

THE STATE OF NEW HAMPSHIRE
SUPREME COURT OF NEW HAMPSHIRE

O R D E R

R-2023-0004 In re August 1, 2023 Report of the Advisory Committee on Rules

The New Hampshire Supreme Court Advisory Committee on Rules (committee) has reported proposed rule amendments to the New Hampshire Supreme Court with a recommendation that they be adopted. **On or before October 23, 2023, members of the bench, bar, legislature, executive branch or public may file with the clerk of the supreme court comments on any of the proposed rule amendments listed on page 3 of this order.**

In accordance with Rules 3 and 4 of the Supplemental Rules of the Supreme Court of New Hampshire for Electronic Filing, comments should be submitted through the supreme court’s electronic filing (e-filing) system into case no. **R-2023-0004**, using “Rules Docket Entries” as the Filing Type and “Comment on Rule” as the Filing Subtype. The address of the supreme court’s e-filing system is: <https://ctefile.nhecourt.us>. The e-filing system is also accessible through the Electronic Services page of the New Hampshire judicial branch website: <https://www.courts.nh.gov/resources/electronic-services/supreme-court/attorneys-self-represented-parties-and-other-non>. Prior to registering with the e-filing system, attorneys should review the Quick Guide – Registering as an Attorney E-Filer; nonlawyers should review the Quick

Guide – Registering as a Nonlawyer E-Filer. The Quick Guides are available on the Electronic Services page.

Persons who electronically submit a comment into case no. **R-2023-0004** will be able to view all other comments through the “Case Search” functionality of the e-filing system. Registered e-filers who wish to use the e-filing system to view the previously submitted comments of others before submitting a comment of their own should call the clerk of the supreme court (603-271-2646) and ask to be added to the case’s “E-File User Access” list, which will then provide them with viewing access through the “Case Search” functionality.

Persons who are unable to submit their comments electronically may mail or deliver them to the clerk of the supreme court at the N.H. Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301. All comments, whether submitted electronically or in paper, will be available for public viewing at the computer kiosks located in the lobby outside the clerk’s office of the Supreme Court Building. They will also be posted for public viewing on the following webpage:

<https://www.courts.nh.gov/resources/committees/advisory-committee-rules/supreme-court-requests-public-comment>.

The language of the proposed rules changes and background regarding the proposals may be found in the August 1, 2023 Advisory Committee on Rules Report, which is available at:

<https://www.courts.nh.gov/resources/committees/advisory-committee->

[rules/reports-court](#). Copies of the August 1, 2023 Advisory Committee on Rules Report are also available upon request submitted to the clerk of the supreme court. The current rules of the New Hampshire state courts are available at: <https://www.courts.nh.gov/resources/court-rules>.

The supreme court is requesting comments on recommendations to amend the following rules:

I. Supreme Court Rule 37(20)

This proposed amendment, the language of which is set forth in Appendix A, would define the “public file” of the Attorney Discipline Office (ADO) and provide access to it, but also identify material that is not part of the “public file.”

II. Rule 3.8 of the New Hampshire Rules of Professional Conduct

This proposed amendment, the language of which is set forth in Appendix B, would add a provision concerning the special responsibilities of a prosecutor when the prosecutor knows of clear and convincing evidence establishing that a defendant was convicted of an offense that the defendant did not commit.

III. Rule 804(b) of the New Hampshire Rules of Evidence

This proposed amendment, the language of which is set forth in Appendix C, would restore an exception to the rule against hearsay statements made by deceased persons in actions by or against representatives of deceased persons.

IV. Rule 1101(d) of the New Hampshire Rules of Evidence

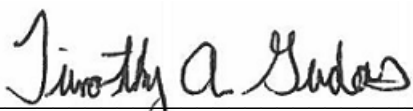
This proposed amendment, the language of which is set forth in Appendix D, would exempt probable cause hearings in involuntary emergency admission (IEA) cases from the New Hampshire Rules of Evidence.

