



WILSON · BUSH & KEEFE

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December 15, 2020

Honorable Patrick E. Donovan, Chair
State of New Hampshire, Advisory Committee on Rules
One Charles Doe Drive
Concord, NH 03301

RE: Proposed Amendment to Rule 12 of the New Hampshire Rules of Criminal Procedure

Dear Chief Justice Donovan and Members:

At our September 2020 meeting, the committee considered a request from David Rothstein, Esq., Director of Litigation for the New Hampshire Public Defender Program, to amend Rule 12 of the New Hampshire Rules of Criminal Procedure. This amendment concerned the State's production of a defendant's criminal record to defense counsel prior to arraignment wherein the State intends to rely upon such record. Prior to our meeting, Judge Delker provided the committee with the current Superior Court Administrative Order 2020-006 (issued July 14, 2020) that addresses this issue. Discussion during our committee meeting revealed that no such rule or order existed in the Circuit Court and the Superior Court Administrative Order appeared to be broader than the proposal submitted by Attorney Rothstein.

You requested that I draft a proposed rule change that can be applied to both superior court and circuit court proceedings. Both Judge Garner and Attorney Gill agreed to work with me to develop proposed language for this proposed rule change. Please find below our proposed language along with issues for discussion by the committee related to this rule.

Discovery of Criminal Record Prior to Arraignment

In any criminal case where the State intends to cite to a defendant's criminal record at arraignment or bail hearing, the State shall provide to either defense counsel or a pro se defendant copies of any and all such records in the State's possession prior to any such hearing such that defense counsel will be given the opportunity to review said records with the defendant, or a pro se defendant to do the same individually, before the arraignment or bail hearing.

If the State fails to provide said copies as described herein, the State shall be prohibited from referencing any such records except for good cause shown. If the State does not intend to cite to a defendant's criminal record during the arraignment or bail hearing, New Hampshire Rule of Criminal Procedure 12(b)(1)(C) shall govern the timing of disclosure in superior court.¹

Judge Garner, Attorney Gill, and I discussed three options for language in the rule describing how such record shall be produced. Those options are presented for the committee's discussion here:

[Option One]: *The State may provide the records by fax, secure email, or similar means to assure the confidentiality of said records.*

[Option Two]: *The State may provide the records in a manner consistent with state and federal law.*

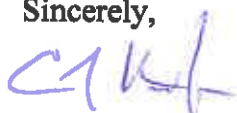
[Option Three]: *The State may provide the records by fax, secure email, or similar means to assure the confidentiality of said records, or in any manner consistent with state and federal law.*

It is our opinion that after the committee agrees on a proposed rule change, the proposed rule should be scheduled for a public hearing. It is our consensus that there are a variety of local practices which would be affected by this rule, and there are clearly important rights at issue for a defendant. As well, the information is often significant in setting bail or preventive detention, so we submit that there should be an opportunity for input from prosecutors, defense counsel, and any other interested party before a rule is finalized.

One final note, Attorney Gill is investigating how the State may provide a criminal record to *pro se* incarcerated defendants in order to comply with this proposed rule change. When we learn additional information in this regard, we will inform the committee.

Thank you for your attention to this matter.

Sincerely,



Charles J. Keefe, Esq.

cc: Honorable Michael Garner
Sean Gill, Esq.

¹ Rule 12 currently does not call for the production of criminal records as part of the State's general discovery obligations in circuit court.