



**THE STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON RULES**

Honorable Patrick E. Donovan, Chair
Abigail Albee, Esquire
Honorable Paul S. Berch
Honorable R. Laurence Cullen
Honorable N. William Delker
Honorable Michael H. Garner
Sean P. Gill, Esquire
Sara S. Greene, Esquire
Jeanne P. Herrick, Esquire
Charles Keefe, Esquire
Derek D. Lick, Esquire
Susan A. Lowry, Esquire
Terri Peterson
Ari Richter
Honorable Donna M. Soucy
Janet L. Spalding, CPA
Charles P.E. Stewart

Frank Rowe Kenison
Supreme Court Building
One Charles Doe Drive
Concord, NH 03301
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Lorrie Platt, Secretary

**NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES**

Agenda – September 10, 2021

1. APPROVAL OF JUNE 4, 2021 MEETING MINUTES

See DRAFT June 4, 2021 meeting minutes (Attachment A)

2. ITEMS STILL PENDING BEFORE THE COMMITTEE

(a) 2019-013. New Hampshire Rule of Professional Conduct 8.4(g). See July 15, 2019 order amending Rule 8.4(g). The order provides that the Committee will undertake review of the rule after it has been in effect for two years, and that the Committee will provide the Court with its recommendations, if any, upon completing that review. At its September 6, 2019 meeting, the Committee voted to place this item on the agenda for its September 2021 meeting. (Attachment B)

(b) Subcommittee reports

2020-009 Proposed amendment to Criminal Rule of Procedure 12 – Report of Subcommittee on Rule 12 (Attachment C)

3. NEW SUBMISSIONS

- (a) 2021-003. Request of Judge Andrew Schulman proposing amendment to Rules of Evidence re authentication (Attachment D)
- (b) 2021-004. Request of Judge Susan Ashley proposing amendment to Circuit Court Family Division Rule 3.6 (Attachment E)
- (c) 2021-005. Proposal by Judicial Conduct Committee to amend Supreme Court Rule 40 (Attachment F) See also
<https://www.courts.state.nh.us/committees/adviscommrules/dockets/2021/2021-005-Supreme-Court-Rule-40-amendment-proposed-by-Judicial-Conduct-Committee.pdf>

4. OTHER BUSINESS

- (d) Report of action taken by Supreme Court on amendments proposed in Rules Committee's July 2021 report
- (e) Discussion - Should a subcommittee file a short report explaining its action when it proposes to amend an existing rule or adopt a new rule. The report could serve as history in future cases where the rule might be implicated.

5. REMAINING MEETING DATES

Friday, December 10

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

DRAFT

Minutes of June 4, 2021 Public Meeting

Supreme Court Courtroom
Frank Rowe Kenison Supreme Court Building
One Charles Doe Drive
Concord, NH 03301

The meeting was called to order at 12:35 p.m. by Justice Donovan, Committee Chair. The following Committee members attended the meeting: Abigail Albee, Esq.; Ari Richter; Charles Keefe; Charles Stewart; Hon. R. Laurence Cullen; Hon. N. William Delker; Hon. Michael Garner; Sean Gill, Esq.; Jeanne P. Herrick, Esq.; Derek Lick, Esq.; Susan A. Lowry, Esq.; and Terri Peterson. Lorrie Platt, Esq., Secretary to the Committee, was also present.

1. Public Hearing

Justice Donovan opened the public hearing. Because no members of the public were present when the hearing opened, the Committee agreed to keep the hearing open as it began to consider items on its agenda.

2. Approval of Minutes of March 19, 2021 Meeting

Upon motion made and seconded, the Committee approved the minutes of its March 19, 2020 meeting.

3. Discussion and Vote on Items on Public Hearing Agenda

(a) 2020-010 Supreme Court Rule 12-A(1) - Mediation

Upon motion made and seconded, the Committee voted to refer the proposed amendment to the court with the recommendation that it be adopted.

(b) 2020-008 Superior Court Rule 12(g) – Motions for Summary Judgment

Upon motion made and seconded, the Committee voted to refer the proposed amendment to the court with the recommendation that it be adopted.

(c) 2020-005 Superior and Circuit Court Rules - Dismissal of Actions

Upon motion made and seconded, the Committee voted to refer the proposed amendments to Superior Court Rule 41, District Division Rule 1.27, Probate Division Rule 172 and Family Division Rule 1.32 to the court with the recommendation that they be adopted.

(d) 2020-006 NH Rule of Criminal Procedure 12 - Discovery of Defendant's Criminal Record

Judge Delker observed that the rule was essentially already in effect under a superior court administrative order. Upon motion made and seconded, the Committee voted to refer the proposed amendment to the Court with the recommendation that it be adopted.

(e) 2020-009 NH Rule of Criminal Procedure 12 (b)(1)(f) – Notice of State's Intention to Offer at Trial Evidence of Defendant's Prior Crimes/Acts

Judge Delker observed that the rule did not establish specific deadlines for disclosure. The committee discussed whether the rule should require that the actual evidence and the identity of the witnesses who were going to testify be disclosed at the time that notice was provided.

Upon motion made and seconded, the Committee voted to table the proposed amendment and to establish a subcommittee comprised of Attorney Keefe, Judge Delker and Judge Garner to consider these and related issues and to recommend how to apply the concept in the Circuit Court.

4. New Submissions

(a) 2021-002 Supreme Court Rule 35

Upon motion made and seconded, the Committee voted to send the May 24, 2021 memo from David Peck to the Bar Association's Ethics Committee for review.

5. Adjournment

Upon motion made and seconded, the committee voted to close the public hearing and adjourn the meeting. The next public meeting of the committee is scheduled for Friday, September 10, 2021.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT OF NEW HAMPSHIRE

O R D E R

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51, the Supreme Court of New Hampshire entered the following order:

Following a public hearing held on April 12, 2019 on the recommendation made by the Advisory Committee on Rules (the Committee) to amend New Hampshire Rule of Professional Conduct (Rule) 8.4, and following a comment period on the court's alternative proposal to amend Rules 8.4 and 4.4 set forth in its May 17, 2019 order, and after considering all comments submitted, the New Hampshire Supreme Court hereby amends the Rules by adopting Rule 8.4(g) and the comments thereto as specified in Appendix A attached to this order. The court makes no changes to Rule 4.4.

The Bar has shown a high level of interest in the proposed amendment to Rule 8.4 since March 2017, when the Committee first considered the question of whether to recommend that this court adopt the American Bar Association's Model Rule of Professional Conduct 8.4(g)(Model Rule 8.4(g)). Since then, members of the Bar have expressed disparate views about Model Rule 8.4(g) and other proposals that were submitted to the Committee and this court. Model Rule 8.4(g) is of relatively recent origin, and a majority of jurisdictions have not yet considered whether to adopt it. Of those jurisdictions that have considered adopting Model Rule 8.4(g), several have declined to do so. As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g). As of this writing, Model Rule 8.4(g) remains under consideration in a number of jurisdictions.

In light of the nascent and ongoing discussion regarding the model rule, the court declines to adopt the rule proposed by the Advisory Committee on Rules. The amendment to Rule 8.4 that the court adopts today is similar to that proposed by the Attorney Discipline Office in a March 25, 2019 letter submitted prior to the April 12 hearing on the Committee's proposal.

The court believes that a review of the operation of the rule that the court adopts today is appropriate once it has been in effect for a reasonable period of time. Accordingly, the court hereby directs the Committee to undertake such a review after the amended rule has been in effect for two years, and that the Committee provide the court with its recommendations, if any, upon completing that review. The court requests that the Committee work with the

New Hampshire Bar Association Ethics Committee, the Attorney Discipline Office, and any other entities or persons the Committee believes would assist in the review.

The amendments to the New Hampshire Rules of Professional Conduct made by this order shall take effect on August 1, 2019.

