THE STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON RULES

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Lorrie Platt, Secretary

NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

Agenda – December 10, 2021

1. PUBLIC HEARING

   a) 2016-009 New Hampshire Rule of Professional Conduct 8.4(g) and Comment – Actions Taken to Embarrass, Harass or Burden Another Person

   - New Hampshire Rule of Professional Conduct 8.4(g) and Supreme Court Comment. (Appendix A).
   - December 1, 2021 letter from New Hampshire Women's Bar Association (Appendix B).

   b) 2020-006 New Hampshire Rule of Criminal Procedure 12 - Discovery; State's Obligation to Provide Copies of Defendant's Criminal Record

   - Amend New Hampshire Rule of Criminal Procedure as set forth in Appendix C.
   - Materials received by Supreme Court in response to July 14, 2021 order seeking public comment on proposal (Appendix D.) (**NOTE**: To avoid duplication, submissions that were subsequently resubmitted to the Rules Committee in response to its October 4,

2021 order requesting public comment have not been reproduced in Appendix D. They can be found in Appendix E.)

Appendix E (Submissions to Rules Committee):

- November 8, 2021 letter from The NH Coalition Against Domestic and Sexual Violence
- November 24, 2021 letter from Merrimack County Attorney (Appendix F
- November 30, 2021 letter from Attorney Jason Grosky (Salem Police Department)
- December 1, 2021 letter from Attorney John Krupski (o/b/o NH Police Association)

c) 2020-009 NH Rule of Criminal Procedure 12 – Discovery: Evidence of Other Crimes, Wrongs or Acts (Appendix F)

d) 2021-005 Supreme Court Rule 40 – Procedural Rules of Committee on Judicial Conduct - Deferred Discipline (Appendix G)

- November 5, 2021 proposed amendment submitted by Attorney Sara Greene and Attorney Jeanne Herrick
- November 30, 2021 email submission from Brian Scott
- December 1, 2021 letter from Jill O'Neill, Executive Director, NH Lawyers Assistance Program
- December 1, 2021 email submission from Kim Lamontagne

e) 2021-003 NH Rule of Evidence 902 – Self-Authenticating Evidence (Appendix H)

- Amend New Hampshire Rule of Evidence 902

f) 2021-004 Circuit Court – Family Division Rule 3.6 - Conditions of Release (Appendix I)

2. DISCUSSION AND VOTE ON PUBLIC HEARING ITEMS

a) 2016-009 New Hampshire Rule of Professional Conduct 8.4(g) and Comment

b) 2020-006 New Hampshire Rule of Criminal Procedure 12 – Discovery; State's Obligation to Provide Copies of Defendant's Criminal Record

c) 2020-009 New Hampshire Rule of Criminal Procedure 12 – Discovery; Evidence of Other Crimes, Wrongs or Acts

d) 2021-005 Supreme Court Rule 40 - Procedural Rules of Committee on Judicial Conduct – Deferred Discipline

e) 2021-003 NH Rule of Evidence 902 - Self-Authenticating Evidence

f) 2021-004 Family Division Rule 3.6 - Conditions of Release

3. APPROVAL OF SEPTEMBER 10, 2021 MEETING MINUTES

See DRAFT SEPTEMBER 10, 2021 meeting minutes (revised) (Appendix J)

4. OTHER BUSINESS

2021-006 New Hampshire Supreme Court Report on the Recommendations of the Criminal Defense Task Force (Appendix K)

5. 2022 MEETING DATES

The Committee should choose meeting and public hearing dates for 2022.

Proposed dates
Friday, March 11, 2022
Friday, June 3, 2022
Friday, September 16, 2022
Friday, December 9, 2022

Public hearings to be held on June 3, 2022 and December 9, 2022

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

2016-009

NHWBA
NEW HAMPSHIRE WOMEN'S BAR ASSOCIATION

December 1, 2021

RECEIVED
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NH SUPREME COURT

New Hampshire Supreme Court
Advisory Committee on Rules
Attn: Lorrie Platt, Secretary to the Committee
1 Charles Doe Drive
Concord, NH 03301
rulescomment@courts.state.nh.us

Re: Review of New Hampshire Rule of Professional Conduct 8.4(g) and Comment

Dear Members of the New Hampshire Supreme Court Advisory Committee on Rules:

On behalf of the New Hampshire Women's Bar Association (NHWBA)'s Board of Directors, I respectfully submit the following comments regarding the New Hampshire Supreme Court Advisory Committee on Rules's review of New Hampshire Rule of Professional Conduct 8.4(g) and Comment ("Rule 8.4(g)"), which took effect on August 1, 2019.

As a threshold matter, consistent with our position stated during the pendency of this Committee's and the Court's deliberations with regard to proposals for this Rule in 2018 and 2019, the NHWBA strongly supports the continued inclusion of Rule 8.4(g) within the New Hampshire Rules of Professional Conduct to deter conduct related to the practice of law that harasses and discriminates those who are members of diverse categories. We would urge this Committee and the Court to reject any argument for the removal of Rule 8.4(g) because of non-use, indicated by a low number of disciplinary cases based on the Rule to date, or for any other reason.

Since August 2019, when Rule 8.4(g) took effect, much has changed, primarily due to the COVID-19 pandemic that ensued less than a year thereafter; yet, the fact that harassment and discrimination, manifesting explicitly and implicitly, continue to be irrefutable, pervasive problems in our profession has not changed. While the pandemic has significantly affected all segments of our profession, it has disproportionately affected women attorneys and attorneys of color and for many related reasons, the negative impact of bias in the work environment has been exacerbated. It has been reported that as the pandemic persists, women attorneys and attorneys of color often feel additional stress and experience more difficulties at work than their white, male colleagues simply because of their gender, race, or ethnicity, for example. Reports about such issues are not new due to the pandemic, however, and are not just anecdotal - the 2021 ABA Profile of the Legal Profession, released on July 19, 2021, is rife with statistics that prove the point, and that is just one example of a comprehensive reporting by the ABA since 2020 of reliable statistics regarding such issues and the glacial pace of advancement of women attorneys and attorneys of color in the profession as a result.[1]

