 or less. If the amount to be paid to the minor before the age of majority in such structured settlement exceeds \$10,000.00, then a guardian of the estate of such minor is required. In determining whether the net amount of a settlement exceeds \$10,000.00, all sums covering attorney's fees, court costs and other expenses related to the claim including medical expenses are to be excluded.

(d) The petition shall contain the following information where applicable:

1. A brief description of the accident and of all injuries sustained and the age of the minor.

2. An itemized statement of all medical expenses and special damages incurred by the minor.

3. The total amount of the settlement and whether any bills or expenses are to be paid out of the total settlement or are being paid in addition as part of the parent's claim. If the parent is being paid anything directly, the petition should contain a statement of the total amount being paid to the parent and a specification of the items covered.

4. Whether the settlement was negotiated by counsel actually representing the minor.

5. A statement from the attorney or non-attorney representative for the minor as to whether there was medical payment insurance available to the minor and whether or not a claim has been made for said benefits or whether payment has been received.

6. A statement from the attorney for the minor as to whether any liens for medical providers have been asserted or are assertable and how the settlement would resolve those liens.

7. The net amount to be received on behalf of the minor.

8. A request that the settlement be approved.

(e) The petition must be accompanied with the following material:

1. A photocopy of the minor's birth certificate.

2. An itemized statement from counsel detailing the nature of the work performed and the time spent on the case. An attorney's fee in excess of 25% of the settlement amount will not be ordinarily allowed unless upon good cause shown. In the event that counsel seeks an attorney's fee in excess of 25%, counsel shall file a motion requesting such an approval which motion shall contain the reasons for the request. A copy of that motion shall be provided to the next friend at least 10 days prior to the hearing or conference relative to approval of the settlement.

(f) The court will not authorize the next friend to settle the action or authorize the execution of releases and will not make any order respecting indemnity agreements, and the petition should make no such request.

(g) The court, upon its own motion, may appoint a guardian ad litem to represent the interests of the minor child and/or to review the

proposed settlement. The fees of the guardian ad litem shall be paid by defendant.

(h) The attorney or non-attorney representative, minor, parent, guardian, or next friend, will ordinarily be required to appear in all cases in support of the petition unless attendance has been excused by the court upon prior motion of counsel or upon the court's review of the file. In all cases where the minor has not actually been represented in the negotiation of the settlement, the minor, parent, and the next friend or guardian shall be required to appear with the attorney or non-attorney representative for the minor.

(i) A full medical report, including a recent and detailed prognosis from the attending physician, will ordinarily be required. "Recent" shall mean a report dated not more than 6 months prior to the date of the filing of the petition for approval of a settlement.

(j)(1) Court approval of a net settlement of \$10,000.00 or less is not required by statute, however if a party desires court approval, the court's order will ordinarily be in substantially the following form:

Settlement approved. All bills listed in the petition are to be paid. Counsel fees in the amount of \$_____ allowed (if settlement was actually negotiated by counsel representing the minor). The balance, amounting to \$_____, shall be deposited in a savings account in the _____ Bank at _____ in the name of _____, as Trustee for _____, no withdrawals to be made prior to the 18th birthday of said minor, except on written approval of the court. Said savings institution is authorized to pay over the full amount remaining in said account to the said _____ upon satisfactory proof that he/she has reached the age of 18 years. Approval is conditional upon compliance with this order with respect to payment of bills and deposit.

(j)(2) If the net amount of a settlement exceeds \$10,000.00, court approval is required, and the Court's order will ordinarily be in substantially the following form:

Settlement approved. All medical bills and other approved expenses listed in the petition are to be paid. Counsel fees in the amount of \$_____ allowed (if settlement was actually negotiated by counsel representing the minor). The balance amounting to \$_____, shall be paid over to _____, as guardian over the estate of the minor.

Said funds shall, upon payment, be under the jurisdiction of the appropriate Court of Probate and shall be administered in accordance

with the requirements of the Court of Probate. Any requests for withdrawal shall be addressed to the Court of Probate for its consideration.

Approval is conditional upon compliance with this order with respect to payment of bills and deposit of funds in accordance with this order.

Counsel for the minor shall be responsible for the settlement funds until said funds shall have actually been deposited in the appropriate guardianship account pursuant to the terms of this order and pursuant to the terms of the guardianship.

(k) In the event that the parties desire to enter into a structured settlement, which is defined as a settlement wherein payments are made on a periodic basis, the following rules shall also apply:

(1) Counsel for the defendants shall provide the court with an affidavit from an independent certified public accountant, or an equivalent professional, specifying the present value of the settlement and the method of calculation of that value.

(2) If the settlement is to be funded by an annuity, the annuity shall be provided by an annuity carrier meeting at least the following criteria:

(A) The annuity carrier must be licensed to write annuities in New Hampshire and, if affiliated with the liability carrier or the person or entity paying the settlement, must be separately capitalized, licensed and regulated and must have a separate financial rating;

(B) The annuity carrier must have a minimum of \$100,000,000.00 of capital and surplus, exclusive of any mandatory security valuation reserve;

(C) The petition shall contain the following information about the annuity and the annuity carrier:

(i) a description of the structure of the annuity arrangement;

(ii) a description of the history and size of the annuity carrier and its experience in issuing annuities;

(iii) a certificate from the New Hampshire Insurance Department stating that the annuity carrier is in good standing in New Hampshire;

(iv) whether the annuity carrier is domiciled or licensed in a state accredited by the National Association of Insurance Commissioners under that organization's Financial Regulation Standards program; and

(v) the annuity carrier's most recent ratings from at least two of the commercial rating services listed in subparagraph (D);

(D) The annuity carrier must have one of the following ratings from at least two of the following rating organizations:

(i) A.M. Best Company: A++, A+, A, or A-;

(ii) Moody's Insurance Financial Strength Rating: Aaa or Aa;

(iii) Standard & Poor's Corporation Insurer Claims-Paying Ability Rating: AAA, AA+, AA, or AA-;

(iv) Duff & Phelps Credit Rating Company Insurance Company Claims Paying Ability Rating: AAA, AA+, AA, or AA-;

(E) The annuity carrier must meet any other requirement the court considers reasonably necessary to assure that funding to satisfy periodic payment settlements will be provided and maintained;

(F) The annuity carrier issuing an annuity contract pursuant to a qualified funding plan under these rules may not enter into an assumption reinsurance agreement for the annuity contract without the prior approval of the court and the owner of the annuity contract and the claimant having the beneficial interest in the annuity contract. The court shall not approve assumption reinsurance unless the reinsurer is also qualified under these rules;

(G) The annuity carrier and the broker procuring the policy shall each furnish the court with an affidavit certifying that the carrier meets the criteria set forth in subsection (D) above as of the date of the settlement and that the qualification is not likely to change in the immediate future. The broker's affidavit shall also contain the following certification: "This determination was made with due diligence by the undersigned based on rating information which was available or should have been available to an insurance broker in the structured settlement trade";

(H) In the event that the parties to the action desire to place the annuity with an annuity carrier licensed in New Hampshire which does not meet the above criteria, the court may consider approving the same, but only if the annuity obligation is bonded by an independent insurance or bonding company, licensed in New Hampshire, in the full amount of the annuity obligation; and

(I) The court reserves the right to require other reasonable security in any structured settlement if the circumstances should so require.

(3) The court may, for good cause shown, approve a structured settlement that does not comply with the provisions of paragraph (k). If the Court approves a settlement that does not comply with the provisions of paragraph (k), the court shall make specific findings on the record explaining the reason(s) for approving the settlement.

Source

Superior Court Rule 111

Rule 36. Dismissal of Actions

All non-jury cases which shall have been pending upon the docket for 3 years, without any action being shown on the docket other than being placed on the trial list, shall be marked “non-suit” or “dismissed” as the case may be, and notice thereof sent to the parties or representatives who have appeared in the action.

Source

Superior Court Rule 168

Rule 37. Default

(a) When a party against whom a judgment for affirmative relief has failed to timely answer or otherwise defend, the party shall be defaulted, and no such default shall be stricken off, except by agreement, or by order of the court upon such terms as justice may require, upon motion and affidavit of defense, specifically setting forth the defense and the facts on which the defense is based.

(b) Final default may be entered by the court, *sua sponte*, where appropriate, or by motion of a party, a copy of which shall be sent to all parties defaulted or otherwise.

(c) In all cases in which final default is entered, whether due to failure to file an Appearance, Answer, or otherwise, the case shall be marked “final default entered, continued for entry of judgment or decree upon compliance with Rule 37.” A copy of the court’s order and any subsequent orders shall be mailed to all parties, defaulted or otherwise.

(d) The non-defaulting party may then request entry of final judgment or decree, by filing a motion, together with an affidavit of damages or, in cases where equitable relief is requested, and where the default is based on a failure to file an appearance, shall include an affidavit as to military service. The moving party shall certify to the court that a copy of all pleadings has been mailed to the defaulting party and shall include a notice that entry of final judgment or decree is being sought. Any party may request a hearing as to final judgment or decree. All notices under this rule shall be sufficient if mailed to the last known address of the defaulting party.

(e) A hearing as to final judgment or decree shall be scheduled upon the request of any party. Otherwise, the court may enter final judgment or decree based on the pleadings submitted or exercise its discretion to hold a hearing depending on the circumstances of the default, the sufficiency of the pleadings and the nature of the damages sought or relief requested.

(f) If the court schedules a hearing, all parties, defaulted or otherwise, shall receive notice and an opportunity to be heard.

Source

Superior Court Rule 75

Rule 38. Procedure After Trial

A motion to set aside a jury verdict shall be filed within 10 days after its rendition, and a motion to set aside any other verdict or decree shall be filed within 10 days from the date on the court’s written notice with respect to same, which shall be mailed by the court on the date of the notice. In each case, the motion shall fully state all reasons and arguments relied on.

Source

Superior Court Rule 73

Rule 39. Verdict upon Negotiable Instrument

When a verdict is rendered upon a negotiable instrument, or similar evidence of indebtedness, the same shall be filed with the Clerk before judgment or execution is issued, unless the Court otherwise orders.

Source

Superior Court Rule 77

Rule 40. Taxation of Costs

(a) *Costs.*

Costs shall be allowed as of course to the prevailing party as provided by these rules, unless the court otherwise directs.

(1) *Taxation of Costs.* Upon written request, the clerk shall tax costs in any case, which shall include the fees of the court and fees for service of process which are documented in the court file.

(2) Any party claiming other allowable costs shall file a motion to allow costs together with an itemized, verified bill of all costs requested, to be ruled upon by the court. Any party aggrieved by the court's order concerning costs may appeal therefrom within 30 days from the date of notice of such order, regardless of whether an appeal concerning the underlying judgment is sought.

(b) *Allowable Costs.* The following costs shall be allowed to the prevailing party: Fees of the court, fees for service of process, witness fees, expense of view, cost of transcripts, and such other costs as may be provided by law. The court, in its discretion, may allow the stenographic cost of an original transcript of a deposition, plus one copy, including the cost of videotaping, and may allow other costs including, but not limited to, actual costs of expert witnesses, if the costs were reasonably necessary to the litigation.

Source

Superior Court Rule 87

Rule 41. Appeals and Transfers to Supreme Court

(a) Whenever any question of law is to be transferred by interlocutory appeal from a ruling or by interlocutory transfer without ruling, counsel shall seasonably prepare and file with the trial court the interlocutory appeal statement or interlocutory transfer statement pursuant to Supreme Court Rule 8 and Supreme Court Rule 9, and after the court has signed the statement, counsel shall mail the number of copies provided for by the rules of the Supreme Court to the clerk thereof.

(b) In all actions in which a verdict or decree is entered, or in which a motion for a nonsuit or directed verdict is granted, or in which any motion is acted upon after verdict or decree, all appeals relating to the action shall be deemed waived and final judgment shall be entered as follows, unless the court has otherwise ordered, or unless a Notice of Appeal has then been filed with the Supreme Court pursuant to its Rule 7:

(1) Where no motion, or an untimely filed motion, has been filed after verdict or decree, on the 31st day from the date on the court's written notice that the court has made the aforementioned entry, grant or dismissal; or

(2) Where a timely filed motion has been filed after verdict or decree, on the thirty-first day from the date on the court's written notice that the court has taken action on the motion.

(c) The court shall not grant any requests for extensions of time to file an appeal document in the Supreme Court or requests for late entry of an appeal document in the Supreme Court; such requests shall be filed with the Supreme Court. See Supreme Court Rule 21(6).

(d) In civil actions in which a mistrial is declared, appeals from the denial of motions for nonsuit or directed verdict shall not be transferred to the Supreme Court before verdict following further trial unless the court shall approve an interlocutory appeal pursuant to Supreme Court Rule 8.

(e) The procedure for preparation of a transcript for cases appealed or transferred to the Supreme Court is governed by Supreme Court Rule 15.

Source

- (a) Superior Court Rule 79
- (b) Superior Court Rule 74
- (c) Superior Court Rule 74
- (d) Superior Court Rule 74
- (e) Superior Court Rule 80

IX. Provisional and Final Remedies

Rule 42. Attachments

(a) *Attachments with Notice.* The following procedure is to be used where the plaintiff requests that the court authorize an attachment of the defendant's property, using the method requiring notice to the defendant and an opportunity for the defendant to be heard before the court renders its decision.

1. The Motion to Attach shall be executed under oath, and accompanied by the Notice to defendant as well as a copy of the Order form.

2. The Motion to Attach shall be fastened to the Complaint.

3. Copies of the Complaint are then to be given to the sheriff or his deputy for service on the defendant; immediately after such service, that Complaint, together with the sheriff's Return of Service, is to be entered with the court.

4. If the Motion to Attach is granted, the plaintiff's attorney, non-attorney representative or *pro se* plaintiff is authorized to fill out a Writ of Attachment in accordance with the Order granting the motion. If permission is granted to make a real estate attachment, the attachment Writ together with the court's Order thereon may be served on the Registry of Deeds by the sheriff, or his deputy, the plaintiff, his attorney or any other person to effect the real estate attachment. To effect all other attachments, the Attachment Writ together with the court's Order thereon must be served by the sheriff, or his deputy. The Return of Service is to be filed immediately on completion of the attachment. No additional service upon the defendant is required to perfect an attachment, provided

that a Notice of Intent has been served upon the defendant as provided in RSA 511-A:2.

(b) *Attachments without Notice (Ex Parte)*. The following procedure is to be used where the plaintiff requests permission to attach using the method that does not require notice to the defendant prior to the attachment:

1. The Motion for Attachment shall be executed under oath, and accompanied with the Notice to defendant and Order form;
2. The motion, and copies, are to be filed in court, and an entry fee paid;
3. If the motion is denied, the plaintiff may move for attachment under the provisions of RSA 511-A:3.
4. If the motion is granted, the plaintiff or his representative is authorized to prepare a Writ of Attachment in accordance with the Order granting the request.
5. A certified copy of the Motion, the Notice to the defendant, and the Court's order thereon shall be fastened to the face of the Writ of Attachment.
6. The Writ of Attachment, Complaint, and Summons, together with copies, shall be delivered to the sheriff with directions to serve the writ of attachment first, within the time directed by the court's order, and immediately thereafter the complaint and summons. In those cases where permission is granted to make a real estate attachment, the Attachment Writ together with the court's Order thereon may be served on the Registry of Deeds by the sheriff, or his deputy, the plaintiff, his attorney or any other person to effect the real estate attachment before the Writs of Attachment and Summons, together with copies, are delivered to the sheriff. The Returns of Service are to be filed immediately after service has been completed.