Date: July 15, 2019

ATTEST:



Eileen Fox, Clerk
Supreme Court of New Hampshire

APPENDIX A

Amend New Hampshire Rule of Professional Conduct 8.4 (new material is in **[bold and in brackets]**) as follows:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official;

(e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law-~~;~~ **or**

(g) take any action, while acting as a lawyer in any context, if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, harass or burden another person, including conduct motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules of Professional Conduct, nor does it preclude a lawyer from engaging in conduct or speech or from maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

New Hampshire Supreme Court Comment

Subsection (g) is intended to govern the conduct of lawyers in any context in which they are acting as lawyers. The rule requires that the proscribed action be taken with the primary purpose of embarrassing,

harassing or burdening another person, which includes an action motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.]

ATTACHMENT C

Rule 12. Discovery¹

(a) Circuit Court-District Division

(1) At the defendant's first appearance before the court, the court shall inform the defendant of his or her ability to obtain discovery from the State. Upon request, in misdemeanor and violation-level cases, the prosecuting attorney shall furnish the defendant with 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) Except for good cause shown, not less than fourteen days prior to trial, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must provide the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose. The party shall also provide access to all statements, reports or other materials that the proponent of Rule 404(b) evidence will rely on to prove the commission of such other crimes, wrongs or acts.

(5) 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.

(b) *Superior Court.* The following discovery and scheduling provisions shall apply to all criminal cases in the superior court unless otherwise ordered by the presiding justice.

(1) *Pretrial Disclosure by the State.* If a case is initiated in superior court, the State shall provide the materials specified in RSA 592-B:6. In addition, within forty-five calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with the materials specified below. If a case is originated in circuit court-district division, within ten

¹ This proposal uses the existing Rule 12. Currently pending before the Supreme Court is a proposal to amend Rule 12 by adding a new subsection (a), which applies to the disclosure of criminal records for use in bail hearings. If that proposal is adopted by the Supreme Court, it will result in renumbering the sections of Rule 12, including this proposal.

calendar days after the entry of a not-guilty plea by the defendant, the State shall provide the defendant with the materials specified below.

(A) A copy of all statements, written or oral, signed or unsigned, made by the defendant to any law enforcement officer or the officer's agent which are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(B) Copies of all police reports; statements of witnesses; and to the extent the State is in possession of such materials, results or reports of physical or mental examinations, scientific tests or experiments, or any other reports or statements of experts, as well as a summary of each expert's qualifications, with the exception of drug testing results from the New Hampshire State Forensic Laboratory, which shall be provided within ten court days from the date of indictment, or such other date as may be authorized in the dispositional conference order.

(C) The defendant's prior criminal record.

(D) Copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places that are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(E) 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).

~~(F) 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.~~

(2) *Pretrial Disclosure by the Defendant*

Not less than sixty calendar days prior to jury selection if the case originated in Superior Court or not less than thirty calendar days prior to jury selection if the case originated in Circuit Court-District Division or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the defendant shall provide the State with copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the defendant as evidence at the trial or hearing.

(3) *Dispositional Conferences*. The purpose of the dispositional conference is to facilitate meaningful discussion and early resolution of cases.

(A) Unless the State does not intend to make a plea offer, in which case it shall so advise the defendant within the time limits specified herein, the State shall provide a written offer for a negotiated plea, in compliance with the Victim's Rights statute, RSA 21-M:8-k, to the defense, no less than fourteen (14) days prior to the dispositional conference. The defense shall respond to the State's offer no later than ten (10) days after receipt.

(B) The judge shall have broad discretion in the conduct of the dispositional conference.

(C) The State, defendant, and defendant's counsel, if any, shall appear at the dispositional conference. The State and the defendant shall be represented at the dispositional conference by an attorney who has full knowledge of the facts and the ability to negotiate a resolution of the case. Counsel shall be prepared to discuss the impact of known charges being brought against the defendant in other jurisdictions, if any.

(D) If a plea agreement is not reached at the dispositional conference, the matter shall be set for trial. The court may also schedule hearings on any motions discussed during the dispositional conference. Counsel shall be prepared to discuss their availability for trial or hearing as scheduled by the court.

(E) Evidence of conduct or statements made during the dispositional conference about the facts and/or merits of the case is not admissible as evidence at a hearing or trial.

(F) If the case may involve expert testimony from either party, both sides shall be prepared to address disclosure deadlines for: all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by the expert witness; a summary of each such expert's qualifications; rebuttal expert reports and

qualifications; and expert depositions. Except for good cause shown, the failure of either party to set expert witness disclosure deadlines at the dispositional conference may be grounds to exclude the expert from testifying at trial.

(4) *Exchange of Information Concerning Trial Witnesses*

(A) Except for good cause shown,

(i) not less than 60 days prior to jury selection, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must provide the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose. The party shall also provide access to all statements, reports or other materials that the proponent of Rule 404(b) evidence will rely on to prove the commission of such other crimes, wrongs or acts.

(ii) not less than 45 days prior to jury selection, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must file a motion to admit such evidence. The motion must identify the evidence and articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose.

(iii) not less than 30 days prior to jury selection, a party shall file a motion to exclude evidence it believes constitutes Rule 404(b) evidence if no motion to admit the evidence has been filed by the opposing party. A motion to exclude filed pursuant to this provision must identify with specificity the evidence the party seeks to be excluded under Rule 404(b).

(BA) Not less than twenty calendar days prior to the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the State shall provide the defendant with a list of the names of the witnesses it anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to paragraph (b)(1) of this rule, the State shall provide the defendant with all statements of witnesses the State anticipates calling at the trial or hearing. At this same time, the State also shall furnish the defendant with the results of New Hampshire criminal record checks for all of the State's trial or hearing witnesses other than those witnesses who are experts or law enforcement officers.

(CB) Not later than ten calendar days before the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than two calendar days prior to such hearing, the defendant shall provide the State with a list of the names of the witnesses the defendant anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the defendant shall provide the State with all statements of witnesses the defendant anticipates calling at the trial or hearing. Notwithstanding the preceding sentence, this rule does not require the defendant to provide the State with copies of or access to statements of the defendant.

(DG) For purposes of this rule, a "statement" of a witness means:

(i) a written statement signed or otherwise adopted or approved by the witness;

(ii) a stenographic, mechanical, electrical or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement; and

(iii) the substance of an oral statement made by the witness and memorialized or summarized within any notes, reports, or other writings or recordings, except that, in the case of notes personally prepared by the attorney representing the State or the defendant at trial, such notes do not constitute a "statement" unless they have been adopted or approved by the witness or by a third person who was present when the oral statement memorialized or summarized within the notes was made.

Justice Donovan-

Attached is a request from Judge Schulman to amend the Rules of Evidence to include Rules 902(13) and 902(14) consistent with the Federal Rules of Evidence with a recent order he wrote explaining the state of the law on this issue. These two provisions were added to the federal rules after NH's 2016 revision to our rules of evidence.

The federal rules read:

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule (902(11) or (12). The proponent also must meet the notice requirements of Rule 902 (11).

Will Delker
Associate Justice
Hillsborough County Superior Court North
300 Chestnut Street
Manchester, NH 03101
wdelker@courts.state.nh.us

From: Hon. Andrew Schulman <aschulman@courts.state.nh.us>
Sent: Friday, May 28, 2021 1:33 PM
To: Hon. William Delker <WDelker@courts.state.nh.us>
Subject: RE: Proposed Rule

I propose NH adopt Fed R. Ev. 902(13) and (14) which add to the list of self-authenticating records. I am presently dealing with a certificate from Google regarding Google searches, which, according to some federal caselaw is a poor fit with 902(11). Hence the new federal rules in 2017.

The State of New Hampshire
Circuit Court



David D. King
Administrative Judge

Susan W. Ashley
Deputy Administrative Judge

Senior Administrator
Gina Belmont, Esq.

Administrators
Sarah H. Freeman, Esq.
Kate E. Geraci, Esq.
Heather S. Kulp, Esq.
Brigette Siff Holmes, Esq.

July 30, 2021

Justice Patrick E. Donovan
Chair, Advisory Committee on Rules

Lorrie Platt
Secretary, Advisory Committee on Rules
One Charles Doe Drive
Concord, NH 03301

RE: Proposed Revision to Circuit Court—Family Division Rule 3.6

Justice Donovan and Rules Sect'y Platt:

On behalf of New Hampshire's Juvenile Probation Transformation team, please find attached a proposed revision to Circuit Court—Family Division Rule 3.6, Conditions of Release, more familiarly known as our juvenile probation rules.

Brief summary:

This proposed revision of Family Division Rule 3.6 is part of a statewide, multidisciplinary effort to transform juvenile probation. The genesis of this transformation, along with New Hampshire's Capstone Project, is explained in more detail below for your reference. The proposed rule revision is the product of extensive collaboration with judges, prosecutors, defense attorneys, law enforcement, diversion coordinators, policy makers, the Office of the Child Advocate, and, most importantly, youth and DCYF's Juvenile Probation and Parole Officers who supervise them. This rule change is intended to consolidate and reduce the sheer number of rules of juvenile probation that currently apply to every youth on probation, so that New Hampshire can shift to a more individualized approach to probation supervision based on a youth's assessed strengths and needs. It is one component of a comprehensive plan that diverts youth whose needs can be better addressed through community services, and—for youth who enter the juvenile justice system and are placed on probation—aligns adolescent brain science and positive youth development to achieve better outcomes for the youth, their families and their communities.

Additional details:

While the desire to revise New Hampshire's juvenile probation rules has existed for decades, the impetus for this proposed revision arose in November 2019, when an 8-member team from New Hampshire was selected to participate in Georgetown University's Center for Juvenile Justice Reform (CJJR). New Hampshire was one of seven jurisdictions accepted into the Transforming Juvenile Probation Certificate Program, and the only state-wide team selected from across the country. The team includes myself, DCYF Director Joseph Ribsam, Esq., New Hampshire Child Advocate Moira O'Neill, Ph.D., Manchester Prosecutor Steven Ranfos, Esq., New Hampshire Public Defender Pamela Jones, Esq., DCYF Associate Bureau Chief-Field Services Amy McCormack, DCYF Administrator II Richard Sarette, and NH Juvenile Diversion Coordinator Nicole Rodler. The Annie E. Casey Foundation (AECF), as well as the Council of State Governments, co-sponsored the week-long program, and AECF has been providing technical assistance to the New Hampshire team in convening educational, discussion and work sessions to advance this transformation.

The goal of the certificate program was to guide teams in fundamentally transforming their system-wide approaches to probation. Each team developed a Capstone Project after evaluating its current probation and diversion processes, and identified opportunities to enhance those efforts on behalf of justice-involved youth. NH's Capstone Project has several components, one of which is revising the rules of probation. I have attached the full Capstone Project, should you wish to review its details.

Juvenile justice stakeholders were introduced to this transformation effort during a remote presentation to over 500 people on January 19, 2021. Attendees included youth and their families, judges, juvenile probation and parole officers, police officers, prosecutors, defense lawyers, diversion coordinators, legislators, and representatives from school districts, treatment providers, and other community organizations. In February and March 2021, the Transformation team hosted seven affinity groups (judges, policy/legislators, law enforcement/prosecution, defense lawyers, JPPOs, youth/family, and service providers/educators) to foster open discussion of the Capstone goals, to gather input, and to address concerns from each group regarding the proposed changes to practice.

We are anticipating achievement of a key Capstone goal: SB 94, passed by New Hampshire's House and Senate and awaiting Governor Sununu's signature, will provide for the completion of a strength-based needs/risk assessment for any youth prior to the filing of a delinquency petition, to help divert youth to more appropriate services if their needs indicate they could be better served without entering the juvenile justice system. Importantly, for those who do enter the juvenile justice system, the assessment will provide valuable information in developing a meaningful, individualized plan for youth who are adjudicated delinquent.

Currently, most youth adjudicated delinquent are placed on probation, and each must follow the twenty rules of conditional release enumerated in the current Rule 3.6,

or be subject to violations that could significantly lengthen their time in the juvenile justice system. The rules themselves do not identify or address the root causes of youths' delinquent conduct, and technical violations frequently push youth deeper into the juvenile justice system. Moreover, several rules are redundant, such as the rules that prohibit *specific* unlawful conduct even though an overarching rule prohibits *any* unlawful conduct. By revising Rule 3.6, we propose to eliminate redundant rules and require only such rules as are necessary for *all* youth, regardless of their needs. Paring down the standardized rules—from twenty to five—will shift the focus of probation from monitoring generic rules to coaching and mentoring youth toward achieving their individualized plan. Such plans should be trauma-informed, and incorporate developmentally, racially and ethnically sensitive interventions. To that end, youth and families will help identify components of the individualized plan, so that appropriate supports and services can be implemented to maximize success in changing detrimental behavior and promoting community safety.

If you have any questions, please feel free to reach out to me at sashley@courts.staten.nh.us or (603) 608-6717, or to any Transformation team member listed above.

Thank you for your time and consideration of this proposed rule change, and for scheduling any necessary hearing on the matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Susan W. Ashley', with a long horizontal flourish extending to the right.

Hon. Susan W. Ashley
Deputy Administrative Judge
NH Circuit Court

3.6 Conditions of Release: In juvenile cases, the Court may place a juvenile on conditional release under the supervision of a Juvenile Probation and Parole Officer (JPPO). The terms and conditions of release, unless otherwise prescribed by the Court, shall be as follows:

- (1) I will remain arrest free and obey all laws.
- (2) I will follow all orders of the court.
- (3) I will submit to reasonable searches of my person, room, and personal property to maintain safety of my person, living environment and community.
- (4) I will not possess, transport, control, or receive any weapon, explosive device, or firearm.
- (5) I will follow my identified individual plan.

~~———— (a) You shall comply with all orders of the Court.~~

~~———— (b) You shall be of good behavior and remain arrest free, obey all laws and cooperate with your parent(s) or custodian at all times.~~

~~———— (c) You shall, if under 18 years of age or until you have graduated, attend school full-time and follow all school rules.~~

~~———— (d) You shall attend school full-time and follow all school rules. If lawfully allowed to attend school only part-time, you shall also be lawfully employed or actively engaged in an employment plan approved by your JPPO.~~

~~———— (e) You shall not consume or possess alcoholic beverages or controlled drugs or any substance or thing determined to be contraband by your JPPO.~~

~~———— (f) You shall submit to random drug testing as ordered by the Court.~~

~~———— (g) You shall attend, and meaningfully participate in, all treatment and counseling as ordered by the Court.~~

~~———— (h) You shall not possess, transport, control or receive any weapon, explosive device, or firearm.~~

~~———— (i) You shall report to your JPPO at such times and places as directed by your JPPO.~~

- ~~———— (j) You shall immediately notify your JPPO of any arrest, summons, or questioning by a law enforcement officer.~~
- ~~———— (k) You shall report any change of address, telephone number, school status, or employment to your JPPO within 24 hours.~~
- ~~———— (l) You shall submit to reasonable searches as requested by your JPPO of your person, property, possessions, vehicle(s), school locker(s), bags, containers, or any other items under your custody, care, or control.~~
- ~~———— (m) You shall submit to visits by your JPPO to your residence and to examinations and searches of your room in the enforcement of your conditions of release.~~
- ~~———— (n) You shall regularly report your earnings to your JPPO and be in compliance with your specified budget as approved by your JPPO.~~
- ~~———— (o) You shall not associate with any person or be at any place in violation of Court orders or the directives of your JPPO.~~
- ~~———— (p) You shall not leave the State of New Hampshire for longer than 24 hours without advance written permission from your parent(s) or guardian or those having legal custody of you. You shall provide your JPPO with said written permission within 24 hours of receipt of said written permission.~~
- ~~———— (q) You shall also obtain a Travel Permit when required by the Interstate Compact on Juveniles and Association of Juvenile Compact Administrators (AJCA) Rules regarding out-of-state travel.~~
- ~~———— (r) You shall agree to return to the State of New Hampshire from any State in the United States or any other place voluntarily and without formality as directed by the Court or your JPPO.~~
- ~~———— (s) You shall comply with designated curfew/home restriction provisions.~~
- ~~———— (t) The Court may impose all or part of the conditions as well as other terms and conditions.~~