[1] A summary of such reports and their results here would be impractical. The NHWBA respectfully urges the Committee to review the following reports and their results during the course of its consideration of Rule 8.4(g):

While the NHWBA has been unsuccessful in learning exactly how many reports of conduct have been made to the Attorney Discipline Office under Rule 8.4(g) since August 1, 2019, our understanding is that the number of such reports has been very low. This alone, however, does not, and should not, equate to a conclusion that Rule 8.4(g) is unnecessary and should be removed. Such a conclusion would be faulty and short-sighted, as many Rules of Professional Conduct are not frequently invoked in complaints made to the Attorney Discipline Office, or in disciplinary decisions issued. By analogy, laws that do not generate frequent prosecutions are not automatically abolished because of the deterrent effect they have, not the number of cases prosecuted under them. Rule 8.4(g) is necessary to include in our profession's code of conduct. In addition, as explained further below, the present language of Rule 8.4(g) likely discourages reports of conduct, and we should take this opportunity to improve it as a tool to combat harassment and discrimination in our profession.

Our Rules of Professional Conduct establish a standard of conduct for attorneys, but these Rules, and our profession's enforcement of them, also serve as a means for ensuring access to justice for all and public confidence in our legal system. While the NHWBA appreciates the time that the Committee and the Court has given to this issue, and the Court's effort in crafting and enacting the Rule 8.4(g) that is in place, for the reasons the NHWBA stated in 2019 prior to the current Rule's enactment, the language of Rule 8.4(g) improperly protects those who may be accused of harassment and discrimination over and to the detriment of those who are the recipients of such unethical behavior and

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2021 ABA Profile of the Legal Profession, released on July 19, 2021, available at: https://www.americanbar.org/news/abanews/aba-news-archives/2021/07/2021-aba-profile-of-the-legal-profession-highlights-how-the-pand/;

2020 NALP Report on Diversity in U.S. Law firms, released in February 2021, available at: https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf;

In Their Own Words, Experienced Women Lawyers Explain Why They Are Leaving Their Law Firms and the Profession, released by the ABA Commission on Women in the Profession on April 19, 2021, available at: https://www.americanbar.org/content/dam/aba/administrative/women/intheirownwords-f-4-19-21-final.pdf;

Left Out and Left Behind, the Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color, released by the ABA Commission on Women in the Profession on June 10, 2020, available at: https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf; and

Walking Out The Door, The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice, released by the ABA Commission on Women in the Profession on April 23, 2020, available at: https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf.

See also the American Journal of Law and Medicine's study of discrimination and bias reported by lawyers with disabilities and lawyers who identify as LGBTQ+, released in March 2021, available at: https://www.cambridge.org/core/journals/american-journal-of-law-and-medicine/issue/8EC8382F8489FADEE245BEDAEA4BDF3A

who may need to report such behavior under the Rule. As a result, it falls short of serving as an explicit and firm denouncement of discrimination and harassment based on the protected classes that is absolutely necessary to combat such endemic issues in the legal profession and to promote the administration of equal justice.

Even though there has been increased focus on diversity, equity, and inclusion in the legal profession, including in New Hampshire, since 2019, the need for meaningful measures to be taken to actually achieve increased diversity, equity, and inclusion in our Bar and to advance the rule of law and access to justice has never been more critical. Ensuring that Rule 8.4(g) is as effective as possible as an accountability tool is one such meaningful measure for us to now take as a Bar, especially as the change that we still need to achieve in the legal profession requires time and effort and over two years have already passed since the Rule's effective date.

While there should be balance in any Rule of Professional Conduct implemented, including, but not limited to, Rule 8.4(g), the balance is skewed in Rule 8.4(g)'s inclusion of "primary purpose" as an intent-based evidentiary hurdle to be surmounted before an attorney's harassing conduct[2] may be held accountable. Use of the term, "primary purpose", in the Rule suggests that the commission of harassment as a less than primary purpose is permissible without consequence. See N.H Prof'l Cond. R., Statement of Purpose (stating that the purpose of our Rules of Professional Conduct is to "establish the boundaries of permissible and impermissible lawyer conduct."). It is not difficult to conceive of explanations that an accused may put forth to argue that the "primary purpose" of his, her, or their conduct was not to harass on the basis of gender or race, for example. Unless there is direct evidence of the accused attorney's intent, such as that the accused attorney said to the person he, she, or they harassed that he, she, or they was doing it because of that person's protected class, it will be very difficult, if not impossible, to prove "primary purpose" under Rule 8.4(g) as written.

The NHWBA notes that the "primary purpose" requirement is not explicitly included in any other New Hampshire Rule of Professional Conduct, which further sends the message that much of the conduct that is currently the problem for diverse attorneys in the legal profession is permissible. There are numerous examples in our Rules of Professional Conduct where an attorney's intent is not an explicit threshold that must be met before an attorney may be held accountable for professional misconduct. As to the inevitable argument being raised that an attorney should not be wrongly "punished" for conduct that he, she, or they did not or could not know was harassment or discrimination, to be frank, we do know, or, at the very least, should know, better by now. To the extent members of our profession claim that they cannot yet discern the bounds of impermissible harassment and discrimination in the practice of law, training and educational opportunities as to these matters are abundantly available and it is our duty to educate ourselves accordingly.

It is our obligation as officers of the Court and protectors of the rule of law that we send a message to all members of our profession through our Rules of Professional

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[2] The NHWBA notes that the word, "discrimination", is not included in Rule 8.4(g), and that "harassment" and "discrimination" are distinct concepts under federal and state law. The terms, "embarrass", "harass", and "burden" included in Rule 8.4(g) are distinct from the term, "discriminate", and those terms do not by their plain meanings apply to instances of discrimination that should be prohibited under our Rules.