Source

- (a) Superior Court Appendix (modified)

Rule 43. Injunctions

- (a) *Temporary Restraining Order; Notice; Hearing; Duration*. A Temporary Restraining Order may be granted without written or oral

notice to the adverse party only if: (1) it clearly appears to the court in which the action is pending from specific facts shown by affidavit or by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition; and (2) the applicant or the applicant's representative certifies to the court in writing the efforts which have been made to give the notice and/or the specific facts supporting the claim why the notice should not be required. Any hearing held without the presence of the adverse party or his or her attorney shall be recorded, unless directed otherwise by the court. Every temporary restraining order, which is granted without notice, shall be endorsed with the date and hour of issuance, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall expire by its terms within such time after issuance, not to exceed 10 days, as the court fixes, unless, within the time so fixed, the order, for good cause shown, is extended for a like period, or unless the party, against whom the order is directed, consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, the application for a preliminary injunction shall be set down for hearing at the earliest possible time, and in any event within 10 days, and, when the matter comes on for hearing, the party, who obtained the temporary restraining order, shall proceed with the application for a preliminary injunction, and if he or she does not do so, the Court shall dissolve the Temporary Restraining Order. On 2 days' notice to the party who obtained the Temporary Restraining Order without notice, or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and, in that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(b) *Preliminary Injunction.*

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party and they shall only be issued by the court.

(2) *Consolidation of Hearing with Trial on Merits.* Before, or after, the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. This subdivision (b)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(c) *Security.* Unless the Court, for good cause shown, shall otherwise order, no Restraining Order or Preliminary Injunction shall issue except upon the giving of an injunction bond by the applicant, in such sums as the Court deems proper, for the payment of such costs and damages as

may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such bond shall ordinarily be required of marital cases or of the United States or of the State of New Hampshire.

(d) *Form and Scope of Injunction or Restraining Order.* Unless the court, for good cause shown, otherwise orders, an injunction or restraining order shall be specific in terms; shall describe in reasonable detail the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) *Labor Disputes and Liens.* These rules are subject to any statutory provisions relating to restraining orders and injunctions in actions involving or growing out of labor disputes and liens.

(f) Before injunctions are granted, it must appear that process at law or in equity has been filed; but, when the object of the injunction would be defeated by the delay necessary to file such process, an injunction may issue to expire on a day specified therein, unless such process be filed by such a day.

(g) Whenever an injunction is issued without notice to, or appearance by, the adverse party (except in marital cases), the party at whose request it is issued, ordinarily shall, and in any case may, be required to give bond with sufficient sureties, conditioned to pay and satisfy all such damages as may be occasioned to the adverse party by reason of the injunction, in case it shall appear that the injunction was improper.

(h) Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Source

- (a) Superior Court Rule 161(a)
- (b) Superior Court Rule 161(b)
- (c) Superior Court Rule 161(c)
- (d) Superior Court Rule 161(d)
- (e) Superior Court Rule 162 and 163
- (f) Superior Court Rule 162
- (g) Superior Court Rule 163
- (h) Superior Court Rule 163

Rule 44. Security

When the plaintiff is a non-resident, he shall furnish security for costs in such amount and within such time as the court may order.

Source

Superior Court Rule 140

Rule 45. Deposit in Court

(a) In proper cases, the defendant may pay into court any sum of money which he admits to be due, accompanied by the general issue as to the balance; and, if the plaintiff shall refuse to accept the same with his costs, in full satisfaction of his claim, such sum shall be struck out of the Complaint; and unless the plaintiff shall prove that a larger sum be due him, he shall have no costs, but the defendant shall be allowed costs from the time of such payment.

(b) When a set-off, counterclaim or recoupment shall be filed and a sum of money paid into court as the balance due the plaintiff, the costs of the plaintiff up to that time shall also be paid into court; and the defendant, if he prevail, shall be allowed only his subsequent costs.

Source

(a) Superior Court Rule 60

(b) Superior Court Rule 61

Rule 46. Periodic Payments

(a) A judgment creditor seeking an order for weekly payments under RSA 524:6-a must file a motion with the court setting out specific grounds for relief. Issuance of a Writ of Execution need not be a preliminary step to the weekly payment process.

(b) Upon the filing of such a motion, an Order noticing the action and identifying a date for a hearing will issue requiring the judgment debtor to appear at a time and date named therein and submit to an examination relative to his property and ability to pay said judgment.

(c) The judgment creditor shall cause the Notice of Hearing to be served either in-hand or by certified mail, restricted delivery, return receipt requested. If the judgment creditor elects to serve the Notice of Hearing by certified mail, restricted delivery, return receipt requested, and if the return receipt is returned without indication that the Notice of Hearing has been properly served, then in-hand service shall be required.

(d) On hearing, the judgment debtor will submit a financial affidavit and will be examined under oath as to his property and ability to pay. Either party may introduce oral and written evidence as the court deems relevant. Technical rules of evidence will not apply.

(e) If the debtor fails to appear at the hearing, the court may proceed and orders may be made in the debtor's absence.

(f) If the court finds that the debtor has no property other than property that is exempt from attachment or execution and that the debtor is unable to make weekly payments on the judgment, the motion will be dismissed. Attendance by the plaintiff or plaintiff's counsel is required unless excused by the court.

(g) If the court is satisfied that the debtor has property not exempt from attachment or execution, the court may order the debtor to produce it, or so much thereof as may be sufficient, to satisfy the judgment and cost of the proceedings, so that it may be taken on execution. If the debtor is able to make weekly payments on the judgment, the court may, after allowing the debtor an appropriate amount for his support and that of his family, if he has a family, order the debtor to make weekly

payments on the judgment from time to time. The court may also make an Order combining any of the orders above mentioned.

(h) The court may prescribe the times, places, amount of payments and other details in making any of its orders. The court may at any time review, revise, modify, suspend or revoke any order made. Failure to obey any lawful order of the court, without just excuse, shall constitute a contempt of court. Contempt proceedings will be initiated by the creditor by a verified motion, and will be handled in a manner similar to support proceedings, except that they will be instituted by summons rather than a *capias*.

(i) A sentence for contempt shall not end the proceedings nor any order made by the court, and future violations of the order, upon which the sentence was founded, may likewise be dealt with as for contempt.

(j) If the motion is dismissed, the creditor shall not file within one year after the date of such dismissal another motion against the same debtor upon the same judgment unless the court otherwise for good cause orders.

Source

Superior Court "Procedures under RSA 524:6-a. Subsection c is the language in District Court Rule 1.21(d).

Rule 47. Enforcement, Contempt, Arrest

(a) *In General.* Process to enforce a judgment for the payment of money shall be a Writ of Execution, unless the court directs otherwise. The proceedings on and in aid of execution shall be in accordance with applicable statutes. In aid of the judgment or execution, the judgment creditor or the judgment creditor's successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules. Process to enforce a judgment for the delivery of land shall be a Writ of Possession.

(b) *Contempt and Arrest.*

Attachments for contempt may be issued by the Court at any time upon evidence of the violation of any injunction or other order, or for neglect of witnesses to give evidence upon subpoena, and commitment may be made thereon. Parties may be arrested upon order of Court and

required to give bonds for appearance and to abide the order of Court in any case where it shall be deemed necessary.

(c) Sheriffs and deputy sheriffs are authorized to take bail in civil contempt proceedings and shall forward forthwith such bail so taken to the Clerk of the Court issuing the *capias*.

(d) *Criminal Contempt.*

(1) *Summary Disposition.* A direct criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the presence of the judge. Oral notice of the conduct observed must be given by the judge. The contemnor must be given an opportunity to speak and present a defense. The order of contempt shall recite the adjudication and sentence and shall be signed by the judge and entered of record. The disposition, when imposed, shall also be entered on a separately numbered State v. (The Contemnor) file.

(2) *Disposition Upon Notice and Hearing.* An indirect criminal contempt shall be prosecuted with notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of an attorney for the state or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided by statute. In a proceeding under this rule, if the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment.

Source

- (a) New
- (b) Superior Court Rules 142 and 143
- (c) Superior Court Rules 143
- (d) Superior Court Rule 95

X. Special Proceedings

Rule 48. Special School and Town Meetings

All complaints requesting permission to hold special school district or town meetings must set forth the facts alleged to create an emergency requiring an immediate expenditure of money and also the specific articles to be inserted in the warrant in the event such permission is granted.

Sample Decrees are set forth below:

DECREE FOR SPECIAL TOWN MEETING

The above entitled complaint came before the Court for hearing and the Court, having considered the evidence, finds that an emergency has arisen in the Town of _____ which may require an immediate expenditure of money.

It is hereby ordered, adjudged and decreed that the Selectmen of the Town of _____ are hereby authorized to hold a Special Town Meeting (insert time and place of meeting), for the purpose of acting upon the article(s) set forth in the accompanying petition, and the Special Town Meeting shall have the same authority as that of an annual Town Meeting.

The above approval is conditioned upon compliance with all statutory requirements relating to posting and notice which control such a Special Meeting.

This decree is made solely for the purpose of permitting the Special Town Meeting to be held, and it is not to be construed nor interpreted in any other manner nor for any other purpose whatsoever.

DECREE FOR SPECIAL SCHOOL MEETING

The above entitled complaint came before the Court for hearing and the Court, having considered the evidence, finds that an emergency has arisen within The _____ School District which may require an immediate expenditure of money.

It is hereby ordered, adjudged and decreed that the said School District is authorized to hold a Special School District Meeting (insert time and place of meeting), for the purpose of acting upon the article(s) set forth in the accompanying petition, and the School District Meeting shall have the same authority as that of an annual School District Meeting.

The above approval is conditioned upon compliance with all statutory requirements relating to posting and notice which control such a Special Meeting.

This decree is made solely for the purpose of permitting the Special Meeting to be held, and it is not to be construed nor interpreted in any other manner nor for any other purpose whatsoever.

Source

Superior Court Rule 123 and Appendix to Superior Court Rules

Rule 49. Business and Commercial Dispute Docket

(I) Pursuant to RSA 491:7-a, upon the appointment by the Governor and Council of its initial presiding superior court justice, a Business and Commercial Dispute Docket (BCDD) is hereby established in the Merrimack County Superior Court. The chief justice of the superior court may from time to time assign additional superior court justices to the BCDD consistent with its caseload and other needs of the superior court.

(II) Definitions:

(a) “Business entity” shall have the definition specified in RSA 491:7-a, II(a).

(b) “Consumer” shall have the definition specified in RSA 491:7-a, II(b).

(III) Jurisdiction of BCDD. The BCDD shall have jurisdiction when the following requirements are met:

(a) all parties have consented to the jurisdiction of the BCDD;

(b) at least one party to the action is a business entity;

(c) no party to the action is a consumer;

(d) if the action involves a claim for money damages, the amount in controversy exceeds \$50,000.00; and

(e) the principal claim or claims arise from or involve the following:

(i) Claims arising from breach of contract or fiduciary duties, fraud, misrepresentation, business tort, or statutory violations arising out of business dealings or transactions.

(ii) Claims arising from transactions under the Uniform Commercial Code.

(iii) Claims arising from the purchase, sale and lease of commercial real or personal property or security interests therein.

(iv) Claims related to surety bonds.

(v) Franchisee/franchisor relationships and liabilities.

(vi) Malpractice claims of non-medical professionals in connection with rendering services to a business enterprise.

(vii) Real estate title petitions.

(viii) Shareholder derivative actions.

(ix) Commercial class actions.

(x) Commercial bank transactions.

(xi) Actions relating to the internal affairs or governance; dissolution or liquidation rights or obligations between and among owners, including shareholders, partners, or members; or liability or indemnity of managers, including officers, directors, managers, trustees, or members or partners functioning as managers, of corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures, or other business enterprises.

(xii) Business insolvencies and receiverships.

(xiii) Other complex disputes of a business or commercial nature.

(IV) Waiver of Venue. Although located in the Merrimack County Superior Court, the BCDD shall have the authority to accept cases filed or which could be filed in any superior court throughout the State of New Hampshire. By agreeing to submit a dispute to the BCDD, the parties shall be deemed to have waived any challenges to venue and to have consented to the case being heard for all purposes in Merrimack County. However, by agreeing to submit a dispute to the BCDD, no party shall be deemed to have waived its right to challenge the personal or subject matter jurisdiction of the courts of New Hampshire over the case in controversy.

(V) Assignment of Cases to the BCDD:

(a) Existing Cases. Cases pending as of the effective date of this rule shall be transferred to the BCDD upon motion of any party specifying the basis for BCDD jurisdiction and including the written agreement or stipulation of all other parties.

Such motions shall be filed in the court where the action is pending, but shall be referred to the presiding justice of the BCDD for ruling.

(b) New Matters. A writ or petition filed after the effective date of this rule shall be assigned to the BCDD upon motion of any party specifying the basis for BCDD jurisdiction and including the written agreement or stipulation of all other parties. In the absence of a showing of good cause for filing at a later time, the motion must be filed before the initial structuring conference. Such motions shall be filed in the court where the action is pending, but shall be referred to the presiding justice of the BCDD for ruling.

(c) In the case of a writ or petition filed after the effective date of this rule in which the plaintiff believes the case meets the requirements for acceptance into the BCDD and in which the plaintiff requests the issuance of a temporary restraining order and/or a preliminary injunction, the plaintiff may file said action in the Merrimack County Superior Court along with a brief statement articulating the reasons why the case should be accepted into the BCDD. The writ or petition and the brief statement shall immediately be brought to the attention of the presiding justice of the BCDD, who shall make a preliminary determination of whether the case meets the requirements for the BCDD other than the requirement of consent by all parties. If the presiding justice of the BCDD makes this determination, the case may be scheduled for a hearing on the request for a temporary restraining order and/or a preliminary injunction. If the presiding justice of the BCDD does not make this determination, the case shall be transferred to a superior court wherein venue over the case appears proper.

Prior to the time of hearing on the request for a temporary restraining order or preliminary objection, the court shall provide all defendants with notice of such request in a manner which the court determines is reasonable under all the circumstances, including the need for the court to address the requests for preliminary relief in a timely manner. Prior to the time of the hearing on the request for preliminary relief, any adverse party may object as of right to the case being heard by the BCDD and if such objection is filed the case shall not be heard by the BCDD but shall be transferred to a superior court wherein venue over the case appears proper. Failure of a party to object to the case being heard by the BCDD prior to the time of the first hearing on the request for interim relief shall constitute consent to the case being heard by the BCDD for all purposes.

(d) Non-Acceptance by BCDD. Notwithstanding the agreement of all parties that a case be heard by the BCDD, the presiding justice of the BCDD shall decline to accept the case if said justice determines that the case does not meet the requirements for BCDD jurisdiction. The BCDD justice making such a ruling shall issue a written order specifying the grounds for declining jurisdiction.

(VI) Except as otherwise provided herein, cases on the BCDD docket shall be subject to all rules of the superior court.

(VII) The presiding justice of the BCDD may establish generally, or in a particular case, procedures consistent with law, including specific case tracks, in order to achieve prompt resolution of discovery and other pretrial matters assigned to the BCDD docket. The presiding justice shall provide litigants adequate notice of such procedures if adopted and may, for good cause shown, waive any such procedures in a particular case.

(VIII) Disqualification of BCDD Justice. In the event the presiding justice of the BCDD is disqualified from hearing a case, the case shall be reassigned by the Chief Justice to another justice of the superior court.

B. CRIMINAL RULES

Rule 101. Application of New Hampshire Rules of Criminal Procedure

The New Hampshire Rules of Criminal Procedure govern the procedure in superior courts when a person is charged as an adult with a crime or violation.