State of New Hampshire Transforming Juvenile Probation Certification Program: Capstone Proposal

Background: Reform of the New Hampshire Juvenile Probation System is happening in the context of whole-system youth welfare transformation. Juvenile Justice will reap valuable benefits from this endeavor with greater overall impact on engagement and outcomes for youth. The systemic changes occurring parallel to this project include but are not limited to:

- Statewide Mobile Response for children/youth
- Strengths-based needs assessment and service match coordinated by independent care management entities
- High fidelity wrap-around alternative to residential treatment
- Increase in evidence-based community treatment modalities state-wide

I. Vision for an Ideal Probation/Diversion System

Vision for an ideal probation/diversion system: New Hampshire's enhanced community-based services implemented under youth welfare reform and driven by the Federal Family First Prevention Services Act will increase prevention for youth engaging in delinquent acts. When youth do engage in delinquent behavior resulting in law enforcement contact, the youth and family will be referred for a risk/strength/needs assessment. The CANS assessment has been identified by DCYF and Children's Behavioral Health as the global assessment tool utilized for both community based services and residential treatment to measure outcomes. The CANS risk module will need to be validated for the State of New Hampshire to ensure validity for identifying risk. Additional training on the tool will be required to account for biases as it relates to racial disparity, so results of the assessment are not skewed towards disproportionate minority involvement. Assessments will assist in informing appropriate interventions for the youth and family. The assessments will be conducted at a mutually agreed upon location that ensures a safe space for confidentiality. The assessor will collaborate with the youth and family to identify an appropriate location to meet within their community, flexibility is key. For youth assessed as low/moderate risk of reoffending, interventions will match identified individual needs of the youth with emphasis on diversion and community-based services whenever appropriate and safe. This plan intentionally does not identify how many attempts a youth can participate in diversion allowing for individualization in care for the youth in New Hampshire. The risk level, needs of the youth, offense, and other information gathered will guide the recommendations for participation in community-based solutions. For those youth requiring the intervention of the Court and for whom probation is deemed appropriate, individualized rules of probation will match needs with services for best outcomes and minimized recidivism.

The overarching capstone goal of this project is to maximize diversion and transform Juvenile Probation to a purposeful intervention targeting youth who pose significant risk for serious re-offending through individualized, positive, pro-social approaches with racial, ethnic, socio-economic and geographical equity.

II. Description of Level Goals

To achieve the New Hampshire Probation Reform Capstone, there are a series of step-by-step short, intermediate and long term goals.

A. Long Term Goal: Build a community of support for probation reform

1. **Short Term Goal:** Develop a community engagement strategy to build consensus around expanding diversion and changing rules of probation
 - a. **Specific:** Coordinate a focus group strategy for guided dialogue among community stakeholders, including focus group guide to facilitate discussions on youth development, adverse experiences, assessment of need and risk, diversion opportunities, rules of probation reform – all in comparison to current conditions.
 - b. **Measurable:** Conducted focus group meetings in geographic representative districts with the distinct stakeholders; to include but not limited to youth, families, law enforcement, court personnel, attorneys, DCYF staff, etc findings will produce data to inform further actions for engagement
 - c. **Assignable:** Reform team with support from Working Group will convene focus groups and report on findings
 - d. **Realistic/Relevant:** Focus group feedback will inform level of buy-in and identify obstacles to be addressed
 - e. **Time-bound:** Implement engagement plan by November 2020; Engagement focus groups will be completed by April 2021
2. **Intermediate Goal:** Establish/expand permanent youth and family groups/organizations to advocate for ongoing reform and refinement of diversion and probation
 - a. **Specific:** Recruit and encourage long-term mechanism for youth and family commitment to juvenile justice reform
 - b. **Measurable:** Advocacy groups convene and establish themselves as permanent voices contributing to juvenile justice reform and operations

- c. Assignable: Reform Team with assistance of Working Group will form a small committee to recruit and engage youth and family partners for ongoing advocacy
- d. Realistic/Relevant: Immediate and ongoing education and advocacy that includes youth and families will build support for, and inform youth- and family sensitive reform, positioning youth and families for optimal outcomes.
- e. Time-bound: June 2020 and ongoing

3. Strategies

- a. Collect available base-line data and identify additional data needs (technical violations, race/ethnicity, conditional release ordered, current provider options, diversion referrals, CHINS/Delinquency petitions filed, recidivism, successful diversion completion, etc...) to inform focus group discussions on opportunities for reform
- b. Statewide Diversion Programs will collect all the same data elements to allow for comprehensive analyzed data to be collected and shared as it relates to race, ethnicity, and level of need as it relates to substance misuse and mental health.
- c. The Diversion Network will reach out to non-accredited programs to engage them in becoming accredited programs.
- d. Engage/include broad representation of stakeholders: youth, parents, juvenile probation and parole officers (JPPO), law enforcement, defense attorneys, providers, courts, schools, legislators, etc. in discussion regarding youth development, brain science, adverse childhood experiences, outcomes of model diversion programs, potential effects of probation reform
- e. Identify needs for legislative action and legislative champions through focus group consensus
- f. Support youth and family advocates throughout focus group process and network with resources in other states, existing groups and potential partners in New Hampshire
- g. Summarize and synthesize all data obtained through focus groups
- h. Present focus group results at the Diversion Summit in May 2021

B. Long Term Goal: Build a robust database designed to assess current needs, service capacity, and youth outcomes in juvenile justice services.

1. Short & Intermediate Goals: Identify data resources, gaps and potential for analysis and reporting

- a. Specific – Inventory all available data currently collected to describe juvenile justice population/demographics, offenses, needs, disparities, outcomes, recidivism; identify all gaps in data for tracking equity, effectiveness, efficiencies and outcomes for youth in Juvenile Justice Services
- b. Measurable – Descriptive report of all data and data needs
- c. Assignable – DCYF is currently reviewing/ Data analysts
- d. Realistic/Relevant – Baseline data will inform outcomes analysis and identify gaps in data and assist in creating a comprehensive data system.
- e. Time-bound – November 2020 and ongoing

2. Strategies

- a. Take guidance for data collection from Probation Reform Certificate Program
- b. Identify specific data elements that are to be collected statewide.
- c. Submit list of data elements to core member data teams to see what is currently collected
- d. Identify gaps in the data elements based on data teams' responses
- e. Create interim measures to collect missing data elements
- f. Strategize ways to enhance data collection for long-term collection for identified elements from law enforcement, court, public defenders, etc.
- g. Collaborate with SACWIS transformation to incorporate data collection and reporting needs in new data management system
- h. Develop reporting mechanisms to inform system progress, needs, and success. System: Decrease in numbers of youth moving through the traditional court process. Decrease in the number of months youth remain on probation. Youth: increased number connected with community based services.

C. Long Term Goal: Develop a system-wide strengths-based needs/risk assessment process for youth encountering law enforcement prior to petitions being filed with the Court.