Conduct that such harassing conduct is not acceptable at any level and that we as a profession hold ourselves to a higher standard[3]. The NHWBA advocates for the language of Rule 8.4(g) to be amended to include the standard of "knew or reasonably should have known" instead of the standard of "primary purpose". This standard, "knew or reasonably should have known," was the standard that this Committee recommended, 12-3, in 2019 prior to the Court's enactment of Rule 8.4(g) and mirrors the standard imposed by the ABA's Model Rule of Professional Conduct 8.4(g)[4]. This standard still requires evidence of intent, but is more balanced to achieve a more meaningful purpose of the Rule.

As our Rules of Professional Conduct are rules of reason to which numerous mitigating factors may be applied, there is no reasonable basis to believe that this standard of "knew or reasonably should have known" would not be applied fairly under Rule 8.4(g) to mete out what is actionable professional misconduct. N.H Prof'l Cond. R., Statement of Purpose. There are already sufficient protections in place within our attorney disciplinary system to ensure that Rule 8.4(g), as amended in accordance with this proposal, is balanced between the rights of the accused and the rights of the recipients of wrongful harassing behavior.

Accordingly, the NHWBA proposes that this Committee recommend to the Court the adoption of the following revised language for Rule 8.4(g) and its Comment:

> **(g) take any action, while acting as a lawyer in any context, if the lawyer knows or reasonably should know ~~or it is obvious~~ that the action ~~has the primary purpose to~~ embarrasses, harasses or burdens 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**

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[3] Arguably, under federal and state law regarding harassment and discrimination in the workplace, members of the public may be presently held to a higher standards than New Hampshire licensed attorneys, as there is no *mens rea* requirement under such laws for certain harassing and discriminating behaviors to result in liability.

[4] The proposed draft of Rule 8.4(g) recommended 12-3 by this Committee in 2019 was as follows:

> (g) engage in conduct while acting as a lawyer in any context that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity. Statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

In contrast the ABA's Model Rule of Professional Conduct 8.4(g) states as follows:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

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.~~

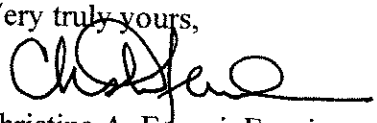
The adoption of this revised language for Rule 8.4(g) and its Comment provides a more reasonable recourse or remedy to individuals who suffer harassment on the basis of their race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity by a New Hampshire attorney, while acting as an attorney.

We can all agree that there is no room in our Bar and in our legal community for harassment or discrimination based on race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity, and that we must meaningfully promote the diversity, equity, and inclusion in our Bar and equal access and justice for all in our legal system. Seizing this opportunity to review and revise Rule 8.4(g) and its Comment will be an important meaningful step in such promotion and will help to close the still existing gap within our present Rules that allows harmful, unethical harassment and discrimination to go unchecked. We respectfully urge this Committee to recommend such revised language to the Court for its adoption.

In the event that the Committee, and by extension the Court, is reluctant to recommend such a revision at this time, in the alternative, the NHWBA respectfully requests that a sub-committee of all of the interested stakeholders be formed to study potential revisions to the current language of Rule 8.4(g) for a reasonable duration, such as for six (6) months, and, after a consensus has been reached, to recommend a proposal for a revised version of Rule 8.4(g) to the Committee, for the Committee's review and if it agrees, for the Committee's recommendation to the Court for potential adoption. While the Court ultimately did not adopt the Committee's recommended proposal for Rule 8.4(g) in 2019, which upon information and belief was shaped in large part by such a sub-committee's work, that process was valuable and such a process could easily be implemented again as part of the Committee's and the Court's review of Rule 8.4(g), which should be careful, transparent, and provide ample opportunities for all interested parties to participate in the negotiation of any proposals with regard to Rule 8.4(g) that are put forth.

Thank you for your consideration.

Very truly yours,



Christina A. Ferrari, Esquire

Immediate Past President
NHWBA Board of Directors

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) ***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 D

2020-006

From: Karinne Brobst [mailto:kbrobst@milford.nh.gov]
Sent: Friday, July 23, 2021 11:39 AM
To: RulesComment <RulesComment@courts.state.nh.us>
Subject: Comment on Rule 12 Change: Defendant's Criminal History

Good morning,

This proposed rule just recently came to my attention. I must strongly urge you to reconsider. This rule would result in an impossible requirement on the State. The rule requires that the State provide a copy of a criminal history of the defendant to the defendant or his/her counsel prior to arraignment, or be prohibited from utilizing the criminal history at the hearing. This is impossible.

Here is a typical scenario: A defendant is arrested and incarcerated overnight with a morning arraignment. At court that morning, the State (sometimes in person or by phone) represents the defendant's criminal history to the judge to justify a detention. If the defendant has been incarcerated in jail overnight, the State has NO ability to provide the criminal history to anyone but the court orally the next morning. Criminal histories are subject to confidentiality rules. I cannot simply fax a history to the jail. They are not an authorized party. I cannot email them, nor would a defendant have access to email in jail. Practically, this means that someone who saw a Bail Commissioner and who was held on any cash bail can never have their criminal history utilized in a bail argument to the judge. This is unacceptable.

In a scenario with an attorney: I may find out who represents the defendant DURING the hearing. I don't often get advance notice. Criminal histories can only be mailed or faxed. If I am in the courthouse having a bail argument and a defense attorney is on the phone or video, and that is when I learn of the representation, I cannot provide the criminal history.

Basically, this amendment would prohibit criminal history from ever being utilized in a bail hearing. It would result in the release of danger offenders with lengthy criminal histories. Moreover, the amendment itself is unnecessary. The defendant knows his/her criminal history.

On behalf of all prosecutors and victims of crime, I strongly urge you to reconsider.

Thank you,

Karinne

Karinne E. Brobst, Esq.
Prosecutor
Milford Police Department
19 Garden Street Milford, NH 03055
603.249.0630

OFFICE OF THE CARROLL COUNTY ATTORNEY
MICHAELA D. ANDRUZZI

August 31, 2021

95 Water Village Road
Box 2
Ossipee, NH 03864
(603) 539-7769

New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Via email: rulescomment@courst.state.nh.us

Re: R-2021-0004
New Hampshire Rule of Criminal Procedure 12 – Discovery of Defendant's Criminal Record

Honorable Justices of the New Hampshire Supreme Court and Advisory Committee on Rules,

Thank you for the opportunity to express our opposition to the proposed amendment to New Hampshire Rule of Criminal Procedure 12. The amendment, as written, runs contrary to our mission to keep victims and the public safe.

