

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, December 10, 2021, 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 as the Committee considers whether to recommend that the Supreme Court adopt amendments to several court rules. In addition, as part of its review of New Hampshire Rule of Professional Conduct 8.4(g), the Committee is seeking the views of any member of the public, the bench, or the bar on the operation of that rule, which has been in effect since August 1, 2019.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court and on the operation of Professional Conduct Rule 8.4(g) may be submitted in writing to the secretary of the Committee at any time on or before December 1, 2021 or may be submitted at the hearing on December 10, 2021. Comments may be emailed to the Committee on or before December 1, 2021 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.

The changes being considered concern the following rules:

I. New Hampshire Rule of Professional Conduct 8.4(g) and Comment – Actions Taken to Embarrass, Harass or Burden Another Person

(This rule took effect on August 1, 2019. In the order adopting the rule, the Supreme Court requested that the Advisory Rules Committee undertake a review of the operation of this rule after it had been in effect for two years. As part of that review, the Committee is seeking public comment regarding the operation of that rule.)

1. New Hampshire Rule of Professional Conduct 8.4(g) and the Supreme Court Comment thereto are set forth in Appendix A.

II. 2020-006. New Hampshire Rule of Criminal Procedure 12 – Discovery: State’s Obligation to Provide Copies of Defendant’s Criminal Record

(This proposal addresses the State’s obligation to provide copies of a defendant’s criminal record to the defendant prior to arraignment or bail hearing.)

1. Amend New Hampshire Rule of Criminal Procedure 12 as set forth in Appendix B.

III. 2020-009. New Hampshire Rule of Criminal Procedure 12 – Discovery: Evidence of Other Crimes, Wrongs, or Acts

(This proposal would amend the requirements for disclosure of evidence of other crimes, wrongs, or acts pursuant to New Hampshire Rule of Evidence 404(b).)

1. Amend New Hampshire Rule of Criminal Procedure 12 as set forth in Appendix C.

IV. 2021-005. Supreme Court Rule 40 – Deferred Discipline

(This proposal would authorize the Judicial Conduct Committee to defer resolution of a complaint against a judge in some cases in which the alleged misconduct was the result of substance misuse or mental health disorder and the conduct is not so serious in nature as to warrant formal discipline by the Supreme Court.)

1. Amend Supreme Court Rule 40 as set forth in Appendix D.

V. 2021-003. New Hampshire Rule of Evidence 902 – Evidence That is Self-Authenticating

(This proposal would amend Rule 902 to add two new categories of self-authenticating evidence.)

1. Amend New Hampshire Rule of Evidence 902 as set forth in Appendix E.

VI. 2021-004. Circuit Court - Family Division Rule 3.6 – Conditions of Release

(This proposal addresses the conditions of release in juvenile cases.)

1. Amend Family Division Rule 3.6 as set forth in Appendix F.

New Hampshire Supreme Court
Advisory Committee on Rules

By: Patrick E. Donovan, Chairperson
and Lorrie Platt, Secretary

October 4, 2021

APPENDIX A

The Advisory Rules Committee is seeking public comment regarding the operation of New Hampshire Rule of Professional Conduct 8.4(g).

Rule 8.4(g) and the Supreme Court Comment thereto follow:

It is professional misconduct for a lawyer to:

. . . .

(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.

APPENDIX B

Amend New Hampshire Rule of Criminal Procedure 12 as follows

(new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 12. Discovery

[(a) *Discovery of Criminal Record Prior to Arraignment*

In any criminal proceeding in which the State intends to rely upon a defendant's criminal record, the State shall provide to either defense counsel or to a pro se defendant copies of any and all such records in the State's possession prior to any such hearing such that defense counsel will be given the opportunity to review said records with the defendant, or a pro se defendant to do the same individually, prior to the hearing.

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

The State may provide the records by fax, secure e-mail, or similar means to assure the confidentiality of said records, or in any manner consistent with state and federal law.]

~~(a)~~ **[(b)]** *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) *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)~~ **[(c)]** *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 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) 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)~~**(c)**(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.

(B) 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.

(C) 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.

(5) *Protection of Information not Subject to Disclosure.* To the extent either party contends that a particular statement of a witness otherwise subject to discovery under this rule contains information concerning the mental impressions, theories, legal conclusions or trial or hearing strategy of counsel, or contains information that is not pertinent to the anticipated testimony of the witness on direct or cross examination, that party shall, at or before the time disclosure hereunder is required, submit to the opposing party a proposed redacted copy of the statement deleting the information which the party contends should not be disclosed, together with (A) notification that the statement or report in question has been redacted and (B) (without disclosing the contents of the redacted portions) a general statement of the basis for the

redactions. If the opposing party is not satisfied with the redacted version of the statement so provided, the party claiming the right to prevent disclosure of the redacted material shall submit to the court for *in camera* review a complete copy of the statement at issue as well as the proposed redacted version, along with a memorandum of law detailing the grounds for nondisclosure.

(6) *Motions Seeking Additional Discovery.* Subject to the provisions of paragraph (b)(c)(8), the discovery mandated by paragraphs (b)(c)(1), (b)(c)(2), and (b)(c)(4) of this rule shall be provided as a matter of course and without the need for making formal request or filing a motion for the same. No motion seeking discovery of any of the materials required to be disclosed by paragraphs (b)(c)(1), (b)(c)(2) or (b)(c)(4) of this rule shall be accepted for filing by the clerk of court unless said motion contains a specific recitation of: (A) the particular discovery materials sought by the motion; (B) the efforts which the movant has made to obtain said materials from the opposing party without the need for filing a motion; and (C) the reasons, if any, given by the opposing party for refusing to provide such materials. Nonetheless, this rule does not preclude any party from filing motions to obtain additional discovery. Except with respect to witnesses or information first disclosed pursuant to paragraph (b)(c)(4), all motions seeking additional discovery, including motions for a bill of particulars and for depositions, shall be filed within sixty calendar days if the case originated in Superior Court, or within forty-five calendar days if the case originated in Circuit Court – District Division after the defendant enters a plea of not guilty. Motions for additional discovery or depositions with respect to trial witnesses first disclosed pursuant to paragraph (b)(c)(4) shall be filed no later than seven calendar days after such disclosure occurs.

(7) *Continuing Duty to Disclose.* The parties are under a continuing obligation to supplement their discovery responses on a timely basis as additional materials covered by this rule are generated or as a party learns that discovery previously provided is incomplete, inaccurate, or misleading.

(8) *Protective and Modifying Orders.* Upon a sufficient showing of good cause, the court may at any time order that discovery required hereunder be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing of good cause, in whole or in part, in the form of an *ex parte* written submission to be reviewed by the court *in camera*. If the court enters an order granting relief following such an *ex parte* showing, the written submission made by the party shall be sealed and preserved in the records of the court to be made available to the Supreme Court in the event of an appeal.

(9) *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; and (D) assessing costs and attorney's fees against the party or counsel who has violated the terms of this rule.

APPENDIX C

Amend New Hampshire Rule of Criminal Procedure 12 as follows

(new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 12. Discovery

(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; **[and]**

(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 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).]

~~[(B)]~~ 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.

~~(B)~~ ~~[(C)]~~ 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.

~~(C)~~ **[(D)]** 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.

(5) *Protection of Information not Subject to Disclosure.* To the extent either party contends that a particular statement of a witness otherwise subject to discovery under this rule contains information concerning the mental impressions, theories, legal conclusions or trial or hearing strategy of counsel, or contains information that is not pertinent to the anticipated testimony of the witness on direct or cross examination, that party shall, at or before the time disclosure hereunder is required, submit to the opposing party a proposed redacted copy of the statement deleting the information which the party contends should not be disclosed, together with (A) notification that the statement or report in question has been redacted and (B) (without disclosing the contents of the redacted portions) a general statement of the basis for the redactions. If the opposing party is not satisfied with the redacted version of the statement so provided, the party claiming the right to prevent disclosure of the redacted material shall submit to the court for *in camera* review a complete copy of the statement at issue as well as the proposed redacted version, along with a memorandum of law detailing the grounds for nondisclosure.

(6) *Motions Seeking Additional Discovery.* Subject to the provisions of paragraph (b)(8), the discovery mandated by paragraphs (b)(1), (b)(2), and (b)(4) of this rule shall be provided as a matter of course and without the need for making formal request or filing a motion for the same. No motion seeking discovery of any of the materials required to be disclosed by paragraphs (b)(1), (b)(2) or (b)(4) of this rule shall be accepted for filing by the clerk of court unless

said motion contains a specific recitation of: (A) the particular discovery materials sought by the motion; (B) the efforts which the movant has made to obtain said materials from the opposing party without the need for filing a motion; and (C) the reasons, if any, given by the opposing party for refusing to provide such materials. Nonetheless, this rule does not preclude any party from filing motions to obtain additional discovery. Except with respect to witnesses or information first disclosed pursuant to paragraph (b)(4), all motions seeking additional discovery, including motions for a bill of particulars and for depositions, shall be filed within sixty calendar days if the case originated in Superior Court, or within forty-five calendar days if the case originated in Circuit Court – District Division after the defendant enters a plea of not guilty. Motions for additional discovery or depositions with respect to trial witnesses first disclosed pursuant to paragraph (b)(4) shall be filed no later than seven calendar days after such disclosure occurs.

(7) *Continuing Duty to Disclose.* The parties are under a continuing obligation to supplement their discovery responses on a timely basis as additional materials covered by this rule are generated or as a party learns that discovery previously provided is incomplete, inaccurate, or misleading.

(8) *Protective and Modifying Orders.* Upon a sufficient showing of good cause, the court may at any time order that discovery required hereunder be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing of good cause, in whole or in part, in the form of an *ex parte* written submission to be reviewed by the court *in camera*. If the court enters an order granting relief following such an *ex parte* showing, the written submission made by the party shall be sealed and preserved in the records of the court to be made available to the Supreme Court in the event of an appeal.

(9) *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; and (D) assessing costs and attorney's fees against the party or counsel who has violated the terms of this rule.

Amend Supreme Court Rule 40 by adding a new section (8-a) as follows (new material is in **[bold and brackets]**);

[(8-A) *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

the 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.]

APPENDIX E

Amend New Hampshire Rule of Evidence 902 by adding new sections

(13) and (14) as follows (new material is in **[bold and brackets]**):

[(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).]

APPENDIX F

Amend Family Division Rule 3.6 as follows (new material is in **bold and brackets**]; deleted material is in ~~strikethrough~~ format):

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.~~