1. **Short Term Goal:** Identify appropriate strengths-based needs and risk assessment instrument(s); determine who will assess youth and necessary training
 - a. Specific: Confirm consensus to adopt the Child and Adolescent Needs and Strengths (CANS) in alignment with Department of Health and Human Services adoption for the expansion of the system of care and determine validation of CANS risk assessment component.
 - b. Measurable: Instrument(s) are identified and assessor identified
 - c. Assignable: Reform Team in consensus with DHHS development team
 - d. Realistic/Relevant: Assessment of youth's needs and risk will be essential to ensuring most effective diversion and probation outcomes
 - e. Time-bound – December 2020
2. **Intermediate Goal:** Identify all training and educational needs for administering assessments and develop a training strategy, including a process for interpreting assessment data, to ensure appropriate referrals to services
 - a. Specific: Match necessary knowledge/skills to conduct assessments with chosen instrument(s), who is available in current workforce with knowledge/skills and ability
 - b. Measurable: Curriculum of learning established
 - c. Assignable: DHHS in alignment with parallel roll-out of System of Care
 - d. Realistic/Relevant: Careful planning of training and application assures effective use of assessment instruments
 - e. Time-bound: July 2020 and ongoing
3. **Strategies**
 - a. Issue RFP to bring on independent assessors to implement the assessment of all youth entering residential treatment in accordance with Family First.
 - b. Identify champions in the law enforcement community to help build consensus that all youth should be screened/assessed prior to being exposed to the juvenile court system.
 - c. Reform team will monitor for DHHS team confirming the NH CANS version is validated
 - d. DHHS team will research the Risk module for the CANS to determine whether it can be validated for New Hampshire

- e. Ensure sensitivity to culture, ethnicity, race, gender, regional and other differences through on-going training for staff.
- f. Identify access point for assessment: Identify the entity and workforce capacity. Consideration given to repurposing some of the current professional Juvenile Justice workforce to screen/assess identified youth, given downward trends in JJ Caseloads.
- g. DCYF to review workforce-workload and capacity for training, implementing, conducting strengths-based needs/risk assessments
- h. DHHS team will assess capacity for providing training, resource needs, and develop a training plan for implementation in the field
- i. Training will align with guidance for the validated instrument(s)
- j. Identify which youth will be assessed (preliminarily assess/screen out some low-risk, low-need youth.
- k. Consistent training for all assessment staff to ensure uniformity of all referrals to both community services and/or court intervention across the state.
- l. Identify quality assurance needs for collecting, managing, and monitoring data and addressing gaps
- m. All action steps are fluid and will be adjusted as needed to promote positive outcomes.

D. Long Term Goal: Expand and standardize equitable, statewide diversion opportunities by January 2022

1. **Short Term Goal:** Review and inventory diversion programs, process, procedure, accessibility and compare with Identified successful systems in other jurisdictions
 - a. Specific: Mapping of all diversion programs and community resources with summary of gaps, differences and opportunities for standardized, equitable programs across the State of New Hampshire
 - b. Measurable: Mapping and summary are complete
 - c. Assignable: Reform Team lead by team representative from diversion
 - d. Realistic/Relevant: Inventory will inform gaps in services, needs, and cost. Relevant for building alternatives to probation
 - e. Time-bound: March 2020
2. **Intermediate Goal:** Resource needs associated with expansion and standardization of diversion assessed and quantified

- a. Specific: Assess existing programs based on national standards and determine resource needs to assure statewide, consistently accessible, equitable diversion opportunities for all youth in need of diversion
- b. Measurable: Develop plan for diversion in, or accessible to, all NH jurisdictions
- c. Assignable: Reform Team, NH Juvenile Court Diversion Network, youth and family advocates, with assistance from Working Group
- d. Realistic/Relevant: Probation reform is dependent upon robust diversion options. Equitable services will depend upon equitable distribution of resources to support them.
- e. Time-bound: On-going

3. Strategies

- a. Identify national standards that are effective, trauma-informed, culturally sensitive, and equitable for all regardless of race, ethnicity, or socio-economic status or geographical location
- b. Conduct evaluation of NHJCD programs to ensure consistency with evidence based national standards.
- c. Identify and collect data points indicative of diversion need and success
- d. Review gaps by jurisdiction and populations served
- e. Identify stakeholders and champions in jurisdictions, especially those in need of services or service expansion
- f. Quantify cost of establishing new services or partnerships and other resources necessary for system expansion
- g. Identify and engage legislative champions for pursuing allocation of resources and any policy change required
- h. Engage youth and parent advocacy groups, as well as other partners to support legislative actions
- i. Leverage the current reforms taking place in New Hampshire in regards to community interventions to include: mobile response, expanded system of care model, and expansion of evidence based treatment.

E. Long Term Goal: Revise rules of probation to reflect individualized, racial, ethnic, trauma-informed responsiveness by January 2022

1. Short Term Goal: Court will initiate changing the Court Rules on Juvenile Probation

- a. Specific: Court will convene a workgroup to develop new Court Rule on Juvenile Probation

- b. Measurable: Workgroup will produce new rule to submit to Supreme Court
 - c. Assignable: Reform Team Court member (Assistant Administrative Judge)
 - d. Realistic/Relevant: New rules will be grounded in findings of focus groups and guidance of national standards on juvenile probation; New rules will transform, be more developmentally appropriate and restorative.
 - e. Time-bound: October 2020-October 2021
2. **Intermediate Goal:** System will be prepared for implementation of new Court Rules on Juvenile Probation
- a. Specific: All training and necessary resources for implementation of new Court Rules will be identified
 - b. Measurable: Plan of implementation will be developed with associated quantified needs.
 - c. Assignable: Assistant Administrative Judge, Court workgroup, Reform team
 - d. Realistic/Relevant: Success of the reform depends upon careful planning and allocation of adequate resources.
 - e. Time-bound: August 2021-January 2022

3. **Strategies**

- a. Identify and convene Court work group for rules change; include a former youth and family member and a JPPO
- b. Engage community and stakeholders in review of conditions of release and options for making them individualized.
- c. Establish needs/risk criteria for probation eligibility, do all youth that are petitioned to court require probation services?
- d. Research other jurisdictions regarding their current rules of probation to garner ideas for the evolution of New Hampshire's rules.
- e. Determine staff engagement strategy and necessary training, in regards to the development of individualized rules of probation.
- f. Determine inter-professional engagement/training needs: LE, Schools, Courts, JJ, regarding what individualized probation rules would look like.
- g. Incorporate and reflect feedback/findings/data from focus group
- h. Design new rules of probation that are individualized and reflect the latest science and practice standards of juvenile probation
- i. Refer to identified strengths-based needs and risk assessment in development to ensure incorporation of matching/relevant interventions.
- j. Seek feedback from community as new rules develop (member checking) through a few key feedback focus groups by stakeholder category: JPPO, Prosecutors, Public Defenders, Youth and Family advocates)

- k. Submit recommendation to the Administrative Judge to garner approval for the rule change.
- l. New rule submitted and moved through Supreme Court approval process
- m. System-wide educational and training initiative informing new changes instituted
- n. New Court Rules of Juvenile Probation implemented
- o. Data collection and reporting strategies in place to assess reform success and outcomes

F. Long Term Goal: Successful legislative initiative to assure all necessary resources and statutory adjustments are implemented to support juvenile justice system reform

- 1. **Short Terms & Intermediate Goals:** Legislative champions will be identified and engage to develop necessary legislative action and budget allocations to support system change
 - a. Specific – Identify statutory implications of changes to diversion, assessment, and probation diversion. (Workforce, training, authority to assess, program resources)
 - b. Measurable – Champions identified; List and strategy for legislative support of all necessary changes
 - c. Assignable – Reform Team and Legislative champions with Working Group, and youth and family advocates
 - d. Realistic/Relevant – In order for reform, legislative mandates will support actions and allocate resources
 - e. Time-bound – Legislative strategy completed by November 2020; Legislative advocacy active through June 2021
- 2. **Strategies**
 - a. Assess all potential legislative needs, including financial implications
 - b. Identify champions and engage
 - c. Develop step-based plan for legislative action as the information in terms of changes in court rules (timeline) and diversion, and funding and training
 - d. Mobilize alliances to advocate for legislative action
 - e. Provide education and counsel to legislators