Our office routinely handles multiple arraignments within hours of a defendant's arrest, both in Superior and in District Court. When we are requesting preventive detention, it is most often because we believe the defendant presents a credible threat to the safety of another human being. The Court, in determining the most appropriate bail conditions, should be in possession of information which allows it to assess the threat.

Creating a procedural hurdle which prevents the Court from considering an individual's past violent conduct does nothing to protect the community or a victim. The Court is statutorily required to consider the safety of the public. This proposed amendment eliminates an important consideration from the Court's analysis by placing a procedural hurdle in front of the safety of the victim and the public in general.

If an individual is unrepresented and incarcerated, the logistics of ensuring that he/she receives a copy of the criminal record in a manner that complies with the law and the proposed rule is untenable. We are a small, rural county. Not all defense attorneys here have access to a fax machine and criminal records cannot be disseminated via email. Our office is located in a different building from the Court, with our jail located in a building which is separate from ours and from the Court. Our resources are scant and our caseloads are high. Adding additional impediments to the process in the tight timelines we are given does not serve the purpose of justice.

Our Court always allows an unrepresented party or defense counsel to respond to the State's arguments on bail. If there is an argument about a representation made by the State, the Court hears it.

Furthermore, Rule 43 of the NHRCrP allows for reconsideration. Bail hearings are often had multiple times in a criminal case. RSA 597:6-e allows for review and appeal of bail conditions. Thus, the amendment is a solution to a problem which doesn't exist. The Court is always free to review detention decisions. At the time of arraignment, the State and the defendant have very limited information. That is precisely why we allow for bail review. Frequently, facts come to light after the initial arraignment and during the discovery phase, which makes it necessary to review those early decisions.

Often, the Court's decision is the only thing standing between the defendant and the safety of a victim. The detriment to a victim may be a matter of life or death. The Court should have all relevant information before it when it makes decisions which have such weighty consequences.

We thank you, most humbly, for your time and your consideration.

Respectfully,

Michaela D. Andruzzi
Carroll County Attorney

NASHUA POLICE DEPARTMENT

Chief of Police Michael Carignan
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August 19, 2021

New Hampshire Supreme Court Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301
rulescomment@courts.state.nh.us

Re: N.H. Rule of Criminal Procedure 12 – Discovery of Defendant's Criminal Record

Dear Advisory Committee Members,

We write in joint opposition as the Nashua, Hollis, and Hudson Police Departments to the proposed rule change to N.H. Rule of Criminal Procedure 12 regarding Discovery of Defendant's Criminal Record.

While we do not object to providing a defendant with his or her criminal record as soon as we can, we are concerned that this proposed rule would adversely impact victims' safety. There are several practical concerns that would make it difficult or impossible for prosecutors in the Nashua District Court to comply with this proposed rule change if it were enacted. The primary concerns are with video arraignments and 36-hour bail hearings pursuant to RSA 597:2, X (a). A defendant's criminal record is a vital piece of the puzzle for the judge to consider when making a determination on bail, particularly in light of ensuring the safety of the defendant, the victim, and the community.

Defendants who are arrested overnight or on weekends, and either held preventatively or held on cash bail that they are unable to post by the bail commissioner, or who refuse the services of the bail commissioner, are transported to the Hillsborough County House of Corrections ("Valley Street Jail") to await a video arraignment the next court day. When these defendants appear in front of the Nashua District Court judge for their 10:00am video arraignment, the vast majority of the time they are unrepresented. The prosecutor who reviews the file before the arraignment makes the determination of what the State will request for bail. The proposed rule would require the State to provide the defendant with his or her criminal record if it plans to ask for preventative detention, high cash bail, or restrictive bail conditions.

Realistically, it is not possible for the State to get the defendant his or her criminal record before the video arraignment. For one, there are federal regulations regarding dissemination of criminal records. Pursuant to the FBI's Criminal Justice Information Services ("CJIS") compliance, if Valley Street Jail were able to accommodate a system where we fax over the criminal record in the morning, we would need to know who will pick up the record off the fax machine and ensure that it is handed to the defendant. The State has significant concerns about providing a defendant in an unknown mental state and at an unknown level of intoxication with a document that lists their social security number, FBI number, address, and criminal history – particularly because the record would need to be sent before the prosecutor has an opportunity to view the defendant on video to get an idea of their current demeanor.

The defendant knows his or her criminal record. If the defendant has an attorney for a bail hearing, they would have spoken about the defendant's criminal record. The issue is the State's capacity to provide a criminal record at the last minute. The proposed rule puts all of the onus on the State and none on the defendant or the defense attorney. Again, CJIS compliance prohibits us from e-mailing criminal records so it takes advanced notice to be able to send a record as discovery. The State would have to ensure that the defendant and/or defense attorney have the record with enough time to review it before the hearing. The proposed rule does not say anything about 3:30pm bail hearing requests that are put on for the next morning or situations where the defense attorney does not reach out to the prosecutor before the hearing.

This has particularly become an issue with the COVID-19 pandemic. In the past, we were in the courtroom with the defense attorney. If they had any questions about the defendant's criminal record, we could show them our file. But when hearings are conducted telephonically, it is not possible to share the document in the moment. It is particularly difficult because the prosecutor does not always know when the defense attorney plans to appear telephonically or in-person. Again, this puts all of the obligation on the State even though it is the defense attorney requesting the bail hearing on the defendant's behalf and then participating in the hearing by phone.

The Nashua District Court conducted a stakeholders meeting where judges, prosecutors, and defense attorneys met and were able to figure out a workable solution to the issue of providing defendant's criminal record before bail hearings. The compromise was that the defense attorney needs to request discovery early enough in the day so that the State can either fax it to them or have a hard copy available to be picked up before the bail hearing in the morning. Again, the problem is not with providing the criminal record. It is with having reasonable notice before the hearing so that the State can accommodate the discovery request.

