

MEMORANDUM

To: N.H. Supreme Court Advisory Committee on Rules

From: Subcommittee on Amendment to Civil Rules of Procedure
N. William Delker, Chair

Date: May 9, 2016

Re: Recommendations regarding Amendments to N.H. Rules of Civil Procedure

OVERVIEW

At the March 11, 2016 meeting of the Supreme Court Advisory Committee on Rules, I was asked to chair a subcommittee to address proposed amendments to the N.H. Rules of Civil Procedure. This endeavor is not intended to be a complete re-writing of the rules but rather to address some specific errors or omissions when the rules were recently adopted. More specifically, this subcommittee was asked to address the following issues:

1. Advisory Committee Agenda Items 2014-006 to -010: The subcommittee was tasked with continuing the work of an original subcommittee that had been chaired by Emily Rice in 2013.
2. The subcommittee was also asked to review a request to consider adopting some or all of the business docket standing orders as part of the civil rules. A link to those orders can be found at: <http://www.courts.state.nh.us/superior/orders/bcdd/Business-and-Commercial-Dispute-Docket-Standing-Orders.pdf>
3. The subcommittee was also tasked with identifying any other issues that may have arisen since the recent adoption of the civil rules. For example, Rule 10(a) addresses the need to raise mandatory counterclaims but the rules are silent about when, if ever, permissive counterclaims can be brought in the action.

On April 18, 2016, the following individuals convened to discuss these matters:

- Hon. N. William Delker, Chair of Subcommittee
- Hon. David Anderson, Rockingham Superior Court
- Karen Gorham, Superior Court Clerk Administrator
- Carolyn Koegler, Secretary of the Advisory Committee on Rules
- Kimberly Kirkland, Esq.
- Jeanne Herrick, Esq.
- David Slawsky, Esq.

Non-Docketed Item 5: Administrative Orders

Proposal: Add a rule to reference administrative orders and where to find them.

Recommendation: Based on the subcommittee's discussion on Non-Docketed Item 4 relating to Appearances, the subcommittee discussed how there are administrative orders that supplement or clarify the rules of procedure. These administrative orders are located on the website but lawyers forget about them and *pro se* litigants would not even have a way to know to look for them. The subcommittee recommends adding a Rule 314 to address the existence of administrative orders.

[Rule 314: The Chief Justice of the Superior Court has issued administrative orders which supplement and/or clarify the rules of civil procedure. The administrative orders can be located on the New Hampshire Judicial Branch website.]

Non-Docketed Item 6: Independent Medical Examination Pursuant to Rule 28A

Proposal: Currently Rule 28A(a) authorizes a defendant to obtain an independent medical examination ("IME") in personal injury cases "prior to, or during, trial." This rule appears to conflict with the disclosure obligations set in RSA 516:29-b, Rule 27, and the structuring order. Several members of the subcommittee felt because Rule 28A(a) gives the defendant a right to the IME, the rule can create injustice in personal injury cases. The superior court was exploring an amendment to the structuring conference form to address the potential unfairness. The proposal is to bring Rule 28A(a) in line with ordinary expert disclosure deadlines.

Recommendation: The subcommittee recommends amending Rule 28A(a) and not simply changing the structuring conference form. The subcommittee recognized that an IME may be appropriate outside of the expert disclosure deadlines, including during trial, if the defendant learns information that may undermine the plaintiff's claim for personal injury. For example, the defendant may make observations or otherwise learn of information during the course of trial that undermines the plaintiff's claim of personal injury. Likewise, the plaintiff may testify during the trial in a manner that may necessitate an IME. Because of the potential for prejudice and disruption of the trial process, an order for an IME outside of the expert disclosure deadlines should be a rare occurrence and only granted for good cause shown. The subcommittee recommends the following amendment: