NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

PUBLIC HEARING NOTICE

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 12:30 p.m. on Friday, June 3, 2016, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before June 2, 2016 or may be submitted at the hearing on June 3, 2016. Comments may be e-mailed to the Committee on or before June 2, 2016, at:

rulescomment@courts.state.nh.us

Comments may also be mailed or delivered to the Committee at the following address:

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Any suggestions for rules changes other than those set forth below may be submitted in writing to the secretary of the Committee for consideration by the Committee in the future.

Copies of the specific changes being considered by the Committee are available on request to the secretary of the Committee at the N.H. Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301 (Telephone 271-2646). In addition, the changes being considered are available

on the Internet (in the Appendix to the Public Hearing Notice) at:

http://www.courts.state.nh.us/committees/adviscommrules/notices.htm

The changes being considered concern the following rules:

I. New Hampshire Rules of Evidence

(These proposed amendments to the New Hampshire Rules of Evidence were submitted to the Advisory Committee on Rules by a Committee co-chaired by Professor John Garvey and Judge David Garfunkel. In an August 3, 2015 report to the Court, the Rules of Evidence Update Committee (NHRE Update Committee) made a number of recommendations to amend the rules after considering whether changes that have been made to the Federal Rules of Evidence should also be made to the New Hampshire Rules of Evidence. Reprinted in the attached appendices are all of the New Hampshire Rules of Evidence, with the exception of Rules 501-512, relating to privileges. The Rules of Evidence Update Committee did not undertake a review of Rules 501-512 because those rules were not modeled on the Federal Rules of Evidence and therefore were not a part of the Committee's targeted review. The Committee's proposals regarding the rules can generally be grouped into three categories: the first group includes those rules the Committee believes should not be amended or adopted; the second group includes those rules the Committee believes should be restyled but which do not include substantive changes to the rules; and the third group includes those rules which the Committee believes should be both restyled and amended in substance. For ease of reference, the three categories are listed below and references are made to the appropriate appendices where the language of each rule and the proposed amendment is set forth).

1. Based upon its review of the New Hampshire Rules of Evidence and the Restyled Federal Rules of Evidence, the Rules of Evidence Update Committee believes that certain of the New Hampshire Rules of Evidence need not be amended. *See* Appendices A, H, M, Q, U, V, W, X, Y, MM, TT, MMM, NNN, OOO.

2. Based upon its review of the New Hampshire Rules of Evidence and the Restyled Federal Rules of Evidence, the Rules of Evidence Update Committee believes that certain of the New Hampshire Rules of Evidence should be restyled to mirror the Federal Rules of Evidence, but need not be substantively amended. *See* Appendices C, E, F, G, J, K, L, N, O, S, Z, AA, BB, CC, EE, FF, GG, HH, II, JJ, LL, RR, SS, VV, YY, ZZ, AAA, BBB, CCC, DDD, EEE, FFF, GGG, HHH, III, JJJ, KKK, LLL.

3. Based upon its review of the New Hampshire Rules of Evidence and the Restyled Federal Rules of Evidence, the Rules of Evidence Update

Committee believes that certain of the New Hampshire Rules of Evidence should be restyled to mirror the Federal Rules of Evidence, and should also be substantively amended. *See* Appendices B, D, I, P, R, T, DD, KK, NN, OO, PP, QQ, UU, WW, XX, WW.

II. Payment of Fines. New Hampshire Rules of Criminal Procedure 29(e).

(A proposal to amend District Division Rule 2.7 (now New Hampshire Rule of Criminal Procedure 29(e)) was jointly submitted to the Advisory Committee on Rules by the American Civil Liberties Union of New Hampshire, Judge King and Judge Kelly. The proposal is designed to address concerns raised relating to the process for the use of incarceration as a means of enforcing the collection of fines. It aims to assure "that no person in New Hampshire is jailed for nonpayment of fines when the reason for nonpayment is an inability to pay." An alternative proposal to amend Rule 29(e) was submitted by Justice Lynn. The Advisory Committee on Rules is requesting comment on both proposals).

1. Delete and replace New Hampshire Rule of Criminal Procedure 29(e) and Strafford and Cheshire County Rule of Criminal Procedure 29(e), as set forth in Appendix PPP.

2. Delete and replace New Hampshire Rule of Criminal Procedure 29(e) and Strafford and Cheshire County Rule of Criminal Procedure 29(e), as set forth in Appendix QQQ.

III. Circuit Court – District Division Rules 5.4, 5.7 and 5.9. Landlord and Tenant

(These proposals would amend District Division Rules 5.4. 5.7 and 5.9 to change the rules that govern the procedure followed in landlord-tenant actions when the tenant defaults by either not filing an appearance or failing to appear for trial).

1. Amend District Division Rule 5.4, as set forth in Appendix RRR.

2. Amend District Division Rule 5.7, as set forth in Appendix SSS.

3. Amend District Division Rule 5.9, as set forth in Appendix TTT.

IV. New Hampshire Rules of Criminal Procedure - Discovery

(This proposal would amend New Hampshire Rule of Criminal Procedure 12(a) and Strafford and Cheshire County Rule of Criminal Procedure 12(a) to make discovery automatic in misdemeanor cases).

1. Amend New Hampshire Rule of Criminal Procedure 12(a), as set forth in Appendix UUU.

2. Amend Strafford and Cheshire County Rule of Criminal Procedure 12(a), as set forth in Appendix VVV.

New Hampshire Supreme Court
Advisory Committee on Rules

By: Robert J. Lynn, Chairperson
and Carolyn A. Koegler, Secretary

April 21, 2016

APPENDIX A

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 100 because the rule is a New Hampshire specific rule on adoption of the New Hampshire rules and is still germane. The rule currently reads, and should continue to read, as follows:

Rule 100. Adoption and Effective Date; Effect Upon Common Law

Pursuant to Part II, Article 73-A of the New Hampshire Constitution the Supreme Court unanimously adopts these rules of evidence. These rules shall govern all cases the trial of which commences on or after July 1, 1985, and shall be effective to the extent they are not inconsistent with statutory law in effect on that date, provided, that upon any later legislative repeal of such inconsistent statutes the appropriate rules shall then become effective. To the extent these rules alter or conflict with the common law, the rules shall govern.

APPENDIX B

Amend New Hampshire Rule of Evidence 101 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would make a substantive change to the rule by adding a definition section to the rule to mirror Federal Rule 101 as follows:

Rule 101. Scope[; Definitions]

[(a)] [Scope.] These rules **[apply to]** ~~govern~~ proceedings in the ~~courts of~~ the State of New Hampshire **[courts. The specific courts and proceedings to which the rules apply, along with]** ~~, to the extent and with the~~ exceptions **[are set out in]** ~~stated in~~ Rule 1101.

[(b) Definitions. In these rules:
(1) "civil case" means a civil action or proceeding;
(2) "criminal case" includes a criminal proceeding;
(3) "public office" includes a public agency;
(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and
(6) a reference to any kind of written material or any other medium includes electronically stored information.]

APPENDIX C

Amend New Hampshire Rule of Evidence 102 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule, but would not make any substantive changes to it.

Rule 102. Purpose and Construction.

~~These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.~~ **[These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.]** While decisions of federal courts involving the Federal Rules of Evidence may be helpful in analyzing problems and issues that arise under these rules, the New Hampshire Supreme Court shall be the final interpreter of these rules. [1]

[1] The NHRE Update Committee's August 3, 2015 report says, "Adoption of restyled FRE," which suggests that the last sentence should be deleted, but the NHRE Committee believes that the sentence should be retained.

APPENDIX D

Amend New Hampshire Rule of Evidence 103 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment, which would make substantive changes, would restyle the rule to mirror Federal Rule of Evidence 103:[2]

Rule 103. Rulings On Evidence

~~(a) *Specific objection.* A general objection shall not be sufficient to raise or preserve an issue for appeal.~~

~~(b) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and~~

~~(1)*Objection.* In case the ruling is one admitting evidence, a contemporaneous objection appears of record, stating explicitly the specific ground of objection; all other grounds for objection shall be deemed waived; or~~

~~(2)*Offer of proof.* In case the ruling is one excluding evidence, the record indicates that the substance of the evidence was contemporaneously made known to the court by offer of proof.~~

[(a) *Preserving a Claim of Error*. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party, and:

[2] The NHRE Update Committee noted in its August 3, 2015 report, regarding this rule, that, "NHRE in its present form adopted the FRE while retaining a few provisions from prior New Hampshire common law. With the passage of time, the committee believes that restyled FRE 103 accurately describes current New Hampshire practice and can be adopted." Thus, it appears that a substantive change is being proposed here. Justice Lynn, chair of the Advisory Committee on Rules, believes that the changes indicated in **red** must be made. He recognizes that this is a departure from the FRE language. In response to Justice Lynn's proposal, the NHRE Committee states, "The committee recommended amending the NH rule to conform to the restyled FRE. The Court has expressed a preference for retaining the NHRE in its present form, citing *State v. Noucas*. While the committee believes that the restyled FRE preserves the essence of the existing NHRE, it understands the Court's concern that the additional language found in the FRE, which preserves for appellate review those rulings that were apparent from the context even if the specific grounds for the objection are not contained in the record, is a departure from NH law. Because of the historical requirement in New Hampshire, as expressed in *State v. Noucas*, that preservation of issues for appellate review requires trial counsel to articulate specific grounds for a trial objection, the committee agrees with the language proposed by the Court.

(1) if the ruling admits evidence, a party, on the record:
(A) timely objects or moves to strike; and
(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of the substance of the evidence and the basis for its admissibility ~~its substance~~ by offer of proof, unless ~~the substance was~~ these matters were apparent from the context.[3]

(b) *Not Needing to Renew an Objection or Offer of Proof.* Once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal.][4]

~~(c) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.~~

[(c) *Court's Statement About the Ruling; Directing an Offer of Proof.* The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.]

~~(d) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.~~

[(d) *Preventing the Jury from Hearing Inadmissible Evidence.* To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.]

~~(e) *Exceptions unnecessary.* Taking of exceptions is no longer necessary in matters of evidence.~~

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[3] The addition of the phrase, "unless the substance was apparent from the context" appears to be a substantive change.

[4] The NHRE Update Committee does not believe that this is a substantive change in practice, but notes that it does appear to be, looking at the words. For example, when issues are worked out in motions in limine, or when a line of questioning is objected to, judges will give continuing objections, without the need to review each time, because repeated objections are invasive and disruptive. The Committee is comfortable with the new language, and recommends it.

~~(f) *Plain error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.~~

[(e) *Taking Notice of Plain Error*. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.]

APPENDIX E

Amend New Hampshire Rule of Evidence 104 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 104, but would not make any substantive changes to it.

Rule 104. Preliminary Questions

~~(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.~~

[(a) *In General.*

The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.]

~~(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.~~

[(b) *Relevance That Depends on a Fact.* When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. If such proof is presented, the court shall admit the evidence. The court may admit the proposed evidence on the condition that the proof be introduced later.][5]

~~(c) *Hearing of jury.* Hearings on the admissibility of confession shall in all cases be conducted out of the hearing of the jury. Hearings on other~~

[5] This language was changed at the Advisory Committee on Rules March 11, 2016 meeting, for the reasons set forth in the minutes from that meeting. The last two sentences of this proposed rule are not included in the Federal Rule. The language of Federal Rule of Evidence 104(b) reads:

> *Relevance That Depends on a Fact.* When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

~~preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.~~

[(c) *Conducting a Hearing So That the Jury Cannot Hear It.* The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.]

~~(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, subject himself or herself to cross-examination as to other issues in the case.~~

[(d) *Cross-Examining a Defendant in a Criminal Case.* By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.]

~~(e) *Weight and credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.~~

[(e) *Evidence Relevant to Weight and Credibility.* This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.]

APPENDIX F

Amend New Hampshire Rule of Evidence 105 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 105, but would not make any substantive changes to it.

Rule 105. ~~Limited Admissibility~~ [Limiting Evidence That Is Not Admissible Against Other Parties Or For Other Purposes]

~~When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted,~~ **[If the court admits evidence that is admissible against a party or for a purpose- but not against another party or for another purpose-]** the court, ~~upon~~ **[on timely]** request, ~~shall~~ **[must]** restrict the evidence to its proper scope and instruct the jury accordingly.