The proposed rule could negatively impact victim safety because the State would potentially be prevented from introducing the defendant's record and therefore the judge would not have that information when deciding appropriate bail. This is particularly concerning in cases involving domestic violence. One common instance is a defendant who is arrested for Stalking and Breach of Bail for violating a Criminal Bail Protective Order where the alleged conduct is a text message

or phone call. On its face, it might be difficult to see why the State might ask for the defendant to be held in preventative detention. However, the defendant's criminal record puts it into context when there is a history of domestic violence arrests and convictions for the judge to understand why the defendant who has demonstrated an inability to comply with the court's orders is a danger to the victim.

RSA 597:2, III(a) provides that the court may consider "all relevant factors" in determining whether releasing a defendant would endanger that person or the public. In contrast, the proposed rule seeks to limit the information available to the judge on the basis of a procedural discovery violation. The proper remedy would be to continue the bail hearing to give the defense attorney an opportunity to obtain and review discovery before requesting a further a bail hearing. *See State v. Stickney*, 148 N.H. 232 (2002).

Ultimately, there are very few cases in district court where the prosecutor will request preventative detention. At the end of the day, this proposed rule weighs withholding information that the defendant already knows against the safety of a victim. The only person involved with the hearing who does not know the defendant's record is the judge. In those select situations, the judge should have all of the information available to make an appropriate determination about whether that defendant is a danger to himself or herself, or to a victim, or to the community.

Michael Carignan
Chief of Police
Nashua Police Department

APPENDIX E

November 8, 2021

Dear NH Supreme Court Advisory Committee on Rules,

The New Hampshire Coalition Against Domestic and Sexual Violence writes in opposition of the proposed amendment to New Hampshire Rule of Criminal Procedure 12, which prevents a judge from considering a defendant's criminal history if the state does not provide it to the defense in advance of a bail hearing. If enacted, this amendment would create grave safety risks for victims of the most dangerous patterns of criminal offenses in our state.

At a time when we should be working to enhance protections for victims, this proposal weakens them and further jeopardizes victims' safety. As calls to New Hampshire's crisis lines soared in recent months, domestic and sexual violence victims shared stories of a system that failed to keep them safe, and a system that they have lost faith in after offenders who harmed them time and time again faced little to no accountability.

A minority of defendants are detained after an arrest. Those who are held face the most serious of criminal charges and often present a clear danger to victim(s) and the larger community. The proposed change to Rule 12 could potentially limit the amount of information at a judge's disposal to determine a defendant's bail and, in turn, open the door to greater safety risks for victims of domestic violence, stalking, and sexual assault, who are among the most vulnerable to revictimization.

At a defendant's arraignment, the prosecutor must present a bail argument with input from the victim(s) and the investigating agency, and there is limited time to do this. The Coalition is greatly concerned that by requiring the state to document and provide timely notice to defense counsel of the defendant's criminal history that valuable resources will be stretched too thin in those critical hours between arrest and arraignment. It is essential that victims are informed at every step and have adequate input as mandated through New Hampshire's Crime Victim Bill of Rights.

A bail decision can have life or death consequences for a victim, particularly in a domestic violence case. There have been too many instances of defendants who, within hours of release, violate no contact orders, return to the victim's place of residence, and commit further, more heinous crimes. We saw this in Nashua in December 2020 when Jency Diaz (226-2020-CR-00957) was released on domestic violence charges and later returned to the victim's apartment, where he brutally beat her and sexually assaulted her, resulting in felony charges.

Any effort to change statewide policy must have victim safety at its center, and this proposed rule change does not do that. Of greatest concern is that this amendment could have lethal consequences for those who are at greatest risk of being killed in our state. Domestic violence escalates in severity and frequency over time. Abusers who are capable of committing the ultimate act of domestic violence, murder, often demonstrate a documented pattern of abuse. To set appropriate bail, the judge must have access to this critical information.

According to the 2018-2019 New Hampshire Domestic Violence Fatality Review Committee Biennial Report, 21 people lost their lives to domestic violence homicide in the Granite State, representing 45% of all homicides during that timeframe. This is a dramatic increase from the prior reporting period, illustrating that domestic violence remains one of the most prevalent legal and social problems in our state. In fact, on average, domestic violence is a factor in 77% of state's murder/suicides and 51% for domestic violence homicides.

Defendants have the right to file a motion for a bail hearing at any point after their arrest and initial arraignment, where the facts of the case and the record can be vetted and argued. A defendant should never be released because there was relevant and available information that the judge was prohibited by court rule from knowing. Bail commissioners should not have more access to complete criminal histories than judges.

We are deeply troubled to see this proposal being advanced and urge you to not adopt this rule change, which would severely compromise the safety of our most vulnerable citizens who have been impacted by crime.

Sincerely,

Lyn M. Schollett
Executive Director

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November 24, 2021

TO: New Hampshire Supreme Court Advisory Committee on Rules

FROM: Paul A. Halvorsen, Merrimack County Attorney

SUBJECT: Submissions for Committee Consideration (Proposed Changes to Rule 12)

Earlier this year I submitted two letters to the Supreme Court with my comments concerning proposed changes to Rule 12. With the Supreme Court referring those proposed changes back to this Committee I updated the two letters I submitted to the Supreme Court and resubmitted them for Committee consideration in connection with the upcoming December 10, 2021, public hearing.

In order to minimize documents going to the Committee I am submitting this memorandum to Ms. Platt, the Committee Secretary, indicating that I am comfortable with providing my two updated letters to the Committee with this memo as a cover to each to maintain the record of all correspondence.

Thank you.