On September 20, 2023, the supreme court adopted certain other recommendations set forth in the August 1, 2023 Advisory Committee on Rules

Report as technical amendments to court rules, including amendments to Supreme Court Rule 42(XIII)(a), Supreme Court Rule 51, Rule 37 of the Rules of the Superior Court, and Rule 3.37 of the Circuit Court – District Division Rules. Accordingly, the supreme court is not requesting comments on those recommendations.

Date: September 21, 2023

ATTEST:



Timothy A. Gudas, Clerk
Supreme Court of New Hampshire

APPENDIX A

Amend Supreme Court Rule 37(20) as follows (deletions are in ~~strikethrough~~ format; additions are in **[bold and brackets]**):

(20) *Confidentiality and Public Access - Matters Initiated On Or After April 1, 2000:*

Applicability Note: Section 20 shall apply to records and proceedings in all matters initiated on or after April 1, 2000.

[(a) The Attorney Discipline Office shall maintain a public file relating to a grievance or referral.

(1) The public file shall consist of:

(A) for non-docketed matters, the grievance, voluntary response(s) from the respondent attorney, if any, the non-docket letter, the grievant's request for reconsideration and response(s) thereto, if any, and any written decision of the Complaint Screening Committee;

(B) for docketed matters that are not referred to disciplinary counsel for formal proceedings, the complaint, mandatory response(s) from the respondent attorney, complainant's or respondent's requests for reconsideration, if any, and any responses(s) thereto, and any written decision of the Complaint Screening Committee; and

(C) for matters that result in formal proceedings, the documents referenced in the index of record maintained by the Hearings and Professional Conduct Committees.

(2) The public file shall not include:

(A) the work product, internal memoranda, and deliberations of the Attorney Discipline Office, the Hearings Committee or the Professional Conduct Committee; or

(B) where a disciplinary matter is initiated by referral, or by a grievance from a non-client, confidential information relating to the respondent attorney's client or clients, unless waived by the client or required by Order of the Supreme Court or Professional Conduct Committee. Nothing in this provision, however, shall restrict a respondent attorney's ability to disclose otherwise

confidential client information pursuant to Rule of Professional Conduct 1.6 for purposes of defending him or herself in disciplinary proceedings.

(3) The public file for matters covered by subsections (a)(1)(A), (B), (C) of this rule shall be available for public inspection and copying at the expense of the member of the public seeking such copies at a rate approved by the Supreme Court.]

~~(a)~~**[(b)]** Grievance outside the Jurisdiction of the Attorney Discipline System or Not Meeting the Requirements for Docketing as a Complaint:

(1) A grievance against a person who is not subject to the rules of professional conduct shall be returned to the grievant. No file on the grievance will be maintained.

(2) ~~All records and materials~~ **[The public file]** relating to a grievance determined by the attorney discipline office or the complaint screening committee not to meet the requirements for docketing as a complaint shall be available for public inspection **[and copying at the expense of the member of the public seeking such copies]** ~~(other than work product, internal memoranda, and deliberations)~~ beginning 30 days after correspondence is sent to the respondent attorney who is the subject of the grievance and the respondent attorney has the opportunity to provide a reply to be filed in the public record. The records and material shall be maintained at the attorney discipline office for two (2) years from the date of the original filing. After this two-year period, the records shall be destroyed.

(3) 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.

~~(b)~~**[(c)]** Grievance Docketed as Complaint: ~~All records and proceedings~~ **[The public file]** relating to a complaint docketed by the attorney discipline system shall be available for public inspection **[and copying at the expense of the member of the public seeking such copies]** ~~(other than work product, internal memoranda, and deliberations)~~ upon the earliest of the following:

(1) When the Attorney Discipline Office general counsel, the complaint screening committee or the professional conduct committee finally disposes of a complaint;

(2) When disciplinary counsel issues a notice of charges;

(3) When the **[attorney discipline office or the]** professional conduct committee files a petition with the supreme court, except as provided by section (11) regarding resignations; or

(4) When the respondent attorney, prior to dismissal of a complaint or the issuance of a notice of charges, requests that the matter be public.