APPENDIX G

Amend New Hampshire Rule of Evidence 106 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 106, but would not make any substantive changes to it.

Rule 106. Remainder of or Related Writings or Recorded Statements

~~When~~ **[If a party introduces all or part of]** a writing or recorded statement ~~or part thereof is introduced by a party~~, an adverse party may require ~~at that time~~ the introduction**[, at the time,]** of any other part**[-]** or any other writing or recorded statement**[- that]** ~~ought~~ in fairness **[ought]** to be considered **[at the same time.]** ~~contemporaneously with it~~.

APPENDIX H

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 201, which currently reads as follows:[6]

Rule 201. Judicial Notice

(a) *Kinds of facts*. A court may take judicial notice of a fact. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(b) *Kinds of law*. A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) regulations of governmental agencies, and (4) ordinances of municipalities and other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.

(c) *When discretionary*. A court may take judicial notice, whether requested or not.

(d) *When mandatory*. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard*. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

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[6] The NHRE Update Committee's rationale for not recommending FRE 201 for adoption in its entirety, as stated in its August 3, 2015 report, is: "Rationale: New Hampshire Rule 201 was intended to adopt Federal Rule 201, but subsections (a) and (b) are structured differently. The Federal Advisory Committee placed notice of the law in the rules of procedure due to their 'assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather the rules of procedure.' The structure of New Hampshire Rule 201 honors the contrary thesis. When a rule of law is a factor in issue in the litigation, it should be fed into the judicial process in the same manner – and subject to the same safeguards – as are facts generally. In practice, the federal courts also rely on judicial notice to feed law into the judicial process, but without the benefit of the rule. New Hampshire Rule 201 legitimizes this practice. After considerable discussion, the committee agreed to recommend that the Court leave NHRE 201 in its present form." Justice Lynn, Chair of the Advisory Committee on Rules, asked, what about legislative facts? The NHRE Committee responded, "We did not consider them specifically. They could be added specifically but one could argue that a legislative fact would be included in this definition."

(f) *Time of taking notice*. Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury*. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Federal Rule of Evidence 201 reads:

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) *Scope*. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) *Kinds of facts That May Be Judicially Noticed*. The court may judicially notice a fact that is not subject to reasonable dispute because it:
(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) *Taking Notice*. The court:
(1) may take judicial notice on its own; or
(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) *Timing*. The court may take judicial notice at any stage of the proceeding.

(e) *Opportunity to Be Heard*. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) *Instructing the Jury*. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

APPENDIX I

Delete and replace New Hampshire Rule of Evidence 301 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment, which mirrors Federal Rule of Evidence 301 would restyle the rule and make one substantive change, to make the rule applicable only in civil cases.[7]

Rule 301. Presumptions [In Civil Cases Generally]

~~In all actions and proceedings, unless otherwise provided for by constitution, statute, case law, or these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.~~

[In a civil case, unless the constitution, statute, case law, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.]

[7] The NHRE Update Committee states in its August 3, 2015 report, "Rationale: The Federal Rule applies only to presumptions in civil proceedings. The New Hampshire Rule in its present form applies to both civil and criminal proceedings. The committee did not know why there is a difference, and the answer is not addressed in the New Hampshire Reporter's notes. [The original Federal Rule as prescribed by the Supreme Court applied to both civil and criminal proceedings. The House passed a version that only applied to civil actions. The Report of the House Committee on the Judiciary states that the Committee limited the scope of Rule 301 to "civil actions and proceedings" to effectuate its decision not to deal with the question of presumptions in criminal cases. In this regard, there was also a Rule 303 prescribed by the Supreme Court which dealt with presumptions in criminal cases. This Rule was deleted by Congress because "…the subject of presumptions in criminal cases is addressed in detail in bills now pending before the Committee to revise the federal criminal code. The Committee determined to consider this question in the course of its study of these proposals." After research and much discussion, the committee decided to recommend the restyled rule because there are no presumptions in criminal cases. If the new rule is adopted, the committee recommends a short reporter's note explaining the change.]" Justice Lynn, Chair of the Advisory Committee on Rules, believes that the rule in NH should not be changed. The NHRE Committee states, "for the reasons stated in our note, we are comfortable with the proposed change. If you want to keep the criminal reference in it, we recommend that we still use the new language but delete the reference to "civil" and replace it with, "in all actions and proceedings." Justice Lynn agrees with changing the introduction to "in all actions and proceedings," as indicated in the proposed amendment.

APPENDIX J

Delete and replace New Hampshire Rule of Evidence 401 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 401, but would not make any substantive changes to it.

Rule 401. ~~Definition of "Relevant Evidence"~~

~~"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.~~

[Rule 401. Test for Relevant Evidence.

Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.]

APPENDIX K

Delete and replace New Hampshire Rule of Evidence 402 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 402, but would not make any substantive changes to it.

~~**Rule 402. Generally Admissible; Irrelevant Evidence Inadmissible**~~

~~All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules prescribed by the New Hampshire Supreme Court. Evidence which is not relevant is not admissible.~~

[Rule 402. General Admissibility of Relevant Evidence.

Relevant evidence is admissible unless any of the following provides otherwise:

- **the United States or New Hampshire Constitution;**
- **a statute;**
- **these rules; or**
- **other rules prescribed by the Supreme Court.**

Irrelevant evidence is not admissible]

APPENDIX L

Delete and replace New Hampshire Rule of Evidence 403 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 403, but would not make any substantive changes to it.

~~Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time~~

~~Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.~~

[Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.]

APPENDIX M

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 404, which currently reads as follows:[8]

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) *Character Evidence Generally*. - Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused*. - Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim*. - Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness*. - Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *Other Crimes, Wrongs, or Acts*. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[8] NHRE Update Committee states in its August 3, 2015 report: "The current New Hampshire Rule is the same effective language as the original Federal Rule. [FRE 404 has been amended four times since New Hampshire adopted the rule. The first amendment (1987) was only technical but the last three amendments were substantive. The 1991 amendment added a pretrial notice requirement to 404 (b). The 2000 amendment provides that when the accused attacks the character of an alleged victim the door is open to an attack on the same character trait of the accused. The 2006 amendment was added to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait.] New Hampshire has a body of case law that has clarified and limited this rule as applied in New Hampshire. After considerable discussion, the committee decided to recommend that the rule be left as is because of the substantial caselaw. (If the Court desires a restyled rule that incorporates the caselaw the committee would be happy to propose one.)" Justice Lynn, Chair of the Advisory Committee on Rules, does not believe a change needs to be made.

Federal Rule of Evidence 404 reads as follows:

RULE 404. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS

(a) *Character Evidence*.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case*. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) *Crimes, Wrongs, or Other Acts*.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses;* Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

APPENDIX N

Amend New Hampshire Rule of Evidence 405 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 405, but would not make any substantive changes to it.

Rule 405. Methods of Proving Character

~~(a) *Reputation or Opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.~~

[(a) *By Reputation or Opinion.* When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.]

~~(b) *Specific Instances of Conduct.* - In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.~~

[(b) *By Specific Instances of Conduct.* When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.]

APPENDIX O

Delete and replace New Hampshire Rule of Evidence 406 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 406, but would not make any substantive changes to it.

Rule 406. Habit; Routine Practice

~~Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.~~

[Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.]

APPENDIX P

Delete and replace New Hampshire Rule of Evidence 407 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 407 and, in doing so, would make minor substantive changes.[9]

Rule 407. Subsequent Remedial Measures

~~When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.~~

[When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- **negligence;**
- **culpable conduct;**
- **a defect in a product or its design; or**
- **a need for a warning or instruction.**

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.]

[9] The changes include adding to the list, "a defect in a product or its design" (included in the original Federal Rule, but not the New Hampshire Rule) and "a need for a warning or instruction" (included in neither the original Federal Rule nor the New Hampshire Rule).

APPENDIX Q

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 408, which currently reads as follows.[10]

Rule 408. Compromise and Offers To Compromise

In a tort case, evidence of (1) a settlement with or the giving of a release or covenant not to sue to or, (2) furnishing or offering or promising to furnish or accepting or offering or promising to accept, a valuable consideration in compromising a disputed claim with one or more persons liable in tort for the same injury to person or property or for the same wrongful death shall not be introduced in evidence in a subsequent trial of an action against any other tortfeasor to recover damages for the injury or wrongful death. Upon the return of a verdict, the court shall inquire of the attorneys for the parties the amount of the consideration paid for any settlement, release or covenant not to sue, and shall reduce the verdict by that amount.

In any other case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Evidence of conduct or statements made in compromise negotiations is likewise not admissible. However, this rule does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations.

This rule does not require exclusion when the evidence is offered for a purpose other than the proof of liability for or invalidity of the claim or its

[10] NHRE Committee's states in its August 3, 2015 report: "This rule involved considerable committee discussion. If the Court would like further information regarding the committee's thought process it is available. Ultimately, the committee decided that FRE 408 is inconsistent with Superior Court Rule 32(d), would change substantive NH law, and would limit the openness of settlement discussions in some civil settings because the federal rule allows for the subsequent use of some civil settlement discussions in criminal cases. For example, if NH adopted FRE 408, a statement in an SEC civil securities fraud settlement negotiation would be admissible in a later prosecution for mail fraud. Statements in any mediation or settlement negotiation in a municipal or state regulatory proceeding would be admissible in a later criminal case. Categorical rules of exclusion operate like privileges to the extent that they exclude relevant, probative and usually truthful and reliable evidence. The reason for this interference with the truth-finding process is that there are other interests at stake—such as, in this instance, the interest in giving parties breathing room to have the frank discussions that are often necessary to compromise and settle cases."

amount, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Federal Rule of Evidence 408 reads:

RULE 408. COMPROMISE OFFERS AND NEGOTIATIONS

(a) *Prohibited Uses*. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) *Exceptions*. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

APPENDIX R

Amend New Hampshire Rule of Evidence 409 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 409 and would make one substantive change by deleting the last sentence.

Rule 409. ~~Payment of~~ [Offers to Pay] Medical and Similar Expenses

Evidence of furnishing**[,]** ~~or offering or~~ promising to pay**[,]** ~~damage including but not limited to~~ **[or offering to pay]** medical, hospital, or similar expenses ~~occasioned by~~ **[resulting from]** an injury is not admissible to prove liability for the injury. ~~Any such payments shall, however, constitute a credit against and be deducted from any final settlement made or judgment rendered with respect to such injury which does not expressly provide to the contrary.~~[11]

[11] The NHRE Update Committee's August 3, 2015 report states, regarding this rule, "adoption of restyled FRE." However, the deletion of the last sentence constitutes a substantive change. It was not included in the "old" federal rule, but was included in the New Hampshire rule. Justice Lynn, Chair of the Advisory Committee on Rules, and the NHRE Committee believe that the sentence should be deleted because it deals with substantive law, not evidence.

APPENDIX S

Amend New Hampshire Rule of Evidence 410 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 410, but would not make any substantive changes.

Rule 410. ~~Inadmissibility of~~ Pleas, Plea Discussions, and Related Statements

~~Except as otherwise provided in this Rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:~~

[(a) *Prohibited Uses*. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:]

~~(1) A plea of guilty which was later withdrawn;~~

[(1) a guilty plea that was later withdrawn;]

~~(2) A plea of nolo contendere;~~

[(2) a nolo contendere plea;]

~~(3) Any statement made in the course of any state court proceeding, or comparable procedure under Rule 11 of the Federal Rules of Criminal Procedure, regarding any of the foregoing pleas; or~~

[(3) a statement made during a proceeding on either of those pleas in any state court proceeding or under Federal Rule of Criminal Procedure 11; or]

~~(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.~~

[(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.]

~~However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought to, in fairness, be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.~~

[(b) *Exceptions*. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.]

APPENDIX T

Amend New Hampshire Rule of Evidence 411 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 411 and would make a minor substantive change.[12]

Rule 411. Liability Insurance

~~Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully or to prove the extent of damages therefor. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness, but only when the proof thereof cannot be reasonably obtained by other means and the trial court determines that its probative value substantially outweighs the danger of unfair prejudice.~~

[Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.]