11/24/21

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November 24, 2021

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

Via email: rulescomment@courts.state.nh.us

Re: Proposed change to N.H. Rule of Criminal Procedure 12 — Discovery of Defendant's Criminal Record (referenced as 2020-006 for a December 10, 2021, public hearing)

Dear Advisory Committee Members,

For the reasons set forth in this letter, I wish to express my opposition to the proposed amendment of the New Hampshire Rules of Criminal Procedure Rule 12; specifically the amendment which would require the State to provide a defendant's criminal record prior to arraignment and would prohibit the State from referencing the record if it was not provided within the parameters set out by the proposed Rule. I believe this proposed rule is overly broad and therefore subject to various interpretations, is difficult to comply with, and unnecessarily limits the amount of relevant information at the judge's disposal. Let me begin my comments by describing the process and some background so that this proposed rule is in context.

The vast majority of people who are arrested are released on personal recognizance bail by a bail commissioner or on a hand summons by the police. Those individuals are generally arraigned as court schedules allow. It is uncommon for the State to attempt to amend bail at those arraignments. The proposed rule would minimally affect those cases.

In a small number of cases a person is held either as required by statute or based on the bail parameters set by the bail commissioner. These tend to be the more serious cases, either felonies or misdemeanors, where the arrested person presents a clear danger to the community or unreasonable risk of flight. When a person is arrested and detained by a bail commissioner, they

must be brought before the court "without unreasonable delay." RSA 594:20-a. The statute goes further to require "All persons shall appear no later than 24 hours after arrest, or no later than 36 hours after arrest if arrested between 8:00 a.m. and 1:00 p.m. and the person's attorney is unable to attend an arraignment on the same day [...] "

In Merrimack County, arraignments on detained individuals are via video with the House of Corrections. The "video arraignments" were not triggered by COVID-19, these hearings have been occurring by video between the Circuit Courts and the House of Corrections for around 20 years. See Larose v. Superintendent, Hillsborough County Correction Admin., 142 N.H. 364, (1997) [finding video arraignments did not violate due process], see also Circuit Court Administrative Order 2011-16 [creating a presumption of arraignment by video for incarcerated defendants]. Once the Felonies First program was implemented the Superior Court also began video arraignments for detained defendants.

Each Court has a designated timeslot with the respective House of Corrections to do their video arraignments. For example, Franklin Circuit Court is scheduled for 10am, Concord Circuit Court at 11am, Superior Court at 1pm, and so on. The judge appears in court, the prosecutor may be in court or may appear by video and the defendant remains at the House of Corrections. A defense attorney, if retained or already appointed based on a defendant's request, may appear at court, via video from counsel's office or via video from the House of Corrections.

At a video arraignment the defendant may request an attorney for the first time. Of course, it is impossible to instantly provide a defendant with an attorney at the video arraignment, so following Koleta Nygn & a. v. Manchester District Court, Case No. 2011-0464 (Decided April 18, 2012) the Supreme Court's Advisory Committee of Rules addressed the issue of court appointed counsel at bail hearings initially through interim District Court Rules. See N.H. Supreme Court Order Adopting Temporary Amendments to Court Rules dated February 20, 2014. These rules were eventually subsumed by the Rules of Criminal Procedure, and the process of initial arraignments and counsel is addressed in Rule 5.

Should a defendant apply for an attorney prior to the video arraignment, the court may appoint an attorney; however, the State (prosecution) may not be notified of this appointment. If a defendant privately hires an attorney, that attorney may simply show up at the video arraignment with no prior notice to the prosecution. Additionally, if there is a defense attorney, the defense attorney may appear either in court or by video from their office or from the House of Corrections. The resulting reality is that the prosecutor may not know if a defendant is represented until the video arraignment begins or where defense counsel may be during, or indeed before, a scheduled arraignment hearing.

Prior to any scheduled arraignment the prosecutor must prepare. This includes receiving and reviewing reports and other documents from the arresting agency, preparing and reviewing complaints and then filing complaints along with the supporting affidavit. The prosecutor must also formulate an appropriate bail argument based on information received from several sources including, but not limited to, victims, police officers and quite possibly prosecutors from other jurisdictions where a defendant may have additional (pending) cases. All of these prosecution activities usually occur during a time when the regularly scheduled morning court docket is in

progress and thereby means that the prosecutor may often need to accomplish this work while in court as opposed to while being in their office. The prosecutor, while in court, is not likely to have immediate access to a fax machine[1] and may not have immediate access to a document scanner, computer[2] or even a telephone.

At the arraignment in there is often a contested bail hearing. The Judge will have read the Gerstein Affidavit; however, the judge must now make a choice about whether to release or detain the defendant. A bail decision, especially one depriving a person of their liberty, is one of the most difficult decisions a judge must make. In some cases this decision may literally have life and death consequences for a defendant or a victim. Indeed, members of the Advisory Committee may remember a case from 1998 where a defendant was released on bail where relevant facts were apparently not known to all parties and the result was a domestic violence related murder/suicide.

Understanding the process and background I will move to some of my more specific concerns.

Overly Broad and Subject to Various (and Inconsistent) Interpretations

The proposed rule does not define terms and leaves overly broad room for interpretation. For example, the proposed Rule says: "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 [...]." We must then ask a threshold question: "What constitutes a 'defendant's criminal record?'" Are we simply talking about the NCIC printout? A prosecutor may be personally aware that a defendant was convicted of other offenses, can the prosecutor mention those convictions or is that part of the defendant's "criminal record?" If referencing prior convictions based on personal knowledge, what would a prosecutor need to provide to defense counsel? Must a copy of the conviction from the Court be provided? Additionally, multiple failures to appear do not appear on criminal records, but a prosecutor may have participated in prior cases where a defendant had failed to appear. Is that part of the "criminal record?" Can a prosecutor mention other open cases known to the prosecutor or are those part of the "criminal record," too?

Compliance with the Proposed Rule is, at best, Difficult

My concerns about difficulties of compliance include but are not limited to:

- Knowledge of Representation: How will the State know if a defendant is represented by appointed or retained counsel or will be acting *pro se*? Prior to an initial hearing a prosecutor is typically unable to speak to a defendant who is detained at a House of Corrections. It is also true that defense counsel seldom file appearances prior to most

[1] Criminal records, as protected materials, must be transmitted by the most reliably secure method available. A stand-alone facsimile machine used on a telephone line is a secure method as it is point-to-point and does not pass through intermediate devices.