POST IMPLEMENTATION GOALS

G. Long Term Goal: Youth outcomes data demonstrates improved system

- a. Specific: Increase in the number of youth referred to Diversion or community based interventions. Decrease in the number of low/moderate risk youth that require traditional juvenile probation.
- b. Measurable: Number of youth in diversion and probation compared to previous 5-year trend; Number completed assessments and corresponding access to services
- c. Assignable: DCYF data center, NH Juvenile Court Diversion Network
- d. Realistic/Relevant: Lower rates of court-involved youth indicates effectiveness of system; identification of need and access to service indicates needs met, diverted from jj system
- e. Time-bound: January 2023

H. Long Term Goal: Evaluate and adjust probation and diversion programs for best outcomes

- a. Specific: Analysis of system use data.....
- b. Measurable: What measures of success will we use?
- c. Assignable: DCYF data center, NH Juvenile Court Diversion Network
- d. Realistic/Relevant: Quality assurance, quality improvement is an ongoing responsibility to assure effectiveness, efficacy of services
- e. Time-bound: Ongoing

III. Agency and Organization Partners

New Hampshire benefits from a well-established network of stakeholder agencies and organizations with interest and roles in juvenile justice. The Division for Children, Youth and Families (DCYF) is an integrated agency with Juvenile Justice and Child Protection responsibilities. DCYF collaborates with law enforcement in both fields, as do the Courts, public defenders, providers, and advocates. In 2018 the Office of the Youth Advocate convened the Youth Advocate's Working Group on Juvenile Justice to assess the system and make recommendations for reform. Over 40 individuals participate in Working Group activities and will support the work plan of probation reform project.

Within DCYF the Juvenile Probation and Parole Officers (JPPO) work most closely with youth and families and will be the point of contact to implement probation rule changes. They represent the greatest need for engagement to promote understanding of youth development, the latest developments in probation, and buy-in. Law enforcement may also require targeted education in youth development, brain science and healthy probation strategies. The shift from

a corrections approach to a developmental competency approach will challenge long-standing cultures. Youth and families will be key stakeholders to engage and organize, building on current programs and expanding participation for more visibility and self-advocacy.

IV. Work plan – See GANT CHART

V. Barriers to Implementation

- A. Community/Stakeholder support
 - 1. Law enforcement push back/safety – not being able to petition someone to court. Strategy is to educate and identify contingency plans. Use JDAI screener as a tool
 - 2. JPPO pushback/safety and culture of corrections versus mentoring/coaching model
 - 3. Families with poor access to services rely upon juvenile justice to access care for youth; current array of community based interventions limited.
- B. Not all Diversion programs throughout the state are accredited. Not all jurisdictions understand how to access accredited Diversion programs.
- C. Consistency of diversion programs and new resources for probation will rely upon a legislative solution, resource allocation to municipalities, and political will.
- D. Timing for increased financial investments in youth services is not good given recent investments – may affect political will
- E. Workforce limitation may limit capacity to launch diversion programs across the State of New Hampshire
- F. Cumbersome state human resources system slow to process new job descriptions, fill positions as needed
- G. Perceptions of whether services exist perceptions of – solutions: education, engagement, legislative solution for funding allocated to municipalities. Goes back to data – Diversion – identify
- H. Service array – being addressed with SB 14
- I. Lack of information about racial ethnic disproportionate representation, therefore difficult to identify effective remedies
- J. Culturally competent services/ language barriers: southern urban communities responding to increasingly diverse populations with limited resources such as translators

VI. Measures of Success

- A. Data to collect to gauge success
 - 1. Reduction of youth on probation
 - 2. Reduction of incarcerated youth
 - 3. Reduction of youth court ordered into residential treatment
 - 4. Reduction of youth placed in institutional settings

5. Number of assessments conducted and corresponding access to service
6. Exit surveys from diversion, treatment, probation
7. Victim satisfaction surveys (restorative justice programs)
8. Focus group follow up

B. Measure system performance

1. Fidelity of instrument use
2. Develop supervision (instrument on staff performance)

VII. Logic model

ATTACHMENT F

STATE OF NEW HAMPSHIRE
JUDICIAL CONDUCT COMMITTEE

Mary E. Collins, Chair
Attorney Jaye L. Rancourt, Vice Chair
Judge James H. Leary
Ernest Goodno
Alan K. Blake
Judge Neals-Erik William ("Will") Delker
Judge Susan B. Carbon
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August 17, 2021

Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Deferred Discipline Rule Proposed
by the NH Judicial Conduct Committee to be added
to Supreme Court Rule 40

Members of the Advisory Committee on Rules:

On behalf of the Judicial Conduct Committee, I have enclosed herewith for your consideration a Deferred Discipline Rule proposed by the Judicial Conduct Committee to be added to Supreme Court Rule 40.

The genesis of this proposal arose this spring following an article appearing in May 17, 2021 issue of the *New Hampshire Bar News* entitled, "Stress and Resiliency in the New Hampshire Judiciary". This article referenced a 2020 Study by *The Professional Lawyer* on "Stress and Resiliency in the United States Judiciary".

The Judicial Conduct Committee took particular interest in *Appendix C* of that study which includes a copy of the ABA Model Rule as well as the rules of a number of states regarding diversion and deferred discipline agreements. Copies of "Stress and Resiliency in the New Hampshire Judiciary", "Stress and Resiliency in the United States Judiciary" and the appendices to this study are also enclosed herewith.

The Judicial Conduct Committee consulted with both Cindy Gray, Director of the Center for Judicial Ethics at the National Center for State Courts, and Jill O'Neill, Executive Director of the New Hampshire Lawyers Assistance Program (NH LAP) in drafting its proposed Deferred Discipline Rule both of whom also favor the adoption of such agreements in appropriate judicial disciplinary matters.

On behalf of the Judicial Conduct Committee, I thank you for your time and consideration.

Yours truly,

/s/ Robert T. Mittelholzer

Robert T. Mittelholzer

RTM

Enc.: Proposed Deferred Discipline Rule

Stress and Resiliency in the New Hampshire Judiciary

Stress and Resiliency in the United States Judiciary (w/appendices)

cc: Mary E. Collins, Chair

Attorney Jaye L. Rancourt, Vice Chair

The Honorable James H. Leary

The Honorable Neals-Erik William Delker

The Honorable Susan B. Carbon

Stephen R. L'Heureux

Thomas R. Eaton

W. Michael Scanlon, Esq.

Larry Gilpin

Proposed Deferred Discipline Rule for New Hampshire to be added to New Hampshire Supreme Court Rule 40

Deferral of Impairment Cases.

- A. If the Committee finds during the course of an investigation that (1) there is probable cause to believe that misconduct, as specified in the report, occurred; and (2) that any misconduct was the result of substance misuse or mental health disorder; and (3) that the conduct is not so serious in nature as to warrant formal discipline by the Supreme Court, the Committee and the judge may agree that the judge undergo confidential evaluation under the supervision of the New Hampshire Lawyers Assistance Program (“NH LAP”). Should the evaluation reveal the existence of a condition for which treatment is appropriate, the Committee may thereafter defer resolution of the report or complaint. A deferred resolution would require the judge participate in professional treatment, counseling, after-care, and/or other assistance program recommended in the evaluation and subject to supervision by NH LAP and any other conditions established by the Committee.

A deferral agreement must include the contemplated resolution of the report or complaint if the judge successfully complies with the terms of the agreement. At the end of the deferral period the judge would bear the burden to demonstrate that he or she has successfully complied with the terms of the deferral. Upon successful completion of the deferral agreement, the report would be resolved upon the terms set forth in the deferral agreement. If the judge does not successfully complete the terms of the deferral, the Committee may proceed upon the original report or complaint. The Committee may also initiate an inquiry or complaint based on any new rule violations which may have occurred during the deferral period.