[12] The NHRE Update Committee's Report states, "Adoption of restyled FRE." However, there is a substantive change. The substantive change, *i..e.,* the deletion of the phrase, "but only when the proof thereof cannot be reasonably obtained by other means and the trial court determines that its probative value substantially outweighs the danger of unfair prejudice" is minor. This was not included in the original federal rule of evidence, so is not included in the restyled federal rule of evidence, but the phrase is included in the NH Rule, so removing it would constitute a substantive change to the New Hampshire Rule of Evidence. The NHRE Committee notes that this sentence was added by the original Committee. As they recall, "it was because the mention of insurance was so taboo in 1985. You could even flirt with a mistrial. There is now a jury instruction that mentions insurance and we do not think it is the big deal it used to be."

APPENDIX U

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 412, which currently reads as follows.[13]

Rule 412. Evidence of Prior Sexual Activity

(a) Except as constitutionally required, and then only in the manner provided in (b), below, evidence of prior consensual sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in any prosecution or in any pretrial discovery proceeding undertaken in anticipation of a prosecution under the laws of this state.

(b) Upon motion by the defense filed in accordance with the then applicable Rules of Court, the defense shall be given an opportunity to demonstrate, during a hearing in chambers, in the manner provided for in Rule 104:

(1) *Evidence Sought During Pretrial Discovery Stage*: that there is a reasonable possibility that the information sought in a pretrial discovery proceeding which would otherwise be excluded under subsection (a), above, will produce the type of evidence that due process will require to be admitted at trial;

(2) *Use of Evidence At Trial:* that due process requires the admission of the evidence proffered by the defense which would be otherwise excluded under subsection (a), above, and the probative value in the context of the case in issue outweighs its prejudicial effect on the victim.

Federal Rule of Evidence 412 Reads:

RULE 412. SEX-OFFENSE CASES: THE VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

(a) *Prohibited Uses*. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

[13] NHRE Update Committee's August 3, 2015 report states: "Rationale: The New Hampshire Rule is specific to New Hampshire and was originally drafted to comply with RSA 632-A:6 as interpreted by caselaw. The federal rule is not recommended by the committee for the reasons stated in the original Reporter's Notes."

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) *Exceptions.*

(1) *Criminal Cases.* The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) *Civil Cases.* In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) *Procedure to Determine Admissibility.*

(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) *Hearing.* Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) *Definition of "Victim."* In this rule, "victim" includes an alleged victim.

APPENDIX V

The NHRE Update Committee recommends against the adoption of Federal Rule of Evidence 413. Federal Rule of Evidence 413 reads as follows:[14]

RULE 413. SIMILAR CRIMES IN SEXUAL-ASSAULT CASES

(a) *Permitted Uses.* In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Defendant.* If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.

(d) *Definition of "Sexual Assault."* In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).

[14] The NHRE Update Committee's August 3, 2015 report states, "Rationale: This rule allows for the admission of evidence of similar offenses in criminal sexual assault cases 'on any matter to which it is relevant.' This would be a substantial change in New Hampshire law that the committee does not recommend. 'Congress enacted Rules 413, 414 and 415 as part of the Violent Crime Control and Law Enforcement Act of 1994. The Act invited the Judicial Conference of the United States to submit alternative recommendations within 150 days. After reviewing extensive public comment, the Judicial Conference opposed the new rules and recommended that Congress either abandon or redraft them. Congress took no further action, and the rules took effect on July 9, 1995.' Fisher, Evidence, 3rd ed., 2013-2014 Statutory and Case Supplement, pp. 94-95 (2013)."

APPENDIX W

The NHRE Update Committee recommends against the adoption of Federal Rule of Evidence 414.[15] Federal Rule of Evidence 414 reads as follows:

RULE 414. SIMILAR CRIMES IN CHILD-MOLESTATION CASES

(a) *Permitted Uses*. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Defendant.* If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.

(d) *Definition of "Child" and "Child Molestation."* In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body — or an object — and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

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[15] The NHRE Update Committee's August 3, 2015 report states, "Rationale: This rule allows for the admission of evidence in criminal child molestation cases of prior acts of molestation 'on any matter to which it is relevant.' This would be a substantial change in New Hampshire law that the committee does not recommend. 'Congress enacted Rules 413, 414 and 415 as part of the Violent Crime Control and Law Enforcement Act of 1994. The Act invited the Judicial Conference of the United States to submit alternative recommendations within 150 days. After reviewing extensive public comment, the Judicial Conference opposed the new rules and recommended that Congress either abandon or redraft them. Congress took no further action, and the rules took effect on July 9, 1995.' Fisher, Evidence, 3rd ed., 2013-2014 Statutory and Case Supplement, pp. 94-95 (2013)."

APPENDIX X

The NHRE Committee recommends against the adoption of Federal Rule of Evidence 415.[16] Federal Rule of Evidence 415 reads as follows:

RULE 415. SIMILAR ACTS IN CIVIL CASES INVOLVING SEXUAL ASSAULT OR CHILD MOLESTATION

(a) *Permitted Uses*. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) *Disclosure to the Opponent*. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) *Effect on Other Rules.* This rule does not limit the admission or consideration of evidence under any other rule.

[16] The NHRE Update Committee's August 3, 2015 report states, "Rationale: This rule allows for the admission of evidence in criminal child molestation cases of prior acts of molestation 'on any matter to which it is relevant.' This would be a substantial change in New Hampshire law that the committee does not recommend. 'Congress enacted Rules 413, 414 and 415 as part of the Violent Crime Control and Law Enforcement Act of 1994. The Act invited the Judicial Conference of the United States to submit alternative recommendations within 150 days. After reviewing extensive public comment, the Judicial Conference opposed the new rules and recommended that Congress either abandon or redraft them. Congress took no further action, and the rules took effect on July 9, 1995.' Fisher, Evidence, 3rd ed., 2013-2014 Statutory and Case Supplement, pp. 94-95 (2013)."

APPENDIX Y

The NHRE Update Committee recommends retaining New Hampshire Rules of Evidence 501-512, relating to privileges, without change. The NHRE Update Committee's August 3, 2015 report states:

"Rationale: None of these rules were adopted from the Federal Rules of Evidence so they were not part of our targeted review. Some of them are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. If the Court would like the committee to make recommendations on these rules based upon Uniform Rule modifications we would be happy to do so."[17]

[17] Justice Lynn, Chair of the Advisory Committee on Rules, does not believe that there is any need to do this now and that the existing privilege rules should remain as they are.

APPENDIX Z

Amend New Hampshire Rule of Evidence 601 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule, but would retain subsection (b).[18]

Rule 601. ~~General Rule of~~ Competency [to Testify in General]

(a) *General rule of competency.* Every person is competent to be a witness ~~except as otherwise provided by statute or in these rules.~~ **[unless these rules or an applicable statute provide otherwise.]**

(b) *Incompetence of a witness*. A person is not competent to testify as a witness if the court finds that the witness lacks sufficient capacity to observe, remember and narrate as well as understand the duty to tell the truth.

[18] The NHRE Update Committee's August 3, 2015 report states, "Rationale: As stated in the original Reporter's Notes, NHRE 601(b) was added to the original FRE 601 to help clarify existing New Hampshire law. The Committee saw no reason to delete this provision."

APPENDIX AA

Amend New Hampshire Rule of Evidence 602 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 602 but make no substantive changes to it.

Rule 602. ~~Lack of~~ [Need for] Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the **[witness' own testimony.]** ~~testimony of the witness.~~ This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

APPENDIX BB

Delete and replace New Hampshire Rule of Evidence 603 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 603 but make no substantive changes.

Rule 603. Oath or Affirmation [to Testify Truthfully]

~~Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience and impress his or her mind with the duty to do so.~~

[Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.]

APPENDIX CC

Delete and replace New Hampshire Rule of Evidence 604 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 604 but make no substantive changes.

Rule 604. Interpreters

~~An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.~~

[An interpreter must be qualified and must give an oath or affirmation to make a true translation.]

APPENDIX DD

Adopt New Hampshire Rule of Evidence 605 as follows:

[Rule 605. Judge's Competency as a Witness.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.][19]

[19] The NHRE Update Committee's August 3, 2015 report states, "Adoption of restyled FRE." The NHRE Committee recommends adoption of this rule, because it believes that it states the obvious, and there does not seem to be any reason to continue to exclude it.

APPENDIX EE

Delete and replace New Hampshire Rule of Evidence 606 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 606 but make no substantive changes.[20]

~~Rule 606. Competency of Juror as Witness~~

~~A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.~~

Rule 606. Juror's Competency as a Witness

[A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.]

[20] Federal Rule of Evidence 606 has a section (b) that was included in the original Federal Rule and is included in the restyled Federal Rule. The NHRE Committee does not recommend the adoption of (b), so only (a) has been restyled. The NHRE Committee's August 3, 2015 states, "As stated in the original Reporter's Notes, FRE 606(b) appears to be more restrictive than New Hampshire law. The committee saw no reason to restrict the judge's discretion." Justice Lynn, Chair of the Advisory Committee on Rules, agrees.

APPENDIX FF

Delete and replace New Hampshire Rule of Evidence 607 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 607 but make no substantive changes.

~~**Rule 607. Who May Impeach**~~

~~The credibility of a witness may be attacked by any party, including the party calling the witness.~~

[Rule 607. Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.]

APPENDIX GG

Delete and replace New Hampshire Rule of Evidence 608 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 608 but make no substantive changes.

Rule 608. ~~Evidence of Character and Conduct of Witness~~
[A Witness's Character for Truthfulness or Untruthfulness.]

~~(a) *Opinion and reputation of character*. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.~~

[(a) *Reputation or Opinion Evidence*. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.]

~~(b) *Specific instances of conduct*. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.~~

[(b) *Specific Instances of Conduct*. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.]

APPENDIX HH

Amend New Hampshire Rule of Evidence 609 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 609 but make no substantive changes.

Rule 609. Impeachment by Evidence of [A Criminal] Conviction ~~of Crime~~

(a) ~~*General rule.* For the purpose of attacking the character for truthfulness of a witness~~,

[*In General.* The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

~~(1) evidence that a witness other than an accused been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and~~

[(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

~~(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.~~

[(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.]

(b) ~~*Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction,~~

~~whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.~~

[(b) *Limit on Using the Evidence After 10 Years.* This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.]

(c) *Effect of* ***[a]*** ~~*p*~~***[P]****ardon,* ~~*a*~~***[A]****nnulment, or* ~~*c*~~***[C]****ertificate of* ~~*r*~~***[R]****ehabilitation.* Evidence of a conviction is not admissible ~~under this rule~~ if**[:]**

(1) the conviction has been the subject of a pardon, annulment, certificate o**[f]**~~r~~ rehabilitation, or other equivalent procedure based on a finding **[that the person has been rehabilitated,]** ~~of the rehabilitation of the person convicted,~~ and ~~that~~ **[the]** person has not been convicted of a **[later]** ~~subsequent~~ crime ~~which was~~ punishable by death or **[by]** imprisonment **[for more than]** ~~in excess of~~ one year, or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

~~(d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.~~

[(d) *Juvenile Adjudications.* Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.]

(e) *Pendency of* ***[an]*** ~~*a*~~***[A]****ppeal.* ~~The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.~~

[A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency of the appeal is also admissible.][21]

[21] Justice Lynn, Chair of the Advisory Committee on Rules, suggests adding the phrase, "of the appeal." This is not in the FRE. The NHRE Committee inquires whether Justice Lynn suggests the addition of this language for clarification, or is there an intended difference. In general, the NHRE Committee approach was that it would not edit unless it was substantive, but defers to the Court on this.

APPENDIX II

Delete and replace New Hampshire Rule of Evidence 610 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 610 but make no substantive changes.

Rule 610. Religious Beliefs or Opinions

~~Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.~~

[Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.]