[2] Should a prosecutor have access to a computer (or other devices such as a telephone) while in court the access to a secure network or scanner is not assured. Device use may be further limited by the courts or by court activity.

arraignments. A criminal record is a private document, so simply sending it to the Public Defender with the hope that they represent the person is not a solution.

- What Constitutes an Opportunity to Review a Record: The proposed Rule indicates that a record concerning a defendant must be sent "prior to any hearing such that defense counsel will be given an opportunity to review said records with the defendant … ." How much time constitutes an "opportunity to review" a record? Is one hour enough? How about 30 minutes? Is 15 minutes overly short to constitute an "opportunity to review?" It is important to remember that in the vast majority of these cases, the defendant is at the jail and their counsel is very likely already busy with a morning docket. Assuming that counsel for the State is aware of an assigned/appointed counsel simply sending a record to a defense counsel's office may not get it into defense counsel's hands. What constitutes adequate presentation to defense counsel? If electronic (i.e. facsimile) transmission to a defense counsel's office constitutes notice what time is used to start the clock ticking to measure an opportunity to review the document with defense counsel's client? If defense counsel is unable to review the record with their client because of defense counsel's schedule, but the State has provided it in a timely manner, will the State be able to utilize the record? For *pro se* individuals how are records sent to them when they are being held at the House of Corrections?

I believe that these areas of concern are just the visible top of the compliance difficulties iceberg. The number of involved parties, the number of delivery options mean that the permutations involving compliance difficulties are many and are so varied that the production of an easily workable rule is clearly elusive.

The Proposed Rule Deprives the Court of Relevant Information

The proposed Rule instructs: "If the State fails to provide said copies as described herein, the State **shall be prohibited** from referencing any such records…" (emphasis in **bold** added). In reality, the impact of the proposed rule is to limit the amount of relevant information the Judge has when making the very important decision regarding bail. This could potentially result in individuals who present a danger to the community being released, not because there was something we were not aware of, but because there was something the judge was prohibited by rule from knowing. Ironically, should this proposed rule be adopted, the judicial system will be in a position where a bail commissioners had access to more complete, relevant and appropriate information than will the judges.

It is worth noting that language very similar to this proposed rule appeared as a July 14, 2020 Superior Court Administrative Order (2020-006). The administrative order states that it would be "fundamentally unfair" to allow the State to cite potentially substantive documents at arraignment or bail hearings which the defense does not have access to. However, this overlooks the following facts: (1) the defendant, having been present for the events that constitute his existing record, is absolutely aware of that record, (2) at the time of a hearing addressed by the proposed rule the State has police reports, witness statements, and sometimes even photographs or video to which a defendant does not have access, and (3) the defense often has access to

information regarding the defendant's ties to the community, family situation, and information to which the State has no access. These structural limitations are why there are several statutory and procedural safeguards already in place allowing for subsequent hearings, reconsideration, and appeals.

Additionally, shortly after Superior Court Administrative Order 2020-006 was signed, the New Hampshire Legislature amended RSA 597:2 III to say, in relevant part: [3]

> "III. When considering whether to release or detain a person, the court shall consider the following issues:
>
> (a) Safety of the public or the defendant. If a person is charged with any criminal offense, an offense listed in RSA 173-B:1, I, or a violation of a protective order under RSA 458:16, III, or after arraignment, is charged with a violation of a protective order issued under RSA 173-B, the court may order preventive detention without bail, or, in the alternative, may order restrictive conditions including but not limited to electronic monitoring and supervision, only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public. In determining whether release will endanger the safety of that person or the public, the court may consider all relevant factors presented pursuant to paragraph IV."

Paragraph IV of that statute was also amended to read:

> "IV (a) Evidence in support of preventive detention shall be made by offer of proof at the initial appearance before the court. At that time, the defendant may request a subsequent bail hearing where live testimony is presented to the court.
>
> (b) At any subsequent hearing, such testimony may be presented via video conferencing, unless the court determines that witness testimony in court is necessary. A request by the defendant for in-court testimony shall be made by oral motion at the initial hearing or by written motion prior to any subsequent hearing. Any order granting the defendant's request shall be distributed to the parties at least 48 hours prior to any subsequent hearing.
>
> (c) There shall be a rebuttable presumption that an alleged victim of the crime shall not be required to testify at the bail hearing. Nothing in this section shall preclude an alleged victim from voluntarily testifying at such hearing. The state may present evidence of statements made in the course of an investigation through a law enforcement officer."

[3] Emphasis in underlined text shown in quoted text from paragraphs III and IV (including subsections) was added.

Clearly, the legislature recognized that there should be no limitation to the relevant information provided to the judge prior to making the important decision about bail. This legislative action effectively (and clearly) nullified the Court's Administrative Order. This legislative action stands for the proposition that when a judge is making a decision about whether or not to hold or release a potentially dangerous individual they should have all the relevant facts. When reading the proposed rule there is a clear appearance that the proposed rule attempts to reinstate the Administrative Order over the actions of the elected Legislature. As the proposed rule has the effect of restricting or limiting or overturning legislative actions the proposed rule may implicate an issue of separation of powers.