Comments

The New Hampshire Rules of Criminal Procedure apply to all proceedings in which a person is charged as an adult with an offense, whether a crime, such as a felony or a misdemeanor, or a violation. See RSA 625:9. Those rules do not govern juvenile proceedings or collateral proceedings such as habeas corpus or mandamus.

C. MISCELLANEOUS RULES

Rule 201. Fees

(I) The appropriate fee must accompany all filings. All fees shall be consolidated into a single payment, when possible.

(II) 27.33% of the entry fee paid in each libel and petition in marital cases (\$41.00) shall be deposited into the special fund established by RSA 458:17-b. Said fund is for the compensation of mediators, appointed pursuant to RSA 458:15-a, and guardians ad litem, appointed pursuant to RSA 458:17-a, when the parents are indigent.

(III) (A) Original Entries:

(i) Original Entry of any Action at Law or Equity except a petition for writ of habeas corpus; Original Entry of all Marital Matters, including Order of Notice and Guardian ad Litem Fee; Transfer; the filing of a foreign judgment pursuant to RSA 524-A; or any Special Writ	\$ 150.00
(ii) Original Entry of a petition for writ of habeas corpus	\$ 0 (no fee)
(B) Small Claim Transfer Fee	\$ 115.00
(C) Motion to Bring Forward (post judgment)	\$ 75.00
(D) Petition to Annul Criminal Record	\$ 50.00
(E) Wage Claim Decision	\$ 25.00
(F) Marriage Waiver	\$ 50.00
(G) Motion for Periodic Payments	\$ 15.00
(H) Writ of Attachment (form)	\$ 1.00
(I) (i) Divorce Certificate (VSR) only	\$ 5.00
(ii) Divorce Certificate, Certified Copy of Decree and if applicable, Stipulation, QDRO, USO, and other Decree-related Documents	\$ 15.00
(J) Certificates and Certified Copies	\$ 5.00
(K) All Copied Material	\$.50/page
(L) Application to Appear <i>Pro Hac Vice</i>	\$ 225.00

(IV) On the commencement of any custody or support proceeding for which a fee is required, including libels for divorce with minor children, an additional fee of \$2.00 shall be paid by the petitioner.

(V) Pursuant to RSA 490:26-a, II, the sum of \$25.00 shall be added to each civil filing fee set forth in paragraphs (III)(A)(i), (III)(C), and (III)(F) above, except for the following types of cases which pursuant to RSA 490:26-a, II(b) are exempt from the surcharge:

(A) Actions relating to children under RSA 169-B, RSA 169-C, and RSA 169-D.

(B) Domestic violence actions under RSA 173-B.

(C) Small claims actions under RSA 503.

(D) Landlord/tenant actions under RSA 540, RSA 540-A, RSA 540-B, and RSA 540-C.

(E) Stalking actions under RSA 633:3-a.

(VI) Records Research Fees:

(A) Record information must be requested in writing and include the individual's full name and, if available, the individual's date of birth.

(B) A fee of \$10.00 per request will be assessed for electronic (computer) searches of less than ten names.

(C) A fee of \$25.00 per request will be assessed for electronic (computer) searches of ten or more names.

(D) Extensive electronic (computer) searches requiring more than one hour will be assessed \$25.00 per additional hour or portion thereof.

(E) A fee of \$25.00 per hour or portion thereof will be assessed for manual searches. The fee is based on this hourly rate and not the number of names per request.

(F) Charges for requests requiring a combination of manual and electronic searches on the same party will be assessed according to the fee schedule for both categories.

EXAMPLE: One request for electronic search with seven names = \$10.00. Additional requirement that one or more of those seven names be manually researched as well = \$25.00 per hour or portion thereof. Assuming the manual research is completed in less than one hour, then the total fee = \$35.00.

Rule 202. Untimely-Filed Guardian ad Litem Reports

(a) A guardian ad litem who, without good cause, fails to file a report required by any court or statute by the date the report is due may be subject to a fine of not less than \$100 and not more than the amount of

costs and attorneys fees incurred by the parties to the action for the day of the hearing. The guardian ad litem shall not be subject to the fine under this rule if, at least ten days prior to the date the report is due, he or she files a motion requesting an extension of time to file the report.

(b) The court clerk shall report to the guardian ad litem board all guardians ad litem who fail to file a report by the date the report is due. However, the report shall clearly indicate all such guardians for whom the court has found good cause for the late filing. The court clerk shall make such report available to the public.

Rule 203. Access To Confidential Records -- Fees And Notice

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.

Rule 204. Photographing, Recording and Broadcasting

(a) The court should permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public. The court may limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequence. Except as specifically provided in this rule, or by order of the court, no person shall within the courtroom take any photograph, make any recording, or make any broadcast by radio, television or other means in the course of any proceeding.

(b) Official court reporters and authorized recorders, are not prohibited by section (a) of this rule from making voice recordings for the sole purpose of discharging their official duties.

(c) *Proposed Limitations on Coverage by the Electronic Media.* Any party to a court proceeding – or any other interested person – shall notify the court at the inception of a matter, or as soon as practicable, if that person intends to ask the court to limit electronic media coverage of any proceeding that is open to the public. Failure to notify the court in a timely fashion may be sufficient grounds for the denial of such a request. In the event of such a request, the court shall either deny the request or issue an order notifying the parties to the proceeding and all other interested persons that such a limitation has been requested, establish deadlines for the filing of written objections by parties and interested persons, and order an evidentiary hearing during which all interested persons will be heard. The same procedure for notice and hearing shall be utilized in the event that the court *sua sponte* proposes a limitation on coverage by the electronic media. A copy of the court’s order shall, in addition to being incorporated in the case docket, be sent to the Associated Press, which will disseminate the court’s order to its members and inform them of upcoming deadlines/hearing.

(d) *Advance Notice of Requests for Coverage.* Any requests to bring cameras, broadcasting equipment and recording devices into a New Hampshire courtroom for coverage of any court proceedings shall be made as far in advance as practicable. If no objection to the requested electronic coverage is received by the court, coverage shall be permitted in compliance with this rule. If an objection is made, the media will be so advised and the court will conduct an evidentiary hearing during which all interested parties will be heard to determine whether, and to what extent, coverage by the electronic media or still photography will be limited. This rule and procedures also apply to all court proceedings conducted outside the courtroom or the court facility.

(e) *Pool Coverage.* The court retains discretion to limit the number of still cameras and the amount of video equipment in the courtroom at one time and may require the media to arrange for pool coverage. The court will allow reasonable time prior to a proceeding for the media to set up pool coverage for television, radio and still photographers providing broadcast quality sound and video.

(1) It is the responsibility of the news media to contact the court in advance of a proceeding to determine if pool coverage will be required. If the court has determined that pool coverage will be required, it is the sole responsibility of the media, with assistance as needed from the court, to determine which news outlet will serve as the “pool.” Disputes about pool coverage will not ordinarily be resolved by the court. Access may be curtailed if pool agreements cannot be reached.

(2) In the event of multiple requests for media coverage, because scheduling renders a pool agreement impractical, the court retains the discretion to rotate media representatives into and out of the courtroom.

(f) *Live Feed.* Except for good cause shown, requests for live coverage should be made at least five (5) days in advance of a proceeding.

(g) *Exhibits.* For purposes of this rule, access to exhibits will be at the discretion of the court. The court retains the discretion to make one “media” copy of each exhibit available in the office of the court clerk.

(h) *Equipment.* Exact locations for all video and still cameras, and audio equipment within the courtroom will be determined by the court. Movement in the courtroom is prohibited, unless specifically approved by the court.

(1) Placement of microphones in the courtroom will be determined by the court. An effort should be made to facilitate broadcast quality sound. All microphones placed in the courtroom will be wireless.

(2) Video and photographic equipment must be of professional quality with minimal noise so as not to disrupt the proceedings; flash equipment and other supplemental lighting or sound equipment is prohibited unless otherwise approved by the court.

(i) *Restrictions.* Unless otherwise ordered by the court, the following standing orders shall govern.

(1) No flash or other lighting devices will be used.

(2) Set up and dismantling of equipment is prohibited when court is in session.

(3) No camera movement during court session.

(4) No cameras permitted behind the defense table.

(5) Broadcast equipment will be positioned so that there will be no audio recording of conferences between attorney and client or among counsel and the presiding judge at the bench. Any such recording is prohibited.

(6) During their term of jury service, jurors will not be photographed in connection with said service.

(7) Photographers and videographers must remain a reasonable distance from parties, counsel tables, alleged victims, witnesses and families unless the trial participant voluntarily approaches the camera position.

(8) All reporters and photographers will abide by the directions of the court officers at all times.

(9) Broadcast or print interviews will not be permitted inside the courtroom before or after a proceeding.

(10) Photographers, videographers and technical support staff covering a proceeding shall avoid activity that might distract participants or impair the dignity of the proceedings.

(11) Appropriate dress is required.

Source

Superior Court Rule 78

Rule 205. Juror Orientation

When a new panel of prospective jurors is first summoned for service, the panel shall be given preliminary instructions regarding the terms and conditions of jury service, the role of the jury in the justice system, and the legal principles applicable to the cases the jurors may hear. Such instructions may be given by a justice of the superior court, by utilization of a prerecorded audio or video presentation created for this purpose, or by a combination of use of a recording and instruction by a justice. Juror orientation sessions shall be open to the public. Except during periods when an audio or video recording is being played, all proceedings involving the judge giving preliminary instructions and taking and responding to juror questions shall be conducted on the record. The record of juror orientation sessions shall be preserved for a period of ten (10) years.

D. ALTERNATIVE DISPUTE RESOLUTION RULES

Rule 301. Alternative Dispute Resolution (ADR)

(A) *Cases for Alternative Dispute Resolution.*

(1) All writs of summons, transfers of actions from the district

court, and such equity cases as the court may deem or the parties may agree are suitable, shall be assigned to ADR, with the exception of those exempted in paragraph (2).

(2) The following categories of civil and equity actions are exempt from the requirements of this rule.

(a) Actions by or against or appeals taken from decisions of the state, counties, or municipalities (including their subdivisions, departments, agencies, boards, and agents), except where the action contains a claim for personal injury or monetary damages, unless the parties agree to ADR and the court approves.

(b) Actions where the parties represent by joint motion that they have engaged in formal ADR before a neutral third party prior to suit being filed.

(c) Actions exempted by the court on motion and for good cause, but only when said motion is filed within 180 days of the return date.

(B) Election of Specific Alternative Dispute Resolution Procedure and Selection of a Neutral.

(1) Promptly after the filing of an answer or appearance in the superior court or upon removal from the district court, the parties shall confer and select an ADR process (that is, mediation, neutral evaluation, or arbitration) and a neutral third party to conduct the process. If the parties cannot agree on the ADR process, they will be required to submit to mediation.

(2) The parties shall select a neutral third party to conduct the dispute resolution process from the court lists of approved neutrals. Prior to making such a selection, the parties shall determine whether they wish to select a neutral from the list of approved volunteer neutrals, or from the list of approved paid neutrals.

(a) If the parties choose a neutral from the list of approved paid neutrals, the parties shall notify the neutral and request that the neutral provide the parties with a schedule of fees and expenses.

(b) Unless the court orders or the parties otherwise agree, the neutral's fees and expenses shall be apportioned and paid in equal shares by each party, and shall be due and payable according to fee arrangements agreed to directly by the parties and the neutral. Fees and expenses paid to the neutral shall be allowed and taxed as costs in

accordance with Superior Court Rule 87(a).

(c) If the parties choose a neutral from the list of approved volunteer neutrals, the parties shall be subject to a one-time administrative fee of \$50.00 per party, which shall be paid to the court at the time the Stipulation for ADR is filed with the court. This is an administrative fee which will be designated for use by the Office of Mediation and Arbitration and is not refundable. Parties who are indigent may petition the court for waiver of the \$50.00 administrative fee.

(d) Parties may select a neutral who is not on the court's lists of approved neutrals if the parties agree on the choice of the neutral.

(3) If the parties cannot agree on the selection of a neutral, they shall so indicate in their Stipulation. The court shall designate a neutral at the structuring conference. If the parties have not selected an ADR method and neutrals by the time the structuring conference occurs, the court shall, at the structuring conference, set a date certain by which ADR shall have occurred.

(C) Stipulation and Court Order for Alternative Dispute Resolution.

(1) No later than ten days prior to the initial structuring conference provided for in Rule 5, the parties must file with the court a comprehensive written stipulation, signed by all counsel, or by parties if unrepresented, containing:

(a) An agreement to seek resolution of the issues involved in the action by designating one or more of the following alternative dispute resolution methods to be carried out as provided in this rule:

- i. Mediation;
- ii. Neutral Evaluation;
- iii. Binding Arbitration; or
- iv. Any other method of dispute resolution agreed upon by the parties.

(b) The designation of a Rule 301 neutral, to serve in the agreed-upon process, or an agreement to accept a neutral chosen by the court from a list provided by the clerk. However, prior to the designation of a Rule 301 neutral to serve in the agreed upon process, the parties or counsel (if parties are represented) shall contact each other in the first

instance and agree upon a neutral and two alternates. They shall appoint one person to contact the neutral, or if need be, the alternates, to determine if the neutral is willing and able to serve and whether it will be on a volunteer or a paid basis.

(c) A schedule for the completion of the agreed-upon ADR process including the filing of case statements and the completion of any necessary discovery, or including the agreement to accept the assistance of the neutral designated under subparagraph (C)(1)(b) in setting a schedule for completion of the process. The schedule must provide for completion of the process within the shortest possible time after filing of the Stipulation, consistent with completion of the minimum amount of discovery necessary to make the process meaningful, but in any event not more than eight months after the date of the Stipulation.

(d) The location of the session and a date by which the session shall have occurred.

(2) The court may waive the initial structuring conference if, prior to the structuring conference, the court has received a completed and signed Rule 301 stipulation and a completed and signed Structuring Conference Order. If the court has not received either or both of these documents, then at the initial structuring conference, after consultation with counsel, or with parties if unrepresented, the court shall issue an order stating: (a) the specific ADR procedure to be used; (b) the identity of, and contact information for, the neutral; (c) the date by which the ADR procedure must be completed; (d) whether the ADR shall be at the courthouse or off-site; and (e) the anticipated time needed for the ADR method chosen. If the court chooses a neutral from the volunteer list, the court shall order the parties to pay a one-time administrative fee of \$50.00 per party.

The court has discretion to waive this fee if the parties are indigent. At the request of the parties for good cause, the court may also permit an individual \$50.00 fee to apply to multiple plaintiffs or defendants, if under the circumstances of the case, the court determines that the per party fee would cause undue hardship if it were applied to individual parties, or if one fee for multiple parties on the same side is deemed equitable by the court.

If the neutral is chosen at the structuring conference either by the parties and counsel or by the court, the parties and counsel shall, within 10 days after the date of the structuring conference, contact the neutral or the alternates, if necessary, and schedule the ADR session with their choice of neutral.

Except for the date by which the ADR procedure must be completed, the structuring conference order regarding ADR may thereafter be amended by agreement of the parties by filing an amended Stipulation with the court. The court may permit an extension of the date by which the ADR procedure must be completed on the motion of either party for good cause shown.

(3) Upon receipt of notice of appointment in a case, the neutral shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If the neutral withdraws, has a conflict of interest, or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

(D) *Alternative Dispute Resolution Proceeding.*

(1) Upon receipt of the structuring conference order, the parties or their counsel shall confirm the date, time and location for the ADR to take place and the neutral shall advise the parties in writing of the schedule for submission and exchange of summaries. Unless the neutral advises otherwise, each party shall exchange a summary, not to exceed five pages, of the significant aspects of their case. The parties may also attach to the summary copies of pertinent documents. Upon receipt of a party's submission, any party may send additional information responding to that submission. Unless the neutral advises otherwise, all submissions shall be exchanged with opposing counsel and shall contain a statement of compliance with the exchange requirement.

