

**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, December 12, 2007, 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 December 11, 2007, or may be submitted at the hearing on December 12, 2007. Comments may be e-mailed to the Committee on or before December 11, 2007, at:

[rulescomment@courts.state.nh.us](mailto: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. Death Penalty Appellate Rules**

[The Advisory Rules Committee notes that the State of New Hampshire proposed the following rule in a pleading filed with the New Hampshire Supreme Court "[w]ithout prejudice to the State's original objection detailing why no special appellate rules are required by this Court to review a death sentence." The Advisory Rules Committee is not at this time recommending the adoption of this or any specific rule. The public hearing on this proposal is being held to receive comments in the event the Court determines that rules are required. (Justice Linda Dalianis and Attorney Emily Rice did not participate in considering this proposal.)]

1. Adopt new Supreme Court Rule 11-A, regarding Death Penalty Appellate Procedure, as set forth in Appendix A.

### **II. Rules of Criminal Procedure**

1. Adopt new Rules of Criminal Procedure as set forth in Appendix B.

### **III. Family Division Rules**

1. Adopt, on a permanent basis, the Family Division Rules that are currently in effect, as set forth in Appendix C.

#### **IV. Attorney Discipline Office Procedures**

1. Amend Supreme Court Rule 37A(II)(a)(3), regarding procedure after receipt of grievances, as set forth in Appendix D.
2. Amend Supreme Court Rule 37A(IV), regarding retention and destruction of documents, as set forth in Appendix E.

#### **V. Judicial Conduct Committee**

1. Amend Supreme Court Rule 40, regarding expenses related to discipline enforcement, in one of the two alternative ways set forth in Appendix F.

#### **VI. Bar Admission Rules**

1. Amend Supreme Court Rule 42(4)(a), regarding pre-law school education requirements for bar applicants, as set forth in Appendix G.
2. Amend Supreme Court Rule 42(4)(c), regarding requirements for bar applicants who graduated from a law school in a foreign country, as set forth in Appendix H.
3. Amend Supreme Court Rule 42(5)(h), regarding confidentiality of bar admission petitions and questionnaires, as set forth in Appendix I.
4. Amend Supreme Court Rule 42(5)(j), regarding procedures before the character and fitness committee, as set forth in Appendix J.

#### **VII. Limited Bar Admission to Provide Pro Bono Services**

1. Adopt new Supreme Court Rule 42-D, regarding limited certificate of admission to provide pro bono services, as set forth in Appendix K.

New Hampshire Supreme Court  
Advisory Committee on Rules

By: Linda S. Dalianis, Chairperson  
and David S. Peck, Secretary

October 18, 2007

## **APPENDIX A**

Adopt new Supreme Court Rule 11-A, regarding Death Penalty  
Appellate Procedure, as follows:

### **RULE 11-A. Death Penalty Appellate Procedures**

(1) In all cases of capital murder where the death penalty is imposed, the judgment of conviction and the sentence of death shall be subject to automatic review by the supreme court within 60 days after certification by the sentencing court of the entire record unless time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules adopted by said court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

(2) The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

(3) *Supreme Court's Determination as to Sentence.*

With regard to the sentence the supreme court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

(b) Whether the evidence supports the jury's finding of an aggravating circumstance, as authorized by law; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(i) For the purpose of the court's review, the term "similar cases" shall mean cases in which the defendant was convicted under RSA 630:1 and such cases pending appeal before the court pursuant to this Rule, where the offense occurred after September 3, 1977.

(ii) The State and the defendant shall submit briefs identifying any cases claimed to be similar. The briefs shall set forth summaries of the crimes and the defendants of those similar cases as far as ascertainable by the record conviction, trial and sentencing hearing.

(4) In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence of death aside and remand the case for resentencing.

## **APPENDIX B**

Adopt new 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, 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 crime

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 an 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 or without a warrant, the complaint, the affidavit of probable cause and other documentation of the arrest shall be filed in a court of competent jurisdiction without unreasonable delay.

(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 issue. 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).

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 review of the bail commissioner's order 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 violations and misdemeanors.

(1) If the defendant is charged with a misdemeanor or violation, the court shall inform the defendant of the nature of the charges, the maximum possible penalty, 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 motion 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 motion 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 maximum possible penalty, the right to retain counsel, and the right to have an attorney appointed by the court 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.

(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).

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 their rights, 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 by mail.

(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; and

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

(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 3 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) *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.

(d) *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.

(e) *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.

(f) *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 a charged offense 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) 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(d) and (e) 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(f) 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 from a justice of the superior court relative thereto and shall be sworn in accordance with law.

(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. Disclosure of such testimony may be made only in accordance with Supreme Court rules.

(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 for by the provisions of 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 the attorney for

the state 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.

(d) 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 to seek an indictment and explaining why the extension is necessary.

#### Comments

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

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 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 maximum possible penalty, 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 maximum possible penalty, waives formal arraignment, and pleads not guilty to the charge. See Appendix for form.

(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 maximum penalty 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 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.

(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 jail 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

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 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 of incarceration, 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*

(A) If the defendant intends to rely upon an alibi or any other defense specified in the New Hampshire criminal code, the defendant shall within thirty calendar days after the entry of a plea of not guilty file a notice to this effect with the court and the prosecution as provided in Superior Court Rules 100 and 101.

(B) If a defendant in a case to which Superior Court Rule 100-A applies intends to offer evidence of prior sexual activity of the victim with a person other than the defendant, the defendant shall not less than forty-five calendar days prior to jury selection file a motion in conformance with the requirements of said rule.

(C) 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) *When Permitted.* 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 prosecution 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 prosecution 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 prosecution 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 prosecution in writing of such intention within thirty calendar days of the plea of not guilty and file a copy of such notice 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 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 and the specific grounds for the objection within ten days upon receiving the adversary's notice of intent to proffer the certificate. Whenever a notice of objection is filed, admissibility of the certificate shall be determined not later than ten days before the beginning of the trial. A proffered certificate shall be admitted in evidence unless it appears from the notice of objection and specific grounds for that objection that the composition, quality, or quantity of the substance submitted to the laboratory for analysis will be contested at trial. 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-!7-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).

## **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 disqualify himself 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, signed by the moving party stating the reasons therefore and stating that the opposing party does not desire a hearing on the motion, if such is the case.

(B) No motion for continuance shall be granted without a hearing unless approval of the opposing party is obtained. The moving party shall have the burden of obtaining such approval.

(C) Agreement of the parties shall constitute a waiver of hearing on a motion to continue; but notwithstanding agreement of the parties, the court shall exercise its sound discretion in granting such continuances.

(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.

(G) Grounds for a continuance shall be set forth in detail in the motion.

(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.* 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. 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. Except for good cause shown, motions to suppress shall be heard in advance of trial. 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) 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.

(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 receipt of the motion. Failure to object shall not, in and of itself, be ground for granting a motion.

#### Comments

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 and derives from current District Court Rules 1.8-A and 1.8-B.

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."

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 other 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 trial court may stay imposition of the sentence during the appeal.

(2) *Appeal to Superior Court.* 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.

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 postverdict 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) *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. However, 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 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, obey all laws, and be arrest-free;

(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;

(A) 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;

(B) 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;

(C) 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

(D) 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:

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

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

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

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

(v) Not be in the unsupervised company of minors of one or the other sex at any time;

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

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

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

(ix) 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). 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, the clerk of court shall give oral and written notice 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, 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 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 57 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. Supreme Court 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 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;
- (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. Where appropriate notice was given, 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 also reflected on the fact 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 *not proessed*, 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. The defendant shall also assert a justification as to why the relief sought should be granted. 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 defendant and the state may agree to waive a hearing on the petition, subject to approval by the court. Otherwise, a hearing shall be held at which the defendant must appear. At the hearing, 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 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 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 justice 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 justice, that justice 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 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.

## **APPENDIX C**

Adopt on a permanent basis the Family Division Rules, which were adopted on a temporary basis by supreme court order dated September 28, 2007, and amended by supreme court order dated October 9, 2007, as follows:

### **RULES OF THE FAMILY DIVISION OF THE STATE OF NEW HAMPSHIRE**

NOTE: The rules as published herein are subject to revisions promulgated from time to time by the New Hampshire Supreme Court and published in the New Hampshire Bar News. See Supreme Court Rules 1 and 51.

#### **GENERAL PROVISIONS**

These rules are established and relate to the Judicial Branch Family Division pursuant to RSA 490-D.

##### RULE

- 1.1 Scope and Application
- 1.2 Waiver of Rules
- 1.3 Waiver of Fees
- 1.4 Open to the Public
- 1.5 Courtroom Conduct
- 1.6 Recordings
- 1.7 Clerk's Office and Judge's Chambers
- 1.8 Case Transfer
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- 1.10 Recusal
- 1.11 Interpreters
- 1.12 Scheduling
- 1.13 Computation and Extension of Time
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- 1.15 Recommendations/*Ex Parte* Orders
- 1.16 Appearances
- 1.17 Special Appearances
- 1.18 Non-Lawyer Representation

- 1.19 Limited Representation by Attorneys
- 1.20 Withdrawal and New Representation
- 1.21 *Pro Hac Vice* Representation
- 1.22 Testimony of Attorney
- 1.23 Pleadings
- 1.24 Pleading Requirements
- 1.25 Discovery
- 1.26 Motions
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- 1.29 Regulation of Media and Other Coverage in the Courtroom
- 1.30 Access to Confidential Records – Fees and Notice
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### **DOMESTIC RELATIONS**

- 2.1 Scope and Applicability
- 2.2 Application of New Hampshire Rules of Evidence
- 2.3 Beginning of Legal Action
- 2.4 Notice of Legal Action
- 2.5 Response to Legal Action
- 2.6 Default and Dismissal
- 2.7 Person Asserting Interest in Legal Action
- 2.8 Presence of Children
- 2.9 Emergency and *Ex Parte* Relief
- 2.10 Child Impact Seminar
- 2.11 First Appearance
- 2.12 Case Manager Conference
- 2.13 Mediation
- 2.14 Alternative Dispute Resolution
- 2.15 Appointment of Guardian ad Litem
- 2.16 Financial Affidavits
- 2.17 Child Support Documents
- 2.18 Parenting Plans
- 2.19 Temporary Hearing
- 2.20 Scheduling Conference
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- 2.22 Uncontested Final Hearing for Divorce or Legal Separation
- 2.23 Settlements and Agreements
- 2.24 Contested Final Hearing
- 2.25 Vital Statistics Form
- 2.26 Decrees in Divorce or Legal Separation
- 2.27 Decrees in Parenting Petitions Actions
- 2.28 Effective Dates
- 2.29 Modification of Final Decree
- 2.30 Enforcement of Court Order

## **JUVENILE DELINQUENCY AND CHILDREN IN NEED OF SERVICES**

- 3.1 Scope
- 3.2 Multiple Representation of Juveniles
- 3.3 Discovery
- 3.4 Acknowledgment of Rights and Waiver of Counsel
- 3.5 Affirmative Defenses
- 3.6 Conditions of Release
- 3.7 Notice and Right to be Heard – Foster Parents, Pre-Adoptive Parents, and Relative Caregivers
- 3.8 Consultation with Juvenile Regarding Proposed Permanency Plan and/or Transition Plan
- 3.9 Protection of Children in Sex-Related Cases
- 3.10 Juvenile Drug Court

## **ABUSE AND NEGLECT**

- 4.1 Scope
- 4.2 Attendance of Non-Parties
- 4.3 Open Hearings
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- 4.5 Consultation with Child Regarding Proposed Permanency Plan and/or Transition Plan

## **GUARDIANSHIP OF MINORS**

- 5.1 Scope
- 5.2 Proper Filing
- 5.3 Notice
- 5.4 Attendance at Hearing
- 5.5 Reports of the Guardian
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- 5.7 Termination of Guardianship
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## **SURRENDERS OF PARENTAL RIGHTS**

- 6.1 Scope
- 6.2 In Lieu of Termination Hearing
- 6.3 Background Information
- 6.4 Notice
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- 6.6 Proper Signing of Surrender
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### **ADOPTIONS**

7.1 Scope

### **TERMINATION OF PARENTAL RIGHTS**

8.1 Scope

### **NAME CHANGE ACTIONS**

9.1 Scope

9.2 Separate Petition Required

9.3 Jurisdiction

9.4 Proper Filing

9.5 Criminal Background Check

9.6 Notice

9.7 Minor Child Name Change

9.8 Hearing Not Required

9.9 Presence at Hearing of Older Child

9.10 Certificate of Change of Name

### **DOMESTIC VIOLENCE**

10.1 Scope

### **NOMINATIONS, APPOINTMENTS AND REAPPOINTMENTS OF MARITAL MASTERS**

11.1 Original Nominations

11.2 Reappointment

# RULES OF THE FAMILY DIVISION OF THE STATE OF NEW HAMPSHIRE

## Section 1 -- GENERAL PROVISIONS

These rules are established and relate to the Judicial Branch Family Division pursuant to RSA 490-D.