Every deferral agreement shall be reduced to writing, shall provide for periodic reporting by NH LAP to the Committee regarding the judge’s compliance or noncompliance, and shall be signed by the judge and the Chair of the Committee. A copy of the agreement will be given to the judge; the original shall be maintained in the Committee’s file.

- B. All statements made by or for a judge in the course of discussions or negotiations with the Committee regarding referral to NH LAP or in the course of his or her involvement in or assessment supervised by NH LAP, including statements made in connection with any evaluation, treatment, counseling, or after-care, shall be privileged and inadmissible as either substantive evidence or impeachment evidence against the judge.

- C. Notwithstanding any other provisions of Rule 40(3) to the contrary, if the Committee resolves a report or complaint by way of a deferral agreement, the Committee may enter a protective order pursuant to Rule 40(3)(g) sealing any parts of the record that would otherwise be public.

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Stress and Resiliency in the New Hampshire Judiciary



May 17, 2021

By Scott Merrill

One in five judges surveyed in the United States meet at least one of the criteria for depressive disorder, according to a 2020 report titled Stress and Resiliency in the U.S. Judiciary.

The National Judicial Stress and Resiliency Survey, the largest of its type ever conducted, was designed by the ABA Commission on Lawyer Assistance Programs. Out of 18,000 judges nationwide, more than 1000 judges participated in the survey which took place amidst the covid-19 pandemic.

Some of the top sources of stress for judges, according to the report that appeared in the Journal of the Professional Lawyer last year, include: the importance and impact of decisions, a heavy docket of cases, unprepared attorneys, and public ignorance of the courts.

In New Hampshire there are five courts that have jurisdiction over a wide variety of cases: The New Hampshire Supreme Court, the Superior Court, the Circuit Court Probate Division, the Circuit Court District Division and the Circuit Court Family Division.

A New Hampshire Judicial Administrator's Perspective on Stress

Administrative Judge for the Circuit Court of New Hampshire, David King, said the stress and resiliency report reflects issues that are very similar to the ones the circuit court deals with every day.

"When I look on page 10 of the study where it speaks about sources of stress, they're describing the circuit court to a T," he said.

Judge King manages the largest section of the New Hampshire court system overseeing 31 judges and 375 non-judicial employees. As an administrator he has had to work on the fly over the past year, monitoring exposures to coronavirus, making decisions about which courtrooms need to be closed and what cases to reschedule.



*Hon. David King, Administrative Judge:
Circuit Court of New Hampshire*

"For me it's not the search warrants or DVs, it's, 'we just found out that the husband of so and so in one of the courts just tested positive and do we need to clean the courthouse in the morning?' Or a judge called and someone in their family has tested positive," Judge King said.

Still, he said he considers himself lucky compared with judges conducting hearings during the pandemic.

"I have more of an ability to close my eyes for a second between issues than those judges who are on the phone all day long. I can tell you from my regular communications with our bench, the amount of stress on the circuit court over the past 13 months is unprecedented. We've never seen anything like this before."

The nature of cases that pass through the circuit court and the decisions judges make can be inherently stressful, Judge King said. This is because many cases involve domestic violence, child abuse and neglect, as well as guardianship and custody issues.

"These types of cases need attention whether we're in the midst of a pandemic or not. They all need to be handled in a timely fashion, but many judges have been working in isolation, oftentimes in the courtroom, doing telephonic hearings all day long."

While the importance of decision making for judges (79.2%) was the number one source of stress in the 2020 Stress and Resiliency report, the number two source was heavy dockets (73.2%).

The circuit court in New Hampshire is authorized to have 45 full time judges but they currently have only 31.

"When you add that to the influx of cases, which hasn't slowed down, it's a recipe for burnout, it's grueling," King said. "We've got about 14,000 cases right now that need to be scheduled for trial in the circuit court and 3500 criminal cases scheduled around the state. That sounds like a huge number but we had 55,000 criminal cases filed in 2020."

Isolation for Judges can be Part of the Job

For Judge Susan Carbon, who serves on judicial conduct committee and the 9th circuit Family Division, in Manchester, life as a judge has been busy over the past year.

"There has been no let up. This myth that things were quiet during Covid is one of the biggest myths I've heard," Judge Carbon said, citing in-person and Webex hearings that have continued to take place. And this, she added, is coupled with the momentous decisions and responsibilities, as well as the persona that judges must maintain for the public.

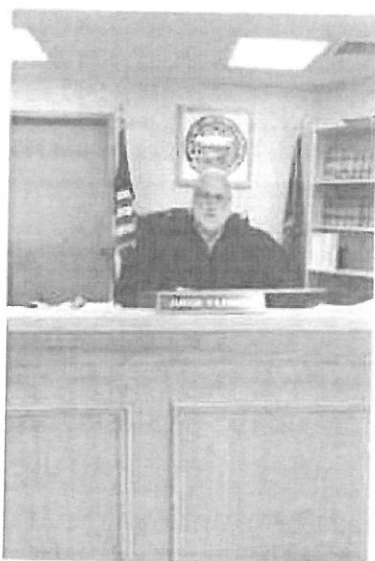


Hon. Susan Carbon: 9th Circuit Family Division, in Manchester

"As a judge you're taking an oath to give every single case 110 percent. You can't come into court and say, 'geeze I'm tired.' You may be tired but the people you're serving don't deserve that and if that's your delivery you shouldn't be on the bench."

Carbon said she doesn't experience the isolation spoken about by some judges in the stress and resiliency report because she has been in court houses with multiple judges. But she acknowledged this can be a real problem for those on the bench in courthouses with only one judge.

"Being in these courthouses I'm in is enormously helpful. You have peers who can relate, or if there's a conflict we can swap cases," Judge Carbon said. "One judge court houses can be difficult though in terms of isolation."



Hon. John Yazinski: NH Circuit Court Sullivan County

Judge John Yazinski, a circuit court judge in Sullivan County since 2001, said every judge experiences isolation in various ways.

"Sometimes it's self-imposed, and sometimes it's one of the practical aspects of the job," he said. "It's particularly difficult in a small county like Sullivan where there's almost nowhere you can go that you don't bump into someone you know or who has been in court in front of you. It requires a self-imposition of stepping back."

This constant awareness of one's public persona is part of being a judge, Carbon explained.

"You have to still remember you're representing the court wherever you go. If

I go for a run and I'm hot and sweaty I'm not going to run in to the grocery store like others might."

And there are awkward encounters with former litigants in public places.

"I've had litigants come to me in the produce section thanking me about cases, whatever it may be, involving their children, saying, 'you really helped me with my adoption' or I've

gone to restaurants where I've had unhappy litigants in marital cases give me the dagger, and I still need to be mindful that this isn't the place to discuss these things."

Judge Carbon mentioned a stalking encounter that led her to install an alarm at her home some years ago and another experience at a restaurant that she referred to as "very inappropriate."

"These things haven't happened in a long time, but it's always a possibility."

Judge Yazinski said he and his wife haven't accepted an invitation to a holiday party or get together for years because of the conflicts such gatherings may create.

"Particularly with hearing family cases there's always someone who knows someone, and people don't always realize that judges can't talk about cases that are in front of them."

Judge Jennifer Lemire, who has a case docket of intricate divorce and parenting cases, said isolation was an issue for her early in her career.

"You find in those smaller courts that when you don't have colleagues to run things by or just chat with or grab lunch with when you have time, it can really affect your psyche."

The Number One Source of Stress: Making Decisions, Getting it Right

The number one source of stress that judges reported in the survey (79.3 percent) was the importance of the decisions they make in court.

Family court, Judge Carbon said, is "probably the most stressful docket in the state."

This is due to the high stakes that come with the decisions judges make regarding parental rights.