APPENDIX JJ

Amend New Hampshire Rule of Evidence 611 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule, but make no substantive changes. Subsections (a) and (c) mirror Federal Rule of Evidence 611, but subsection (b) does not.[22]

Rule 611. Mode and Order of [Examining Witnesses and Presenting Evidence] ~~Interrogation and Presentation~~

(a) *Control by **[the]** ~~c~~[**C**]ourt**[; Purposes]***. - The court ~~shall~~ **[should]** exercise reasonable control over the mode and order of ~~interrogating~~ **[examining]** witnesses and presenting evidence so as to**[:]**

(1) make **[those procedures effective for determining the truth;]** ~~the interrogation and presentation effective for the ascertainment of the truth,~~

(2) avoid **[wasting]** ~~needless consumption of~~ time~~,~~**[;]** and

(3) protect witnesses from harassment or undue embarrassment.

(b*) Scope of cross-examination*. - A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

(c) *Leading ~~q~~[**Q**]uestions*. - Leading questions should not be used on ~~the~~ direct examination ~~of a witness~~ except as ~~may be~~ necessary to develop ~~his~~ **[the witness's]** testimony. Ordinarily**[, the court should allow** leading questions**[;**

(1)] ~~should be permitted~~ on cross-examination~~.~~**[; and**

(2)] When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party**[.]**~~, interrogation may be by leading questions.~~

[22] The NHRE Update Committee's August 3, 2015 report states that the Committee does not recommend any changes to this rule. The NHRE Committee now believes that the stylistic changes to the (a) and (c), as indicated, should be made. Regarding a potential substantive change, the NHRE Update Committee states in its August 3, 2015 report, "Rationale: As stated in the original Reporter's Notes, NHRE 611 offers a flexible approach to examination, consistent with New Hampshire law. NHRE 611(b) generally allows for more latitude on the scope of cross-examination than does FRE 611(b). The committee saw no reason to change this practice."

APPENDIX KK

Delete and replace New Hampshire Rule of Evidence 612 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 612 and make some substantive changes.

~~Rule 612. Writing or Object Used To Refresh Memory~~

~~(a) *While testifying*. If, while testifying, a witness uses a writing or object to refresh his or her memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.~~

~~(b) *Before testifying*. If, before testifying, a witness uses a writing or object to refresh his or her memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.~~

~~(c) *Terms and conditions of production and use*. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the Supreme Court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.~~

Rule 612. Writing Used to Refresh a Witness's Memory

(a) *Scope*. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) *Adverse Party's Options; Deleting Unrelated Matter*. An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) *Failure to Produce or Deliver the Writing*. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.]

APPENDIX LL

Amend New Hampshire Rule of Evidence 613 and add a 2016 Update Committee note for placement directly following the rule, and before the Reporter's Notes, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 613 but make no substantive changes.

Rule 613. [Witness's] Prior Statements ~~of Witnesses~~

(a) ~~*Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.~~

[(a) *Showing or Disclosing the Statement During Examination.* When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.]

~~(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).~~

[(b) *Extrinsic Evidence of a Prior Inconsistent Statement.* Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

2016 Update Committee Note [23]

When a witness has been impeached by the use of prior inconsistent statements, New Hampshire common law "allows the admission of prior

[23] This comment was added by the NHRE Update Committee following the March 11, 2016 Advisory Committee on Rules Meeting, at the request of the Advisory Committee on Rules.

consistent statements for the purpose of rehabilitation . . . . The prior consistent statements, however, may not be used substantively, and a defendant is entitled to a limiting instruction to prevent unfair prejudice. Even when a witness's credibility has been attacked through the use of prior inconsistent statements, however, the common law rule allowing admission of rehabilitative testimony should be used with caution." *State v. White*, 159 N.H. 76, 79 (2009) (internal citations and quotation omitted).]

APPENDIX MM

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 614,[24] which currently reads as follows:

Rule 614. Interrogation of Witnesses by Court

(a) *Interrogation by the Court.* The court may not ordinarily interrogate a witness and may do so only as long as it maintains impartiality.

(b) *Objections.* Objections to the interrogation by the court may be made at the time or at the next available opportunity when the jury is not present.

Federal Rule of Evidence 614 reads,

RULE 614. COURT'S CALLING OR EXAMINING A WITNESS

(a) *Calling.* The court may call a witness on its own or at a party's request. Each party is entitled to crossexamine the witness.

(b) *Examining.* The court may examine a witness regardless of who calls the witness.

(c) *Objections.* A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

[24] The NHRE Update Committee's August 3, 2015 report states, "Rationale: In contrast to FRE 614, NHRE 614 states that a judge may not ordinarily interrogate a witness. The committee saw no reason to change the New Hampshire rule."

APPENDIX NN

Amend New Hampshire Rule of Evidence 615 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 615 and make substantive changes.[25]

Rule 615. Exclu[ding]~~sion of~~ Witnesses

~~At the request of a party the court shall in criminal cases and may in civil cases order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or a victim of the crime, or (2) an officer or employee of a party in a civil case which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.~~

[(1) At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.]

(2) A sequestration order issued under subsection (1) of this rule prohibits a sequestered witness (1) from being present in the courtroom

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[25] The NHRE Update Committee's August 3, 2015 report does not recommend any changes to this rule, *see* August 3 report at page 7, stating "FRE 615 provides that witnesses *must* be excluded at the request of either party. NHRE requires exclusion in a criminal case but gives the judge discretion in a civil matter. The committee saw no reason to change the New Hampshire rule." However, Justice Lynn, Chair of the Advisory Committee on Rules, believes that the NH rule should be changed to read as the federal rules does, as indicated in (1), and also believes that the rule should be further amended, as indicated in **red.** The language set forth in section (1) is FRE language. The language set forth in section (2) is not.

until after the witness has testified and is not subject to recall by any party, and (2) from discussing the testimony he or she has given or the questions asked[26] in the proceeding with any other witness who is subject to sequestration and who has not yet testified. A sequestration order shall not be construed to impose additional restrictions unless the order clearly describes such restrictions.

[26] The language "or the questions asked" was proposed by Justice Lynn and the NHRE Committee following the March 11, 2016 Advisory Committee on Rules Meeting. Some Committee members have indicated that they do not believe it is appropriate to include this language.

APPENDIX OO

Amend New Hampshire Rule of Evidence 701 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 701 and make one substantive change, with the addition of section (c).

Rule 701. Opinion Testimony by Lay Witnesses

If ~~the~~ **[a]** witness is not testifying as an expert, ~~the witness'~~ testimony in the form of **[an]** opinion~~s or inferences~~ is limited to **[one that is:]** ~~those opinions or inferences which are~~

(a) rationally based on the **[witness's]** perception**[;]** ~~of the witness, and~~

(b) helpful to ~~a~~ clear**[ly]** understanding ~~of~~ the **[witness's]** testimony or ~~the~~ **[to]** determin~~ation~~**[ing]** ~~of~~ a fact in issue~~.~~**[; and**

(c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.]

APPENDIX PP

Amend New Hampshire Rule of Evidence 702 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 702 and make substantive amendments with the addition of sections (b), (c) and (d).

Rule 702. Testimony by Experts [Witnesses]

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a~~**[A]** witness **[who is]** qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise~~.~~ **[if:**

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.]

APPENDIX QQ

Delete and replace New Hampshire Rule of Evidence 703 and add a 2016 Update Committee note, for placement directly following the rule, and before the Reporter's Notes, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 703 and make a substantive change.[27]

Rule 703. Bases of [An Expert's] Opinion Testimony ~~by Experts~~

~~The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence~~.

[An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

2016 Update Committee Note[28]

In recommending this Rule, the Committee adopts the comments in the Advisory Committee Notes for Federal Rule 703, including 2000 and 2011, including the following:

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[27] The NHRE Update Committee's August 3, 2015 report states, "Adoption of restyled FRE." However, the addition of the sentence, "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect" constitutes a substantive change. The NHRE Update Committee notes that this is not a substantive change to the federal rule, but it is a change to the New Hampshire rule. The federal rule was amended, but the New Hampshire rule was not. The NHRE Evidence Update Committee recommends that the change be made now.

[28] This comment was added by the NHRE Update Committee following the March 11, 2016 Advisory Committee on Rules Meeting, at the request of the Advisory Committee on Rules.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.]

APPENDIX RR

Delete and replace New Hampshire Rule of Evidence 704 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 704 but would make no substantive changes.[29]

Rule 704. Opinion on [An] Ultimate Issue

~~Testimony in the form of a~~**[A]**n opinion ~~or inference otherwise admissible~~ is not objectionable ~~solely~~ **[just]** because it embraces an ultimate issue**[.]** ~~to be decided by the trier of fact.~~

[29] The NHRE Update Committee's August 3, 2015 report notes that Federal Rule of Evidence 704 contains a section (b), but the Committee does not recommend it for adoption. The August 3, 2015 report states, "Rationale. FRE 704(b) was added in 1984, after John Hinkley Jr. was found not guilty by reason of insanity in the assassination attempt on President Reagan. The rule provides an exception to the general rule stated in FRE 704(a). The Committee saw no reason to recommend creating the exception in New Hampshire."

APPENDIX SS

Delete and replace New Hampshire Rule of Evidence 705 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 705 but make no substantive changes.

Rule 705. Disclo~~sure~~[ing] ~~of~~ the Facts or Data Underlying [An] Expert Opinion

~~The expert may testify in terms of opinion or inference and give reason therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination~~.

[Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.]

APPENDIX TT

The NHRE Update Committee recommends against the adoption of Federal Rule of Evidence 706. Federal Rule of Evidence 706 reads as follows:[30]

RULE 706. Court-Appointed Expert Witnesses

(a) *Appointment Process.* On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) *Expert's Role.* The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) *Compensation.* The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court direct — and the compensation is then charged like other costs.

(d) *Disclosing the Appointment to the Jury.* The court may authorize disclosure to the jury that the court appointed the expert.

(e) *Parties' Choice of Their Own Experts*. This rule does not limit a party in calling its own experts.

[30] The NHRE Update Committee's August 3, 2015 report states, "Rationale: This rule is reserved under the current NHRE. As stated in the original Reporter's Notes, New Hampshire has a variety of statutes that deal with the appointment of experts. The committee saw no reason to change the New Hampshire rule."

APPENDIX UU

Amend New Hampshire Rule of Evidence 801 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment restyles the rule to mirror Federal Rule of Evidence 801 and makes one substantive change, with the addition of the last sentence of (d)(2)(e):[31]

Rule 801. Definitions [That Apply to this Article: Exclusions from Hearsay]

~~The following definitions apply under this article:~~

(a) *Statement.* ~~A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.~~ **["Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.]**

(b) *Declarant.* ~~A~~ "~~d~~**[D]**eclarant" ~~is a~~ **[means the]** person who **[made the]** ~~makes a~~ statement.

(c) *Hearsay.* ~~"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted~~. **["Hearsay" means a statement that:**

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.]

(d) *Statements ~~which~~ **[that]** ~~a~~**[A]**re not ~~h~~**[H]**earsay.* A statement **[that meets the following conditions]** is not hearsay**[:]** ~~if~~

(1) ~~*Prior statement by witness.*~~ ***[A Declarant-Witness's Prior Statement.]*** The declarant testifies ~~at the trial or hearing~~ and is subject to cross-examination **[about a prior]** ~~concerning the~~ statement, and the statement**[:]** ~~is~~

(A) **[is]** inconsistent with the declarant's testimony, and was given under ~~oath subject to the~~ penalty o~~r~~**[f]** perjury at a trial, hearing, or other proceeding, or in a deposition~~,or~~**[;]**

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[31] The NHRE Update Committee's August 3, 2015 states, "Adoption of Restyled FRE." However, there is a substantive change being proposed, as noted. The Committee notes that this amendment was made to the federal rule after New Hampshire adopted the rules in 1985, but the New Hampshire rules was never updated. The Committee believes that this change should be made now.