- 1.1 SCOPE AND APPLICATION: These general provisions apply to all family division case types, unless otherwise stated. All references to “judge” include “marital master” unless otherwise stated.
- 1.2 WAIVER OF RULES: The family division may waive the application of any rule as justice may require, except where precluded by law.
- 1.3 WAIVER OF FEES: The family division may waive any fee for good cause shown.
- 1.4 OPEN TO THE PUBLIC: Hearings in the family division are open to the public unless otherwise specified by statute or order.
- 1.5 COURTROOM CONDUCT: Any person addressing the Court or questioning a witness shall stand, unless excused by the Court. No person shall approach the bench without permission of the Court.
- 1.6 RECORDINGS: All hearings held in the courtroom shall be recorded electronically. Recordings need not be monitored unless a party files a formal request for a record and the trial judge determines that the procedures for monitor-less recordings will not adequately protect the record. In making this determination the Court should consider the quality of the recording device, the general sound quality of the courtroom, the nature of the proceedings, and the likelihood of a transcription request.
- 1.7 CLERK’S OFFICE AND JUDGE’S CHAMBERS:
  - A. No petitioners, respondents, witnesses, police personnel, prosecutors, attorneys, or others 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 case is pending or to be heard except in open court or in the presence of all parties.

D. Any person who shall make any such statement to any judge, except in open court or in the presence of all parties, may be subject to contempt proceedings under RSA 495:2.

#### 1.8 CASE TRANSFER:

A. Any case filed in one family division location involving a family that has another active case filed at a different family division location may be transferred to a single location upon motion by any party or upon independent action of the family division. A party wishing to transfer such a case shall file a motion to transfer with the proposed family division location, with a copy to the original family division location. A transfer of the case will take place only upon mutual agreement of both family division locations.

B. Parties who have cases filed in both family division and non-family division locations may request that one case or the other be transferred so that both may be heard at the same location. Similarly, either Court may, on its own motion, recommend transfer. A transfer of the case will take place only upon mutual agreement of both Courts. The request to transfer shall be filed with the court from which the case will be transferred.

#### 1.9 MULTIPLE CASE FILINGS:

A. In the event that two petitions for divorce, parenting, legal separation, or other action are filed involving the same parties but at different family division locations, the court shall transfer one case, considering the second case filed to be a cross-petition in the same action. In deciding which location will retain jurisdiction, the Court will consider, among other factors, convenience of the parties and witnesses and the timing of the filing of the respective petitions.

B. In the event two such petitions are filed involving the same parties, one in a family division location and one in a superior court, upon motion of either party or upon independent action of the Court, and upon consultation of the Courts, and upon consideration of such factors as convenience to the parties and witnesses, the cases shall be heard in a single location.

1.10 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 shall be immediately brought to the attention of the court. Failure to raise a basis for recusal shall constitute a waiver 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.

1.11 INTERPRETERS: If an objection is raised, no person who has assisted in the preparation of a case shall act as an interpreter at the hearing.

1.12 SCHEDULING: Parties are expected to attend court prepared to select dates for future hearings.

1.13 COMPUTATION AND EXTENSION OF TIME: In computing any period of time, 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, as specified in RSA 288, in which case the period shall extend until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

1.14 GUARDIANS AD LITEM :

A. Certification by the New Hampshire Guardian ad Litem Board (referred to in this rule as the "Board") in superior, district and probate courts is encouraged to ensure adequate numbers of guardians ad litem who are qualified to serve in all categories of family division cases.

B. At a minimum, persons serving as guardians ad litem in the family division must be Board certified as follows:

- (1) For appointment in family division cases of divorce, legal separation, parental rights and responsibilities, guardians ad litem must be Board-certified in the superior court.
- (2) For appointment in family division cases of juvenile delinquency, children in need of services, and abuse and neglect, guardians ad litem must be Board certified in the district court.
- (3) For appointment in family division cases of termination of parental rights, guardianship of minors, or adoption, guardians ad litem must be Board-certified in the probate court.

- (4) For appointment in family division cases of domestic violence, guardians ad litem must be Board-certified in either superior or district court.

C. *Untimely-filed Guardian ad Litem Reports.*

- (1) 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 (10) days prior to the date the report is due, the GAL files a motion requesting an extension of time to file the report. See RSA 490:26-g.
- (2) The 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 Clerk shall make such report available to the public.

1.15 RECOMMENDATIONS/*EX PARTE* ORDERS: Recommendations of marital masters may be approved in person, by facsimile transmission, by telephone or electronically. Such recommendations may be approved by any judge of the state, regardless of whether they are specially designated as family division judges. Any judge of the state may issue emergency orders for family division cases in person, by telephone, by facsimile transmission or electronically. All such orders shall be transmitted to the appropriate family division location upon execution. See RSA 490-D:9.

1.16 APPEARANCES: A lawyer intending to represent a party must file a written Appearance.

1.17 SPECIAL APPEARANCES: Special Appearances shall be deemed general thirty (30) days after the return day of the action, unless a special plea or motion to dismiss is filed within that time.

1.18 NON-LAWYER REPRESENTATION:

A. No person who is not a lawyer will be permitted to appear, plead, prosecute or defend an action for any party, other than the person's own case, unless of good character and until there is on file with the court:

- (1) A power of attorney signed by the party for whom the person seeks to appear, witnessed and acknowledged before a Justice of the Peace or Notary Public, authorizing this person to appear in the particular action; and
- (2) An affidavit in which the person discloses:
  - (a) all misdemeanor and felony convictions (other than those in which a record of the conviction has been annulled by statute),
  - (b) all instances in which the person has been found by any court to have violated a court order or any provision of the rules of professional conduct applicable to non-lawyer representatives, and
  - (c) all prior proceedings in which the person has been permitted to appear, plead, prosecute or defend any action for any party, other than himself, in any court.

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.

#### 1.19 LIMITED REPRESENTATION BY ATTORNEYS:

A. *Limited Appearance.* 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 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 Family Division Rule 1.24 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 writ, petition, counterclaim, cross-claim or any amendment which is filed with the court, 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.

B. *Pleadings 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 Family Division Rule 1.24 despite the fact the pleading need not be signed by the attorney.

C. *Automatic Termination of Limited Representation.* Any limited representation appearance filed by an attorney, as authorized under Professional Conduct Rule 1.2(f) and Family Division Rule 1.19, 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 Family Division Rule 1.20.

1.20 WITHDRAWAL AND NEW REPRESENTATION: Other than limited representation by attorneys as allowed by Family Division Rule 1.19, and Professional Conduct Rule 1.2(f), no attorney shall be permitted to withdraw that attorney's appearance in a case after the case has been scheduled 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 shall clearly set forth the reason therefor and contain a certification that copies have been sent to all other counsel or opposing parties, if appearing pro se, and to counsel's client at the client's last known address, which shall be fully set forth within the body of the motion. 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 the financial obligations to pay for the attorney's services. Upon receipt of a motion to withdraw, a hearing may be scheduled. Notice by mail shall be sent to all counsel of record, or parties if unrepresented by counsel, and to the client of withdrawing counsel, at the client's last known address. If withdrawing counsel's client fails to appear at said hearing, the Court may, in its discretion, and without further notice to said client, order the hearing date continued or make such other order as justice may require.

1.21 *PRO HAC VICE* REPRESENTATION:

A. An attorney who is not a member of the Bar of this State (a "Nonmember Attorney") who wishes to participate in any hearing must file an application to appear *pro hac vice*. The application 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:
  - (a) has been denied admission *pro hac vice* in this State;
  - (b) had admission *pro hac vice* revoked in this State; or
  - (c) 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 family division, 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 (the "In-State Attorney") who will be associated with the applicant and present at any hearing. However, presence of New Hampshire Bar member may be waived by the Court.

B. The Court has discretion 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.

C. 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.

D. 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.

1.22 TESTIMONY OF ATTORNEY: No attorney shall be compelled to testify in any case unless provided with five (5) days' written notice.

1.23 PLEADINGS:

A. Copies of all pleadings filed and communications addressed to the court shall be provided to all other counsel or to the opposing party if appearing pro se. When an attorney has filed a limited appearance under Family Division Rule 1.19 A, 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 Family Division Rule 1.19 C, no further service need be made upon that attorney. All such pleadings and communications shall contain a statement of compliance with this rule.

B. 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 with 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.

#### 1.24 PLEADING REQUIREMENTS:

A. All pleadings and the appearance and withdrawal of counsel shall be signed by the attorney of record or an associate or by a pro se party. Names, addresses, New Hampshire Bar identification numbers, telephone numbers, and to the extent available electronic mail addresses, shall be typed or stamped beneath all signatures on papers to be filed or served. No attorney or pro se party will be heard until an appearance is properly filed.

B. The signature of an attorney or pro se party to a pleading constitutes a certificate that the pleading has been read by the person signing the document; that to the best of the person's knowledge, information and belief there is good ground to support it; and that it is not filed for delay. If a pleading is not signed, or is signed with an intent to defeat this rule, it may be stricken and the action may proceed as though the pleading had not been filed.

C. If either party changes attorneys during the pendency of the action, the name of the new attorney shall be entered on the docket. Whenever the attorney of a party withdraws an appearance, and no other appearance is entered, the Clerk 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.

#### 1.25 DISCOVERY:

A. *General.* Unless specified in another section of these rules, these discovery rules apply in all family division case types. The Court, in its discretion, may limit or expand the scope of discovery in any case as justice requires.

B. *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; permission to enter upon land or other property for inspection and other purposes; physical or mental examinations; and requests for admission. Unless the Court orders otherwise, or unless otherwise provided in these rules, the frequency of use of these methods is not limited.

C. *Scope of Discovery.* Unless otherwise ordered, parties may obtain discovery regarding any matter, not privileged, which 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, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds 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.

D. *Expert Witnesses.*

- (1) Within thirty (30) days of a request by the opposing party, or in accordance with an order of the Court, a party shall be required to supply a Disclosure of Expert Witness(es) as defined under Rule 702 of the Rules of Evidence, which document shall:
  - (a) identify each person, including any party, whom the party expects to call as an expert witness at trial;
  - (b) provide a brief summary of the expert's education and experience relevant to the expert's area of expertise;
  - (c) state the subject matter on which the expert is expected to testify; and
  - (d) 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.

The party shall attach to the disclosure a copy of any expert report relating to such expert.

- (2) A party may discover facts known or opinions held by an expert, who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
- (3) Unless manifest injustice would result, (i) the Court shall require that the party seeking discovery pay the expert a

reasonable fee for time spent in responding to discovery under subdivisions 1.25 D (1) and 1.25 D (2) of this rule, and (ii) with respect to discovery obtained under subdivision 1.25 (D) (2), the Court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

E. *Written Interrogatories.*

(1) *General.* Any party may serve written interrogatories upon any other party, by mail or delivery by hand.

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.

Interrogatories may include any topic not subject to privilege. Furthermore, it is not grounds for refusal to answer a question that the testimony would be inadmissible at the hearing, if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege.

(2) *Notice.* The party requesting the interrogatories shall provide the other party with notice of the obligation to answer the interrogatories within thirty (30) 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 shall be as follows:

**Notice: These interrogatories are propounded in accordance with Family Division Rule 1.25. 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 attorney who served them upon you. If you object to any question, you must note your objection and state the reason for your objection. 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.**

Interrogatories may be served at any time after service of the action.

