

**Carolyn A. Koegler**

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**From:** Hon. William Delker  
**Sent:** Friday, August 18, 2017 1:01 PM  
**To:** Justice Robert J Lynn  
**Cc:** Carolyn A. Koegler  
**Subject:** Amendment to N.H. R. Civ. P. 36(d)(5)

We came across a problem with Rule 36(d)(5) recently. This rule deals with the issue of when an attorney who is representing a party can be called as a witness in the case. The relevant portion of the rule states:

"No attorney shall be compelled to testify in any cause in which he or she is retained, unless the attorney shall have been notified in writing previous to the commencement of the term of trial that he or she will be summoned as a witness therein, and unless he or she shall have been so summoned previous to the commencement of the trial." (emphasis added).

There is no specific definition of "the term of trial" in either the rules, the statutes, or the case law. Our law clerk did some research and it appears this is very outdated concept.

This came up in a case where the opposing party did not notify the plaintiff's lawyer until the final pretrial conference in a bench trial that the defendant intended to call the lawyer as a witness. The final pretrial was 10 days before trial. I am not sure what the rule should be about how much notice is appropriate but the rule should be more clear than Rule 36(d)(5).

Will Delker