(B) **[is]** consistent with the declarant's testimony and is offered to rebut an express or implied charge ~~against~~ **[that]** the declarant ~~of recent fabrication or~~ **[recently fabricated it or acted from a recent]** improper influence or motive **[in so testifying;]**~~,~~ or

(C) ~~one of identification of a person made after perceiving him or her; or~~ **[identifies a person as someone the declarant perceived earlier.]**

(2) ~~*Admission by party opponent.*~~ ***[An Opposing Party's Statement.]*** The statement is offered against a**[n opposing]** party and**[:]** ~~is~~

(A) **[Was made by]** the party~~'s own statement,~~ in ~~either~~ an individual or ~~a~~ representative capacity**[;]** ~~or~~

(B) **[is one]** ~~a statement of which~~ the party ~~has~~ manifested **[that it adopted or believed to be true;]** ~~adoption or belief in its truth, or~~

(C) **[was made]** ~~a statement~~ by a person **[whom]** ~~authorized by~~ the party **[authorized]** to make a statement **[on]** ~~concerning~~ the subject**[;]**~~, or~~

(D) **[was made]** ~~a statement~~ by the party's agent or **[employee on]** ~~servant concerning~~ a matter within the scope of **[that relationship, and while it existed; or]** ~~the party's agency or employment, made during the existence of the relationship, or~~

(E) **[was made by the party's]** ~~a statement by a~~ coconspirator ~~of a party~~ during ~~the course~~ and in furtherance of the conspiracy. **[The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of that relationship under (D); or the existence of the conspiracy or participation in it under (E).]**

APPENDIX VV

Delete and replace New Hampshire Rule of Evidence 802 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 802 but make no substantive changes.

~~**Rule 802. Hearsay**~~

~~Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority.~~

[RULE 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- **a statute;**
- **these rules; or**
- **other rules prescribed by the Supreme Court.]**

APPENDIX WW

Amend New Hampshire Rule of Evidence 803 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 803 and, in doing so, would make a number of substantive changes.

~~Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial~~
[Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness.]

~~The statements, records and documents specified in 803(1) through 803(24) are not excluded by the hearsay rule, even though the declarant is available as a witness.~~

[The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:]

(1) *Present Sense Impression*

A statement describing or explaining an event or condition**[,]** made while **[or immediately after]** the declarant ~~was~~ perceive**[ed]**~~ing~~ **[it].** ~~the event or condition, or immediately thereafter~~.

(2) *Excited Utterance*

A statement relating to a startling event or condition**[,]** made while the declarant was under the stress of excitement **[that it]** caused**[.]** ~~by the event or condition~~.

(3) *Then**[-]**Existing Mental, Emotional, or Physical Condition*

A statement of the declarant's then**[-]**existing state of mind **[(such as motive, intent or plan)]**, or emotion**[al]**, sens**[ory]**~~ation~~, or physical condition (such as ~~intent, plan, motive, design,~~ mental feeling, pain, ~~and~~ **[or]** bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the **[validity or terms of the]** ~~execution, revocation, identification, or terms of~~ declarant's will.

~~(4) *Statements for Purposes of Medical Diagnosis or Treatment*~~ [32]

[32] What is being proposed here is arguably a substantive change except, as the NHRE Update Committee notes in its August 3, 2015 report, "With respect to 803(4), the restyled rule would

~~Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness.~~

[(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.]

~~(5) *Recorded Recollection*~~ [33]

~~A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his or her memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence and may be received as an exhibit unless the court, in its discretion, finds that such admission is unduly cumulative or prejudicial.~~

[(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

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eliminate language currently found at the end of the NH rule, "regardless of to whom made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness." The committee believes this language is superfluous and that adopting the restyled rule will not change the meaning. If the Court agrees, we recommend a short footnote explaining this."

[33] The amendments proposed here would make a substantive change. As the NHRE Update Committee notes in its August 3, 3015 report, "With respect to 803(5), the committee believes that adoption of the restyled rule will result in a change as to the admissibility of the statement as an exhibit. Under the current NH rule, past recollection recorded "may be received as an exhibit unless the court, in its discretion, finds that such admission is unduly cumulative or prejudicial." Because past recollection recorded is the statement of a witness who can no longer remember and is therefore subject to only limited cross-examination, the committee believes that the document should not be allowed as an exhibit unless offered by an adverse party, as provided in the federal version of the rule. If the Court agrees, the committee recommends a short Reporter's Note explaining this change. Justice Lynn, Chair of the Advisory Committee on Rules, agrees.

(C) accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.]

~~(6) *Records of Regularly Conducted Activity*~~

~~A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph, includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit~~.

[(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.]

~~(7) *Absence of Entry in Records Kept in Accordance With the Provisions of Rule 803(6)*~~

~~Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Rule 803(6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of the kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information of other circumstances indicate lack of trustworthiness.~~

[(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.]

~~(8) *Public Records and Reports*~~

~~Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.~~

[(8) *Public Records*. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.]

~~(9) *Records of Vital Statistics*~~

~~Records of data compilations in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law.~~

[(9) *Public Records of Vital Statistics*. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.]

~~(10) *Absence of Public Record or Entry*~~

~~To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.~~

[(10) *Absence of a Public Record.* Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.]

~~(11) *Records of Religious Organizations*~~

~~Statements of births, marriages, divorces, deaths, legitimacy, and ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.~~

[(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.]

~~(12) *Marriage, Baptismal, and Similar Certificates*~~

~~Statements of fact, contained in a certificate that the maker performed a marriage or ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.~~

[(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament;[34] and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.]

~~(13) *Family Records*~~

~~Statements of fact containing personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tomb stones, or the like.~~

[34] This constitutes a substantive change to the rule.

[(13) *Family Records*. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.]

~~(14) *Records of Documents Affecting an Interest in Property*~~

~~The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.~~

[(14) *Records of Documents That Affect an Interest in Property*. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.]

(15) *Statements in Documents **[That]** Affect~~ing~~ an Interest in Property***[.]*** A statement contained in a document **[that]** purport**[s]**~~ing~~ to establish or affect an interest in property if the matter stated was relevant to the **[document's]** purpose **[-]** ~~of the document,~~ unless **[later]** ~~the~~ dealings with the property **[are]** ~~since the document was made have been~~ inconsistent with the truth of the statement, or the purport of the document.

(16) *Statements in Ancient **Documents*****[. A]** ~~S~~**[s]**tatement~~s~~ in a document **[that is at least 20]** ~~in existence twenty (20)~~ years **[old and whose]** ~~or more, the~~ authenticity ~~of which~~ is established.

(17) *Market Reports~~,~~ **[and Similar]** Commercial Publications***[.]*** Market quotations, ~~tabulations,~~ lists, directories, or other ~~published~~ compilations, **[that are]** generally ~~used and~~ relied **[on]** ~~upon~~ by the public or by persons in particular occupations.

~~(18) *Learned Treatise*~~ [35]

[35] As is noted in the NHRE Update Committee's August 3, 2015 report, the Committee recommends the adoption of restyled FRE, "with the exception of the last sentence of 803(18), which would be changed to track the current NH rule to read 'If admitted, the statement may be read into evidence but may not be received as an exhibit unless the Court finds that the probative value of the statement as an exhibit outweighs the prejudicial effect of its admission.'

~~To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits unless the Court finds that the probative value of the statements outweigh their prejudicial effect.~~

[(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but may not be received as an exhibit unless the Court finds that the probative value of the statement as an exhibit outweighs the prejudicial effect of its admission.]

(19) *Reputation Concerning Personal or Family History***[. A]** ~~R~~**[r]**eputation among ~~members of~~ a person's family by blood, adoption, or ~~a~~ marriage~~,~~ **[-]** or among **[a person's]** ~~his or her~~ associates~~,~~ or in the community **[-]**concerning ~~a~~ **[the]** person's birth, adoption, **[legitimacy, ancestry,]** marriage, divorce, death, ~~legitimacy,~~ relationship by blood, adoption, **[or]** marriage~~, ancestry~~ or ~~other~~ similar fact**[s]** of ~~his or her~~ personal or family history.

(20) *Reputation Concerning Boundaries or General History****[. A*** ~~R~~**[r]**eputation in a community~~,~~ **[-]** arising before the controversy~~,~~ **[concerning]** ~~as to~~ boundaries of ~~or customs affecting~~ land~~s~~ in the community **[or customs that affect the land, or concerning general historical events important to that** ~~, and reputation as to events of general history important to the~~ community**[,]** ~~or~~ state, or nation**[.]** ~~in which located.~~

(21) *Reputation ~~as to~~ [Concerning] Character***[. A]** ~~R~~**[r]**eputation **[among a]** ~~of a~~ person's ~~character among~~ associates or in the community **[concerning the person's character]**.

. . . With respect to 803(18), the current New Hampshire version allows the judge discretion with respect to whether learned treatises can be admitted as exhibits after being read to the jury. The federal version does not allow treatises to be admitted as exhibits under any circumstance. These treatises can sometimes be lengthy and difficult to understand when only received orally. The committee saw no reason to change this aspect of the New Hampshire rule. Justice Lynn, Chair of the Advisory Committee on Rules, agrees.

(22) ~~Reserved~~[36] **[*Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:**

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[36] The NHRE Update Committee recommends restyling Rule 803, largely in accordance with FRE restyled. However, FRE has a section (22), but the NHRE does not. This is a substantive change not noted in the August 3, 2015 report. Justice Lynn, Chair of the Advisory Committee on Rules, tends to think that section (22) is necessary. In an email, the NHRE Committee stated, "The committee had a lively discussion about proposed Rule 803(22). Judges Schulman and Garfunkel expressed concerns about this rule as it may apply to a non-party witness in a civil case. They stated:

> "The rule allows judgment of a previous conviction to be entered substantively. It further states that the "evidence is admitted to prove any fact essential to the judgment." While we have no concerns when such evidence is admitted against [the confessing] party in a subsequent trial, we are troubled about admitting such evidence to prove facts based upon a non-party's guilty plea. In such a case, the fact of a non-party's guilty plea could be admitted to prove a fact or element at issue in the case. The non-party would not be called as a witness and would therefore not be subject to cross examination. And, the …plea would be admitted to prove any fact that was 'essential to the judgment' in the non-party's case, which may also be an essential fact in the case at issue…Thus, an element of the plaintiff's case, or the defendant's affirmative defense, could be proved by a judgment against a non-party, without that person ever having testified…Imagine the following:
>
> 1. A school is sued because a teacher sexually assaults a student.
> 2. The teacher pleads guilty to a criminal offense. The school, of course, had no ability to control whether the teacher pled guilty or not.
> 3. Why should the judgment against the teacher be admitted against the school in civil litigation, if the school was not in privity with the teacher at the time of the teacher's guilty plea?
>
> Same issue in a civil case resulting from a motor vehicle accident when the driver pleads to Reckless Operation (down from a DUI) and the employer is the civil defendant.
>
> What if the conviction related to a witness or a third party and the party [against whom the conviction is offered] was not the defendant in the criminal case?
>
> Why should a civil litigant who was not party to a criminal case be bound by whatever stipulation of fact the criminal defendant and government entered into?"

Judge Laplante was asked by Judges Garfunkel and Schulman for his thoughts and he responded:

> "The issues raised by Judge Schulman do not bother me. I think it comes down to his last point/question – – 'why should a civil litigant be bound by a fact stipulated/agreed-to by a nonparty with whom the civil litigation and was not in privity?'.
>
> But that is the point – – 803(22) does not bind anybody to anything. It simply allows for the admissibility of evidence. It is not a stipulation, or an instance of judicial notice, or even a presumption. It simply allows the evidence to be admitted, and all of the (admittedly thought-provoking) scenarios raised by Judge Schulman can be adequately addressed through cross-examination, contradictory or explanatory evidence, or argument.
> …803(22) is fine by me…"

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.]

~~(23) *Judgment as to Personal, Family or General History, or Boundaries*~~

~~Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.~~

[(23) *Judgments Involving Personal, Family, or General History, or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.]

~~(24) *Other Exceptions*~~[37]

~~A statement not specifically covered by any of the foregoing exceptions, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that: (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.~~

Attorney Johnson suggested that we not adopt 803(22). The other committee members did not voice an objection to the proposed rule.

[37] The NHRE Update Committee, in its August 3, 2015 report, recommends moving this section to Rule 807. The Committee states, "With respect to 803(24), the "other exceptions" rule, this rule has been transferred in the federal version to 807, along with 804(5). The committee recommends this. If the Court agrees, the committee recommends a short Reporter's Note indicating the change." Justice Lynn, Chair of the Advisory Committee on Rules, agrees.