(3) *Copies.* The party serving the interrogatories shall furnish the answering party with an original and two copies. The interrogatories shall be arranged so that after each separate question space will be provided to enable the answering party to respond.

(4) *Answers.* 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.

Each question shall be answered separately, fully and responsively, such that the final document shall have each interrogatory immediately followed by its answer.

The party served with interrogatories shall provide the original and one copy of the answers, by mail or delivery in hand, to the party requesting them within thirty (30) days of receipt of the interrogatories. If, in any interrogatory, a copy of a paper or document is requested, only one copy need be included with the answers. If the copy is a report of an expert witness or a treating physician, it shall be the exact copy of the entire report or reports rendered by him, and the answering party shall certify that the existence of other reports of that expert, either written or oral, are unknown to the answering party and, if such become later known or available, the answering party shall serve them promptly on the requesting party.

(5) *Extension of Deadlines.* The parties may extend interrogatory deadlines by written agreement, provided any such extension is not inconsistent with discovery orders of the Court.

(6) *Objections, Motions to Compel, Motions to Strike.* If a party objects to any questions, that party may either answer the question by stating it is improper or may, within twenty (20) days after the service of interrogatories, move to strike any question, setting out the specific grounds of objection. The answering party shall make timely answer, however, to all questions to which that party does not object. All other interrogatories shall nonetheless be answered within the thirty days allowed, or within such time as the Court directs.

The party requesting the interrogatories who receives a response that one or more questions are improper, may within twenty (20) days, move to compel answer(s) to the question(s), and, if the motion is granted, the question(s) shall be answered within such time as the Court directs.

If a party, who is served with interrogatories requesting copies of

papers, objects to furnishing them, that party may either state with specificity the reasons for non-compliance or invite the party seeking the copies to inspect and copy the papers at a designated time and place. The party seeking a copy of a paper which is not provided may within twenty (20) days of receipt of the answers file a motion seeking compliance.

Motions to strike interrogatories or to compel more specific answers shall include a statement summarizing the nature of the action and shall include the text of the questions and answers, if any, objected to.

When objections are made to interrogatories or requests for admissions, before there is any hearing regarding the objections, counsel for the parties shall attempt in good faith to settle the objections. 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. If, following such conference, counsel are unable to settle objections, counsel for the objecting party shall notify the Clerk and request a hearing.

Where an objection to an interrogatory has been withdrawn or has been overruled by the Court, the answer to the interrogatory shall be provided within ten (10) days.

(7) *Frivolous Motions.* 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.

(8) *Limitations on Number of Interrogatories.* A party may file more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed fifty (50), unless 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 it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

The other party shall have the same privileges in answering written interrogatories as the deponent in the taking of a deposition.

(9) *Supplementation of Responses.* 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 Family Division Rule 1.25 I.

(10) *Use of Interrogatories.* Interrogatories and answers may be used at the hearing to the same extent as depositions. If less than all of the interrogatories and answers are marked or read into evidence by a party, an adverse party may read into evidence any other of the interrogatories and answers or parts necessary for a fair understanding of the parts read into evidence.

Neither the interrogatories nor the answers need be filed with the Clerk unless the Court so directs.

(11) *Failure to Answer.* If the party, upon whom interrogatories have been served, fails to answer the interrogatories within thirty (30) days, unless written objection to the answering of the interrogatories is filed within that period, such 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 ten (10) days of receiving notice and moves to strike the conditional default. If the defaulted party fails to move to strike the conditional default within ten (10) days of receiving notice, the adverse party may move to have a default judgment entered and damages assessed. 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, upon its own motion, order a hearing.

#### F. *Depositions.*

Notice shall be provided to any person whose deposition is requested. Twenty (20) days notice is considered reasonable in all cases, unless otherwise ordered by the Court.

Every notice of a deposition to be taken within the State shall contain the name of the stenographer/professional proposed to record the testimony.

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 attorney of record. Notices given pursuant to this rule may be given by mail or by service in hand.

The questions and answers shall be taken in shorthand or other form of verbatim reporting approved by the Court and transcribed by a competent stenographer/professional agreed upon by the parties or their attorneys. In the absence of such agreement, the stenographer/professional 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/professional recording the testimony.

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.

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.

The signature of a person outside the State, acting as an officer legally empowered to take depositions or affidavits, with an appropriate 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 this person's authority.

The person being deposed 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.

If any person being deposed refuses to answer any question asked in the deposition, the party asking the question may request an order of the Court 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 person deposed and the party or attorney advising the refusal, or either of them, to pay the examining or requesting party the reasonable expenses incurred in obtaining the order, including reasonable attorneys 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 attorneys fees.

G. *Use of Videotape Depositions.*

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 person deposed 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.

If any problem arises as to the admissibility or inadmissibility of evidence, this should be handled in the same manner as written interrogatories.

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 pretrial conference with a transcript of the videotape proceedings that is sufficient to enable the Court to act upon the objection before the hearing, or the objection shall be deemed waived.

H. *Limits on Discovery.* 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:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the Court;

- (6) that a deposition after being sealed be opened only by order of the Court;
- (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

If the 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.

I. *Supplementation of Responses.* A party who has responded to a request for discovery with a response that was complete when made is under a continuing duty to supplement responses to include information thereafter acquired, as follows:

- (1) A party is under a duty to supplement responses concerning any question regarding the identity:
  - (a) and location of persons having knowledge of discoverable matters; and
  - (b) of each person expected to be called as an expert witness, the subject matter on which the expert is expected to testify, and the substance of the testimony.
- (2) A party is under a duty to amend a prior response if it is known that the response:
  - (a) was incorrect when made; or
  - (b) though correct when made, is no longer true.

J. *Discovery Deadlines.* The discovery dates established at a scheduling conference or other hearing are Court orders and may not be extended by the parties without written permission of the Court.

K. *Abuse of Discovery.* The Court, in its discretion, may sanction any party including through the use of fees and costs, for abusing the discovery process.

## 1.26 MOTIONS:

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

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

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

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

E. *Motions to Reconsider*: A motion for reconsideration or other post-decision relief shall be filed within ten (10) days of the date on the Clerk's written notice of the order or decision, which shall be mailed by the Clerk on the date of the notice. The motion shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present; but the motion shall not exceed ten (10) pages. A hearing on the motion shall not be permitted except by order of the Court.

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

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

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

## 1.27 CONTINUANCES:

A. Except for the initial hearing in a case or for an emergency hearing, hearing dates are generally selected by agreement of the parties and the court. Therefore, motions to continue will usually be denied, except for

good cause shown. The Court may condition the granting of a motion to continue on a requirement that the moving party obtain a date and time agreeable to all other parties and the court.

B. For hearings scheduled by the court without input from the parties, motions to continue shall be filed within ten (10) days from the date of the mailing of the notice of a hearing.

C. Any motion to continue filed by counsel shall contain a certification that the client has been notified of the reasons for the continuance, has assented to the motion, and has been forwarded a copy of the motion.

D. A motion to continue based upon the unavailability of a material witness must be supported by an affidavit containing the name of the material witness, the anticipated content of the testimony, what has been done to procure the attendance of the witness, including the date the request was initially made of the witness to testify, and a statement that the adverse party will not admit to the facts without the presence of the witness. The same rule shall apply with regard to the unavailability of a material document or other evidence.

E. *Priority of Scheduling.* Where a hearing has been scheduled in one case prior to the scheduling of another hearing, the case scheduled first shall take priority over the subsequently scheduled cases, except as follows:

- (1) to accommodate a subsequently scheduled case involving a jury trial in state or federal court, or argument before the New Hampshire Supreme Court or any federal appellate court;
- (2) to comply with the hearing requirements of RSA 169-B, C, or D;
- (3) to comply with the hearing requirements of RSA 173-B; or
- (4) if unusual circumstances cause the respective Courts to agree that an order of precedence other than the above shall take place.

#### 1.28 OFFERS OF PROOF:

A. When making an offer of proof, an attorney represents to the Court that the witness or document which is the subject of the offer has been examined by the attorney and the attorney reasonably believes, taking into account all that is known about the case, that the evidence is not false, is

admissible through a witness who could testify under oath to establish the point for which it is offered, and is not offered for a frivolous purpose. In an *ex parte* proceeding, the attorney also represents that any offer of proof has been accompanied by a sworn statement of all material facts known to the attorney which will enable the Court to make an informed decision of the issues presented.

B. When the Court exercises discretion to receive evidence by offers of proof, the following procedure shall be employed:

- (1) an offer of proof as to the testimony of a witness shall be received only if that witness is in the courtroom at the time of the offer, and that witness would testify to the same information under oath if asked;
- (2) any witness whose testimony is presented by offer of proof may be cross-examined by the opposing party, subject to the discretion of the Court; and
- (3) where credibility is challenged, or for any purpose in the Court's discretion, the Court may question the witness or require the witness' proof be presented from the witness stand.

C. If evidence could have been accepted by the Court without the necessity of testimony under oath from a witness for its introduction, for example when the parties have agreed, that evidence may also be received by offer of proof without the presence of the witness in court.

D. Requests for restraining orders against any person should not be presented by offers of proof.

#### 1.29 REGULATION OF MEDIA AND OTHER COVERAGE IN THE COURTROOM:

A. The Court should generally 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 procedures 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 Clerk 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 Clerk, to determine which news outlet will serve as the “pool.” Disputes about pool coverage will not 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 (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 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 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 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 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) 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.
- (7) All reporters and photographers will abide by the directions of the court officers at all times.
- (8) Broadcast or print interviews will not be permitted inside the courtroom before or after a proceeding.
- (9) Photographers, videographers and technical support staff covering a proceeding shall avoid activity that might distract participants or impair the dignity of the proceedings.
- (10) Appropriate dress is required.

#### Comment

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 consequences. 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.

1.30 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:

- A. A financial affidavit filed pursuant to Family Division Rule 2.16 and kept confidential under RSA 458:15-b, I, or RSA 461-A:3.
- B. 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.

1.31 APPEALS TO THE SUPREME COURT:

A. When a question of law is to be transferred after a decision on the merits, all appeals shall be deemed waived and final judgment shall be entered on the thirty-first (31<sup>st</sup>) day from the date on the Clerk's written notice that the Court has made the decision on the merits, unless the party aggrieved enters a notice of appeal in the Supreme Court within thirty days from the date on the Clerk's written notice of the Court's decision that aggrieves the party, pursuant to Supreme Court Rule 7, and mails the number of copies provided for by the rules of the Supreme Court to its Clerk. 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).

B. Whenever any question of law is to be transferred by interlocutory appeal from a ruling or by interlocutory transfer without ruling, counsel shall prepare and file with the Clerk of the family division 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 its Clerk.

## Section 2 -- DOMESTIC RELATIONS

2.1 SCOPE AND APPLICABILITY: The family division has jurisdiction over all divorces, parenting actions, legal separations, annulments, child support actions, separate maintenance actions, paternity, legitimation, registration of foreign judgments and decrees, uniform interstate family support, administrative support violations, and any actions to change or enforce any of these orders once they become final. These rules apply to divorce, legal separation, and parenting actions, and serve as guidance for the other case types listed above.

2.2 APPLICATION OF NEW HAMPSHIRE RULES OF EVIDENCE: The New Hampshire Rules of Evidence do not apply to the actions listed above. However, the Court in its discretion may utilize the New Hampshire Rules of Evidence to enhance the predictable, orderly, fair, and reliable presentation of evidence.

2.3 BEGINNING OF LEGAL ACTION:

A. *Petition.* All domestic relations actions begin with the filing of a petition. A petition may be jointly filed by both parties.

B. *Where to File Petition.* New petitions should be filed in the county in which the petitioner lives. If there are multiple family division locations within a county, the petition is properly filed in the family division location for the town in which the petitioner resides, as outlined in RSA 490-D:4. If both parties reside within the same county, the petition may be filed at the family division location for the town of residence of either the petitioner or respondent.