(2) Thirty days before the date of the first scheduled ADR session, each party must certify to the neutral that party's readiness to proceed on the scheduled date or request that the neutral reschedule the ADR session. At any time, upon written request of a party for good cause shown, the neutral may reschedule the ADR session for a date prior to the date set forth in the structuring conference order for completion of the ADR proceeding.

(3) All parties and their counsel must attend a scheduled ADR session, unless the court, for good cause, excuses an individual from participation or authorizes an individual to participate by speaker telephone. A corporation, partnership, or other entity that is a party, and a liability insurer that is defending the action, must each be represented by a person, other than outside counsel, who has settlement authority and authority to enter into stipulations. With the agreement of all parties and the neutral, any person having an interest that may be materially affected by the outcome of the proceeding may be invited to attend the session in person or by counsel.

(4) Within 15 days after the conclusion of an ADR proceeding, other than binding arbitration, the neutral must report the results of the process to the court in writing. The report may not disclose the neutral's assessment of any aspect of the case or substantive matters discussed during the session or sessions except as is required to report the information required by this paragraph. The report must contain the following items:

(a) The date on which the session or sessions were held including the starting and finishing times;

(b) The names and addresses of all persons attending, showing their role in the session and specifically identifying the representative of each party who had decision-making authority;

(c) A summary of any substitute arrangement made regarding attendance at the session;

(d) The results of the session, stating whether full or partial settlement was reached and appending any agreement of the parties;

(5) In any action in which ADR does not result in a settlement, the action will proceed in accordance with any agreement reached in the ADR process, or in the absence of an agreement, as ordered by the court.

(6) ADR proceedings shall not stay, alter, suspend, or delay pretrial discovery, motions, hearings, or conferences nor the requirements and time deadlines of New Hampshire Superior Court Rule 5.

(E) Inadmissibility of Alternative Dispute Resolution Proceedings.

(1) ADR proceedings and information relating to those proceedings shall be confidential. Information, evidence, or the admission of any party or the valuation placed on the case by any neutral shall not be disclosed or used in any subsequent proceeding. Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. All non-binding ADR proceedings are deemed settlement conferences consistent with the Superior Court Rules and Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding, the fact that there was an ADR proceeding or any other matter concerning the conduct of the ADR proceedings except as required by the Rules of Professional Conduct or the Mediator Standards of Conduct.

(2) Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its use in an ADR proceeding.

(F) *Sanctions.*

If a party or a party's counsel fails without good cause to appear at an ADR session scheduled pursuant to this rule, or fails to comply with any order made hereunder, the court may, on its own or upon motion of a party, impose any sanction that is just under the circumstances.

(G) *Qualifications of and Approval Process for Neutrals.*

(1) Qualifications of Neutrals

(a) Good standing. All neutrals (neutral evaluators, mediators, arbitrators) must be attorneys admitted to practice in New Hampshire who are in good standing.

(b) Moral character. Neutrals must be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court.

(c) Disclosures. Applicants must disclose criminal convictions or findings of professional misconduct, which have not been annulled. The Administrative Council may refuse to approve an applicant who has been convicted of a criminal offense or has been found to have committed professional misconduct. Failure to disclose complete and accurate information may constitute grounds for decertification.

(d) Specific Requirements.

(i) Mediators -- All Rule 301 mediators must have at least 20 hours of training in civil mediation. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in mediating case(s) with an approved Rule 301 mediator/mentor. The 20-hour training requirement may be satisfied by way of training provided by the Office of Mediation and Arbitration for a fee, or the mediator may provide to the Office of Mediation and Arbitration documentation of equivalent training, subject to its approval. A mediator/mentor must be approved as a mediator/mentor by the Administrative Council before serving as a mentor.

New Rule 301 mediators shall be subject to the 20-hour training requirement. All mediators who were on the court's approved list

of former Rule 170 mediators prior to January 1, 2008, will not be subject to the 20-hour training requirement; they will, however, be subject to a biennial 8-hour refresher-training requirement. The 8-hour refresher training must be completed by January 1, 2009. The refresher training requirement may be satisfied by way of court-sponsored training, which shall be provided without charge to mediators, or a mediator may provide to the Office of Mediation and Arbitration documentation of equivalent training, subject to its approval.

(ii) Neutral Evaluators -- Neutral evaluators must be attorneys who have a minimum of 10 years experience in litigation in the subject matter areas to which they may be assigned as neutral evaluators. All neutral evaluators must have at least 20 hours of training in ADR and an additional 4 hours of training in neutral evaluation. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in neutral evaluation of case(s) with an approved Rule 301 neutral evaluator/mentor. The neutral evaluator/mentor must be approved by the Administrative Council before serving as a neutral evaluator/mentor.

(iii) Arbitrators -- Arbitrators must be attorneys who have a minimum of 10 years of experience in litigation in the subject matter areas which they may be assigned as arbitrators. All arbitrators must have a minimum of 20 hours of training in ADR and an additional 8 hours of training in arbitration under this rule. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in actual arbitration of case(s) with an approved Rule 301 arbitrator/mentor. The arbitrator/mentor must be approved by the Administrative Council before serving as an arbitrator/mentor. Arbitrators shall adhere to all codes of conduct generally applicable to both commercial and private arbitrations.

(2) Application and Approval Process

(a) In order to serve as a neutral, an attorney must apply and be approved by the Administrative Council. In approving neutrals, the Administrative Council may consider the applicant's alternative dispute resolution experience or other relevant factors, such as length of practice or trial experience.

(b) Neutrals may choose to be listed on the volunteer list, the paid list, or both. Neutrals shall pay an annual rostering fee pursuant to a fee schedule established by supreme court order. The amount of the fee may vary depending upon which list the neutral chooses to be included.

The fee will be used to support the Office of Mediation and Arbitration. The neutral may provide biographical information for inclusion on the list, as well a description of those areas of the law in which the neutral has enhanced knowledge. All neutrals, regardless of whether they are on the paid or volunteer list, shall agree to act as a volunteer neutral for a minimum of at least two days but not more than four days annually. Neutrals in these volunteer cases must also agree to travel to the courthouse in which the case is located if the parties and counsel have chosen to have the ADR proceeding there.

(c) Neutrals shall apply for inclusion on the court's lists by submitting an application, the applicable rostering fee, and three letters of reference as set forth in this rule to the Office of Mediation/Arbitration. Inclusion on the court's list of approved neutrals remains valid for a one year period from July 1 through June 30 of each year. To request continued inclusion on the court's list or lists, a neutral, prior to June 1 of each year, shall:

(i) File a statement that there have been no material changes in his or her initial application for inclusion, or if there have been material changes, list and explain them.

(ii) File documentation that the neutral has completed required refresher training in the field of alternative dispute resolution in accordance with section (G)(1)(c).

(iii) Pay the rostering fee set for inclusion on the court's list of approved neutrals.

(d) All neutrals agree that as a condition of inclusion on the Court's list of approved neutrals, they may be required to provide at least two days but no more than four days of volunteer ADR sessions each year.

(H) *Immunity for Rule 301 Neutral.*

A "Neutral" (defined as a Neutral Evaluator, Mediator or Arbitrator) selected to serve and serving under Superior Court Rule 301 or Rule 302 shall have immunity consistent with RSA 490-E:5.

Rule 302. Arbitration by Agreement

(A) *Cases for Arbitration.* Subject to RSA 542, non-criminal disputes will be assigned to arbitration upon agreement of the parties or as

mandated by a written contractual provision.

(B) *Submission of Dispute to Arbitration.*

(1) Prior to the commencement of any lawsuit, if all parties to the arbitration consent, a written request for arbitration may be made to the Administrator of the Office of Mediation and Arbitration. The administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 302, unless the parties agree otherwise. In all cases, the parties should utilize the Office of Mediation and Arbitration and the list of approved arbitrators. The parties shall be subject to an administrative fee of \$250.00 per party, which shall be paid to the Office of Mediation and Arbitration. Parties who are indigent may petition the superior court for waiver of the administrative fee.

In cases submitted under subsection (B)(1) of this rule in which administration of the Arbitration Hearing is conducted pursuant to Rule 302, all references in Rule 302(C) through 302(S) to the superior court shall be deemed to refer to the Office of Mediation and Arbitration.

(2) After commencement of any lawsuit, a written request for arbitration shall be made to the Superior Court. In the event that the dispute is pending in a New Hampshire Court, a copy of the written submission shall be sent to the clerk for the appropriate court; and all proceedings in that court will cease. The administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 302.

(C) *Qualifications of and Approval Process for Arbitrators.*

The provisions of Superior Court Rule 301(G) shall apply to arbitrators.

(D) *Immunity for Arbitrators.*

An arbitrator selected to serve and serving under New Hampshire Superior Court Rule 302 shall have immunity consistent with RSA 490-E.

(E) *Neutrality.*

All arbitrators, whether selected by a party, selected by all parties, selected by the court or the Office of Mediation and Arbitration, or selected by arbitrators, shall be neutral and shall serve with impartiality.

(F) *Communication with Arbitrator.*

No party and no one acting on behalf of any party shall communicate ex-parte with an arbitrator or a candidate for arbitrator concerning the arbitration.

(G) *Arbitrator's Disclosure.*

Upon receipt of notice of appointment in a case, an arbitrator shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If an arbitrator withdraws, has a conflict of interest, or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

(H) *Arbitration Panel.*

In all cases so assigned, the parties shall select arbitrator(s) from the court list of approved arbitrators. The parties may choose either a single or three-person panel. In the event the parties cannot agree upon the panel number, a three-person panel will be utilized for all cases involving claims or counterclaims exceeding \$100,000 or cases involving three or more parties. In the event the parties cannot agree upon the panel number, a single member panel will be utilized for all cases involving claims or counterclaims of \$100,000 or less.

(1) When the parties choose arbitrator(s) from the list of approved paid arbitrators, the parties shall notify the arbitrator(s) and request that the arbitrator(s) provide the parties with a schedule of fees and expenses.

(2) Unless the court orders or the parties otherwise agree, arbitrators who are chosen from the list of approved paid arbitrators shall be compensated as follows. In the event a single arbitrator is selected, the parties shall equally share the costs of the arbitrator. When there are two parties and they select a three-person panel, each party shall pay for the arbitrator selected by the party and share the fees of the third panel member. When there are three parties and they select a three-person panel, each party shall be responsible for the arbitrator selected by the party. In the event there are more than three parties, the parties shall pay a pro rata share of the entire arbitration panel's fees.

(3) Parties may select arbitrator(s) who are not on the court's list of approved arbitrators if the parties agree on the choice of the arbitrator(s).

(4) If the parties cannot agree on the selection of arbitrator(s), they shall so indicate in the Stipulation required to be filed pursuant to Superior Court Rule 301(C)(1). In the event the parties cannot agree on an arbitrator for single-person panels, the court shall designate an

arbitrator at the structuring conference. For three-person panels, if the parties cannot unanimously agree upon the arbitrators and there are two parties, each will select an arbitrator and the two arbitrators will select the third. In the event there are three parties, each will select an arbitrator. The three selected arbitrators will serve as the panel. In the event there are more than three parties and they cannot unanimously agree upon the panel, each party will submit one name to the court and the court shall select three individuals from the names submitted to serve as the arbitration panel.

(I) *Preliminary Hearing.*

(1) At the request of any party, the panel will schedule within 14 days of the request a preliminary hearing with counsel and/or the parties. The preliminary hearing may be conducted by telephone at the panel's discretion.

(2) During the preliminary hearing, the parties and the panel shall discuss and establish a schedule for the hearings, any outstanding discovery issues, any outstanding procedural issues, and to the extent possible a clarification of the issues.

(3) *Ex parte* communications between a party's counsel and arbitrator are prohibited.

(J) *Hearings: When and Where Held; Notice.*

(1) Hearings shall be held at a place designated by the panel. The hearing date shall be established at the preliminary hearing or by the panel after consultation with counsel and/or the parties. Counsel and/or the parties shall respond to requests for hearing dates within seven (7) days of the request. Counsel or the parties shall be notified in writing at least thirty (30) days before the hearing of the time and place of the hearing. No hearing shall be assigned for Saturdays, Sundays, legal holidays, or evenings unless by the unanimous agreement of all counsel or parties.

(2) Unless excused by the panel, all parties shall be in attendance at the hearing, and each party shall have at least one person present who has authority to authorize settlement.

(K) *Postponement of Arbitration.*

In the event that counsel or any party for good cause shown is unable to proceed, the panel may reschedule the case in their discretion. The postponement shall be for no more than 30 days absent extraordinary

circumstances.

(L) *Default and Sanctions.*

Upon failure of a party to appear at a scheduled arbitration hearing or to participate in good faith in the proceedings, a default judgment may be entered and reasonable costs and attorneys fees may be assessed against the party. Default judgments may be contested only by the filing of a Motion to Strike Default setting forth specific grounds therefor within ten (10) days of the mailing of the Notice of Default. The panel shall have discretion as to appropriate sanction, including assessing costs, attorneys' fees, or entering default.

(M) *Prehearing Submissions.*

(1) Unless otherwise agreed to at the preliminary hearing, the parties shall exchange a list of witnesses they intend to call, including experts, a short description of the anticipated testimony of each witness, an estimate of the length of direct testimony of each witness, and all exhibits at least thirty (30) calendar days before the arbitration hearing. The parties shall attempt to resolve any disputes regarding the admissibility of exhibits. The exhibits must be premarked and a list of the exhibits submitted, indicating those exhibits that are to be admitted without objection and those exhibits that are objected to.

(2) If the parties intend to offer expert witnesses at the time of the hearing, at least sixty (60) calendar days before the arbitration hearing an expert disclosure consistent with the Superior Court Rule 25(b) shall be made. Failure to make such a disclosure will result in the exclusion of the expert as a witness at the hearing. Any objection to the sufficiency of the disclosure and, therefore, the admissibility of the expert's testimony will be ruled upon by the panel.

(N) *Case Summary.*

(1) All parties shall submit and exchange no later than ten (10) days prior to the arbitration hearing a double-spaced typewritten summary of not more four (4) pages upon 8½" x 11" paper of the significant portions of their case.

(2) All such summaries shall contain a written stipulation, or, if counsel cannot agree to file a stipulation, a separate statement by each party, setting forth the following information:

- (i) All uncontested facts;

- (ii) All contested facts;
- (iii) Pertinent applicable law;
- (iv) Disputed issues of law;
- (v) Specific claims of liability by each party making such claims;
- (vi) Specific defenses to liability by each party asserting such defenses;
- (vii) An itemized statement of special damages by each party claiming such damages;

(3) All such summaries shall contain a statement of compliance with the exchange requirement.

(4) The purpose of the case summary submission is to apprise the panel of the issues in dispute.

(O) *Securing Witnesses and Documents for the Arbitration Hearing.*

(1) The panel may issue subpoenas for the attendance of witnesses or the production of documents. All parties shall produce for the Arbitration Hearing all witnesses requested in writing by another party that are in their employ or under their control. This shall be done without the need of subpoena.

(2) The testimony of witnesses shall be given under oath.

(3) The plaintiff shall present all of his/her evidence. In the event of multiple plaintiffs, each plaintiff shall present all of his/her evidence. The defendant will then present evidence to support its defenses and any counterclaims. In the event of multiple defendants, one defendant will complete his evidence and then the remaining defendants will proceed.

(4) Witnesses will be subject to cross-examination by other counsel (or the opposing party where a party is unrepresented) and the panel. The panel has the discretion to vary this procedure provided the parties are treated fairly, justly, and equally and that each party is given an adequate opportunity to present his/her case.

(5) The panel exercising its discretion shall conduct the proceedings with a view to expediting the hearing and expediting the resolution of the dispute. Therefore, strict conformity to New Hampshire Rules of Evidence is not required, with the exception that the panel shall apply applicable

New Hampshire law relating to privileges and work product. The panel shall consider evidence that is relevant and material to the dispute, giving the evidence such weight as is appropriate. The panel may limit testimony to exclude evidence that would be unduly repetitive.

(6) Openings and closing will be allowed and may be made orally or in writing.

(P) *Hearing Closure.*

If post-hearing memoranda are to be submitted or closing arguments are to be made in writing, the hearing shall be deemed closed upon receipt by the panel of the written submissions. The date for the written submissions shall be established; otherwise, the hearing will be closed at the conclusion of the presentation of the evidence and oral arguments.

(Q) *Transcript of the Testimony.*

Any party may arrange for a stenographic or other record to be made of the hearing and shall inform the other parties in advance. The requesting party shall bear the cost of the stenographic record. A copy of the stenographic record shall be made available to all other parties upon request.

(R) *Report of Award.*

(1) Within twenty (20) days after the hearing closure date, the panel shall file a Report of Award. Originals of the Award shall be mailed to all counsel or parties. If there is a dissent, it shall be signed separately; but, the Award shall be binding if signed by the majority of a three-member panel.

(2) The decision need not be in a particular form but must include sufficient findings of fact and conclusions of law to establish a basis for the decision.

(S) *Legal Effect of Report and Award; Entry of Judgment.*

The Report of Award, unless appealed consistent with provisions of New Hampshire RSA 542:8, shall be final and shall have the attributes and legal effect of a verdict. If no appeal is taken within the time and in the manner specified in New Hampshire RSA 542:8, any party may move for confirmation and entry of judgment in accordance with New Hampshire RSA 542:8. After entry of such judgment, execution process may be issued as in the case of other judgments.

Rule 303. Judge-Conducted Intensive Mediation of Certain Cases

(A) For purposes of this rule only, the term “complex case” shall mean: (1) with respect to any case in which the relief sought is monetary damages, a case wherein there is a realistic possibility the damages awarded could exceed \$250,000.00; and (2) with respect to any case in which relief other than monetary damage is sought, a case wherein the trial can reasonably be expected to last more than five trial days.

(B) Upon agreement of the parties, the presiding justice may assign a complex case for intensive mediation. Such assignment may be made at or at any time after the initial Rule 5 conference but shall not be made later than 90 days before the trial date except for good cause shown. Assignment of a case to intensive mediation shall not stay, alter, suspend, or delay pretrial discovery, motions, hearings, conferences or trial unless the presiding justice so orders.

(C) The mediator for intensive mediation conducted under this rule shall be an active, senior active or retired superior court justice other than the justice to whom the case has been assigned for trial or who has presided over any pretrial hearings or ruled upon any pretrial motions. The justice who serves as mediator and all persons who participate in the mediation shall have no communication with the justice to whom the case is assigned for trial concerning the mediation or any matter pertaining to the merits of the case. All justices who serve as mediators pursuant to this rule shall have completed an approved mediation training program. The provisions of Rule 301(C)(3) shall apply to all superior court justices who serve as mediators under this rule.

The litigants and counsel must recognize that the neutrals will not be acting as legal advisors or legal representatives. They must further recognize that, because the neutrals are performing quasi-judicial functions and are performing under the auspices of the Court, each such neutral has immunity from suit, and shall not be called as a witness in any subsequent proceeding relating to the parties' negotiations and/or his/her participation, except as set forth in Rule 301(F).

(D) The parties shall be provided at least 30 days advance notice of the date, time and location of the mediation session and of the name of the justice who will be serving as the mediator. Any party claiming grounds to recuse the justice assigned as mediator, shall file a motion for such relief within 10 days after the date of the notice scheduling the mediation. Any such motion shall be referred for ruling to the justice assigned as the mediator and said justice's ruling on the motion shall be final and not subject to further review. In the event the justice assigned

as mediator grants the motion to recuse, the case shall be reassigned to another justice for mediation. Mediation sessions shall be held at a court facility but, subject to the availability of facilities, normally shall be held in a location other than the court wherein the case will be tried.

(E) Mediation under this rule shall be conducted in accordance with the procedures specified in Rule 301(D) and 301(F), except that the summaries submitted by the parties may be up to 10 pages in length.

D. SENTENCE REVIEW DIVISION RULES

Rule 401. After notice and within thirty (30) days of sentencing by the Superior Court, the defendant may apply to have his sentence reviewed. Defendant's counsel has the duty to protect the defendant's interest by insuring that the defendant understands that:

- (1) he has a right to a review of the sentence imposed;
- (2) if he requests a sentence review, the sentence may be increased, decreased, modified or affirmed.

Rule 401a. The State also has the right to request a review of a state prison sentence within 30 days of sentencing.

Rule 402. Only state prison sentences, whether stand committed, suspended or deferred, are subject to sentence review. Sentence review is not available for those sentences mandated by statute. At the time of sentencing, the clerk of the Superior Court shall provide the defendant, counsel and the prosecutor with an application for sentence review. The application shall state that:

- (1) the parties have a statutory right to a review of a sentence; and
- (2) the Sentence Review Division may increase, decrease, modify or affirm the sentence entered by the Superior Court. The Clerk of Court shall also so advise the parties.

Rule 403. If application is not made for sentence review until after the defendant is incarcerated in the State Prison (or other institution to which he may be transferred), the application shall be made in the following manner:

- (a) The application form shall be completed and sent to the Secretary of the Sentence Review Division, 17 Chenell Drive, Suite 1, Concord, New Hampshire, 03301, or directly to the Clerk of Court of the sentencing county.

(b) One copy of the completed application shall be retained by the defendant (or the State) for personal use and as a record of application.

(c) The completed application shall indicate the date on which application is made.

Rule 404. When application for sentence review is made directly to the Clerk of the Superior Court, the Clerk shall immediately notify the secretary of the Sentence Review Division, by mail, of the date such application was filed. When application is received by the Secretary of the Review Division, copies shall be prepared and mailed in accordance with Rule 407 (a) through (c) below.

Rule 405. The Secretary of the Sentence Review Division shall keep a record log in which shall be recorded the date the completed application for review was received. Notice from the Clerk of an application filed directly in the Superior Court shall be recorded as being received on the date such application was filed in the court.

Rule 406. The Sentence Review Division record log shall be open for inspection to defense attorneys and prosecutors in any case in which an application for sentence review has been made.

Rule 407. Copies of the application for review of sentence and notice of hearing shall be forwarded by the Secretary of the Sentence Review Division to the following persons:

- (a) The sentencing judge;
- (b) The County Attorney and/or Attorney General; and
- (c) The defendant's attorney of record.

Rule 408. Any application for sentence review that is submitted after thirty (30) days from the date of sentencing shall be returned with notice to all parties that the application is not timely. There is no right to appeal the return of untimely requests for sentence review except that the Sentence Review Division may, for GOOD CAUSE SHOWN, decide to consider the merits of any untimely request for sentence review.

Rule 409. Hearings before the Sentence Review Division shall normally be in accordance with the order the applications were recorded in the Sentence Review Division record log.

Rule 410. On his or her own initiative or at the request of the Sentence Review Division, the sentencing judge may provide the Sentence Review Division with a statement of reasons for imposing the sentence under review. If submitted, such

statement shall be furnished to the parties prior to the date of the hearing before the Sentence Review Division.

Rule 411. The filing of an application for sentence review does not stay execution of the sentence as originally imposed.

Rule 412. Sentences may be reviewed that were imposed prior to the effective date of RSA 651:58 (August 5, 1975), and for those sentences the thirty (30) day rule will not apply. Sentences may be reviewed even if the sentence to the State Prison has been suspended or deferred or if the time to be served is less than one year because of credit for pre-sentence confinement.

Rule 413. State Prison sentences may be reviewed whether they result from a finding of guilty following trial, or, unless waived, as a result of entering a plea of guilty, or a finding of guilty following a plea of *nolo contendere*. Sentences may also be reviewed following a re-sentencing if the original sentence has been set aside by judicial process other than by the Sentence Review Division.

Rule 414. The Division can act in any of the following ways:

- (a) It may increase the sentence imposed by the sentencing judge;
- (b) It may decrease the sentence imposed by the sentencing judge;
- (c) It may otherwise modify the sentence; or,
- (d) It may affirm the sentence.

Rule 415. The Sentence Review Division will *only consider* matters that are a part of the record of sentencing and will require the production of the following materials if they were used in the imposition of sentence:

- (a) Presentence reports;
- (b) Any other records, documents or exhibits available to the sentencing judge relevant to affect such a review of the sentence(s).

Rule 416. The Sentence Review Division will not consider any matter or development subsequent to the imposition of the sentence. Matters not to be considered include:

- (a) Institutional adjustment;
- (b) New social information;
- (c) Institutional disciplinary actions pending or taken against the applicant;

- (d) Work reports; or
- (e) Inmate release plans.

Rule 417. The applicant shall have the right to appear and be represented by counsel at the sentence review hearing. Counsel should be trial counsel below. Court appointed counsel shall be reimbursed as provided by law. No sentence may be increased, however, without the personal appearance of the defendant and the defendant's attorney unless either or both waive appearance in writing. The State may be represented by the County Attorney of the county wherein the sentence and judgment were imposed or by the Attorney General.

Rule 418. If the Sentence Review Division orders a different sentence than that imposed by the trial judge, the Sentence Review Division shall resentence the defendant in accordance with its decision. Copies of the Division's amended sentence(s) shall be forwarded to the clerk of the court which imposed the original sentence(s) and to the parties or their counsel.—

Rule 419. Any time served prior to the sentence modification shall be counted in calculating the sentence as modified.

Rule 420. The decision of the Sentence Review Division is final and the reasons for any change of sentence will be stated in a written opinion. In its decision, the Sentence Review Division will give consideration to, but is not limited by, the following objectives of the New Hampshire Criminal Code sanctions:

- (a) Isolation of the offender from society to prevent criminal conduct during the period of confinement;
- (b) Rehabilitation of the convicted offender into a non-criminal member of society;
- (c) Deterrence of other members of the community who might have tendencies toward criminal conduct similar to those of the offender;
- (d) Deterrence of the defendant, himself;
- (e) Reaffirmation of social norms for the purpose of maintaining respect for the norms themselves;
- (f) The individual characteristics of the defendant prior to the imposition of the sentence, except that information, which does not affirmatively appear on the record or in the judge's statement of reasons for the sentence, shall be excluded;

(g) The facts and circumstances of the crime or crimes which affirmatively appear in the record of the proceedings; and

(h) Statistical information concerning the sentences imposed for the same crime committed by other individuals in the State of New Hampshire.

Rule 421. The original of each decision or order shall be sent to the Clerk of Court for the county wherein judgment was rendered. Copies shall be sent to the sentencing judge, defendant, defense counsel, the Department of Corrections, and the County Attorney and/or the Attorney General's office.

Rule 422. The scope of review of the Sentence Review Division shall be:

(a) The excessiveness or leniency of the sentence having regard for the nature of the offense, the protection of the public interest and safety, and the character of the offender;

(b) The manner in which the sentence was imposed, including the sufficiency and accuracy of the information before the sentencing court.

Rule 423. Unless at least two members of the Sentence Review Division concur in amending a sentence, the sentence below shall stand. When only two Sentence Review Division members review a sentence, the decision must be unanimous in order to change a sentence.

F. STANDARD SUMMONS FORM

_____ ss.

COURT

v.

SUMMONS IN CIVIL ACTION

CASE NUMBER:

TO: (Name and address of Defendant)

YOU ARE HEREBY SUMMONED and required to file with the Court (Clerk's name and Court's address to be inserted below) and serve on Plaintiff's Attorney (name and address to be inserted below)

an Answer to the Complaint which is served on you with this Summons, or a Motion to Dismiss, within 30 days after the Return Date noted below. If you fail to file a timely Answer or Motion to Dismiss, a default will be taken against you for the relief demanded in the Complaint.

Return Date

Clerk

Date Filed

RETURN OF SERVICE

Service of the Summons and complaint was made by me

Date: _____

NAME OF SERVER

TITLE

Check one box below to indicate appropriate method of service

- Served personally upon the defendant. Place where served:

- Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

Name of person with whom the summons and complaint were left:

- Returned unexecuted:

- Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL:

SERVICES:

TOTAL:

DECLARATION OF SERVER

I declare under penalty of perjury that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date

Signature of Server _____

Address of Server _____

APPENDIX C

Amend Supreme Court Rule 50 as follows (additions are in **brackets**]; deletions are in ~~strike-thru~~ format):

RULE 50. Trust Accounts

(1) *Interest-Bearing Trust Accounts.* A member of the New Hampshire Bar shall create or maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time and must comply with the following provisions:

A. An interest-bearing trust account shall be established with any bank or savings and loan association authorized by federal or State law to do business in New Hampshire and insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation ("financial institution"). Funds in each interest-bearing trust account shall be subject to withdrawal upon demand.

B. The rate of interest payable on any interest-bearing trust account shall be the same rate of interest paid by the depository institution for all other holders of similar accounts. Interest rates higher than those offered by the institution on regular checking or savings accounts may be obtained by a lawyer or law firm on some or all deposited funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

C. Lawyers, law firms or others acting on their behalf when depositing clients' funds in an interest-bearing account shall direct the depository institution:

(i) to remit interest or dividends, as the case may be, at least quarterly, to the New Hampshire Bar Foundation; and

(ii) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent; and

(iii) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation.

D. The interest or dividends received by the Foundation shall be used solely by the Foundation for the following purposes:

- (i) for the support of civil legal services to the disadvantaged;
- (ii) for public education relating to the courts and legal matters;
- (iii) for such other programs as may be approved by the supreme court.

Such income shall be applied only to activities permitted to be conducted by organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954, as from time to time amended.

E. Attorneys, either individually or through their firm organizations, shall complete an annual Authorization to Financial Institutions by August 1 of each year listing any interest-bearing trust account(s) for clients' funds under paragraph (1) and directing the New Hampshire Bar Foundation to act on behalf of the depositing lawyer or law firm to convert clients' non-interest bearing trust account(s) to interest-bearing trust account(s) under provisions of Rule 50(1).

~~F. A lawyer or law firm who declines to maintain accounts described in subdivision (1)A of this rule must submit a Notice of Declination in writing to the Clerk of the Supreme Court by August 1 of any year for the period beginning such August 1 and extending until such declination is revoked.~~

~~———— (i) Notwithstanding the foregoing, any participating lawyer or law firm may petition the Court at any time and may be granted leave to file a Notice of Declination at a time other than that specified above. An election to decline participation may be revoked at any time by filing a request for enrollment in the program.~~

~~———— (ii) A lawyer or law firm that does not file with the Clerk of the Supreme Court a Notice of Declination in accordance with the provisions of this rule shall be required to maintain accounts in accordance with subdivision (1)A of this rule.~~

G. **[F.]** This rule may be subsequently amended to effectuate its purposes or to comply with any amendments to the Internal Revenue Code.