APPENDIX XX

Amend New Hampshire Rule of Evidence 804 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 804 and, in doing so, would make several substantive changes.[38]

Rule 804. [Exceptions to the Rule Against] Hearsay ~~Exceptions;~~ [- When the] Declarant [Is] Unavailable [Witness]

~~(a) *Definition of unavailability*. "Unavailability as a witness" includes situations in which the declarant -~~

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

[38] The NHRE Update Committee recommends adopting the restyled Federal Rule of Evidence 804, which includes some substantive changes. The Committee's August 3, 2015 report states, "Rationale: The committee believes that the amendments adopted in the FRE 804 strike a good balance and improve the rule. For your convenience, the notes on the amendments are set forth below.

NOTES OF ADVISORY COMMITTEE ON RULES—2010 AMENDMENT

Subdivision (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g.*, *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses." Justice Lynn, Chair of the Advisory Committee on Rules, agrees with this change to 804(b)(3).

~~(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement; or~~

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

~~(2) persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so; or~~

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

~~(3) testifies to a lack of memory of the subject matter of his or her statement; or~~

[(3) testifies to not remembering the subject matter;]

~~(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or~~

[(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 hearing and the proponent of the witness' statement has been unable to procure the witness' attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the witness' attendance or testimony) by process or other reasonable means.~~

[(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[39]

(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.][40]

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[39] This makes a substantive change but is not discussed in the NHRE Update Committee's August 3, 2015 report. The NHRE Committee notes that these reflect changes to the FRE that were made after NH adopted the rules in 1985. Justice Lynn, Chair of the Advisory Committee on Rules, agrees with the changes.

[40] This makes a substantive change but is not discussed in the NHRE Update Committee's August 3, 2015 report. The NHRE Committee notes that these reflect changes to the FRE that were made after NH adopted the rules in 1985. Justice Lynn, Chair of the Advisory Committee on Rules, agrees with the changes.

(b) **[*The*]** ~~*Hearsay*~~ *exceptions*. The following are not excluded by the **[rule against]** hearsay ~~rule~~ if the declarant is unavailable as a witness:

~~(1) *Former testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination~~.

[(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 belief of impending death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.~~

[(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 which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in this position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.~~

[(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 ~~p~~**[P]ersonal** or ~~f~~**[F]amily** ~~h~~**[H]istory***. ~~(A)~~ A statement **[about:]** ~~concerning~~

[(A) the declarant's own birth, adoption, **[legitimacy, ancestry,]** marriage, divorce, ~~legitimacy,~~ relationship by blood, adoption, or marriage, ~~ancestry,~~ or ~~other~~ similar fact**[s]** of personal or family history, even though **[the]** declarant had no **[way]** ~~means~~ of acquiring personal knowledge **[about that fact]** ~~of the matter stated;~~ or

(B) **[another person concerning any of these facts, as well as death,]** ~~a statement concerning the foregoing matters, and death also, of another person~~, if the declarant was related to the **[person]** ~~other~~ by blood, adoption, or marriage or was so intimately associated with the **[person's]** ~~other's~~ family **[that the declarant's information is likely to be]** ~~as to be likely to have~~ accurate**[.]** ~~information concerning the matter declared.~~

~~(5) *Statement of a deceased person.* In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided the Trial Judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge~~.[41]

~~(6) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~[42]

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[41] The deletion of this provision is a substantive change that is not discussed in the NHRE Update Committee's August 3, 2015 report. The provision was not contained in the original Federal Rule of Evidence. The NHRE Committee notes that this was NOT a federal rule, but was New Hampshire's RSA 516:25. That statute was repealed, effective January 1, 1995, so the rule will be gone if it is deleted. The Committee does not have a strong opinion on whether to retain or delete this provision. The information would still be admissible, subject to the judge's discretion, under 807 or other exceptions, depending upon the circumstances of the utterance.

[42] This paragraph in the federal rules was moved to FRE 807. The NHRE Update Committee recommends in its August 3, 2015 report that this paragraph be moved to NHRE 807.

[(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 YY

Amend New Hampshire Rule of Evidence 805 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 805, but make no substantive changes.

Rule 805. Hearsay Within Hearsay

Hearsay ~~included~~ within hearsay is not excluded **[by]** ~~under~~ the **[rule against hearsay]** ~~Hearsay Rule~~ if each part of the combined statements conforms with an exception to the **[rule.]** ~~hearsay rule provided in these Rules.~~

APPENDIX ZZ

Amend New Hampshire Rule of Evidence 806 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 806, but make no substantive changes.

Rule 806. Attacking and Supporting [The Declarant's] Credibility ~~of Declarant~~

When a hearsay statement~~,~~ **[-]** or a statement **[described]** ~~defined~~ in Rule 801(d) (2)(C), (D), or (E)~~,~~ **[-]** has been admitted in evidence, the **[declarant's]** credibility ~~of the declarant~~ may be attacked, and **[then]** ~~if attacked may be~~ supported, by any evidence **[that]** ~~which~~ would be admissible for those purposes if **[the]** declarant had testified as a witness. **[The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.]** ~~Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.~~ If the party against whom **[the]** ~~a hearsay~~ statement **[was]** ~~has been~~ admitted calls the declarant as a witness, the party **[may]** ~~is entitled to~~ examine the declarant on the statement as if **[on]** ~~under~~ cross-examination.

APPENDIX AAA

Adopt New Hampshire Rule of Evidence 807 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would add a provision that includes the substance of 803(22) and 804(6) (which are being recommended for deletion), but makes no substantive change to the rules.[43]

Rule 807. Residual Exception.

(a) *In General.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

[43] The NHRE Update Committee report states: "In the federal version of the rules, 803(24) and 804(5) have been transferred to a single rule, 807. The committee recommends this. If the Court agrees, the committee recommends a short Reporter's Note indicating the change." Justice Lynn, Chair of the Advisory Committee on Rules, agrees.

APPENDIX BBB

Amend New Hampshire Rule of Evidence 901 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyles the rule to mirror Federal Rule of Evidence 901, but make no substantive changes.

Rule 901. ~~Requirement of Authentication or Identification~~ [Authenticating or Identifying Evidence.]

~~(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.~~

[(a) *In General.* To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

~~(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:~~

[(b) *Examples.* The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) *Testimony of* ***[a]*** ~~*w*~~***[W]****itness with* ~~*k*~~***[K]****nowledge*. - Testimony that a**[n item]** ~~matter~~ is what it is claimed to be.

(2) *Nonexpert* ~~*o*~~***[O]****pinion* ***[About]*** ~~*on*~~ ~~*h*~~***[H]****andwriting*. – **[A]** ~~N~~**[n]**onexpert**['s]** opinion ~~as to the genuineness of~~ **[that]** handwriting **[is genuine]**, based **[on a]** ~~upon~~ familiarity **[with it that was]** not acquired for ~~purposes of~~ the **[current]** litigation.

~~(3) *Comparison by trier or expert witness.* - Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.~~

[(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.]

(4) *Distinctive ~~c~~**[C]**haracteristics and the ~~l~~**[L]**ike*. – **[The]** ~~A~~**[a]**ppearance, contents, substance, internal patterns, or other distinctive characteristics **[of the item]**, taken **[together]** ~~in conjunction~~ with **[all the]** circumstances.

(5) **[Opinion About a]** *Voice ~~identification~~*. **[An opinion identifying a person's voice -]** ~~Identification of a voice,~~ whether heard firsthand or through mechanical or electronic transmission or recording~~,~~**[-]** ~~by opinion~~ based **[on]** ~~upon~~ hearing the voice at any time under circumstances **[that]** connect~~ing~~ it with the alleged speaker.

(6) **[*Evidence About A*]** *Telephone ~~c~~**[C]**onversation~~s~~*. – **[For a]** ~~T~~**[t]**elephone conversation~~s~~, ~~by~~ evidence that a call was made to the number assigned at the time **[to:]** ~~by the telephone company to a particular person or business, if~~

(A) **[a particular person, if]** ~~in the case of a person,~~ circumstances, including self-identification, show **[that]** the person answering **[was]** ~~to be~~ the one called~~,~~**[;]** or

(B) **[a particular business, if]** ~~in the case of a business,~~ the call was made to a ~~place of~~ business and the **[call]** ~~conversation~~ related to business reasonably transacted over the telephone.

(7) **[*Evidence About*]** *Public ~~r~~**[R]**ecords ~~or reports~~*. - Evidence that**[:**

(A)] a **[document was]** ~~writing authorized by law to be~~ recorded or filed ~~and in fact recorded or filed~~ in a public office **[as authorized by law;]**~~,~~ or

(B) a purported public record **[or]** ~~, report,~~ statement~~, or data compilation, in any form,~~ is from the ~~public~~ office where items of this **[kind]** ~~nature~~ are kept.

~~(8) *Ancient documents or data compilation*. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.~~

[(8) *Evidence About Ancient Documents or Data Compilations*. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.]

(9) **[*Evidence About a* ** *Process or ~~s~~**[S]**ystem*. - Evidence describing a process or system ~~used to produce a result~~ and showing that **[it]** ~~the process or system~~ produces an accurate result.

(10) *Methods ~~p~~**[P]**rovided by **[a]** ~~s~~**[S]**tatute or ~~r~~**[R]**ule*. - Any method of authentication or identification **[allowed by a]** ~~provided by~~ statute or by other rules prescribed by the New Hampshire Supreme Court.

APPENDIX CCC

Amend New Hampshire Rule of Evidence 902 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 902, but make no substantive changes.

Rule 902. [Evidence that is] Self-Authentica~~tion~~[ing]

~~Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:~~

[The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:]

~~(1) *Domestic public documents under seal.* - A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution~~.

[(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.]

~~(2) *Domestic public documents not under seal.* - A document purporting to bear the signature in an official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.~~

[(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.]

(3) *Foreign ~~p~~**[P]**ublic ~~d~~**[D]**ocuments*. - A document **[that purports]** ~~purporting~~ to be **[signed]** ~~executed~~ or attested **[by a person who is authorized by a foreign country's law to do so.]** ~~in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and~~ **[The document must be]** accompanied by a final certification **[that certifies]** ~~as to~~ the genuineness of the signature and official position **[of the signer or attester -]**~~(A) of the executing or attesting person, or (B)~~ **[or]** of any foreign official whose certificate of genuineness ~~of signature and official position~~ relates to the **[signature]** ~~execution~~ or attestation or is in a chain of certificates of genuineness ~~of signature and official position~~ relating to the **[signature]** ~~execution~~ or attestation. **[The certification]** ~~A final certification~~ may be made by a secretary of **[a United States]** embassy or legation**[; by a]**~~,~~ consul general, ~~consul,~~ vice consul, or consular agent of the United States**[;]**~~,~~ or **[by]** a diplomatic or consular official of the foreign country assigned or accredited to the United States. **[If all parties have been given a]** ~~If~~ reasonable opportunity ~~has been given to all parties~~ to investigate the **[document's]** authenticity and accuracy ~~of official documents~~, the court may, for good cause**[, either:]** ~~shown,~~

[(A)]order that **[it]** ~~they~~ be treated as presumptively authentic without final certification**[;]** or

[(B) allow it] ~~permit them~~ to be evidenced by an attested summary with or without final certification.

~~(4) *Certified copies of public records*. A copy of an official record or report or entry therein, or of a document recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or rule prescribed by the Supreme Court.~~

[(4) *Certified Copies of Public Records*. A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed by the Supreme Court.]

(5) *Official ~~p~~**[P]**ublications*. ~~—~~**[A]** ~~B~~[b]ook~~s~~, pamphlet~~s~~, or other publication~~s~~ purporting to be issued by **[a]** public authority.

(6) *Newspapers and ~~p~~**[P]**eriodicals*. - Printed material~~s~~ purporting to be **[a]** newspaper~~s~~ or periodical~~s~~.

(7) *Trade ~~i~~[I]nscriptions and the ~~l~~[L]ike.*~~—~~ **[An]** ~~I~~**[i]**nscription~~s~~, sign~~s~~, tag~~s~~, or label~~s~~ purporting to have been affixed in the course of business and indicating **[origin,]** ownership, **[or]** control~~, or origin~~.