C. *Petition Caption.* Domestic relations actions shall be entitled “In the matter of ...and...”, stating the names of the parties. The first name shall be of the petitioner and the second shall be of the respondent.

D. *Petition Type.* The subject matter of the petition, such as petition for divorce, shall be stated in the title of the petition.

E. *Petition Contents.* Petitions filed under these rules shall contain all information required on the petition forms posted on the judicial branch website at [www.courts.state.nh.us](http://www.courts.state.nh.us) and available at any family division location.

F. *Proper Filing.* An action under this section is considered properly filed upon the court’s receipt of a completed individual or joint petition, a personal data sheet, and the correct filing fee.

G. *Personal Data Sheet.* At the time of any initial filing, the filing party shall, and the responding party may, file a completed personal data sheet. Should a party become aware of any change in addresses, telephone numbers, or employment during the pendency of a case or of any outstanding support order, that party shall notify the court of such change. Access to information contained in the personal data sheet shall be restricted to court personnel, the Office of Child Support, the court-appointed mediator, the guardian ad litem, the parties, and counsel unless a party has requested on the data sheet that it not be disclosed to the other party.

H. *Adultery/Co-Respondent.* All petitions and cross petitions for divorce or legal separation alleging adultery shall contain the name and address of the person with whom the party is accused of committing adultery, if known, and, if not, a statement to that effect.

#### 2.4 NOTICE OF LEGAL ACTION:

A. *Joint Petitions.* Because joint petitions are signed and filed by both parties, no further notice or service is required.

B. *Individual Petitions.* Upon receipt of an individual petition, the court shall attach to the petition a Notice to Respondent (formerly orders of notice) and an appearance form.

(1) The court forwards a notice to the respondent, indicating that the petition has been filed and that the respondent or the respondent's attorney may accept service of the petition at the court within ten (10) days. A respondent's attorney, who has filed an appearance, may request and accept service by mail provided the attorney files a receipt of service signed by the respondent within five (5) business days of the attorney's receipt of the petition.

(2) If neither the respondent nor the attorney for the respondent accepts service of the petition as set forth above, the petition shall be forwarded to the petitioner for service on the respondent either by certified mail, restricted delivery, signed by the addressee only, or by sheriff; or, if the respondent is out of state, by an officer authorized to make service in the state where the respondent lives. In all instances, the petitioner shall file the return receipt or the return of sheriff/officer service as proof of service.

C. If the above methods of service are neither feasible nor successful, the Court, upon motion of the petitioner, will consider alternate methods of service.

D. *Notice to Co-Respondent.* Any person not a party to the proceedings who is accused of adultery shall be served with an attested copy of the petition with the orders of notice. Such service is not required if the co-respondent resides outside the state, in which case notice by regular US mail is acceptable.

## 2.5 RESPONSE TO LEGAL ACTION:

A. *Appearance:* Any party intending to participate in the case must file a written Appearance within fifteen (15) days of receipt of the Notice to Respondent.

B. *Responsive Pleadings.* No responsive pleading is required of the respondent, unless alimony or other affirmative relief is requested; provided, however, that the court may, as justice may require, allow a respondent to seek alimony or other affirmative relief despite the failure to file a timely responsive pleading. If the respondent chooses to file a response, with or without a cross-petition, it shall be filed in the timeframes set forth in the Clerk's notice. A cross-petition need not be served in hand or by sheriff, but shall contain a certificate that the respondent has delivered a copy of the cross-petition to the petitioner by pre-paid mail.

C. *Notice to Co-Respondent.* Any person not a party to the proceedings who is accused of adultery shall be served with an attested copy of the cross-petition and orders of notice. Such service is not required if the co-respondent resides outside the state, in which case notice by regular US mail is acceptable.

## 2.6 DEFAULT AND DISMISSAL:

A. *Default.* If the court has not received a timely appearance or response from the respondent, and the petitioner has requested the entry of a default, a default hearing shall be scheduled not less than thirty (30) days from the petitioner's written request, provided the petitioner has filed a military affidavit, vital statistics form, non-cohabitation affidavit, affidavit of impossibility, uniform support order and child support guideline worksheet if child support is to be ordered, proposed decree, parenting plan, and a current financial affidavit, together with a certificate that copies of each of the foregoing items have been forwarded to the other party. If a non-cohabitation affidavit is not filed with the court as required by this rule, the hearing may proceed following at least fourteen (14) days' notice from the court to the other party that the matter has been scheduled for hearing. After a default, a motion to substantively amend the proposed orders will only be considered by the Court after service upon the other party.

B. *Dismissal.* The Court may dismiss a petition without prejudice due to insufficiency of allegations or service. The order of dismissal shall state the reason for the dismissal.

## 2.7 PERSON ASSERTING INTEREST IN LEGAL ACTION:

A. *Asserted by a Person who is not a Party to the Case.* Any person asserting an interest in the proceedings may seek to intervene as a party in the action by filing a motion to intervene. The motion must include a brief statement concerning the person's relationship to the subject matter of the case and reason for seeking intervention.

B. *Asserted by a Party to the Case.* Any party to an action may file a motion to join another person/entity to the action by setting forth a brief statement concerning that person or entity's relationship to the subject matter of the case and reason for including that person to the action. If the Court joins the person or entity as a party to the case, that person may be ordered by the Court to appear in the case.

2.8 PRESENCE OF CHILDREN: A child shall not be brought to court as a witness, or to attend a hearing, or be involved in depositions without prior order of the Court allowing that child's participation. To obtain permission of the Court for the presence of a child in such a proceeding, good cause must be shown.

## 2.9 EMERGENCY AND *EX PARTE* RELIEF:

A. *Emergency.* If either party believes a hearing is needed prior to participation in mediation, that party shall file a request for an immediate hearing, identifying the emergency and the issues to be addressed at the hearing.

B. *Ex Parte.* Subject to the provisions of RSA 458:16 and RSA 461-A:9, an emergency order may be granted without written or oral notice to the other party or attorney only if it clearly appears to the Court from specific facts shown by sworn statement or by the verified petition that immediate and irreparable injury, loss, or damage shall result to the applicant, the children, or the marital estate before the other party or attorney can be heard. If the other party is represented or has filed an appearance, normally no relief will be granted without notice to the other party and an opportunity to be heard. An *ex parte* order may be requested by motion of the petitioner/attorney prior to service of the petition. A hearing shall be scheduled within thirty (30) days of the issuance of an *ex parte* order. In addition, the party against whom the orders are issued may file a written request with the court for a hearing on such orders, which hearing shall be held no later than five (5) days after the request is received.

2.10 CHILD IMPACT SEMINAR: In any action involving married or unmarried parents of minor children, the parties shall attend the child impact seminar as required by RSA 458-D as soon as possible after the commencement of the action but no later than forty-five (45) days after service of the petition upon the respondent. Parties shall not be required to attend the same seminar if there is an RSA 173-B order in effect. No permanent agreement will be approved until both parties have attended the child impact seminar, except by order of the Court for good cause shown. The Court, in its discretion, may schedule a show cause hearing, and issue sanctions, for any party failing to comply with the requirements of RSA 458-D.

2.11 FIRST APPEARANCE: A First Appearance will be held within 30 days after service has been accomplished in divorces and legal separations in which there are minor children and in parenting petition cases. Attendance by both parents is required, and is expected at the same First Appearance, unless good cause exists to allow separate attendance. If a protective order pertaining to the parents is in effect, each parent shall attend a separate First Appearance. Attendance by attorneys is optional. At First Appearance, a judge will give information about the court process and mediation. Before the parties leave First Appearance, the court will schedule mediation or the next court event.

2.12 CASE MANAGER CONFERENCE: In any case in which there is at least one self-represented party, the court may schedule a case manager conference. The case manager will explain court documents that will be required depending on the type of action. If the parties are in agreement, the case manager may assist the parties in putting their agreement into writing on court forms.

2.13 MEDIATION:

A. In divorce actions and legal separation actions in which there are minor children, and in parenting petition cases, parties shall be ordered to participate in mediation unless the Court finds that mediation would not be appropriate due to factor(s) listed in RSA 461-A:7.

B. Participation in mediation may be ordered in new divorces and legal separations without minor children and in those divorce, legal separation, or parenting cases in which final orders have been issued if those cases return to court for further Court orders.

C. If there is a finding of domestic violence as defined in RSA 173-B:1, and if the parties agree to mediate despite the existence of the protective order, all mediation sessions shall occur at the courthouse.

D. The court will be involved in scheduling the initial mediation session in each case. Thereafter, mediation will be scheduled through the

parties and the mediator. Parties must cooperate with the mediator to establish the next mediation date at the end of each mediation session.

E. Attorneys may attend mediation sessions with their clients, provided the mediator is able to establish a balanced opportunity for both parties to participate in the mediation.

F. Mediation will be ordered only with mediators certified pursuant to RSA 328-C who have contracted with the Judicial Branch. However, parties may arrange private mediation with a mediator of their choice, regardless of whether these mediators have contracts with the judicial branch.

G. Payment of mediator fees shall be pursuant to Supreme Court Rule 48-B.

2.14 ALTERNATIVE DISPUTE RESOLUTION: At any time prior to the final hearing, the Court may order the parties to engage in mediation if deemed appropriate by the Court, or to engage in other forms of alternative dispute resolution if agreed upon by the parties.

2.15 APPOINTMENT OF GUARDIAN AD LITEM : A guardian ad litem may be appointed at the request of either party or upon order of the Court. Any guardian ad litem appointed under this rule shall be certified by the Guardian ad Litem Certification Board. The Court shall apportion payment between the parties. Written reports of the guardian ad litem shall be kept in an envelope marked confidential within the court file, and shall only be disclosed to parties or attorneys to the action. Absent good cause shown, a guardian ad litem shall not be appointed while the parties are engaged in mediation.

2.16 FINANCIAL AFFIDAVITS:

A. In all cases in which support and/or division of property (temporary, permanent, or otherwise) and/or payment of the guardian ad litem or mediator are in any way involved, each party shall file with the court and with the other party a typewritten or legibly handwritten financial affidavit which contains the information requested on the family division financial affidavit. Such affidavits shall be exchanged with the other party and filed with the court seven (7) days prior to any hearing, unless excused by the Court. If there has been no change in financial circumstances since the filing of the previous affidavit, a party may file an Affidavit of No Change. If, by the time of the hearing, there is any change in financial circumstances, a new financial affidavit must be filed and exchanged as soon as the change is known.

B. Each party shall indicate all sources and amounts of income and expenses, and shall disclose the identification and value of each asset of the party, whether owned individually, jointly, or in any other form. If the exact

value of an asset is not known, the party shall disclose its identification and approximate value, indicating that the value is an estimate only. The parties shall be under a continuing order to make full and complete disclosure to each other of the identification and value of all assets of the parties, and any changes to the identification or value of the assets during the pendency of the case. Intentional failure to disclose any asset at the time of the scheduling conference, or at any time thereafter when an asset is discovered, shall be considered a violation of this rule subject to appropriate action by the Court, including the award of that asset to the other party.

C. Financial affidavits filed in divorce, legal separation, annulment, or parenting petition cases shall be confidential to non-parties. Access to such financial affidavits shall be pursuant to Family Division Rule 1.30.

#### 2.17 CHILD SUPPORT DOCUMENTS:

The family division Uniform Support Order, Uniform Support Order-Standing Order, and Instructions for Completion of the Uniform Support Order shall be used in all cases involving dependent children in which child support may be ordered. These forms should not be abbreviated and no provision shall be deleted. If a particular provision does not apply, then the words “not applicable” should be used.

In cases in which the parties are in agreement on support issues, only one child support guideline worksheet and one uniform support order shall be filed. If the parties are not in agreement, each party shall file a child support guideline worksheet and a proposed uniform support order.

In cases involving child support where the obligor has failed to file a financial affidavit or otherwise disclose the obligor’s income, the obligee should make a reasonable estimate of the obligor’s income, use that amount in calculating support on the child support guideline worksheet, and include a statement to that effect in the proposed uniform support order.

Stipulations, agreements, or proposed decrees must state whether the child support award is in accordance with the child support guidelines and, if not, explain the proposed deviation.