~~(e)~~**[(d)]** Records may be destroyed after:

(1) three years of the date of notice of dismissal; or

(2) three years of the date of an annulment in accordance with Rule 37A; or

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

~~(d)~~**[(e)]** Proceedings for Reinstatement or Readmission: When an attorney seeks reinstatement or readmission pursuant to section (14), **[the Attorney Discipline Office shall maintain a public file relating to such reinstatement or readmission. The public file shall not include the work product, internal memoranda, and deliberations of the Attorney Discipline Office, the Hearings Committee or the Professional Conduct Committee. The public file shall consist of the documents referenced in the index of record maintained by the Hearings and Professional Conduct Committees. The public file relating to reinstatement or readmission shall be available for public inspection and copying at the expense of the member of the public seeking such copies at a rate approved by the Supreme Court.]** ~~the records, with the exception of the bar application, and the proceedings before the hearing panel and the professional conduct committee shall be public (other than work product, internal memoranda, and deliberations).~~

~~(e)~~**[(f)]** Proceedings Based upon Conviction or Public Discipline: If the investigation is predicated upon a conviction of the respondent for a crime or upon public discipline imposed upon the respondent in another jurisdiction, the entire file pertaining to the crime or the public discipline, other than the work product, internal memoranda, and deliberations of the attorney discipline system, shall be available for public inspection.

~~(f)~~**[(g)]** Proceedings Alleging Disability: All proceedings involving allegations of disability on the part of a New Hampshire licensed attorney shall be kept confidential until and unless the supreme court enters an order suspending said attorney from the practice of law pursuant to section (10), in which case said order shall be public.

~~(g)~~**[(h)]** Protective Orders: Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise

confidential or privileged information concerning the complainant, a witness, the attorney, or other persons. In order to protect the legitimate privacy interests of such persons, the professional conduct committee, may, upon request, or on its own initiative, issue a protective order prohibiting the disclosure of confidential, malicious, personal, privileged information or material submitted in bad faith. 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. Any person aggrieved by a decision on a protective order may, within thirty (30) days of the decision, 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 court has acted or the period for requesting court review has expired.

~~(h)~~**(i)** Disclosure to Authorized Agency: The attorney discipline office may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to authorized agencies investigating qualifications for admission to practice or fitness to continue practice, to law enforcement agencies investigating qualifications for government employment, **[to the New Hampshire Public Protection Fund,]** and to law enforcement agencies authorized to investigate and prosecute violations of the criminal law. If the attorney discipline office decides to answer a request for relevant information, and if the attorney who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the attorney discipline office shall send to the attorney at his or her last known address, by certified mail, a notice that information had been requested and by whom, together with a copy of the information that the attorney discipline office proposes to release to the requesting agency. The attorney discipline office shall inform the subject attorney that the information shall be released at the end of ten (10) days from the date of mailing the notice unless the attorney obtains a supreme court order restraining such disclosure. Notice to the attorney, as provided in this section, shall not be required prior to disclosure of relevant information that is otherwise confidential **[to the New Hampshire Public Protection Fund or]** to law enforcement agencies authorized to investigate and prosecute violations of the criminal law.

~~(i)~~**(j)** Disclosure to Supreme Court for Rule 36 Review: The attorney discipline office shall disclose relevant information that is otherwise confidential to the supreme court, upon its request, in connection with the court's review of applications under Supreme Court Rule 36.

~~(j)~~**(k)** Disclosure to National Discipline Data Bank: The clerk of the supreme court shall transmit notice of all public discipline imposed on an attorney by the supreme court or the professional conduct committee (upon notice from said committee), or the suspension from law practice due to disability of an

attorney, to the National Discipline Data Bank maintained by the American Bar Association.

~~(k)~~**(1)** Disclosure to Lawyers Assistance Program: The Attorney Discipline Office shall have the power to disclose otherwise confidential information to the New Hampshire Lawyers Assistance Program whenever the Attorney Discipline Office determines that such disclosure would be in the public interest.

~~(j)~~**(m)** Duty of Participants: All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this rule.