"There's nothing more important than your kids, and when you're the one making those decisions that are going to impact children in a profound way... I labor over those decisions because I know the consequences are so enormous."

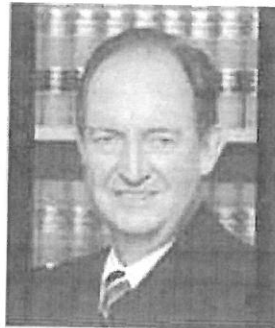
New Hampshire Supreme Court Justice, Gary Hicks, said getting decisions right presents a substantial pressure for judges.

"You've got to get it right, that's the pressure," he said. "It's a cultural thing for us. We took an oath to be right all the time. It's hard to think we could be right all the time, but that's still the goal."

Judge Yazinski described the decision-making process in court as the most stressful part of his job.

"It's easy to divide property because people can replace property, but it's difficult to make a decision that will have a lifelong impact on the people in front of you, as the article points out," he said.

Echoing Judge Carbon, the hardest decisions, he said, involve children, particularly abused and



Hon. Gary Hicks: New Hampshire Supreme Court

neglected children.

“Those decisions weigh on you because if you get it wrong a child can be injured. Any judge who has done a lot of abuse and neglect cases will have made a mistake and will get the call in the middle of the night to find out the child you returned is in the hospital because a parent has injured them. Those are the ones that can haunt.”

One of the stressors Judge Lemire hears about often, she says, are overburdened dockets, as well as neglect cases that require judges to see graphic evidence of substantial physical abuse and neglect.

“That can be difficult. And terminating the parental rights is a decision that is never made lightly. I liken it to a criminal case where the standard is beyond reasonable doubt.”

Respecting Difference, Recognizing Bias

One part of the study that made Judge Yazinski reflect, he says, was a section that described judges at the end of the day making harsher, more biased decisions, than at the beginning of the day.

“If you’re required, as we are, to hear 10 or 12 half hour cases, and to have to act on all the emergencies that come in, and get orders out from three weeks before, by the end of day you’re absolutely exhausted. I reflected when I read that and I thought to myself, ‘am I conscious that this might happen, and do I make an effort to make sure it doesn’t happen?’”

One of things that Yazinski became involved in during a time of particularly high stress was mindfulness and meditation.

“If you learn mindfulness, as the article suggests, and which many judges have adopted, you do take a step back. For me, when I feel the urge to get angry there’s the immediate reaction to simply concentrate on the breath.”

Yazinski keeps a saying on his bench from Victor Frankl, the Austrian psychiatrist, philosopher, and Holocaust survivor, that stares him in the face each day during hearings.

The saying reads: “Between every stimulus and response there is a space and in that space is our power to choose our response and, in our response, lies our growth and our freedom.”

“I really try to live in that space and I’m not perfect,” Judge Yazinski says. “The struggle is that judges aren’t expected to have or show emotions, but we’re human beings affected by things just like anyone else. We have good days and bad days, but on the bench it’s a struggle on a bad day not to show it’s a bad day and I certainly haven’t perfected the art of it, but at least I can recognize it.”

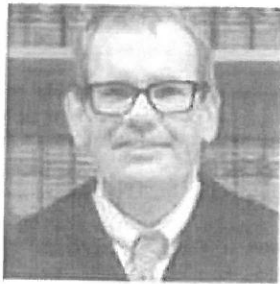
Judge Lemire said she keeps her ego in check by recognizing she is there to help those who come before her, and to not simply “wield authority and power.”

“A lot of those who come through our doors don’t have attorneys. It’s important that we recognize that we’re here to help them with whatever the issue is and to not simply wield authority and power,” she said. “Your patience can be tried by some difficult litigants or attorneys, or lack of evidence, or a busy docket. We have to be careful to remind ourselves that we’re here to help people. Sometimes you feel like a counselor.”

Judge Carbon teaches about implicit bias through trainings she does for the New Hampshire chapter of Court Appointed Special Advocates (CASA), a national association in the United States that supports and promotes court-appointed advocates for abused or neglected children.

While rare, she says she has known of judges who are disrespectful to people by holding expectations that exceed what is reasonable, demanding that people do something because it pleases their fancy, or those who even flaunt their position by wearing their robes in public.

"I am very, very privileged, and I'm in a position that holds high public status. It would be very easy to abuse this position and I've seen judges do it all too often," she said. "The law is always your framework but you need to listen and learn and realize that no two cases are the same. When working with people whose backgrounds are different from your own you have to be very mindful that you aren't superimposing your values on other people. I train classes to be mindful of this."



*Hon. William Delker: Hillsborough County
Superior Court*

Hillsborough County Superior Court Judge William Delker said he enjoys the decision-making process but noted that some decisions are very challenging.

"I enjoy that part of it because it's like a hunt for the right answer. One can look at the law and feel confident that the decision is based on principles of law," he said. "Decisions about bail and sentencing, however, are incredibly challenging because there's no obvious right or wrong answer and we're often operating on incomplete information. In some cases it can be a matter of life and death, or a person's liberty, and those are monumental decisions."

Sentencing considerations are another area that Judge Delker finds difficult.

"In New Hampshire the guidelines are so amorphous that you don't have many guideposts to tell you what's right and wrong, and each case has to be decided on its own merit," he said.

Fighting the temptation to send people to jail because it's the easy thing to do has been something Judge Delker says he is always aware of. Even when he has a defendant with a bad record there may be "some glimmer of hope."

One case that stands out to him involves a woman he has worked with for three years trying to come up with creative solutions to her situation.

"This person who has been in front of me for three years is just a different person since I first sentenced her," he said. "And it was not an easy decision to make based on her background at the time."

Staying Busy and Finding Balance with Exercise, Friends, and Family

All of the New Hampshire judges interviewed about the stress and resiliency report cited keeping busy, spending time with family and friends, as well as exercise, as the most important sources of well-being in their lives.

Judge Lemire said she took up cycling with her husband and is looking forward to resuming a yearly trip with her family.

For Judge Delker, who says he doesn't typically stress out, staying busy is, itself, a source of wellbeing.

"I...like working," Judge Delker said, joking that he's probably not a good person to talk about work-life balance because, "I don't really have one."

"Unless I'm doing one of my hobbies, I feel like work is fulfilling to me and I work best when I'm busy. I have periods when things are less busy, particularly over the past year we haven't been doing jury trials. But I thrive best in that environment."

Judge Delker, who also teaches law school students, described the sedentary nature of being a judge as one of the aspects of his job that requires him to exercise. He goes to the gym three or four times a week and has a host of projects around his house that help him maintain balance.

"This job is so sedentary. I literally sit, get up, sit, and walk across the hall, and sit again. And that's my job. I need to exercise," he said.

Justice Hicks says the one thing he has learned over the years regarding how to stay mentally healthy is the need to take time off.

"I'm not very good at it, but all judges need to take time off. It's contrary to our nature when there are cases to be decided and work to be done but we need to do it. I find that after three or four days when I'm away I can breathe normally and it's refreshing."

Justice Hicks has trips to Vermont planned for the summer where he will be able to spend time with his grandchildren, who, he says, he learns a great deal from.

"If I'm with my grandkids I shut everything off because they demand everything. I have learned a lot from them," he says. "Is a week enough, no. But that's the most that most of us ever take. I would say the key is to be aware and not let the pressure sneak up on you. Don't take a vacation too late."

While Judge King says some judges are "getting burnt out" due to heavy caseloads and other concerns relating to the pandemic, there is hope in the air.

"People can see the light at the end of the tunnel. We can see that by late May or June we'll be able to go back to some semblance of normal."

As for the importance of reports like the stress and resiliency survey?

Judge Carbon says it has taken her years to understand she can only do her best and that she is not in control over every aspect of the lives of people in front her.

"Surveys like the Stress and Resiliency report express what judges feel but don't take the time to put into words. If you're not addressing the stress you risk not being on your game with every single case."