#### 2.18 PARENTING PLANS:

##### A. Requirements:

(1) Parenting plans shall be filed in all divorce and legal separation actions where there are minor children, and in all parenting actions. Parents shall work together to agree upon as many provisions of the parenting plan as possible. Exceptions to the requirement that

parents work together in parenting plans include cases where there is evidence of domestic violence, child abuse or neglect, or as otherwise excused by the Court.

(2) For all temporary and final hearings requiring parenting plans, the parties are expected to file a joint parenting plan, which includes all provisions with which they are in agreement. The parties shall file separate proposed parenting plans for those parenting items which are in dispute. Additionally, parenting plans must be filed in all actions to modify final parenting plans or prior final parenting-related orders issued in divorce, legal separation, or parenting actions.

(3) Parties may use the parenting plan form provided by the court or may create their own parenting plan. However, parties who create their own parenting plans must adhere to the standard order of lettered paragraphs set forth in these rules.

(4) All parenting plans required by this rule shall be filed as separate documents, signed by one or more parties.

B. *Standard Order of Paragraphs for Parenting Plan.*

(1) All parenting plans shall be set forth in the following order of paragraphs.

- (a) Decision-Making Responsibility
  - (i) Major Decisions
  - (ii) Day-to-Day Decisions
  - (iii) Other
  
- (b) Residential Responsibility & Parenting Schedule
  - (i) Routine Schedule
  - (ii) Holiday and Birthday Planning
  - (iii) Three-day weekends
  - (iv) Vacation Schedule
  - (v) Supervised Parenting Time
  - (vi) Other Parental Responsibilities
  
- (c) Legal Residence of a Child for School Attendance
  
- (d) Transportation and Exchange of the Child(ren)
  
- (e) Information Sharing and Access, Including Telephone and Electronic Access
  - (i) Parent-Child Telephone Contact

- (ii) Parent-Child Written Communication
- (f) Relocation of a Residence of a Child
- (g) Procedure for Review and Adjustment of Parenting Plan
- (h) Method(s) for Resolving Disputes
- (i) Other Parenting Agreements Attached

(2) For any of the above, "N/A" may be used to denote paragraphs that do not apply to a particular situation.

#### 2.19 TEMPORARY HEARING:

A. Subject to the rules regarding mediation, the Court may schedule a temporary hearing if one is requested by either party. The notice of this hearing shall indicate the amount of time allotted for the hearing, generally thirty (30) minutes. Temporary hearings shall be conducted by offers of proof. Parties shall comply with the provisions of Family Division Rule 1.28 pertaining to Offers of Proof.

B. Motions for extended or evidentiary temporary hearings shall be heard at the time specified in the notice of hearing, unless ruled upon in advance by the Court.

C. If a temporary hearing is scheduled, a scheduling conference shall generally also be held at the same date and time. In the event a temporary agreement is reached, the parties must still appear for the scheduling conference.

D. Seven (7) days prior to the temporary hearing, the parties shall file and exchange financial affidavits and proposed temporary decrees; and if minor children are involved, agreed upon and proposed parenting plans, uniform support orders, and child support worksheets.

E. No agreement for temporary orders shall be approved without the current financial affidavit of each party, or an affidavit of impossibility, having been filed.

2.20 SCHEDULING CONFERENCE: A scheduling conference may be scheduled if the other party has filed an appearance and the matter has not been settled. At the scheduling conference, the Court may (1) refer the parties to mediation, (2) appoint a guardian ad litem for the child(ren), (3) issue discovery orders, and (4) determine the future schedule of the case, including the dates for

pretrial, status, motion, final and/or other hearings, as well as issue other orders necessary to the further scheduling of the case. Counsel and parties must be prepared at the scheduling conference to set specific dates for each event. Dates established shall not be extended except in extraordinary circumstances.

#### 2.21 PRETRIAL CONFERENCE:

A. A pretrial conference will generally be held prior to the final hearing to identify contested issues, identify witnesses, mark exhibits, exchange documents, and complete any other matters the Court deems appropriate, including setting further conference and/or hearing dates. At the pretrial conference, the parties shall file and exchange pretrial statements, current financial affidavits, and proposed decrees; and if there are minor children, child support worksheets, uniform support orders, and agreed upon and proposed parenting plans. Following the pretrial conference, the court shall not accept modifications to documents presented at the pretrial conference unless the modified documents have been exchanged within a reasonable time before final hearing. This rule shall be strictly enforced.

B. In divorce actions, legal separation actions, and parenting cases to the extent applicable, pretrial statements must include:

- (1) A list of disputed issues;
- (2) Special circumstances under child support guidelines;
- (3) Factors justifying sole decision-making responsibility;
- (4) Factors justifying unequal property division;
- (5) Circumstances justifying alimony;
- (6) Unresolved discovery issues;
- (7) Valuation(s) agreement status/values;
- (8) A list of witnesses, including expert witnesses;
- (9) A list of exhibits;
- (10) Estimated time for final hearing;
- (11) Likelihood of settlement; and
- (12) Special circumstances affecting trial scheduling.

2.22 UNCONTESTED FINAL HEARING FOR DIVORCE OR LEGAL SEPARATION: A decree of divorce may be issued without conducting a final hearing, and without the presence of the parties, if all required documents have been filed, both parties have waived, in writing, their attendance at the final hearing, and the Court is satisfied with the clarity of the documents submitted.

2.23 SETTLEMENTS AND AGREEMENTS:

A. All stipulations and agreements shall be typed and signed by the parties and, if represented by counsel, by attorneys for the parties. The Court may accept handwritten agreements, but may require the parties to file a typewritten substitute (conformed copy) with the court within ten (10) days. A typewritten substitute does not need to contain signatures.

B. Whenever the Clerk receives a Mediation Report indicating that a case has settled, or written notice from a party or an attorney that a case has settled, the parties shall have thirty (30) days in which to file all required settlement documents. If the documents are not filed within this timeframe, the Court shall take such action as justice may require, including dismissal of the case where appropriate.

C. No agreement for temporary or final orders shall be approved without a current financial affidavit of each party having been filed, or an affidavit indicating that there has been no change in the financial status of the party since the last time the party filed a financial affidavit.

2.24 CONTESTED FINAL HEARING:

A. For final hearings which were not preceded by a pretrial conference, the parties shall, unless excused by the Court, file and exchange no later than thirty (30) days before the final hearing, the following:

(1) list of witnesses

(2) copies of all exhibits to be offered at final hearing

(3) proposed final decrees

(4) where minor children are involved, an agreed upon parenting plan on those issues to which the parties agree, proposed parenting plans for the issues not agreed upon, child support guidelines worksheets, and proposed uniform support orders.

B. In addition to the requirement for submitting documents at a pretrial conference, or in the event a pretrial conference was not held as outlined above, updated financial affidavits, or affidavits of no financial change

if appropriate, shall be filed and exchanged seven days prior to the final hearing.

C. Seven (7) days prior to the final hearing, the parties shall submit jointly prepared agreements and parenting plans on all issues which are not in dispute, and a jointly filed list of personal property, indicating those items which the parties agree each may have, and those items which remain in dispute.

D. Failure to disclose the identity of a witness in accordance with these rules may preclude the party from offering the testimony of that witness at the final hearing. Failure to list and exchange an exhibit in accordance with these rules may result in the Court's denying the admission of the exhibit.

E. The parties are expected to communicate with each other in advance of the final hearing with respect to the sharing and management of the allotted hearing time. The Court reserves the right to participate in this process by conducting a trial management conference.

2.25 VITAL STATISTICS FORM. No divorce, legal separation, or annulment shall be heard on its merits, or a final agreement approved, until a completed typewritten vital statistics report is filed with the court by the petitioner/attorney.

#### 2.26 DECREES IN DIVORCE OR LEGAL SEPARATION:

A. *Temporary.* All temporary agreements and proposed decrees shall be set forth in the following order of paragraphs. "N/A" may be used to denote paragraphs that do not apply to a particular situation.

- (1) Type of Case
- (2) Parenting Plan and Uniform Support Order
- (3) Tax Exemptions for Children
- (4) Guardian ad Litem Fees
- (5) Alimony
- (6) Health Insurance for Spouse
- (7) Life Insurance
- (8) Motor Vehicles

- (9) Furniture and Other Personal Property
- (10) Retirement Plans and Other Tax-Deferred Assets
- (11) Other Financial Assets
- (12) Business Interests of the Parties
- (13) Division of Debt
- (14) Marital Home
- (15) Other Real Property
- (16) Restraints against the Property
- (17) Restraining Order
- (18) Other Requests

B. *Final.* All final agreements and proposed decrees shall be set forth in the following order of paragraphs. "N/A" may be used to denote paragraphs that do not apply to a particular situation.

- (1) Type of Case
- (2) Parenting Plan and Uniform Support Order
- (3) Tax Exemptions for Children
- (4) Guardian ad Litem Fees
- (5) Alimony
- (6) Health Insurance for Spouse
- (7) Life Insurance
- (8) Motor Vehicles
- (9) Furniture and Other Personal Property
- (10) Retirement Plans and Other Tax-Deferred Assets
- (11) Other Financial Assets

- (12) Business Interests of the Parties
- (13) Division of Debt
- (14) Marital Home
- (15) Other Real Property
- (16) Enforceability after Death
- (17) Signing of Documents
- (18) Restraining Order
- (19) Name Change
- (20) Other Requests

2.27 DECREES IN PARENTING PETITION ACTIONS:

All agreements and proposed decrees in parenting actions shall be set forth in the following order of paragraphs. "N/A" may be used to denote paragraphs that do not apply to a particular situation.

- (1) Parenting Plan and Uniform Support Order
- (2) Tax Exemptions for Children
- (3) Guardian ad Litem Fees
- (4) Life Insurance
- (5) Enforceability after Death
- (6) Restraining Order
- (7) Other Requests

2.28 EFFECTIVE DATES:

A. *Uncontested Matters.* Decrees in uncontested cases where the parties have filed a permanent agreement shall become final on the date signed by the judge pursuant to RSA 490-D:9, unless otherwise specified by the Court.

B. *Contested and Defaulted Matters.* In contested cases or upon the default of either party, where no post-decree motion has been filed, the decree will not become final until the thirty-first (31<sup>st</sup>) day from the date of the Clerk's notice of decision. If a timely appeal is filed, the decree will not become final until the expiration of the appeal period pursuant to Supreme Court Rule 7. If a timely post-decree motion is filed, and there is no appeal taken, the decree becomes final thirty (30) days from the Court's action on the post-decree motion.

C. *Inactive Cases.* All domestic relations cases which have been placed on hold by request of the parties shall be dismissed after six (6) months unless there is a request by a party to reactivate the case, or a request for a further extension for good cause.

D. Once a decree becomes final, any further request for relief must be by petition, accompanied by a filing fee and a personal data sheet, with notice given to the other party, as set forth in Family Division Rule 2.4. Prior to a decree becoming final, no filing fee is required, and notice may be provided by regular US mail.

#### 2.29 MODIFICATION OF FINAL DECREE:

A. *General.* After a decree becomes final, either party may petition the court to change the final court order in their case. The petition must be provided to the other party as though it were a new case, with service to be accomplished as set forth in Family Division Rule 2.4. Regardless of which party files the petition, the parties will maintain original party designations. The original petitioner is always the petitioner, and the original respondent is always the respondent, even though the respondent may be the party requesting change.

B. *Proper Filing.* A properly filed petition to change the court order includes: A Petition to Change Court Order that states the names, dates of birth, and address(es) of the parties; the names and dates of birth the parties' children; the parts of the Court's order that are being requested to be changed; the specific changes that are being sought; reason(s) why the Court should change the order; a statement about the receipt of public/medical assistance; a personal data sheet; and the filing fee.

C. *Where to File Petitions to Change Court Order.*

(1) A Petition to Change Court Order that refers to a family division order should be brought in the family division location that issued the order.

(2) A Petition to Change Court Order that refers to a superior court order issued before the existence of the family division should be filed in the family division location where it would have been filed under Family Division Rule 2.3 B if the family division had been in existence at the time of original filing.