Nothing in this section prevents a grievant from disclosing publicly the underlying conduct of an attorney which he or she believes violates the rules of professional conduct or is otherwise inappropriate. The immunity from civil liability provided by section (7) does not apply to such disclosures. This section does prohibit a grievant, however, from disclosing publicly the fact that a grievance or complaint against the attorney about the conduct had been filed with the attorney discipline system pending the grievance or complaint becoming public in accordance with the provisions of this section.

~~(m)~~**(n)** Violation of Duty of Confidentiality: Any violation of the duty of confidentiality imposed by section (20) may result in action of the professional conduct committee at the request of the non-violating party or on its own motion. That action may consist of opening the file and the proceedings earlier than would have been the case under section (20), terminating the proceedings with or without public comment, or such other action as the professional conduct committee deems appropriate in the circumstances.

~~(n)~~**(o)** With respect to records to be made available for public inspection under this Rule or Rule 37A, final disciplinary decisions of the professional conduct committee and the supreme court shall be made available for public inspection electronically via the internet; all other records shall be made available **[for public inspection and copying at the expense of the member of the public seeking such copies at a rate approved by the Supreme Court.]** ~~for public inspection only at the attorney discipline office.~~

APPENDIX B

Amend Rule 3.8 of the New Hampshire Rules of Professional Conduct as follows (deletions are in ~~striketrough~~ format; additions are in **[bold and brackets]**):

Rule 3.8. Special Responsibilities of a Prosecutor

[(a)] The prosecutor in a criminal case shall:

[(1)a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

[(2)b)] make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

[(3)e) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

[(4)d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

[(5)e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

[(a)1)the information sought is not protected from disclosure by any applicable privilege;

[(b)2)the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

[(c)3)there is no other feasible alternative to obtain the information;

[(6)e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain

from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

[(b) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted of an offense that the defendant did not commit, the prosecutor shall unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant, and where the conviction was obtained within the prosecutor's jurisdiction, the prosecutor shall request that the court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, or where the conviction was obtained outside the prosecutor's jurisdiction, the prosecutor shall make timely disclosure of that evidence to the chief prosecutor of the jurisdiction where the conviction occurred.]

2004 ABA Model Rule Comment

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to

obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

APPENDIX C

Amend Rule 804(b) of the Rules of Evidence as follows (deletions are in ~~striketrough~~ format; additions are in **[bold and brackets]**):

Rule 804. Exceptions to the Rule Against Hearsay - When the Declarant Is Unavailable as a Witness

(a) *Criteria for Being Unavailable.* A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies:

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) *The Exceptions.* The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony. Testimony that:*

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had - or, in a civil case, whose predecessor in interest had - an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) ~~Other Exceptions. (Transferred to Rule 807)~~ **[Statement of a Deceased Person. In a civil action, suit, or proceeding by or against the representatives of a deceased person, a statement made by the deceased person:**

(1) in good faith;

(2) based upon personal knowledge; and

(3) under circumstances indicating that it is trustworthy.]

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused - or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result.

APPENDIX D

Amend Rule 1101(d) of the Rules of Evidence as follows (deletions are in ~~strikethrough~~ format; additions are in **[bold and brackets]**):

Rule 1101. Applicability of Rules

- (a) *Courts*. These rules apply to the proceedings in the district and probate divisions of the circuit court, the superior court, and the supreme court.
- (b) *Proceedings Generally*. These rules apply generally to all civil and criminal proceedings unless otherwise provided by the constitution or statutes of the State of New Hampshire or these rules.
- (c) *Rule of Privilege*. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.
- (d) *Rules Inapplicable*. The rules (other than with respect to privileges) do not apply in the following situations:
 - (1) *Preliminary Questions of Fact*. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.
 - (2) *Grand Jury*. Proceedings before grand juries.
 - (3) *Miscellaneous Proceedings*. Proceedings for extradition or rendition; preliminary examinations in criminal cases; juvenile certification proceedings under RSA 169-B:24; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; proceedings with respect to parole revocation or probation violations; recommittal hearings; domestic relations cases within the jurisdiction of the Family Division of the Circuit Court; civil domestic violence and stalking proceedings; **probable cause hearings for involuntary emergency admissions under RSA 135-C:31**].