

New Hampshire Public Defender

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October 15, 2019

Carolyn Koegler, Secretary
New Hampshire Supreme Court Advisory Committee on Rules
One Charles Doe Drive
Concord, N.H. 03301

Re: Proposed Change to Rule of Criminal Procedure 12(b)

Dear Secretary Koegler:

I am the Director of Litigation for the New Hampshire Public Defender, which represents indigent defendants charged with criminal offenses in superior court. I am writing to comment on the proposed amendment to Rule of Criminal Procedure 12(b), which states:

(F) If the case may involve expert testimony from either party, both sides shall be prepared to address disclosure deadlines for: all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by the expert witness; a summary of each such expert's qualifications; rebuttal expert reports and qualifications; and expert depositions. Except for good cause shown, the failure of either party to set expert witness disclosure deadlines at the dispositional conference shall be grounds to exclude the expert from testifying at trial.

The Program does not object to setting disclosure deadlines for expert witnesses and associated materials. Those orders should be tailored to the facts and circumstances of individual cases. For example, if the defendant is charged with possession of a drug, and she will not contest that the seized item was a drug, this can be addressed at an early stage, and without the necessity of a detailed order. If, on the other hand, the State conducted several types of forensic or scientific testing, setting deadlines will be more difficult.

The selection of the dispositional conference as the event triggering the initial disclosure obligation raises concerns. First, in many cases, the State may not have test results back from the state lab or other entities. If it does not, there can be no discussion of experts.

Second, in the Felonies First era, the defense has generally had the case for six weeks or less by the time of the dispositional conference. Sometimes, the defendant has not been indicted. Often, the defense will have just received discovery, or will have received only partial discovery. Where the State has provided complete discovery with all its lab results by the time of the

dispositional conference, defense counsel is rarely prepared to meaningfully discuss experts it may use, or dates by which it may disclose materials relating to experts.

Using the dispositional conference as a scheduling benchmark is thus likely to cause the parties to provide dates that are not realistic, or that will ostensibly have to be changed. If it is desirable to have a rule addressing this topic, the disclosure deadline should be tied to an event occurring later in the life cycle of the case.

Finally, it is not clear what might constitute good cause for relief from the rule. The Program submits that any circumstance described in the above paragraphs – not having any test results, having several different types of test results, not having discovery, not having complete discovery, or not having had adequate time to review discovery – constitutes good cause. Other potential circumstances include getting new discovery, facing additional indictments, having difficulty finding a suitable expert, or having an expert drop out of the case. If the time for fixing obligations is the dispositional conference, the cases in which good cause exists will outnumber those in which the court is able to set realistic expert disclosure deadlines.

For these reasons, the Program opposes a rule requiring the parties to disclose information about experts at the dispositional conference. The Program submits that either no special rule is necessary, or the deadline should be later in the process.

Please feel free to contact me if the Committee has any questions.

Sincerely,

/s/

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