D. *Mediation.* If the issues raised in the petition are not resolvable at the first post-decree hearing, the Court may order the parties to engage in mediation before scheduling further hearings.

E. *By Agreement.* If the parties agree to change the final order, they may file an agreement with the court. No petition, service, or filing fee is required. The Court, in its discretion, may approve an agreement to change the final order without a hearing.

F. *Legal Separation To Divorce.* Parties may agree in writing to change a decree of legal separation to one of divorce, subject to the Court's determination that justice requires such a change.

#### 2.30 ENFORCEMENT OF COURT ORDER:

A. *General.* Any party may request that another party be found in contempt for violating an order of the Court by way of motion or petition, as the case may require.

B. *Requirements.*

(1) Open cases. When a contempt action is brought in an open case, a proper filing includes: A Motion for Contempt that explains what court order is believed to have been violated; what specific conduct is alleged to have occurred in violation of the court order; and what relief is being requested of the Court. No filing fee is required. Notification to all parties may be accomplished by regular US mail.

(2) Closed cases. When a contempt action is brought in a closed case, a proper filing includes: A Petition for Contempt that explains what court order is believed to have been violated; what specific conduct is alleged to have occurred in violation of the court order; and what relief is being requested of the Court. A filing fee and personal data sheet are required. Notice to the party alleged to be in contempt must be accomplished by sheriff's service in New Hampshire, or by any person authorized to make service if done outside of New Hampshire. Notice to other parties of the original action may be by regular US Mail.

C. *Attachments, Arrests, Incarceration.* Attachments or arrests and incarceration for civil contempt may be ordered by the Court upon a finding of

the violation of any Court order, after notice and an opportunity to be heard. Parties may be arrested upon Court order and required to post bonds for appearance and compliance with court orders in any case where it shall be deemed necessary.

### Section 3 -- JUVENILE DELINQUENCY AND CHILDREN IN NEED OF SERVICES

3.1 SCOPE: These rules, unless otherwise stated, apply to RSA 169-B Delinquency cases and RSA 169-D Children in Need of Services cases.

3.2 MULTIPLE REPRESENTATION OF JUVENILES:

An attorney shall have an affirmative duty to immediately notify the court in all cases involving multiple representation. An attorney shall not be permitted to represent more than one juvenile involved in the same case unless counsel and the court have established a record, in accordance with this rule, that indicates convincingly that the potential for conflict is very slight.

Counsel shall, upon commencement of representation, investigate the possibility of conflict of interest between clients and discuss that possibility with each client. If counsel determines that conflict is highly unlikely and that counsel may therefore continue to represent each client, the court shall be so notified and shall promptly convene a hearing at which the relevant facts shall be made a part of the record, which may be a mechanical record on tape. Such record shall include evidence of counsel's discussion of the matter with each client, evidence of each client's informed consent to multiple representation based on the client's understanding that the client is entitled to independent counsel, and either a written or oral waiver by each client of any conflict arising from the multiple representation.

3.3 DISCOVERY:

A. Within seven (7) days after the arraignment, the prosecutor shall furnish the juvenile's attorney or the juvenile and parent(s), if the juvenile has no attorney, with the following:

- (1) A copy of records of statements or confessions, signed or unsigned, by the juvenile, to any law enforcement officer or officer's agent;
- (2) A list of any tangible objects, papers, documents or books obtained from or belonging to the juvenile;
- (3) A list of names of witnesses, including experts and their reports;

- (4) Copies of any lab reports;
- (5) 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).
- (6) Notification of the State's intention to offer at trial, pursuant to NH Rule of Evidence 404B, evidence of other crimes, wrongs, or acts committed by the juvenile, 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; and
- (7) A statement as to whether the foregoing evidence, or any part thereof, will be offered at the adjudicatory hearing.

B. Within fourteen (14) days after the arraignment, the juvenile shall provide the prosecutor with a list of names of witnesses, including experts and their reports and copies of any lab reports, that the juvenile anticipates introducing at the adjudicatory hearing.

C. In the event of a petition filed by a party other than the State, the above discovery rules shall apply, except that the petitioner shall forward materials to the juvenile or attorney, and the juvenile or the juvenile's attorney shall forward materials to the petitioner within the applicable time frames.

#### 3.4 ACKNOWLEDGMENT OF RIGHTS AND WAIVER OF COUNSEL:

In all Delinquency or CHINS cases, except those filed by a parent, guardian, or custodian, if the juvenile elects to enter a plea of true or *nolo contendere*, without counsel, the juvenile and a parent shall review and sign:

- (1) A Juvenile Acknowledgment of Rights form; and
- (2) A Waiver of Counsel form.

The judge shall review these documents with the juvenile and the parent(s) to ensure they are understood.

If the juvenile is represented by counsel, the juvenile and counsel shall execute a Juvenile Acknowledgment of Rights form.

No plea from a juvenile shall be taken unless a Juvenile Acknowledgment of Rights form is executed by the juvenile, and parent(s) or counsel, except for good cause shown.

In all Delinquency or CHINS cases filed by a parent, the Court shall appoint counsel to represent the juvenile before a plea of true or *nolo contendere* may be considered by the Court.

### 3.5 AFFIRMATIVE DEFENSES:

If a juvenile intends to rely upon the defense of alibi, the juvenile shall notify the prosecution in writing of that intention and a copy of the notice shall be filed with the court within fourteen (14) days of the arraignment. The notice of alibi shall be signed by the juvenile, or counsel if represented, and shall state the specific place at which the juvenile claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the juvenile intends to rely to establish such alibi.

Within five (5) days after the receipt of the notice of alibi, the prosecution shall furnish the juvenile, or counsel, in writing with a list of the names and addresses of any additional witnesses not previously identified.

If, prior to or during the adjudication, 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 immediately notify the other party, or counsel, of the witness' existence, identity and address.

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 juvenile's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the juvenile to testify concerning the alibi, even notice has not been filed.

If a juvenile intends to claim any defense specified by the Criminal Code, a notice of that intention identifying its basis of the intention shall be filed with the court, with a copy going to the prosecution, within fourteen (14) days of the arraignment. If the juvenile fails to comply with this rule, the Court may exclude any testimony relating to such defense or make such other order as justice requires.

3.6 CONDITIONS OF RELEASE: In juvenile cases, the Court may place a juvenile on conditional release under the supervision of a Juvenile Probation and Parole Officer (JPPO). The terms and conditions of release, unless otherwise prescribed by the Court, shall be as follows:

- (a) You shall comply with all orders of the Court.
- (b) You shall be of good behavior and remain arrest free, obey all laws and cooperate with your parent(s) or custodian at all times.

- (c) You shall, if under 18 years of age or until you have graduated, attend school full-time and follow all school rules.
- (d) You shall attend school full-time and follow all school rules. If lawfully allowed to attend school only part-time, you shall also be lawfully employed or actively engaged in an employment plan approved by your JPPO.
- (e) You shall not consume or possess alcoholic beverages or controlled drugs or any substance or thing determined to be contraband by your JPPO.
- (f) You shall submit to random drug testing as ordered by the Court.
- (g) You shall attend, and meaningfully participate in, all treatment and counseling as ordered by the Court.
- (h) You shall not possess, transport, control or receive any weapon, explosive device, or firearm.
- (i) You shall report to your JPPO at such times and places as directed by your JPPO.
- (j) You shall immediately notify your JPPO of any arrest, summons, or questioning by a law enforcement officer.
- (k) You shall report any change of address, telephone number, school status, or employment to your JPPO within 24 hours.
- (l) You shall submit to reasonable searches as requested by your JPPO of your person, property, possessions, vehicle(s), school locker(s), bags, containers, or any other items under your custody, care, or control.
- (m) You shall submit to visits by your JPPO to your residence and to examinations and searches of your room in the enforcement of your conditions of release.
- (n) You shall regularly report your earnings to your JPPO and be in compliance with your specified budget as approved by your JPPO.
- (o) You shall not associate with any person or be at any place in violation of Court orders or the directives of your JPPO.

- (p) You shall not leave the State of New Hampshire for longer than 24 hours without advance written permission from your parent(s) or guardian or those having legal custody of you. You shall provide your JPPO with said written permission within 24 hours of receipt of said written permission.
- (q) You shall also obtain a Travel Permit when required by the Interstate Compact on Juveniles and Association of Juvenile Compact Administrators (AJCA) Rules regarding out-of-state travel.
- (r) You shall agree to return to the State of New Hampshire from any State in the United States or any other place voluntarily and without formality as directed by the Court or your JPPO.
- (s) You shall comply with designated curfew/home restriction provisions.
- (t) The Court may impose all or part of the conditions as well as other terms and conditions.

3.7 NOTICE AND RIGHT TO BE HEARD-- FOSTER PARENTS, PRE-ADOPTIVE PARENTS, AND RELATIVE CAREGIVERS: When a juvenile is placed out of home, foster parents, pre-adoptive parents and/or relatives providing care for the juvenile are entitled to notice of all review hearings, permanency hearings and post-permanency hearings and shall be allowed to be heard at these hearings, but shall not be given party status unless otherwise granted by the Court.

3.8 CONSULTATION WITH JUVENILE REGARDING PROPOSED PERMANENCY PLAN AND/OR TRANSITION PLAN: The juvenile's attorney shall consult in an age-appropriate manner with the juvenile about the juvenile's views of the proposed permanency plan and/or transition plan. The attorney shall report about the consultation to the court in writing and/or orally at a permanency hearing. Such consultation shall not preclude the juvenile from attending and/or being heard at a permanency hearing.

3.9 PROTECTION OF CHILDREN IN SEX-RELATED CASES:

In any proceeding under RSA 169-B alleging a sex-related offense in which a minor child is an alleged victim or a witness, the Court shall allow the use of anatomically correct drawings and/or anatomically correct dolls as demonstrative evidence to assist the alleged victim or witness in testifying unless otherwise ordered by the Court for good cause shown.

In the event that the alleged victim or 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 offense.

3.10 JUVENILE DRUG COURT: Certain cases brought under the CHINS and Delinquency statutes may be referred to the Juvenile Drug Court (JDC). JDC is a more intensified session of either of these proceedings. It is not a separate court, nor is a separate petition required. Procedures in cases in JDC are governed by these rules, the appropriate statutes, and court protocols.

## Section 4 -- ABUSE AND NEGLECT

4.1 SCOPE: The family division has jurisdiction in RSA 169-C Child Protection Act cases.

4.2 ATTENDANCE OF NON-PARTIES: Any party wishing to bring other persons to hearings held in RSA 169-C cases shall first obtain permission of the Court, either by written motion in advance of the hearing, or upon oral motion at the beginning of the hearing. Such other persons will not be allowed into the hearing until the Court approves the request. Such persons shall not be entitled to participate but may do so with the permission of the Court. See RSA 169-C:14.

4.3 OPEN HEARINGS PILOT PROJECT: Other than in those counties in which the legislature has adopted a presumption of open hearings, hearings under RSA 169-C are closed to the public. In those counties in which hearings under this chapter are presumed open, parties to the action must inform the court in writing before any hearing, or orally and on the record at the beginning of any hearing, if they believe the hearing should be closed to the public, in full or in part. See Chapter Law 134 (2006) pertaining to open hearings in Grafton, Rockingham and Sullivan Counties.

4.4 NOTICE AND RIGHT TO BE HEARD-- FOSTER PARENTS, PRE-ADOPTIVE PARENTS, AND RELATIVE CAREGIVERS: When a child is placed out of home, foster parents, pre-adoptive parents and/or relatives providing care for a child are entitled to notice of all review hearings, permanency hearings and post-permanency hearings and shall be allowed to be heard at these hearings, but shall not be given party status unless otherwise granted by the Court.

4.5 CONSULTATION WITH CHILD REGARDING PROPOSED PERMANENCY PLAN AND/OR TRANSITION PLAN: The child's Court Appointed Special Advocate (CASA), guardian ad litem (GAL), and/or attorney, shall consult in an age-appropriate manner with the child about the child's views of the proposed permanency plan and/or transition plan. The CASA, GAL or attorney shall report about the consultation to the court in writing and/or orally at a permanency hearing. Such consultation shall not preclude the child, at the child's own request or

the request of the Court, from attending and/or being heard at a permanency hearing.

## Section 5 -- GUARDIANSHIP OF MINORS

5.1 SCOPE: The family division has jurisdiction of guardianship of minors, when there is not a related estate of the minor.

5.2 PROPER FILING: A properly filed guardianship action includes a completed petition, a copy of the minor's birth certificate (certified copy when filing pursuant to RSA 463:18-a for activated members of the armed services), the filing fee, a death certificate of any deceased parent of the minor, and completed NH State Police and DHHS background check forms for all members of the household who are eighteen (18) years or older.

5.3 NOTICE: Certified mail, return receipt requested, shall be used to provide notice to each parent individually, and to any person who has had principal custody or care of the minor during the sixty (60) days prior to the filing of the petition. The orders of notice shall be sent by regular first class mail to the following: the petitioner(s); the minor if fourteen (14) years of age or older; the person nominated to be guardian; any person named as a testamentary guardian in the will of the deceased parent; DHHS if there is a pending juvenile proceeding affecting the minor; and others as identified in the statute as may be appropriate.

5.4 ATTENDANCE AT THE HEARING : The parent(s) with legal custody are required to attend the hearing, even if they consent to the guardianship. A minor fourteen (14) years of age or older shall attend the hearing unless excused by the Court.

5.5 REPORTS OF THE GUARDIAN : The guardian shall file a report on the status of the guardianship six (6) months after the initial appointment, twelve (12) months after the initial appointment, and annually thereafter. A late fee may be charged to a guardian for any report that is not filed on time.

5.6 REPORTS OF THE PARENT: Either or both of the parents may file a statement or report with the court on or before each review date.

5.7 TERMINATION OF GUARDIANSHIP: Any person, including the minor if fourteen (14) years of age or older, may petition the court to terminate a guardianship. The court will determine by a preponderance of the evidence whether substitution or supplementation of parental care and supervision is no longer needed to ensure the minor's safety and physical and psychological well-being.

In addition to terminating a guardianship by Court order, guardianships terminate upon the death of the minor or upon the minor's eighteenth (18<sup>th</sup>) birthday. The guardian must notify the court within thirty (30) days of either event. Guardianships may also terminate upon the minor's adoption or emancipation. However, if the minor consents, jurisdiction may be extended beyond the eighteenth (18<sup>th</sup>) birthday if DHHS is the guardian and supports continued jurisdiction, and the minor is attending high school and considered likely to complete it. If extended, jurisdiction shall terminate if the minor revokes consent and such revocation is approved by the Court, completes high school or attains age twenty-one (21), whichever first occurs, or if DHHS revokes its consent and such revocation is approved by the Court. See RSA 463:15.

5.8 CONFIDENTIALITY: The existence of a guardianship case or the fact that a guardianship hearing is on the docket is not confidential. However, guardianship hearings shall be closed to the public, except for persons other than the parties, their counsel, witnesses and agency representatives whom the Court may, in its discretion, admit. Records, reports and evidence shall be confidential to the extent that they contain information relating to the personal history or circumstances of the minor and the minor's family . If any person other than a party wishes to review a case file, a motion must be filed and submitted to the Court for consideration.

## Section 6 -- SURRENDERS OF PARENTAL RIGHTS

6.1 SCOPE: The family division has jurisdiction of adoptions in conjunction with proceedings brought pursuant to RSA 169-C, RSA 170-C and RSA 463. Hence, its jurisdiction over surrenders pursuant to RSA 170-B is similarly restricted.

6.2 IN LIEU OF TERMINATION HEARING: The surrender may be filed in lieu of the Court conducting a contested termination of parental rights hearing. Upon approval of the surrender, the termination hearing may be cancelled.

6.3 BACKGROUND INFORMATION: Upon filing the surrender, the parent shall file information on the age and medical and personal backgrounds of the birth parents and the child. See RSA 170-B:9, III.

6.4 NOTICE: Upon filing the surrender, notice will be provided by the court by way of certified mail, return receipt requested, signed by the addressee only, to all persons entitled to receive notice as set forth in RSA 170-B:6. If notice by certified mail is not successful, or is not likely to be successful, the court may provide notice by alternate means.

6.5 TIME TO REQUEST HEARING: Such persons shall have thirty (30) days from the date of the court's notice to request a hearing. Failure to make a timely request for a hearing shall result in forfeiture of any parental rights.

6.6 PROPER SIGNING OF SURRENDER: The surrender must be signed by the parent in the presence of the Court, or upon prior approval of the Court, may be signed in the presence of another individual or judicial officer.

6.7 PARENT UNDER EIGHTEEN: If the surrendering parent is under the age of eighteen (18), the Court may require the assent of the minor's parents or legal guardian.

6.8 FRAUD OR DURESS: In the absence of fraud or duress, the surrender shall be final.

6.9 WITHDRAWAL: A surrender may not be withdrawn unless the court is notified in writing prior to the issuance of the final decree of adoption. An evidentiary hearing on the request to surrender shall be conducted, but the rules of evidence shall not apply and the Court shall have discretion to determine who shall be permitted at the hearing. The Court may allow the withdrawal of the surrender only if it finds fraud or duress and that the withdrawal is in the best interests of the adoptee. If a withdrawal of one parent is authorized, the other parent shall be notified and given an opportunity to request, within thirty (30) days, that this parent's surrender also be withdrawn.

## SECTION 7 -- ADOPTION

7.1 Scope: The family division has jurisdiction of adoptions in conjunction with proceedings brought pursuant to RSA 169-C, RSA 170-C or RSA 463.

## SECTION 8 -- TERMINATION OF PARENTAL RIGHTS

8.1 SCOPE: The family division has jurisdiction in termination of parental rights actions brought pursuant to RSA 170-C.

## SECTION 9 -- NAME CHANGE ACTIONS

9.1 SCOPE: Pursuant to RSA 490-D:2(X), a petition to change name may be filed in matters related to cases within the jurisdiction of the family division. All other name change actions must be filed in the probate court.

9.2 SEPARATE PETITION REQUIRED: To obtain a name change, a separate petition must be filed unless:

- (a) An individual seeks to restore a former name prior to the issuance of a final decree of divorce under RSA 458; or
- (b) An individual seeks to change a child's name as part of an adoption proceeding.

9.3 JURISDICTION: Petitions for name change may be filed if they relate to an open or closed case within the jurisdiction of the family division, even if not originally filed or heard in a family division location.

9.4 PROPER FILING: A properly filed name change request includes:

- A Petition for Change of Name Relating to family division jurisdiction;
- A Name Change Affirmation;
- A Personal Data Sheet;
- Certified copy of birth certificate;
- A Criminal Record Release Authorization (for name change of anyone 17 years of age or older);
- A valid photograph identification (for name change of an adult);
- The filing fee; and
- If the petition relates to a minor, a consent if the parent/guardian is in agreement with the change.

9.5 CRIMINAL BACKGROUND CHECK: Results of criminal record checks are confidential and shall not be disclosed to anyone other than a party to the case, without prior Court approval.

9.6 NOTICE: Absent good cause shown, the petitioner shall provide notice to all parties involved in the case. In open cases, notice may be provided by regular US mail. In closed cases, notice shall be by certified mail, return receipt requested.

9.7 MINOR CHILD NAME CHANGE: If the name change request pertains to a minor child, notice is not required if the non-petitioning parent/guardian has consented in writing under oath, or if that parent's rights have been terminated.

9.8 HEARING NOT REQUIRED: The Court, in its discretion, may act upon the petition without a hearing, under circumstances where no objections have been filed and where the criminal record check results report no finding.

9.9 PRESENCE AT HEARING OF OLDER CHILD: If the request pertains to a minor child who is fourteen (14) years or older, a hearing must be held and that child must attend the hearing.

9.10 CERTIFICATE OF CHANGE OF NAME: If the Court grants the petition to change name, a Certificate of Change of Name will be issued to the petitioner for filing with appropriate agencies.

## SECTION 10 -- DOMESTIC VIOLENCE

10.1 SCOPE: The family division has jurisdiction in cases brought pursuant to RSA 173-B.

## SECTION 11 – NOMINATIONS, APPOINTMENTS AND REAPPOINTMENTS OF MARITAL MASTERS

11.1 ORIGINAL NOMINATIONS:

- (a) When a marital master position is to be filled, the Administrative Judge shall form a committee to evaluate each applicant in the manner it deems appropriate and which shall make a recommendation to the Administrative Judge of the Judicial Branch Family Division who shall determine the candidate(s) to be submitted to the Governor and Council for appointment.
- (b) TERM OF APPOINTMENT AND CONDITIONS: The original term of appointment by Governor and Council shall be three years pursuant to RSA 490-B:7, III. Thereafter, the term of office shall be five years. The Administrative Judge of the Family Division may, at any time, consider and act on any grievance or complaint concerning a marital master and take whatever action is appropriate, including termination. Marital masters shall be bound by the Canons of the Code of Judicial Conduct and serve at the pleasure of the Administrative Judge of the Family Division.

11.2 REAPPOINTMENT:

- (a) A marital master desiring to be reappointed at the expiration of the master's original term, must file a request with the Administrative Judge of the Judicial Branch Family Division, no later than ninety (90) days prior to the expiration of the term.

- (b) In making the decision to reappoint, the Administrative Judge shall review all performance evaluations conducted during the master's term of office, conduct a personal interview with the master as deemed necessary, and consider any other relevant information received from any person concerning the master's performance during the master's term of office.
- (c) Reappointment shall be at the discretion of the Administrative Judge of the Judicial Branch Family Division, subject to such conditions as may be appropriate.

## APPENDIX D

Amend Supreme Court Rule 37A(II)(a)(3) as follows (new material is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

### *(3) Procedure after Receipt of Grievance*

(A) *Initial Screening of Grievance.* General counsel shall review each grievance upon receipt to determine whether the grievance is within the jurisdiction of the attorney discipline system and whether the grievance meets the requirements for docketing as a complaint.

**[When necessary, general counsel may request additional information or documents from the grievant. Except for good cause shown, failure of a grievant to provide such additional information and/or documents within twenty (20) days may result in general counsel processing the grievance based on the then existing file, or dismissing the complaint without prejudice.]**

**Upon receipt of the above information, general counsel may allow a respondent thirty (30) days to file a voluntary response if it is deemed necessary to assist in the evaluation process.**

**Extensions of time are not favored.]**

(B) *Requirements for Docketing Grievance as a Complaint.* A grievance shall be docketed as a complaint if it is within the jurisdiction of the attorney discipline system and it meets the following requirements:

(i) *Violation Alleged.* ~~It contains a statement of facts which, if true, would establish a violation of a disciplinary rule.~~ **[contains: (a) a brief description of the legal matter that gave rise to the grievance; (b) a detailed factual description of the respondent's conduct; (c) the relevant documents that illustrate the conduct of the respondent, or, if the grievant is unable to provide such documents, an explanation as to why the grievant is unable to do so; and (d) whatever proof is to be provided, including the name and addresses of witnesses to establish a violation of a disciplinary rule.]**

(ii) *Standing*. With the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, it ~~was~~ **[must be]** filed by a person who is directly affected by the conduct complained of or who was present when the conduct complained of occurred, and contains a statement establishing these facts.

(iii) *Oath or Affirmation*. It is typed or in legible handwriting and, with the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, signed by the grievant under oath or affirmation, administered by a notary public or a justice of the peace. The following language, or language that is substantially equivalent, must appear above the grievant's signature: "I hereby swear or affirm under the pains and penalties of perjury that the information contained in this grievance is true to the best knowledge."

(iv) *Limitation Period*. It was filed with the attorney discipline office within the period of limitation set forth in section (I)(i).

(C) *Treatment of Grievance Not Within Jurisdiction of Attorney Discipline System or Failing to Meet Complaint Requirements*. A grievance that is not within the jurisdiction of the attorney discipline system or that does not meet the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B) shall not be docketed and shall be ~~disposed of~~ **[dismissed]** in accordance with section (II)(a)(4).