(2) *Attorney's Financial Records:*

A. Every attorney shall maintain records of the handling, maintenance and disposition of all funds or securities of a client at any time in his possession from the time of receipt to the time of final distribution and shall preserve such records for a period of six (6) years after final distribution of such funds or securities or any portion thereof. Specifically, every attorney

or the firm organization shall maintain a trust accounting system that shall include at the minimum, (1) a ledger or system showing all receipts and disbursements from the trust account or accounts with appropriate entries identifying the source of the receipts and the nature of the disbursement, and (2) a separate accounting page or columns for each client for whom property is held, which shall show all receipts and disbursements and carry a running account balance. Any other system that preserves the above-mentioned features and sufficiently accounts for trust funds may also be used. In addition there shall be maintained an index, or equivalent single source for identification of all trust accounts, including special interest-bearing trust accounts, probate accounts, custodial accounts and client agency accounts.

B. All cash property of clients received by attorneys shall be deposited in one or more clearly designated trust accounts (separate from the attorney's own funds) in financial institutions. Any attorney depositing client funds into an out-of-state financial institution shall file a written authorization with the Clerk of the Supreme Court authorizing the Court or its agents to examine and copy such out-of-state account records. Under no circumstances may any attorney use out-of-state banks other than those located in Maine, Vermont, Massachusetts, or the state in which the attorney's office is situated, without obtaining prior written approval from the Supreme Court.

C. Only those retainer fees, that are refundable if not earned, and as to which the attorney has so informed the client, shall be deposited in the trust account(s) described above. These shall not be withdrawn from the account of the attorney or firm organization until earned. All other retainer fees may be deposited in the attorney's general operating account.

D. All funds received as proceeds of collections or awards on behalf of a client shall be deposited in gross in the trust account(s) required above, and shall not be charged with a fee until distribution.

E. The practice of law in the form of a partnership or a professional association shall not relieve an attorney from the obligation of compliance with this Supreme Court Rule.

F. Each bank account required by Rule 50, except those accounts excluded by Rule 50-A(3), shall be reconciled by the lawyer or law firm on a monthly basis. Such reconciliation shall disclose (a) the balance of the account according to the bank's records; (b) the balance of the account according to the lawyer or law firm's records; (c) a detailed listing of all differences between items (a) and (b); (d) a listing of all clients' funds in the accounts as of the reconciliation date; and (e) a detailed listing of all differences between items (b) and (d).

APPENDIX D

Amend Supreme Court Rule 50-A as follows (additions are in **bold and brackets**]; deletions are in ~~strike thru~~ format):

RULE 50-A. Certification Requirement

(1) In order to assure compliance with the requirements of Rule 50 and in order to ascertain that the records and accounts described in Rule 50 are properly maintained, all attorneys licensed to practice in the State of New Hampshire, whether in private practice or not, other than those in inactive status, shall individually or through their firm organizations file an annual Certificate of Compliance and, ~~unless they have filed a Notice of Declination under Rule 50(1)F,~~ **[the attorney does not maintain a trust account and does not have in his possession any assets or funds of clients, also file an]** Authorization to Financial Institutions on or before August 1st of each year. For purposes of this rule, an attorney shall not be considered to be "in inactive status" if the attorney's New Hampshire Bar Association membership status was active *at any time* during the one-year period beginning on June 1 of the year preceding the reporting year and ending on May 31 of the reporting year. The Certificate of Compliance shall certify to one of three things:

A. That the attorney does not maintain a trust account and does not have in his possession any assets or funds of clients;

B. That client funds maintained by the attorney are held in accounts in full compliance with the requirements of Rule 50; or

C. That the attorney is willing to submit to a spot compliance audit to his trust accounts at his own expense.

A prescribed Certificate of Compliance form will be sent to the attorney annually by the New Hampshire Bar Association with the attorney's annual dues assessment. The self-certification may be completed by the attorney or by a private accountant employed for this purpose by the attorney. The completed Certificate of Compliance forms shall be filed with the New Hampshire Supreme Court by delivery to the New Hampshire Bar Association by August 1st of each year. The self-certification procedure shall be supplemented by annual compliance checks by an accountant selected by the Supreme Court. The accountant's purpose in conducting a compliance check will be to determine whether the minimum standards set forth in Rule 50 are being maintained. All information obtained by the accountant shall remain confidential except for purposes of transmitting

notice of violations to the Professional Conduct Committee or the Supreme Court. The information derived from such compliance checks shall not be disclosed by anyone in such a way as to violate the attorney-client privilege except by express order from the Supreme Court. The certification and authorization ~~or declination~~ requirements of this rule shall not apply to any full-time judge, full-time marital master, or full-time supreme, superior, and district court clerk or deputy clerk, except that the certification requirement shall apply where such judge, marital master, clerk, or deputy clerk was in the active practice of law at any time during the twelve (12) months immediately preceding August 1st of any year.

The Authorization to Financial Institutions shall be signed by an authorized signer for the accounts listed. The completed authorization shall be returned to the New Hampshire Bar Foundation by August 1 of each year.

(2) An attorney who fails to comply with the requirements of Rule 50 with respect to the maintenance, availability, and preservation of accounts and records, who fails to file the required annual Certificate of Compliance, or the annual Authorization to Financial Institutions ~~or a Notice of Declination~~, or who fails to produce trust account records as required shall be deemed to be in violation of Rule 1.15 of the Rules of Professional Conduct and the applicable Supreme Court Rule. Unless upon petition to the Supreme Court an extension has been granted, failure to file the required annual Certificate of Compliance by August 1st shall, in addition, subject the attorney to one or more of the following penalties and procedures:

A. A fine of \$100 for each month or fraction thereof after August 1st in which the Certificate of Compliance remains unfiled; in addition, an attorney who has been fined \$300 or more under this section may be suspended from the practice of law in this State;

B. Audit of the attorney's trust accounts and other financial records at the expense of the attorney, if the certificate remains unfiled on December 1st; and

C. Based upon results of the audit, initiation of proceedings for further sanctions, including suspension.

Any check, draft or money order received as payment of any fine imposed pursuant to this rule, which is returned to the court as uncollectable, shall be returned to the sender and shall not constitute payment of the fine. Whenever any check, draft or money order issued in payment of any fine imposed pursuant to this rule is returned to the court as uncollectable, the court shall charge a fee of \$25, plus all protest and

bank fees, in addition to the amount of the check, draft or money order to the person presenting the check, draft or money order to cover the costs of collection. The fine shall not be considered paid until the fine plus all fees have been paid.

Reinstatement following a suspension ordered pursuant to Rule 50-A(2)(A) above shall be only by order of the Supreme Court, upon petition to the court following the filing of the Certificate of Compliance and payment of the fine. If the petition is filed more than one year after the date of the order suspending the person from the practice of law in this State, then the petition shall be accompanied by evidence of continuing competence and learning in the law, and evidence of continuing moral character and fitness. If the evidence of continuing competence and learning in the law, and evidence of continuing moral character and fitness, are satisfactory to the court, the court may order reinstatement upon such conditions as it deems appropriate.

If the evidence of continuing competence and learning in the law is not satisfactory to the court, the court shall refer the motion for reinstatement to the professional conduct committee for referral to a panel of the hearings committee. The hearing panel shall promptly schedule a hearing at which the attorney shall have the burden of demonstrating by a preponderance of the evidence that he or she has the competency and learning in law required for reinstatement. At the conclusion of the hearing, the hearing panel shall promptly file a report containing its findings and recommendations and transmit same, together with the record, to the professional conduct committee. The professional conduct committee shall review the report of the hearings committee panel, the record and the hearing transcript and shall file its own recommendations and findings, together with the record, with the court. Following the submission of briefs, if necessary, and oral argument, if any, the court shall enter a final order.

If the evidence of continuing moral character and fitness is not satisfactory to the court, the court shall order the applicant to file with the committee on character and fitness and with the clerk of the supreme court the petition and questionnaire referred to in Supreme Court Rule 42(5)(e). Further proceedings shall be governed by Rule 42.

(3) Except for requirements of Rule 50, subparagraph (2)A, requiring the inclusion of probate accounts in the index of trust accounts, the provisions of Rule 50, paragraph (2), and of this Rule 50-A shall not apply to probate accounts (including estate, testamentary trusts, guardian, and conservator accounts).

(4) The Supreme Court may at any time order an audit of such

financial records or trust accounts of an attorney, and take such other action as it deems necessary to protect the public.

APPENDIX E

Adopt new Supreme Court Rule 57-A as follows:

RULE 57-A. Custody and Return of Documents and Materials Filed In Camera in Trial Courts

During the time a case is pending in the trial court, all documents and materials filed in camera with the court shall be maintained by the court.

Upon the final conclusion of a case in the trial court, documents and materials filed in camera will be held at the court until such time as the appeal period has expired. At that time, the clerk shall return the documents and materials filed in camera to the individual or organization that filed them with the court.

If an appeal is filed, the documents and materials filed in camera shall remain in the custody of the trial court pending resolution of the appeal unless the supreme court orders that they be transferred for purposes of the appeal. Upon receipt of the mandate from the supreme court, and if no further proceedings are required, the trial court clerk shall return the documents and materials filed in camera to the individual or organization that filed them with the court.

APPENDIX F

Adopt new Superior Court Medical Malpractice Screening Panel Rules as follows:

SUPERIOR COURT RULES MEDICAL MALPRACTICE SCREENING PANELS (RSA 519-B)

Rule 1. At the time the Writ of Summons is entered with the Court, counsel for the plaintiff shall also provide a copy of the Writ to the Superior Court Center.

Rule 2. All physicians and lawyers who serve as panel members shall provide the Superior Court Center with a curriculum vitae and/or detailed summary of their educational and professional background and practice.

Rule 3. At least 10 days prior to the panel structuring conference, counsel shall submit to the appropriate Superior Court and directly to the Panel Chair, a proposed joint 519-B Scheduling Conference Order. If approved by the Panel Chair, the conference may be cancelled. If not approved, or if there remain unresolved issues, the conference will proceed as scheduled.

Rule 4. The Chair of the Panel has authority to extend deadlines and otherwise exercise discretion over pre-hearing and hearing matters to ensure a fair determination by the Panel.

Rule 5. 519-B Panel Hearing shall be scheduled within 6 months of the return date unless extended for good cause by the Chairperson as more particularly provided in RSA 519-B:4, II and VI.

Rule 6. Panel Hearing shall take place at least 90 days before the anticipated or scheduled trial date unless the parties agree otherwise, or for good cause shown.

Rule 7. Witness Lists

a. Within 10 days after the date identified for disclosure of defendant's experts, all parties shall send directly to each panel member and to the Superior Court Center, a list of all witnesses, including experts, who may offer testimony or evidence at the panel hearing, whether by live testimony, by report, by transcript, or otherwise. This list shall be provided to each panel member on the standard witness list form. Panel members will be required to identify any possible conflict(s) by completing the witness list and sending it to the Superior Court Center within 10 days of receipt.

b. The witness list provided to the panel shall include the names, addresses, and practice affiliations, if any, of all potential witnesses, with sufficient detail to

enable each panel member to determine whether he or she has any conflict of interest. This list shall not include any reference to substance of the witnesses' anticipated testimony.

Rule 8. Length of Panel Hearing

Expected length of proceeding (excluding deliberations): As a general rule, hearings shall be held to conclusion within one day unless at the structuring conference or at the hearing, the Chairperson in his or her discretion determines that justice and fairness require additional time.

Rule 9. Submissions 30 days prior to hearing:

- a. Special procedural requests
- b. Pre-hearing motions
- c. Final witness list, expert and non-expert. The witness list shall include the witness's name, address, and whether the witness's testimony will be submitted by deposition, report, affidavit or live testimony.
- d. Submissions shall be mailed to the Chairperson and all counsel of record and pro se parties, if any.

Rule 10. Submissions 10 days prior to the panel hearing:

- a. A brief summary statement by each party
- b. Medical records
- c. Expert opinions submitted by deposition, signed written reports, affidavit, or pre-trial disclosures signed by the expert
- d. Witness deposition transcripts
- e. Submissions shall be mailed to the Chairperson, panel members all counsel of record and pro se parties, if any.

Counsel and parties are directed to coordinate their efforts to ensure that no more than one set of medical records and one deposition transcript for each deponent is provided to each of the panel members. In addition, each counsel shall be permitted to submit excerpted or highlighted portions of depositions.

Rule 11. Allocation of time at the Panel Hearing

a. In advance of the panel hearing, counsel and pro se parties, if any, shall attempt to reach agreement regarding the allocation of time among the parties for presentation at hearing. If the parties cannot agree, they may request a conference in advance of the hearing with the Panel Chair to determine time allocation.

b. The Panel Chair will allocate fairly the time allowed for each presentation, which may include limitations on the time allowed for direct and cross-examination, taking into account factors such as, the nature of the witness' testimony, the number of parties, and the length of the hearing.

Rule 12. Offers of Proof and Expert Opinions

a. Offers of Proof – Except by agreement of the parties, offers of proof, including expert opinions offered by oral representations of counsel and written statements unsigned by the expert, are presumptively inadmissible as evidence.

b. Expert Opinions – Expert opinion evidence shall be permitted by live or video testimony, deposition transcript, written report, affidavit, or disclosure signed by the expert.

Rule 13. Waiver of Panel Hearing

Any agreement to waive the panel hearing shall be received by the Superior Court Center no later than 10 days prior to hearing except for good cause shown. Any notification of waiver less than 10 days may, in the discretion of the Panel Chair, on recommendation to the Chief Justice of the Superior Court, subject the party or parties responsible for the late notification to fines and/or expenses.

APPENDIX G

Adopt a new Rule ____, either as part of the New Hampshire Rules of Criminal Procedure, or as part of the Superior Court Rules, as follows:

[Rule ____.] In all criminal cases, the appearance of counsel for the defendant shall be deemed to be withdrawn thirty (30) days after sentence is imposed unless the sentence imposed was a deferred sentence or unless a post-sentencing motion is filed within said thirty (30) days period. Where a deferred sentence is imposed, the appearance of counsel for the defendant shall be deemed to be withdrawn thirty (30) days after the deferred sentence is brought forward or suspended. Where a post-sentencing motion is filed within thirty (30) days after imposition of sentence, the appearance of counsel for the defendant shall be deemed to be withdrawn thirty (30) days after the court rules on said motion.

APPENDIX H

Adopt new Family Division Rule 1.25A as follows:

1.25A. Mandatory Initial Self Disclosure:

A. Application.

This Mandatory Initial Self Disclosure Rule applies to all new actions in the family division for divorce, legal separation, annulment, or civil union dissolution. For parenting or child support petitions, or petitions to enforce or change court orders in parenting, divorce, legal separation, or civil union dissolution cases in the family division, sections B (1) (g) through (l) shall not apply.

B. Initial Disclosures.

1. Except as otherwise agreed by the parties or ordered by the Court, each party shall deliver the following documents to the other no later than the earlier of (i) forty-five (45) days from the date of service of the petition or (ii) ten (10) days prior to the temporary hearing or initial hearing on the petition, not including the First Appearance required by rule 2.11:

(a) A current financial affidavit in the format required by family division rule 2.16, including the monthly expense form.

(b) The past three (3) years' personal and business federal and state income tax returns and partnership and corporate returns for any non-public entity in which either party has an interest, together with all tax return schedules, including but not limited to W-2s, 1099s, 1098s, K-1s, Schedule C, Schedule E and any other schedules filed with the IRS.

(c) The four (4) most recent pay stubs (or equivalent documentation) from each current employer, and the year-end pay stub (or equivalent documentation) for the calendar year that concluded prior to the filing of the action.

(d) For business owners or self-employed parties, all monthly, quarterly and year-to-date financial statements to include profit and loss, balance sheet and income statements for the year in which the action was filed; and all year-end financial statements for the calendar year that concluded prior to the filing of the action.

(e) Documentation confirming the cost and status of enrollment of employer provided medical and dental insurance coverage for:

- i. The party,
- ii. The party's spouse, and

iii. The party's dependent child(ren).