(8) *Acknowledged ~~d~~[D]ocuments.*~~—~~ **[A]** ~~D~~**[d]**ocument~~s~~ accompanied by a certificate of acknowledgment **[that is lawfully]** executed ~~in the manner provided by law~~ by a notary public or **[an]**other officer **[who is]** authorized ~~by law~~ to take acknowledgments.

(9) *Commercial ~~p~~[P]aper and ~~r~~[R]elated ~~d~~[D]ocuments.*~~—~~ Commercial paper, **[a]** signature~~s~~ **[on it]** ~~thereon~~, and **[related]** documents**[,]** ~~relating thereto~~ to the extent **[allowed]** ~~provided~~ by general commercial law.

(10*) Presumptions ~~u~~[U]nder [a] ~~s~~[S]tate ~~s~~[S]tatute.* ~~—Any~~ **[A]** signature, document, or **[anything else that state law declares]** ~~other matter declared by state law~~ to be presumptively or prima facie genuine or authentic.

~~(11) *Certified domestic records of regularly conducted activity.* – The original or a duplicate of a domestic record of regularly conducted activity, which would be admissible under Rule 803(6), and which the custodian thereof or another qualified person certifies under oath –~~

~~(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;~~

~~(B) was kept in the course of the regularly conducted activity; and~~

~~(C) was made by the regularly conducted activity as a regular practice.~~

~~A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.~~

[(11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.]

(12) *Certified foreign records of regularly conducted activity.* – In a civil case, the original or a duplicate of a foreign record of regularly conducted activity, which would be admissible under Rule 803(6), and which is accompanied by a written declaration by the custodian thereof or another qualified person that the record –

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

[(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).]

APPENDIX DDD

Amend New Hampshire Rule of Evidence 903 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 903, but make no substantive changes.

Rule 903. Subscribing Witness' Testimony ~~Unneeessary~~

~~The testimony of a subscribing witness is not necessary to authenticate a writing unless otherwise required by statute.~~

[A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.]

APPENDIX EEE

Amend New Hampshire Rule of Evidence 1001 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 1001, but make no substantive changes.

Rule 1001. Definitions [that Apply to this Article]

~~For purposes of this article the following definitions are applicable:~~

[In this article:]

~~(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.~~

[(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.]

~~(2) *Photographs.* "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.~~

[(c) A "photograph" means a photographic image or its equivalent stored in any form.]

~~(3)~~**[(d)]** ~~*Original.*~~ An "original" of a writing or recording **[means]** ~~is~~ the writing or recording itself or any counterpart intended to have the same effect by **[the]** ~~a~~ person **[who]** execut**[ed]**~~ing~~ or issu**[ed]**~~ing~~ it. **For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.** ~~An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."~~

~~(4) *Duplicate.* A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of~~

~~photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.~~

[(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.]

APPENDIX FFF

Amend New Hampshire Rule of Evidence 1002 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 1002, but make no substantive changes.

Rule 1002. Requirement of [The] Original

~~To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.~~

[An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise.]

APPENDIX GGG

Amend New Hampshire Rule of Evidence 1003 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 1003, but make no substantive changes.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as ~~an~~ **[the]** original unless ~~(1)~~ a genuine question is raised **[about]** ~~as to the authenticity of~~ the original**[’s authenticity]** or ~~(2) in~~ the circumstances **[make]** it ~~would be~~ unfair to admit the duplicate**[.]** ~~in lieu of the original.~~

APPENDIX HHH

Amend New Hampshire Rule of Evidence 1004 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 1004, but make no substantive changes.

Rule 1004. Admissibility of Other Evidence of Contents

~~The~~ **[An]** original is not required~~,~~ and other evidence of the content~~s~~ of a writing, recording, or photograph is admissible if**[:]** –

~~(1)~~**[(a)]** ~~*Originals lost or destroyed.* –~~ ~~A~~[a]ll **[the]** originals are lost or ~~have been~~ destroyed, **[and not by]** ~~unless~~ the proponent **[acting]** ~~lost or destroyed them~~ in bad faith; ~~or~~

~~(2)~~**[(b)]** ~~*Original not obtainable.* –~~ **[An]** ~~No~~ original can**[not]** be obtained by any available judicial process ~~or procedure~~; ~~or~~

~~(3) *Original in possession of opponent.* At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or~~

[(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or]

[(d)] ~~(4) *Collateral matters.* –~~ ~~T~~**[t]**he writing, recording, or photograph is not closely related to a controlling issue.

APPENDIX III

Amend New Hampshire Rule of Evidence 1005 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 1005, but make no substantive changes.

Rule 1005. [Copies of] Public Records [to Prove Content]

~~The contents of an official record or public document recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.~~

[The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.]

APPENDIX JJJ

Amend New Hampshire Rule of Evidence 1006 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 1006, but make no substantive changes.

Rule 1006. Summaries [to Prove Content]

[The proponent may use a summary, chart, or calculation to prove] ~~T~~**[t]**he content~~s~~ of voluminous writings, recordings, or photographs ~~which~~ **[that]** cannot **[be]** conveniently ~~be~~ examined in court**[.]** ~~may be presented in the form of a chart, summary, or calculation.~~ **[The proponent must make]** ~~T~~[t]he originals~~,~~ or duplicates~~, shall be made~~ available for examination or copying, or both, by other parties at **[a]** reasonable time and place. **[And]** ~~T~~**[t]**he court may order **[the proponent to]** ~~that they be~~ produce~~d~~ **[them]** in court.

APPENDIX KKK

Amend New Hampshire Rule of Evidence 1007 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 1007, but make no substantive changes.

Rule 1007. Testimony ~~or Written Admission of Party~~ [or Statement of a Party to Prove Content.]

[The proponent may prove the] ~~C~~**[c]**ontent~~s~~ of **[a]** writing~~s~~, recording~~s~~, or photograph~~s~~ ~~may be proved~~ by the testimony**[,]** ~~or~~ deposition **[or written statement]** of the party against whom **[the evidence is]** offered**[. The proponent need not account for the original.]** ~~or by the party's written admission, without accounting for the nonproduction of the original.~~

APPENDIX LLL

Amend New Hampshire Rule of Evidence 1008 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This amendment would restyle the rule to mirror Federal Rule of Evidence 1008, but make no substantive changes.

Rule 1008. Functions of [the] Court and Jury

~~When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact~~.

[Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.]

APPENDIX MMM

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 1101 because the rule is a New Hampshire specific rule on the applicability of the New Hampshire rules and is still germane. The rule currently reads, and should continue to read, as follows:

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 rules 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; divorce cases; and domestic violence proceedings.

APPENDIX NNN

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 1102 because the rule is a New Hampshire specific rule on amending the New Hampshire rules and is still germane. The rule currently reads, and should continue to read, as follows:

Rule 1102. Amendments

Amendments to the Rules of Evidence may be made as provided by the New Hampshire Supreme Court.

APPENDIX OOO

The NHRE Update Committee recommends that no changes be made to New Hampshire Rule of Evidence 1103 because the rule is a New Hampshire specific rule on the name the New Hampshire rules and is still germane. The rule currently reads, and should continue to read, as follows:

Rule 1103. Title

These rules may be known and cited as the New Hampshire Rules of Evidence.

APPENDIX PPP

Delete and replace New Hampshire Rule of Criminal Procedure 29(e) and Strafford and Cheshire County Rule of Criminal Procedure 29(e) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This proposal was jointly submitted to the Advisory Committee on Rules by the American Civil Liberties Union of New Hampshire, Judge King and Judge Kelly.

(e) Monetary Assessments

~~(1) If, at the time of sentencing, the defendant asserts a present inability to pay fines, restitution or penalty assessments imposed, the defendant shall be required to complete an affidavit of resources, under oath. The Court shall hold a hearing inquiring into the defendant's finances and may consider such factors as the defendant's employment, good faith attempts to seek employment, spousal, family and partner income, savings, property, ownership, credit lines and expenses including child support. A defendant shall not be incarcerated if the failure to pay is a result of a present inability to pay.~~

~~(2) Upon finding of present inability to pay the monies due, either in whole or in part, the court shall establish a reasonable payment schedule. In such a case, the court shall, pursuant to RSA 490:26-a, II-a, include a $25.00 fee to be added to the fine. The $25.00 fee shall be paid prior to or simultaneously with the payment of the fine. The court may, in its discretion and if allowable by law, suspend all or part of any fines, restitution or penalty assessments. The court may also, in its discretion and if allowable by law, order the commitment of the defendant to a county correctional facility in default of payment of a fine where the defendant shall be credited the statutory amount, see RSA 618:9, toward the payment of the fine for each day of incarceration. Alternatively, the court may allow the defendant to perform community service, pursuant to a court-approved plan, whereby every verifiable hour of community service shall be applied against the fine at a rate of $10.00 an hour.~~

~~(3) If payment is not made as required, the defendant shall appear on a date set by the court and show cause why incarceration in lieu of payment should not be ordered. If a defendant fails to appear after proper notice, the court may issue a capias for the arrest of the defendant.~~

[(1) Fines imposed by the court shall be due and payable on the date the sentence is imposed. Where a defendant indicates an inability to pay forthwith, the defendant shall complete an affidavit of resources, under

oath, prior to leaving the courthouse. The court will then determine whether the defendant has the financial ability to pay the fine.

(2) The determination of a defendant's financial ability to pay the fine shall be made by comparing the defendant's assets and incomes with the amount of the fine. The defendant's assets shall include all real and personal property owned in any manner by the defendant, unless exempt from execution, levy, attachment, garnishment, or other legal process under any state or federal law. The defendant's income shall include all income, whether earned or not, from any source, unless exempt from execution, levy, attachment, garnishment, or other legal process under any state or federal law, and shall be reduced only by the amount of expenses which are reasonably necessary for the maintenance of the defendant and his dependents and by the amount of defendant's anticipated or current obligation to repay the Office of Cost Containment for the cost of appointed counsel.

(3) In any case where the court finds that the defendant is unable to pay the fine either on the date the sentence is imposed or later, the court may: (i) defer or suspend payment of all or part of the fine or order periodic payment; or (ii) allow the defendant to perform community service, pursuant to a plan submitted to and approved by the court. In any such deferral or order of periodic payment, the court shall, pursuant to RSA 490:26-a, II-a, include a $25.00 fee to be added to the fine. Every hour of verified community service shall be applied against the fine at the rate of $15.00 an hour. A community service plan approved under this paragraph shall take into account the defendant's circumstances including but not limited to age, disability, health, employment, and access to child-care and transportation.

(4) Conduct which the court finds is a willful failure to pay a fine or to perform community service as ordered may be punishable as criminal contempt of court and only through the provisions of RSA 618:9. "Willful failure to pay" means a defendant has intentionally chosen not to pay the fine when he has had the ability to do so.

(5) No defendant shall be incarcerated for nonpayment of a fine unless counsel has been appointed or the defendant executes a valid waiver of counsel, and the Court, having conducted an ability-to-pay hearing, concludes that the defendant willfully failed to pay the fine or perform community service.

(6) In any case where the court is considering the issuance of an order of commitment for willful nonpayment of a fine, it may also consider whether an order of periodic payments is appropriate under the circumstances as well as the appropriateness of the options set forth in

paragraph (C) above. The court shall also make written findings of the facts upon which the court has made its determination that the defendant has willfully failed to pay the fine or perform community service as ordered.

(7) When the court appoints counsel to represent a defendant in a proceeding related to (E), above, the court shall grant the defendant relief from the obligation to repay the State for their appointed counsel fees under RSA 604-A:9 I-b, when the court determines that the defendant is financially unable to repay.]

APPENDIX QQQ

Delete and replace New Hampshire Rule of Criminal Procedure 29(e) and Strafford and Cheshire County Rule of Criminal Procedure 29(e)as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format). This proposal is identical to the proposal set forth in appendix PPP, except for the language indicated in **bold and in red.** This proposal was submitted to the Advisory Committee on Rules by Justice Lynn, Chair of the Advisory Committee on Rules.