## APPENDIX E

Amend Supreme Court Rule 37A(IV), and adopt said subsection on a permanent basis, as follows (new language to be added is in **bold and in brackets**); current language to be deleted is in ~~strikethrough mode~~):

:

### (IV) **Confidentiality and Public Access**

(a) *Confidentiality of and Public Access to Proceedings and Records.*

(1) *General Rule.* The confidentiality of and public access to records, files and proceedings shall be governed by Supreme Court Rule 37.

(2) *Public Access to Files.*

(A) *Grievance against Person Not Subject to Rules of Professional Conduct.* Correspondence to the grievant relating to a grievance against a person who is not subject to the rules of professional conduct shall be available for public inspection for a period of two years. After this two-year period, the correspondence shall be destroyed.

(B) *Grievance Not Docketed as a Complaint.* All records (other than work product, internal memoranda and deliberations) relating to a grievance filed against a person who is subject to the rules of professional conduct but which is not docketed as a complaint, shall be maintained at the attorney discipline office for two (2) years from the date of original filing, and it shall be available for public inspection during this period. After this two-year period, the records shall be destroyed.

(C) *Complaints.* All records (other than work product, internal memoranda and deliberations) relating to a complaint that is docketed shall be maintained at the attorney discipline office and shall be available for public inspection in accordance with the provisions of Supreme Court Rule 37. Paper records may be destroyed after:

(i) three years of the date of notice of dismissal, ~~with or without~~ **[without]** a caution; or

(ii) three years of the date of an annulment in accordance with section (V) of this rule; or

(iii) five years after the death of the attorney-respondent.

(D) *Index of Complaints.* The attorney discipline office shall maintain an index of complaints docketed against each attorney, which shall contain pertinent information, including the outcome of the complaint. No index of grievances that are not docketed as complaints shall be maintained.

(E) *Protective Order.* Any person or entity, at any point in the processing of a complaint, may request a protective order from the professional conduct committee, or the committee may issue on its own initiative, a protective order prohibiting the disclosure of confidential, malicious, personal, or privileged information or material submitted in bad faith, and directing that the proceedings be so conducted as to implement the order. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the professional conduct committee. The professional conduct committee shall act upon the request within a reasonable time. Within thirty (30) days of the committee's decision on a request for protective order, or of the committee's issuance of one on its own initiative, an aggrieved person or entity may request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the supreme court has acted, or the period for seeking supreme court review has expired. A motion for review of the professional conduct committee's decision about issuance of a protective order shall be filed as a confidential matter in the supreme court.

## APPENDIX F

Amend Supreme Court Rule 40 in one of the following two alternative ways (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

### Alternative No. 1

Adopt the following new subsection 13-A:

#### ***[(13-A) Expenses Relating to Discipline Enforcement:***

**In all cases in which discipline is imposed, including cases resolved by informal resolution or adjustment, all expenses incurred by the committee on judicial conduct in the investigation and enforcement of discipline may, in whole or in part, be assessed to a disciplined judge to the extent appropriate.]**

### Alternative No. 2

Amend the definition of "Informal resolution and adjustment", subsection 8(f), and subsection 12(c) as follows:

#### A. Definition of Informal resolution or adjustment

Informal resolution or adjustment - Discipline imposed by the committee when the committee determines that the judge has violated the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the court. Informal resolution may include

admonishment of the judge, issuance of a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, **[assessing some or all of the expenses incurred by the committee on judicial conduct in the investigation and enforcement of discipline,]** or other similar remedies.

#### B. Subsection 8(f)

(f) During the course of its investigation, the committee may informally resolve the matter with the consent of the judge. Such informal resolution may take the form of written advice or admonishment, the requirement of remedial action, ~~or~~ the imposition of conditions, **[the assessment of some or all of the expenses incurred by the committee on judicial conduct in the investigation and enforcement of discipline,]** or any combination thereof. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with an informal resolution or adjustment. The consent of the judge to informal resolution of the matter shall constitute a waiver of his or her right to a hearing.

#### C. Subsection 12(c)

(c) If the committee determines, by the affirmative vote of at least seven of its members, that there has been a violation of the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the supreme court, it shall dispose of the matter by informal resolution or adjustment. Such disposition may take the form of admonishing the judge, issuing a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, **[assessing some or all of the expenses incurred by the committee on judicial conduct in the investigation and enforcement of discipline,]** or other similar remedial action, or any combination of the foregoing. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with an informal resolution or adjustment. If a proceeding is disposed of by informal resolution or adjustment pursuant to this

subsection (c), the committee shall prepare a report of its findings and disposition, which shall be available for public inspection. Disclosure to the grievant shall be limited as provided in subsection (3)(c)(2) or subsection (3-a)(h) of this rule.

## APPENDIX G

Amend Supreme Court Rule 42(4)(a) as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

(4)(a) Every such applicant must furnish satisfactory proof that before beginning the study of law the applicant successfully completed at least three (3) years of work required for a bachelor's degree in an accredited college **[or received an equivalent education in the opinion of the court. An applicant who has not successfully completed at least three (3) years of work required for a bachelor's degree in an accredited college shall have the burden of proving that the requirements of this paragraph have been met. In addition to filing the petition and questionnaire for admission, any such applicant must submit information sufficient for the court to determine that the requirements of this paragraph have been met]**.

## APPENDIX H

Amend Supreme Court Rule 42(4)(c) as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

(c) Notwithstanding the foregoing paragraph, a person who has graduated from a law school in an English-speaking, common law country and who has pursued a course of study substantially equivalent to that of a law school approved by the American Bar Association shall be eligible to apply for examination provided that such person is ~~(a)~~ a member in good standing of the bar of that country, ~~or (b)~~ **[and (a)]** the holder of a master's degree from a law school approved by the American Bar Association, or ~~(c)~~ **[(b)]** a member of the bar of one of the States of the United States who was admitted after examination and is in good standing. Any person who seeks admission to practice law in the State of New Hampshire who is a graduate of a law school in a foreign country shall have the burden of proving that the requirements of this paragraph have been met. In addition to filing the petition and questionnaire for admission, any foreign law school graduate seeking admission must file an affidavit, signed under oath, attesting that the requirements of this paragraph have been met and submitting information sufficient for the court to determine that the requirements have been met.

## APPENDIX I

Amend Supreme Court Rule 42(5)(h) as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

(h) **[The petition and questionnaire filed by an applicant, with the exception of the applicant's name and address, all]** ~~All~~ matters referred to the committee for investigation~~], and all information relating to an applicant gathered by the committee]~~ shall be confidential. No member of the committee at any time, either while a member of the committee or thereafter, shall disclose any matter in any file, except at the request of the committee, or the supreme court or unless legally required to do so. All minutes or records circulated to members of the committee shall be kept confidential. All records relating to matters referred to the committee shall be retained in the committee's ~~permanent~~ files.

## APPENDIX J

Amend Supreme Court Rule 42(5)(j) as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

(j) **[If the recommendation of the committee on character and fitness is in favor of admission, the court may accept the recommendation and grant the application for admission or decline to accept the recommendation. If the court determines that the recommendation of the committee should not be accepted, it shall either remand the matter to the committee for further investigation and consideration or refer the matter to a referee for an evidentiary hearing during which the applicant shall have the burden of proving his or her good moral character and fitness.]** If the recommendation of the committee on character and fitness is against admission, the report of the committee shall set forth the facts upon which the adverse recommendation is based and its reasons for rendering an adverse recommendation. The committee shall promptly notify the applicant about the adverse recommendation and shall give the applicant an opportunity to appear before it and to be fully informed of the matters reported to the court by the committee, and to answer or explain such matters.

## APPENDIX K

Adopt new Supreme Court Rule 42-D as follows:

### **RULE 42-D. Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program**

(I) The Supreme Court may issue a limited certificate to practice law in New Hampshire to any person who:

(a) is or was admitted to practice law in New Hampshire or any other state or territory of the United States or the District of Columbia and is retired from the active practice of law or is on inactive status (for purposes of this rule, "inactive" means any status other than "active");

(b) has not been retired or on inactive status for more than seven years;

(c) has been a member in good standing in each jurisdiction in which the retired or inactive attorney is or was admitted to practice law;

(d) has not been disciplined for professional misconduct in any jurisdiction within the past fifteen years and is not the subject of any pending disciplinary proceeding;

(e) is associated with an "approved legal services organization" as that term is defined below;

(f) performs all activities authorized by this Rule under the supervision of an attorney who is an active member of the New Hampshire Bar employed by, or participating as a volunteer for, an "approved legal services organization" as that term is defined below and who assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the retired or inactive attorney participates; and

(g) agrees to abide by the New Hampshire Rules of Professional Conduct and all other rules governing the practice of law in this State and to submit to the jurisdiction of the Supreme Court for disciplinary purposes.

(II) For purposes of this Rule, the term "approved legal services organization" means a pro bono publico legal services program sponsored by a court-annexed program, a bar association, a New Hampshire law

school, or a not-for-profit organization that provides legal services to persons of limited means and that receives funding from the federal Legal Services Corporation, the New Hampshire Bar Foundation, and, in addition, shall include any not-for-profit legal services organization designated an approved legal services organization by the Supreme Court upon petition to the Supreme Court.

(III) The limited certificate issued under this Rule authorizes the retired or inactive attorney to provide legal services solely to clients approved to receive services from the approved legal services organization. The retired or inactive attorney issued a limited certificate may:

(a) appear in any court or before any tribunal in this State, provided that (i) the client consents, in writing, to that appearance, (ii) the supervising approved legal services organization has given written approval for the appearance, and (iii) such written consent and approval is filed with the court or tribunal prior to the appearance;

(b) prepare pleadings and other documents to be filed in any court or before any tribunal in this State on behalf of the client, provide that such pleadings shall also be signed by a supervising attorney of the approved legal services organization; and

(c) otherwise engage in the practice of law as is necessary for the representation of the client, but only after prior consultation with, and upon the express consent of, a supervising lawyer of the approved legal services organization.

(IV) An attorney desiring a limited certificate shall file with the Clerk of the Supreme Court an application on a form prescribed by the Supreme Court accompanied by:

(a) a certification by an approved legal services organization stating that:

(1) the retired or inactive attorney is currently associated with the approved legal services organization;

(2) an active member of the New Hampshire Bar employed by, or acting as a volunteer for, the approved legal services organization will assume the duties of the supervising attorney required by this Rule; and

(3) the retired or inactive attorney meets the requirements of section (I) of this Rule;

(b) a certificate of good standing from each jurisdiction in which the retired or inactive attorney is or was admitted to practice law; and

(c) a sworn statement by the retired or inactive attorney that the retired or inactive attorney:

(1) has read and is familiar with the New Hampshire Rules of Professional Conduct and all rules relating to the practice of law in this State and will abide by the provisions thereof; and

(2) will neither ask for nor receive compensation of any kind for the legal services rendered under this rule.

(V) The prohibition against compensation for the limited certificate attorney set forth in paragraph (IV)(c)(2) above shall not prevent the approved legal services assistance organization from reimbursing the limited certificate attorney for actual expenses incurred while rendering services hereunder, nor shall it prevent the approved legal services assistance organization from making such charges for its services as it may otherwise properly charge. The approved legal services assistance organization shall be entitled to receive all court-awarded attorney's fees for any representation rendered by the retired or inactive attorney.

(VI) Any questions concerning the fitness or qualifications of the retired or inactive attorney may be referred by the standing committee on character and fitness for a hearing and recommendation.

(VII) The limited certificate shall be revoked immediately upon:

(a) notice by the approved legal services assistance organization stating that the retired or inactive attorney has ceased to be associated with the approved legal services assistance organization. Such notice must be sent to the retired or inactive attorney and must be filed with the Clerk of the Supreme Court within five days after the association has ceased. The notice need not state a reason for the cessation of the association; or

(b) a determination by the Supreme Court, in its discretion, that the limited certificate should be revoked. Notice of the revocation shall be sent to the retired or inactive attorney and the approved legal services assistance organization within five days of the revocation.

(VIII) Upon the revocation of the limited certificate, the supervising attorney shall immediately file notice of the revocation in the official file of each matter pending before any court or tribunal in which the retired or inactive attorney was involved.