(f) For the twelve (12) months prior to the filing of the action, any credit, loan and/or mortgage applications, or other sworn statement of assets and/or liabilities, prepared by or on behalf of either party.

(g) For the twelve (12) months prior to the filing of the action, documentation related to employee benefits such as but not limited to stock options, retirement, pension, travel, housing, use of company car, mileage reimbursement, profit sharing, bonuses, commissions, membership dues, or any other payments to or on behalf of either party.

(h) For the twelve (12) months prior to the filing of the action, statements for all bank accounts held in the name of either party individually or jointly, or any business owned by either party, or in the name of another person for the benefit of the either party, or held by either party for the benefit of the parties' minor child(ren).

(i) For the twelve (12) months prior to the filing of the action, statements for all financial assets, including but not limited to all investment accounts, retirement accounts, securities, stocks, bonds, notes or obligations, certificates of deposit owned or held by either party or held by either party for the benefit of the parties' minor child(ren), 401K statements, individual retirement account (IRA) statements, and pension-plan statements.

(j) For the twelve (12) months prior to the filing of the action, any and all life insurance declaration pages, beneficiary designation forms and the most recent statements of cash, surrender and loan value.

(k) For the six (6) months prior to the filing of the action, statements for all credit cards held by either party, whether individually or jointly.

(l) Any written prenuptial or written postnuptial agreements signed by the parties.

2. The parties may redact all but the last four (4) digits of any account numbers and social security numbers that appear on any statements or documents.

3. The parties shall promptly supplement all disclosures as material changes occur while the action is pending.

4. A party may seek a protective order for information disclosed in response to these mandatory disclosures. Protective orders will ordinarily be available upon request. In the event of a dispute concerning the need for a protective order, the party seeking the order shall file a motion requesting that the Court conduct an *in camera* review of the materials in dispute. The Court will review the materials and

determine if a protective order is necessary. From the date of the filing of the motion until such ruling, the materials shall be produced, but shall be disclosed by the parties only to their attorneys, staff, experts/consultants, in court, and as otherwise necessary in connection with the pending action. Materials submitted for *in camera* review shall be sealed in the Court's file until the Court determines the necessity of a protective order. If a protective order is issued, the Court shall seal the exhibits submitted in connection with the request for the protective order that remain in the Court's file.

C. *Unavailability of Documents.*

1. In the event that either party does not have any or all of the documents required under this rule or has not been able to obtain them, that party shall state in writing, under oath, the specific documents which are not available, the reasons the documents are not available, and the efforts made by the party to obtain the documents. A statement of unavailability under this provision does not limit the filing party's duty to supplement disclosures and provide the other party with documentation as it becomes available.

2. When a statement of unavailability is filed or when it otherwise becomes apparent that documents required by this rule are unavailable, the party seeking the documents may prepare and submit to the other party appropriate authorizations or releases enabling the seeking party to retrieve the documents from their source. Upon receipt of such a release or authorization the party to whom documents were unavailable shall execute and immediately return to the seeking party the release or authorization. The seeking party may use the authorization or release to retrieve the unavailable documents covered by this rule, initially at their own expense, but that expense may be reallocated upon motion or at the final hearing.

D. *Failure to Provide Initial Disclosures.*

1. Unless and until a party provides Initial Disclosures as required by section B and C above, the Court may impose sanctions, including, but not limited to prohibiting that party from: (a) introducing into evidence any document which was required under section B or C of this rule; (b) testifying or making an offer of proof regarding information or subject matter which is likely to be contained in or referred to in section documents required by section B and C; (c) filing requests for discovery as allowed under the family division rules; or (d) filing any discovery motions.

2. If a party's failure to provide Initial Disclosures prejudices access of a compliant party to requested substantive relief, such as the calculation and receipt of child support, the Court may, in addition to other sanctions, address the relief requested by the compliant party on the basis of reasonable estimates and assumptions, at least until such time as the documents are produced.

E. *Additional Discovery.*

If a party is in compliance with section B and C of this rule, that party may request further information as allowed under family division rules. This rule is not intended to limit the scope of discovery as provided under family division rule 1.25.

F. *Certificate Of Compliance.*

All parties file a Certificate of Compliance no later than the earlier of (i) forty-five (45) days from the date of service of the petition or (ii) ten (10) days prior to the temporary hearing or initial hearing on the petition, not including the First Appearance required by rule 2.11.

APPENDIX I

Adopt on a permanent basis District Court Rule 3.3, which was adopted on a temporary basis by Supreme Court order dated December 10, 2009, as follows (no changes are being proposed to the temporary rule now in effect):

Rule 3.3. Court fees

(I) Fees

(A) Original Entries:

Civil Writ of Summons or Counterclaim (including set-off, recoupment, cross-claims and third-party claims)	\$130.00
Replevin	\$ 120.00
Landlord/Tenant entry	\$ 100.00
Registration of Foreign Judgment	\$ 150.00
Small Claims Entry and Counterclaim, \$5000 or less (including set-off, recoupment, cross-claims and third-party claims)	\$ 72.00
Small Claims Transfer Fee	\$ 108.00
Small Claims Entry and Counterclaim, \$5001 to \$7500 (including set-off, recoupment, cross-claims and third-party claims)	\$ 127.00

(B) General and Miscellaneous

Motion for Periodic Payments	\$ 25.00
Petition to annul criminal record	\$ 100.00
Original writ	\$ 1.00
Writ of Execution	\$ 25.00
Petition for Ex Parte Attachment, or Writ of Trustee Process	\$ 25.00
Reissued Orders of Notice	\$ 25.00
Application to Appear <i>Pro Hac Vice</i>	\$ 225.00

(C) Certificates & Copies

Certificate of Judgment	\$ 10.00
Exemplification of Judgment	\$ 25.00
Certified Copies	\$ 5.00

All copied material (except transcripts)	\$.50/page
Computer Screen Printout	\$.50/page

(II) Surcharge

Pursuant to RSA 490:26-a, II, the sum of \$25.00 shall be added to each civil filing fee set forth in paragraph (I)(A) above, except for the following types of cases which pursuant to RSA 490:26-a, II(b) are exempt from the surcharge:

- (A) Actions relating to children under RSA 169-B, RSA 169-C, and RSA 169-D.
- (B) Domestic violence actions under RSA 173-B.
- (C) Small claims actions under RSA 503.
- (D) Landlord/tenant actions under RSA 540, RSA 540-A, RSA 540-B, and RSA 540-C.
- (E) Stalking actions under RSA 633:3-a.

(III) Records Research Fees

(A) Records Research Fees. Record information must be requested in writing and include the individual's full name and, if available, the individual's date of birth. A fee of \$20 per name will be assessed per name for up to 5 names. Additional names will be assessed \$5 per name. Record information must be requested in writing and include the individual's full name and, if available, the individual's date of birth.

(B) The Clerk may waive the records research fee when a request for record information is made by a member of the media consistent with the public's right to access court records under the New Hampshire Constitution.

APPENDIX J

Adopt on a permanent basis District Court Rule 3.28, which was adopted on a temporary basis by Supreme Court order dated December 10, 2009, as follows (no changes are being proposed to the temporary rule now in effect):

Rule 3.28. District Court Civil Writ Mediation Rules.

(A) Purpose. The District Court establishes these Civil Writ mediation rules to increase access to justice; to increase parties' satisfaction with the outcome; to reduce future litigation by the same parties; to make more efficient use of judicial resources; and to expand dispute resolution resources available to the parties.

(B) Definitions. For the purpose of this rule, the following definitions apply.

(1) Mediation. Mediation is a process in which a mediator facilitates settlement discussions between parties.

a. The mediator has no authority to make a decision or impose a settlement upon the parties.

b. The mediator attempts to focus the attention of the parties upon their needs and interests rather than upon their rights and positions.

c. Any settlement is entirely voluntary.

d. In the absence of settlement, the parties lose none of their rights to a resolution of their dispute through litigation.

Mediation is based upon principles of communication, negotiation, facilitation and problem solving that emphasize:

a. The needs and interest of the parties

b. Fairness

c. Procedural flexibility

d. Privacy and confidentiality

e. Full disclosure

f. Self determination

(2) Mediator. An impartial person who facilitates discussions between the parties to a mediation. The role of the mediator includes but is not limited to assisting the parties in identifying issues, reducing obstacles to communication, and providing the parties an opportunity for each to be heard in a dignified and thoughtful manner. The mediator's focus will be on encouraging and supporting the parties' presentations to and reception from one another allowing them to find a resolution that is appropriate.

(3) Party. Any person whose name is designated on the record as plaintiff or defendant and their attorney or any other person who has filed an appearance.

(C) Mediator Qualifications. Mediators shall satisfy the qualifications and criteria specified by the Supreme Court. Minimum qualifications include: completion of a 20-hour mediation process training; two years experience as a mediator or equivalent experience, and an understanding of civil and landlord/tenant law is helpful.

All mediators serving as civil writ mediators shall contract with the Administrative Office of the Courts for a term of one year.

(D) Referral of cases to mediation. The Civil Writ mediation program is voluntary. Cases may be referred to mediation where parties have not filed an "opt-out" notice with the Court and all remaining parties indicate that they desire to proceed with mediation.

(E) Continuances. If a party files a Motion to Continue Mediation for good cause, the Court has discretion to continue the mediation and set a new mediation date if no prior Motions to Continue Mediation have been granted. The Court will not grant multiple requests to continue mediation.

(F) Failure to Attend Mediation. If either party fails to attend mediation without good cause and without providing sufficient notice to the other party(ies) and to the Court, the parties shall lose the opportunity to participate in the mediation program. Under those circumstances the matter shall not be rescheduled for mediation and the matter shall be returned to the trial docket.

(G) Mediator Assignment. The Administrative Judge of the District Court, in consultation with the Office of Mediation and Arbitration, shall determine the mediation needs for each District Court in the Civil Writ program. Assignment of mediators shall be based on the mediator needs of each Court.

Each District Court shall schedule civil writ cases and allocate mediator(s) in a manner that accommodates the case load of the Court.

(H) Payment of mediator fees. Civil writ mediators shall be paid on a per case fee set by the Supreme Court. Payments shall be made out of the Office of Mediation and

Arbitration (“OMA”) Fund established under RSA 490-E:4. No additional fees or reimbursements shall be made.

(I) Disclosure of Conflict. Upon receipt of a notice of appointment in a case, the mediator shall disclose any circumstances likely to create a conflict of interest, the appearance of conflict of interest, a reasonable inference of bias or other matter that may prevent the process from proceeding as scheduled.

(1) If the mediator withdraws, has a conflict of interest or is otherwise unavailable, another mediator shall be appointed by the Court.

(2) The burden of disclosure rests on the mediator. After appropriate disclosure, the mediator may serve if both parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.

(J) Impartiality. Impartiality shall be defined as freedom from favoritism or bias in word, action and appearance.

(1) Impartiality implies a commitment to aid all parties, as opposed to an individual party, when moving toward an agreement. A mediator shall be impartial and shall advise all parties of any circumstances bearing on possible bias, prejudice or impartiality.

(2) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of the proposed options for settlement.

(3) A mediator shall withdraw from mediation if the mediator believes the mediator can no longer be impartial.

(4) A mediator shall not give or accept a gift, request, favor, loan, or any other item of value to or from a party, attorney or any other person involved and arising from the mediation process.

(K) Prohibitions. A mediator shall not provide counseling or therapy to any party during the mediation process nor shall a mediator who is an attorney represent either party, or give legal advice during or after the mediation.

The mediator shall not use the mediation process to solicit or encourage future professional services with either party.

(L) Self determination. A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties.

(1) A mediator shall not coerce or unfairly influence a party into a settlement agreement and shall not make a substantive decision for any party to a mediation process.

(2) A mediator shall not intentionally or knowingly misrepresent material facts or circumstances in the course of conducting a mediation.

(3) A mediator shall promote consideration of the interest of persons affected by actual or potential agreements who are not present during a mediation.

(4) The mediator shall promote mutual respect amongst the parties throughout the process.

(M) Professional Advice. A mediator shall only provide information the mediator is qualified by training or experience to provide.

(1) When a mediator believes a non represented party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.

(2) While a mediator may point out a possible outcome of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the Court in which the case is filed will resolve the dispute.

(N) Confidentiality. A mediator shall preserve and maintain the confidentiality of all mediation proceedings. Any communication made during the mediation which relates to the controversy mediated, whether made to the mediator or a party, or to any other person present at the mediation is confidential.

(1) A mediator shall keep confidential from the other parties any information obtained in an individual caucus unless the party to the caucus permits disclosure.

(2) All memoranda, work products and other materials contained in the case file of a mediator are confidential. The mediator shall render anonymous all identifying information when materials are used for research, training or statistical compilations.

(3) Confidential materials and communications are not subject to disclosure in any judicial or administrative proceedings except for any of the following:

a. Where the parties to the mediation agree in writing to waive the confidentiality.

b. When a subsequent action between the mediator and a party to the mediation for damages arises out of the mediation.

c. Where there are threats of imminent violence to self or others.

d. Where reporting is required by state law.

(O) Inadmissibility of Mediation Proceeding. Mediation proceedings under this rule are non-binding and shall not impair the right of the litigants to demand a trial. Any settlement reached at mediation shall be binding on the parties and entered as a judgment. Information, evidence or the admission of any party shall not be disclosed or used in any subsequent proceeding.

(1) Statements made and documents prepared by a party, attorney, or other participant in the aid of such proceedings shall be privileged and shall not be disclosed to any Court or construed for any purpose as an admission against interest.

(2) All mediation proceedings are deemed settlement conferences as prescribed by Court rule and the Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding the fact that there has been a mediation proceeding.

(3) Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its use in a mediation proceeding under this rule.

(4) A mediator shall not be called as a witness in any subsequent proceeding relating to the parties' negotiation and participation except as set forth in Section N of this rule.

(P) Concluding Mediation. If an agreement is reached during the mediation process, the parties shall reduce their agreement to a written memoranda on the points on which agreement has been reached, and the memoranda shall be reviewed and signed by all parties before the mediation ends, unless the parties otherwise agree that additional time is necessary to ensure that the parties have time to consult with counsel about their agreement if unrepresented at the time of the mediation. In that case, the parties shall submit the written agreement to the Court within thirty days of the mediation session. Within 48 hours of the mediation session, the mediator shall submit an ADR report indicating the status of the agreement either attaching it to the ADR report, or, indicating that it will be filed with the Court within the next thirty days.

If an agreement is not reached during the mediation process, the mediator shall notify the Court via the ADR report that the mediation failed to resolve the issue in conflict or if the mediation successfully resolved part of the matter, the ADR report will so indicate.

(Q) Immunity. The mediator will not be acting as legal advisor or legal representative. The parties should recognize that, because the mediator is performing quasi-judicial functions and is performing under the auspices of the District Court, each such mediator has immunity from suit, and shall not be called as a witness in any subsequent proceeding relating to the parties' negotiations and participation except as set forth in Section N of this rule.

(R) Removal from list of Civil Writ mediators. Appointment to the Civil Writ roster in the District Court confers no vested rights to the mediator, but is a conditional privilege that is revocable.

(1) At any time during the one year rostering period, upon notice and opportunity to be heard, a civil writ mediator who is found to have engaged in conduct that reflects adversely on his/her impartiality or in the performance of his/her duties as a mediator, or is found to have persistently failed to carry out the duties of a mediator, or is found to have engaged in conduct prejudicial to the proper administration of justice, shall be removed from the list of civil writ mediators.

(2) All complaints regarding a mediator's performance shall be forwarded to the NH Judicial Branch Director of the Office of Mediation and Arbitration and the Administrative Judge of the District Court. The Director of the OMA will investigate the complaint and will make recommendations to address the complaint to the Administrative Judge of the District Court.