(e) Monetary Assessments

~~(1) If, at the time of sentencing, the defendant asserts a present inability to pay fines, restitution or penalty assessments imposed, the defendant shall be required to complete an affidavit of resources, under oath. The Court shall hold a hearing inquiring into the defendant's finances and may consider such factors as the defendant's employment, good faith attempts to seek employment, spousal, family and partner income, savings, property, ownership, credit lines and expenses including child support. A defendant shall not be incarcerated if the failure to pay is a result of a present inability to pay.~~

~~(2) Upon finding of present inability to pay the monies due, either in whole or in part, the court shall establish a reasonable payment schedule. In such a case, the court shall, pursuant to RSA 490:26-a, II-a, include a $25.00 fee to be added to the fine. The $25.00 fee shall be paid prior to or simultaneously with the payment of the fine. The court may, in its discretion and if allowable by law, suspend all or part of any fines, restitution or penalty assessments. The court may also, in its discretion and if allowable by law, order the commitment of the defendant to a county correctional facility in default of payment of a fine where the defendant shall be credited the statutory amount, see RSA 618:9, toward the payment of the fine for each day of incarceration. Alternatively, the court may allow the defendant to perform community service, pursuant to a court approved plan, whereby every verifiable hour of community service shall be applied against the fine at a rate of $10.00 an hour.~~

~~(3) If payment is not made as required, the defendant shall appear on a date set by the court and show cause why incarceration in lieu of payment should not be ordered. If a defendant fails to appear after proper notice, the court may issue a capias for the arrest of the defendant.~~

[(1) Fines imposed by the court shall be due and payable on the date the sentence is imposed. Where a defendant indicates an inability to pay forthwith, the defendant shall complete an affidavit of resources, under oath, prior to leaving the courthouse. The court will then determine whether the defendant has the financial ability to pay the fine.

(2) The determination of a defendant's financial ability to pay the fine shall be made by comparing the defendant's assets and incomes with the amount of the fine. The defendant's assets shall include all real and personal property owned in any manner by the defendant, unless exempt from execution, levy, attachment, garnishment, or other legal process under any state or federal law. The defendant's income shall include all income, whether earned or not, from any source, unless exempt from execution, levy, attachment, garnishment, or other legal process under any state or federal law, and shall be reduced only by the amount of expenses which are reasonably necessary for the maintenance of the defendant and his dependents and by the amount of defendant's anticipated or current obligation to repay the Office of Cost Containment for the cost of appointed counsel. The court also may consider (1) spousal, partner and family income or assets to the extent they are available to the defendant: (2) the defendant's ability to access credit; and (3) the diligence exercised by the defendant in pursuing employment or other means of satisfying his financial obligations.

(3) In any case where the court finds that the defendant is unable to pay the fine either on the date the sentence is imposed or later, the court may: (i) defer or suspend payment of all or part of the fine or order periodic payment; or (ii) allow the defendant to perform community service, pursuant to a plan submitted to and approved by the court. In any such deferral or order of periodic payment, the court shall, pursuant to RSA 490:26-a, II-a, include a $25.00 fee to be added to the fine. Every hour of verified community service shall be applied against the fine at the rate of $15.00 an hour. A community service plan approved under this paragraph shall take into account the defendant's circumstances including but not limited to age, disability, health, employment, and access to child-care and transportation.

(4) Conduct which the court finds is a willful failure to pay a fine or to perform community service as ordered may be punishable as civil contempt of court subject to the provisions of RSA 618:9. "Willful failure to pay" means a defendant has intentionally chosen not to pay the fine when he has had the ability to do so. Upon proof by the State that a defendant has failed to pay a fine ordered by the court, the burden of proof shall be upon the defendant to establish by a preponderance of the

evidence that he or she does not have the ability to pay and that he or she has exercised reasonable diligence in pursuing the means to pay.

(5) No defendant shall be incarcerated for nonpayment of a fine unless the Court, having conducted an ability-to-pay hearing, concludes that the defendant willfully failed to pay the fine or perform community service.

(6) In any case where the court is considering the issuance of an order of commitment for willful nonpayment of a fine, it may also consider whether an order of periodic payments is appropriate under the circumstances as well as the appropriateness of the options set forth in paragraph (C) above. The court shall also make findings in writing or on the record of the facts upon which the court has made its determination that the defendant has willfully failed to pay the fine or perform community service as ordered.

This proposal does not include a section (7).]

APPENDIX RRR

Amend Circuit Court - District Division Rule 5.4 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 5.4. Failure to Answer.

[A.] If the defendant does not file an appearance on or before the return day, a notice of default shall be issued that the plaintiff may recover possession of the demanded premises and costs; and, if the writ includes a claim for unpaid rent the notice of default may include the amount of unpaid rent claimed, not to exceed fifteen hundred dollars ($1,500.00) in addition to the costs. A writ of possession and notice of judgment shall also issue, but not until the expiration of at least three days after the Clerk's notice of default and upon the filing of a military affidavit and, if the writ includes a claim for unpaid rent, an affidavit of damages.

[B. If the defendant files a motion to strike the default prior to the issuance of a writ of possession and notice of judgment, no writ of possession shall issue prior to the Court's ruling upon the motion. If the motion to strike the default is denied, then a notice of judgment shall be issued, and the writ of possession shall not issue until the expiration of the seven day period for filing a Notice of Intent to Appeal set forth in RSA 540:20. If the defendant files a timely Notice of Intent to Appeal, then the writ of possession shall not leave until the expiration of the appeal period set forth in Supreme Court Rule 7, except as otherwise provided in RSA 540:25, I, or following an order from the Supreme Court dismissing the defendant's possessory appeal or deeming the defendant's possessory appeal waived for failure to comply with RSA 540:25, II. If the possessory action was instituted for nonpayment of rent, the Court shall determine and set forth its order denying the motion to strike the default the amount which must be paid into Court on a weekly basis in the event the defendant appeals. This amount is equal to the actual weekly rent or the periodic rent converted into a weekly sum.]

APPENDIX SSS

Amend Circuit Court - District Division Rule 5.7 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 5.7. Writ of Possession and Judgment.

A. If the defendant fails to appear for trial, or if upon trial it is considered by the Court that the plaintiff has sustained the complaint, judgment shall be rendered that the plaintiff recover possession of the demanded premises and costs, and a writ of possession shall issue.

1. If the defendant failed to appear for trial, then the writ of possession and notice of judgment shall not issue until the expiration of at least three days after the Clerk's notice of default and, if the writ includes a claim for unpaid rent, upon the filing of an affidavit of damages.**[If the defendant files a motion to strike the default prior to the issuance of a writ of possession and notice of judgment, no writ of possession shall issue prior to the Court's ruling upon the motion. If the motion to strike the default is denied, then a notice of judgment shall be issued, and the writ of possession shall not issue until the expiration of the seven day period for filing a notice of Intent to Appeal set forth in RSA 540:20. If the defendant files a timely Notice of Intent to Appeal, then the writ of possession shall not issue until the expiration of the appeal period set forth in Supreme Court Rule 7, except as otherwise provided in RSA 540:25-I, or following an order from the Supreme Court dismissing the defendant's possessory appeal or deeming the defendant's possessory appeal waived for failure to comply with RSA 540:25, II. If the possessory action was instituted for nonpayment of rent, the Court shall determine and set forth in its order denying the motion to strike the default the amount which must be paid into Court on a weekly basis in the event the defendant appeals. This amount is equal to the actual weekly rent or the periodic rent converted into a weekly sum.]**

2. If upon trial the plaintiff sustained the complaint, then the writ of possession shall not issue until the expiration of the seven day period for filing a Notice of Intent to Appeal set forth in RSA 540:20. If the defendant files a timely Notice of Intent to Appeal, then the writ of possession shall not issue until the expiration of the appeal period set forth in Supreme Court Rule 7, except as otherwise provided in RSA 540:25, I, or following an order from the Supreme Court dismissing the defendant's possessory appeal or deeming the defendant's possessory appeal waived for failure to comply with RSA 540:25, II.

B. In all cases in which a judgment for plaintiff is rendered where the action is based upon nonpayment of rent, the Court shall determine and set forth in

its order the amount which must be paid into Court on a weekly basis in the event defendant appeals. This amount is equal to the actual weekly rent or the periodic rent converted into a weekly sum.

C. In all cases which include a claim for unpaid rent the Court's judgment shall include a money judgment on the plaintiff's claim and any setoff or counterclaim by defendant.

APPENDIX TTT

Amend Circuit Court - District Division Rule 5.9 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 5.9. Notice Form.

[A.] The Landlord and Tenant Writ shall incorporate or have attached to it the following notice:

> If you desire to be heard on the matters raised in these papers, you must notify the Court by filing an appearance form with the Clerk of Court on or before the date specified on this writ next to the words "RETURN DAY". (These forms are available at the Clerk's Office.) Once you have filed your appearance, a date for a hearing will be set by the court and you will be notified by mail. You do not have to physically appear in court on the RETURN DAY since there will be no hearing on that day. If the landlord claims unpaid rent and if you file a claim or counterclaim which offsets or reduces the amount owed to the landlord, you must file the claim or counterclaim on or before the RETURN DAY shown on this Landlord and Tenant Writ. Space is provided on the appearance form for making the claim or counterclaim. IF YOU DO NOT FILE AN APPEARANCE FORM, IT WILL BE ASSUMED YOU DO NOT WISH TO CONTEST THE ACTION, A DEFAULT JUDGMENT WILL BE ENTERED AGAINST YOU, WHICH MAY INCLUDE ANY UNPAID RENT CLAIMED BY THE LANDLORD, AND A WRIT OF POSSESSION MAY ISSUE.

[B. Whenever the defendant does not file an appearance on or before the return day, the Clerk's notice of default shall include the language set forth in rule 5.4. Whenever the defendant fails to appear for trial, the Clerk's notice of default shall include the language set forth in Rule 5.7(A)(1).]

APPENDIX UUU

Amend New Hampshire Rule of Criminal Procedure 12(a) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(a) *Circuit Court-District Division*

(1) ~~Upon request~~, **[Within 10 calendar days after the arraignment]** in misdemeanor **[cases]** and **[upon request in]** violation-level cases, the prosecuting attorney shall furnish the defendant with **[any and all discovery, including but not limited to,]** the following:

(A) A copy of records of statements or confessions, signed or unsigned, by the defendant, to any law enforcement officer or agent;

(B) A list of any tangible objects, papers, documents or books obtained from or belonging to the defendant; and

(C) A statement as to whether or not the foregoing evidence, or any part thereof, will be offered at the trial.

(2) Not less than fourteen days prior to trial, the State shall provide the defendant with:

(A) a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, it anticipates introducing at trial;

(B) all exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995); and

(C) notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts.

(3) Not less than seven days prior to trial, the defendant shall provide the State with a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, the defendant anticipates introducing at trial.

(4) *Sanctions for Failure to Comply.* If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including but not limited to:

(A) ordering the party to provide the discovery not previously provided;

(B) granting a continuance of the trial or hearing;

(C) prohibiting the party from introducing the evidence not disclosed;

(D) assessing the costs and attorneys fees against the party or counsel who has violated the terms of this rule.

APPENDIX VVV

Amend the Strafford and Cheshire County Rule of Criminal Procedure 12(a) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(a) *Circuit Court-District Division*

(1) ~~Upon request,~~ **[Within 10 calendar days after the arraignment]** in misdemeanor **[cases]** and violation-level cases, the prosecuting attorney shall furnish the defendant with **[any and all discovery, including, but not limited to,]** the following:

(A) A copy of records of statements or confessions, signed or unsigned, by the defendant, to any law enforcement officer or agent;

(B) A list of any tangible objects, papers, documents or books obtained from or belonging to the defendant; and

(C) A statement as to whether or not the foregoing evidence, or any part thereof, will be offered at the trial.

(2) Not less than fourteen days prior to trial, the State shall provide the defendant with:

(A) a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, it anticipates introducing at trial;

(B) all exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995); and

(C) notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts.

(3) Not less than seven days prior to trial, the defendant shall provide the State with a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, the defendant anticipates introducing at trial.

(4) *Sanctions for Failure to Comply.* If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including but not limited to:

(A) ordering the party to provide the discovery not previously provided;

(B) granting a continuance of the trial or hearing;

(C) prohibiting the party from introducing the evidence not disclosed;

(D) assessing the costs and attorneys fees against the party or counsel who has violated the terms of this rule.