(3) All civil writ mediators must inform the Director of the Judicial Branch Office of Mediation and Arbitration and the Administrative Judge of the District Court within 30 days of a change in circumstances such as a conviction of a felony or loss of professional license. Civil writ mediators who are convicted of a felony or misdemeanor involving moral turpitude, or who have a professional license revoked, shall be denied certification.

APPENDIX K

Adopt on a permanent basis District Court Rule 4.29, which was adopted on a temporary basis by Supreme Court order dated December 10, 2009, as follows (no changes are being proposed to the temporary rule now in effect):

Rule 4.29. District Court Small Claims Mediation Rules.

(A) Purpose. The District Court establishes these small claims mediation rules to increase access to justice; to increase parties' satisfaction with the outcome; to reduce future litigation by the same parties; to make more efficient use of judicial resources; and to expand dispute resolution resources available to the parties.

(B) Definitions. For the purpose of this rule, the following definitions apply.

(1) Mediation. Mediation is a process in which a mediator facilitates settlement discussions between parties.

a. The mediator has no authority to make a decision or impose a settlement upon the parties.

b. The mediator attempts to focus the attention of the parties upon their needs and interests rather than upon their rights and positions.

c. Any settlement is entirely voluntary.

d. In the absence of settlement, the parties lose none of their rights to a resolution of their dispute through litigation.

Mediation is based upon principles of communication, negotiation, facilitation and problem solving that emphasize:

a. The needs and interest of the parties

b. Fairness

c. Procedural flexibility

d. Privacy and confidentiality

e. Full disclosure

f. Self determination

(2) Mediator. An impartial person who facilitates discussions between the parties to a mediation. The role of the mediator includes but is not limited to assisting the parties in identifying issues, reducing obstacles to communication, and providing the parties an opportunity for each to be heard in a dignified and thoughtful manner. The mediator's focus will be on encouraging and supporting the parties' presentations to and reception from one another allowing them to find a resolution that is appropriate.

(3) Party. Any person whose name is designated on the record as plaintiff or defendant and their attorney or any other person who has filed an appearance.

(C) Mediator Qualifications. Mediators shall satisfy the qualifications and criteria specified by the Supreme Court. Minimum qualifications include: completion of a 20-hour mediation process training; two years experience as a mediator or equivalent experience, and an understanding of civil and landlord/tenant law is helpful.

All mediators serving as small claims mediators shall contract with the Administrative Office of the Courts for a term of one year.

(D) Referral of cases to mediation. Small Claims cases of less than \$5,000 may be referred to mediation where requested by any party and all remaining parties indicate that they desire to proceed with mediation. In small claims cases where the jurisdictional amount is over \$5,000, mediation is mandatory and shall be scheduled for mediation in advance of, or on, the hearing date.

(E) Default and dismissal in mandatory mediation small claims cases:

(1) Default. If the case is scheduled for mandatory mediation in accordance with RSA 503:1 and if only one party is in attendance for the scheduled mediation session, the matter shall be subject to Rule 4.14 of the District Court Small Claims Rules.

(2) Dismissal. If the case is scheduled for mandatory mediation in accordance with RSA 503:1 and if neither party attends the mediation session, then the matter shall be subject to Rule 4.23 of the District Court Small Claims Rules.

(3) Payment to Mediator if a case is defaulted or dismissed. If a mediation is scheduled in accordance with RSA 503:1 but does not occur due to a default or dismissal, then the mediator shall be entitled to payment for the mediation session, even if does not go forward due to the failure of either one or both parties to attend.

(F) Mediator Assignment. The Office of Mediation and Arbitration in consultation with the Administrative Judge of the District Court shall determine the mediation needs for each District Court. Assignment of mediators shall be based on the needs of each court.

Each District Court shall schedule small claims cases and allocate mediator(s) in a manner that accommodates the small claims case load of the court.

(G) Payment of mediator fees [in non-mandatory cases]. Small Claims mediators shall be paid on a per case fee set by the Supreme Court. Payments shall be made out of the Mediator Fund established by the court. No additional fees or reimbursements shall be made.

(H) Disclosure of Conflict. Upon receipt of a notice of appointment in a case, the mediator shall disclose any circumstances likely to create a conflict of interest, the appearance of conflict of interest, a reasonable inference of bias or other matter that may prevent the process from proceeding as scheduled.

(1) If the mediator withdraws, has a conflict of interest or is otherwise unavailable, another mediator shall be appointed by the court.

(2) The burden of disclosure rests on the mediator. After appropriate disclosure, the mediator may serve if both parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.

(I) Impartiality. Impartiality shall be defined as freedom from favoritism or bias in word, action and appearance.

(1) Impartiality implies a commitment to aid all parties, as opposed to an individual party, when moving toward an agreement. A mediator shall be impartial and shall advise all parties of any circumstances bearing on possible bias, prejudice or impartiality.

(2) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of the proposed options for settlement.

(3) A mediator shall withdraw from mediation if the mediator believes the mediator can no longer be impartial.

(4) A mediator shall not give or accept a gift, request, favor, loan, or any other item of value to or from a party, attorney or any other person involved and arising from the mediation process.

(J) Prohibitions. A mediator shall not provide counseling or therapy to any party during the mediation process nor shall a mediator who is an attorney represent either party, or give legal advice during or after the mediation.

The mediator shall not use the mediation process to solicit or encourage future professional services with either party.

(K) Self determination. A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties.

(1) A mediator shall not coerce or unfairly influence a party into a settlement agreement and shall not make a substantive decision for any party to a mediation process.

(2) A mediator shall not intentionally or knowingly misrepresent material facts or circumstances in the course of conducting a mediation.

(3) A mediator shall promote consideration of the interest of persons affected by actual or potential agreements who are not present during a mediation.

(4) The mediator shall promote mutual respect amongst the parties throughout the process.

(L) Professional Advice. A mediator shall only provide information the mediator is qualified by training or experience to provide.

(1) When a mediator believes a non represented party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.

(2) While a mediator may point out a possible outcome of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case is filed will resolve the dispute.

(M) Confidentiality. A mediator shall preserve and maintain the confidentiality of all mediation proceedings. Any communication made during the mediation which relates to the controversy mediated, whether made to the mediator or a party, or to any other person present at the mediation is confidential.

(1) A mediator shall keep confidential from the other parties any information obtained in an individual caucus unless the party to the caucus permits disclosure.

(2) All memoranda, work products and other materials contained in the case file of a mediator are confidential. The mediator shall render anonymous all identifying information when materials are used for research, training or statistical compilations.

(3) Confidential materials and communications are not subject to disclosure in any judicial or administrative proceedings except for any of the following:

- a. Where the parties to the mediation agree in writing to waive the confidentiality.
- b. When a subsequent action between the mediator and a party to the mediation for damages arises out of the mediation.
- c. Where there are threats of imminent violence to self or others.
- d. Where reporting is required by state law.

(N) Inadmissibility of Mediation Proceeding. Mediation proceedings under this rule are non-binding and shall not impair the right of the litigants to demand a trial. Any settlement reached at mediation shall be binding on the parties and entered as a judgment. Information, evidence or the admission of any party shall not be disclosed or used in any subsequent proceeding. Partial settlements may occur and are subject to these rules. Please see section O below for additional information on partial settlements.

(1) Statements made and documents prepared by a party, attorney, or other participant in the aid of such proceedings shall be privileged and shall not be disclosed to any court or construed for any purpose as an admission against interest.

(2) All mediation proceedings are deemed settlement conferences as prescribed by court rule and the Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding the fact that there has been a mediation proceeding.

(3) Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its use in a mediation proceeding under this rule.

(4) A mediator shall not be called as a witness in any subsequent proceeding relating to the parties' negotiation and participation except as set forth in Section N of this rule.

(O) Concluding Mediation. If an agreement is reached during the mediation process, the parties shall reduce their agreement to a written memoranda, and the memoranda shall be reviewed and signed by all parties before the mediation ends.

If a partial settlement is reached the parties shall reduce to a written memoranda the points on which agreement has been reached. The mediator shall indicate on the ADR Report that the matter has been partially resolved and those issues that shall remain unresolved shall return to the trial docket for resolution by the Court. As in the case of a full settlement, all mediation proceedings resulting in a partial settlement are deemed settlement conferences as prescribed by court rule and the Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding the fact that there has been a mediation proceeding. Evidence that would otherwise be

admissible at trial shall not be rendered inadmissible as a result of its use in a mediation proceeding under this rule resulting in a partial settlement.

If an agreement is not reached during the mediation process, the mediator shall notify the court that the mediation failed to resolve the issue in conflict.

(P) Immunity. The parties must recognize that the mediator will not be acting as legal advisor or legal representative. They must further recognize that, because the mediator is performing quasi-judicial functions and is performing under the auspices of the District Court, each such mediator has immunity from suit, and shall not be called as a witness in any subsequent proceeding relating to the parties' negotiations and participation except as set forth in Section N of this rule.

(Q) Implementation. The Office of Mediation and Arbitration in consultation with the Administrative Judge of the District Court shall be responsible for designating an implementation schedule for the expanded small claims mediation program.

(R) Removal from list of small claims mediators. Certification to mediate Small Claims Cases in the District Court confers no vested rights to the mediator, but is a conditional privilege that is revocable.

(1) At any time during the period of certification, upon notice and opportunity to be heard, a small claims mediator who is found to have engaged in conduct that reflects adversely on his/her impartiality or in the performance of his/her duties as a mediator, or is found to have persistently failed to carry out the duties of a mediator, or is found to have engaged in conduct prejudicial to the proper administration of justice, shall be removed from the list of certified small claims mediators.

(2) All complaints regarding a mediator's performance shall be forwarded to the Director of the NH Judicial Branch Office of Mediation and Arbitration who will inform the Administrative Judge of the District Court about the complaint. The Director of the OMA will investigate the complaint, and will make recommendations to address the complaint to the Administrative Judge of the District Court.

(3) All Small Claims mediators must inform the Judicial Branch Office of Mediation and Arbitration within 30 days of a change in circumstances such as a conviction of a felony or loss of professional license. Small Claims mediators who are convicted of a felony or misdemeanor involving moral turpitude, or who have a professional license revoked, shall be denied certification.

APPENDIX L

Adopt on a permanent basis Probate Court Rule 169, which was adopted on a temporary basis by Supreme Court order dated December 10, 2009, as follows (no changes are being proposed to the temporary rule now in effect):

Rule 169. FEES.

(I) ENTRY FEES:

(a) Original Entry of any Equity Action or Counterclaim (including set-off, recoupment, cross-claims and third-party claims)	\$ 185.00
(b) Petition File and Record Authenticated Copy of Will, Foreign Wills; Petition Estate Administration for estates with a gross value greater than \$25,000; Petition Administration of Person Not Heard From; Petition Guardian, Foreign Guardian or Conservator (RSA 464-A)	\$ 155.00
(c) Petition Termination of Parental Rights; Petition Involuntary Admission; Petition Guardian Minor Estate and Person and Estate (RSA 463); Petition Guardian of Incompetent Veteran (RSA 465)	\$ 125.00
(d) Petition Adoption, includes one certificate (no entry fee when accompanied by a Petition for termination); Motion to Reopen (estate administration); Motion to Bring Forward	\$ 95.00
(e) Petition Estate Administration for estates having a gross value of \$25,000 or less; Petition Change of Name (includes one certificate); Petition Guardian Minor Person (RSA 463)	\$ 65.00
(f) Marriage Waiver	\$ 60.00
(g) Motion Prove Will in Common and/or Solemn Form (administration required); Motion to Re-examine Will	\$ 125.00
(h) Petition Appoint Trustee	\$ 125.00

- (i) Motion Successor Trustee, Administrator, Executor, or Guardian of Estate and Person and Estate (RSA 463) (RSA 464-A); All Executor/Administrator Accounting for estates with a gross value greater than \$25,000; Trustees Accounting; Guardian/Conservator Accounting; Motion for Summary Administration \$ 65.00

- (j) Petition Change of Venue (includes authenticated copy fee); Motion Successor Guardian of Person (RSA 463) (RSA 464-A); Motion Sue on Bond; Motion Remove Fiduciary; Motion Fiduciary to Settle Account \$ 40.00

- (k) Landlord Tenant Entry pursuant to ancillary jurisdiction under RSA 547:3-1 \$ 100.00

- (l) Small Claim Entry and Counterclaim, \$5000 or less (including set-off, recoupment, cross-claims and third-party claims) pursuant to ancillary jurisdiction under RSA 547:3-1 \$ 72.00

- (m) Small Claim Transfer Fee pursuant to ancillary jurisdiction under RSA 547:3-1 \$ 108.00

- (n) Civil Writs of Summons and Counterclaims (including set-off, recoupment, cross-claims and third-party claims) pursuant to ancillary jurisdiction under RSA 547:3-1 \$ 130.00

- (o) Replevin pursuant to ancillary jurisdiction under RSA 547:3-1 \$ 120.00

- (p) Small Claim Entry and Counterclaim, \$5001 to \$7500 (including set-off, recoupment, cross-claims and third-party claims) pursuant to ancillary jurisdiction under RSA 547:3-1 \$ 127.00

- (q) Pursuant to RSA 490:26-a, II, the sum of \$25.00 shall be added to each civil filing fee set forth in subsections (a), (b), (c), (d), (e), (f), (h), (n), and (o) above.

(II) ENTRY FEES INCLUDE:

Preparation and issuance of Original Orders of Notice, Notice, Copies of Decrees, mailing costs, certificate to discharge surety.

(III) ENTRY FEES DO NOT INCLUDE:

Notice by publication. The Party or the Attorney for the Party from whom the notice is required shall pay this fee. The Register of each county shall determine the cost of publication. The request may require that payment be made directly to the publisher of the notice.

In-hand service. If service by a law enforcement officer is required, the Party or the Attorney for the Party from whom the notice is required shall pay the cost of service to the appropriate county sheriff's department.

Additional copies. If additional copies of any document, or additional certificates are requested beyond those included in normal processing as indicated above, the Party or the Attorney for the Party requesting the additional copies shall pay the costs in advance as indicated under "Certificates & Copies."

(IV) OTHER:

Defaults (RSA 548:5-a)	\$ 25.00/each occurrence
Citations/show cause (RSA 548:5-a and 550:2)	\$ 50.00/each occurrence
Duplicate Audio	\$ 25.00/each tape or CD
Application to Appear <i>Pro Hac Vice</i>	\$ 225.00
Ex Parte Petition for Attachment, Ex Parte Petition for Writ of Trustee Process	\$ 25.00
Motion for Periodic Payments	\$ 25.00
Reissued Orders of Notice	\$ 25.00
Writ of Execution	\$ 25.00

(V) CERTIFICATES & COPIES:

Certificates	\$ 5.00
Certification	\$ 5.00 plus copy fee
Photocopy of Will	\$ 1.00/page
All other copied material	\$.50/page
Original writ (form)	\$ 1.00
Authenticated Copy of Probate	\$ 25.00/each

Certificate of Judgment	\$ 10.00
Exemplification of Judgment	\$ 25.00

"Certificates & Copies" shall apply to individual requests for the above services, requests for additional certificates beyond those provided with the original entries and requests for additional copies beyond those provided with the original entry fees.

(VI) RECORDS RESEARCH FEES:

Records Research Fees. Record information must be requested in writing and include the individual's full name and, if available, the individual's date of birth. A fee of \$20 per name will be assessed for up to 5 names. Additional names will be assessed \$5 per name.

The Register may waive the records research fee when a request for record information is made by a member of the media consistent with the public's right to access court records under the New Hampshire Constitution.