My serious concerns about limiting information at bail hearings, as suggested by the proposed rule, is bolstered by a tragic event in NH that is known to many in the legal community. Unfortunately, there was a well-known incident in 1998 in which a District Court's bail order was amended in Superior Court which resulted in a dangerous man, Mr. James Golightly, being released. Shortly after being released, Mr. Golightly murdered his former girlfriend, Ms. Traci Winship, and then killed himself. The decision to agree to release Mr. Golightly was made by an individual who apparently did not have all the relevant facts and, it appears, the judge reducing bail also did not have all the relevant facts on which to base the Court's decision. Following this tragedy the New Hampshire Legislature amended RSA 597:6-e via HB216 (1999) and SB382 (2000) to require that when a bail decision is appealed to a Superior Court judge, the moving party must provide that judge with all of the information the District Court judge had when making the bail decision.[4] The premise is simple: a judge making a decision should have all the relevant information available.[5]

During the discussion and testimony on HB216 (1999) individuals in opposition to that bill indicated that the bill was not necessary, because "most judges want to see records prior to proceedings, already." When asked "How do we assure the judge will look at them?" the suggestion was "You could require the prosecutor to supply the court with the person's records." See Testimony of Andy Schulman available at RELATIVE TO RELEASE CONDITIONS PENDING TRIAL FOR DEFENDANTS IN DOMESTIC VIOLENCE, STALKING, OR PROTECTIVE ORDER VIOLATION CASES, HB216, 1999 SESSION (N.H. 1999)

[4] RSA 596:6-e is clear. It says, in relevant parts, that while the issue of a bail review/appeal "shall be determined promptly" no action can be taken on a review/appeal "until the moving party has provided to the superior court certified copies of the complaint, affidavit, warrant, bail slip, and any other court orders relative to each charge for which a release or detention order was issued by a justice, or a bail commissioner." Emphasis in underlined text added.

[5] A report issued by The National Institute of Justice [NIJ], in discussing issues involving domestic violence, instructs: "Judges should understand that if an abuser has a prior record for **any** crime, he is a high-risk domesticviolence offender, not a low-risk "first" offender. Judges should demand access to prior criminal and abuse histories before fashioning civil orders, making pretrial release decisions, or sentencing abusers." Extracted from Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges" at page 23 available at Practical Implications of Current Domestic Violence Research (ojp.gov) (emphasis in **bold text** in the original, emphasis in underlined text added.) The NIL report also instructs: "For judges to make safe decisions about bail, sentencing or fashioning civil orders, they must insist on appropriate information about abusers" prior activities, including those associated with increased risk for lethality." *Id* at page 28, emphasis in underlined text added.

HTTP://GENCOURT.STATE.NH.US/SOFS_ARCHIVES/1999/HOUSE/HB216H.PDF (JANUARY 27, 1999 HEARING, REMARKS OF ANDY SCHULMAN, PAGE 12, PARAGRAPH 2). Ironically, with the proposed rule now before the Advisory Committee on Rules, it appears that we are moving away from the common sense and best practice suggestion requiring that records be provided to the judges in favor of prohibiting those same records from being provided.

If we limit or put prerequisite requirements upon the State's use of a criminal history at a bail hearing, where does it end? Would we also limit the State's ability to present the victim's input to the court unless it is provided to the defendant in advance? Would we prevent the State from referring to information from the police that is not contained in the Gerstein Affidavit unless that information is documented and provided to the defense? Would we prevent the State from presenting relevant and informative photographs at bail hearings unless they have been provided? The bigger question is whether or not we will similarly limit the information a defendant is allowed to present with regard to their ties to the community, medical issues, personal obligations, employment, and so on, unless that information is documented and provided to the prosecutor in advance?

In closing I want to make it clear that I recognize the position many defense attorneys may find themselves in during a bail hearing where they are faced with addressing a defendant's record. However, the remedy should not be to keep important, relevant and probative information on the issue of bail away from a judge. The remedy should be that the defense attorney can come back and have a subsequent bail hearing once they have had time to further review and vet information presented at the initial hearing. Indeed, in Circuit Court this remedy already exists in RSA 597:2(X), which grants a hearing on a "motion to reconsider" bail for detained individuals within 36 hours; and in RSA 597:6-e which allows for an additional "prompt" hearing at the defendant's request. This remedy exists in Superior Court as well through a motion to reconsider or an appeal to the New Hampshire Supreme Court pursuant to RSA 597:6-e.[6]

I don't believe anyone wants to limit the amount of relevant information judges receive. No one I know wants to impair a judge's ability to make the right decision regarding releasing or detaining a defendant. No one wants to put at risk a victim of domestic violence or a victim of a non-DV offense through the release of a dangerous person. Unfortunately, this proposed rule may do those very things.

PHC 11/24/21

Paul Halvorsen
Merrimack County Attorney

[6] Please reference my supplemental letter, also dated November 24, 2021, for detailed summary of the bail review and appeal options available to a defendant.

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November 24, 2021

New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Via email: rulescomment@courts.state.nh.us

Ref: Proposed change to N.H. Rule of Criminal Procedure 12 — Discovery of Defendant's Criminal Record (referenced as 2020-006 for a December 10, 2021, public hearing)

Dear Advisory Committee Members:

This letter supplements my separate submitted letter also dated November 24, 2021.

This letter specifically addresses part of Attorney Rothstein's June 30, 2020, letter to the Advisory Committee on Rules suggesting the proposed change to Rule 12. A copy of Attorney Rothstein's letter is at Attachment #1.

Please allow me call your attention to the last line on page 1 of Attorney Rothstein's letter. For ease of reference that portion is highlighted within Attachment #1. That line, referring to bail orders, alleges that "Once the presiding judge issues a bail order, it is very difficult, as a practical matter to gain further review of it or to reverse it." Rothstein letter at page 1 para 4. I do not believe that Attorney Rothstein's comment reflects the current state of the bail process which, in both Circuit and Superior Courts, allows many opportunities to review, modify and appeal bail. It is worthy to note that there have been several recent legislative

changes to bail related statutes in the last several years impacting, clarifying and expanding protections afforded an arrestee (defendant). Please let me summarize the many protections currently afforded an arrestee:

- In Circuit Court cases:
  - Bail in most cases is initially set by a Bail Commissioner (unless such services are declined by the arrestee).
  - If an arrestee declines the services of a Bail Commissioner or is held (detained) then the arrestee must be brought before a Circuit Court Judge under strict statutory time limits outlined in RSA 594:20-a (i.e. "...no later than 24 hours after arrest ... [Saturday, Sundays and holidays excepted])".
  - If, after appearing before a judge, an arrestee remains detained and was not represented at the initial appearance Rule 5(e) of the Rules of Criminal Procedure mandates "A bail hearing, at which the defendant's counsel is present, **shall** be held within 24 hours of a written or oral request for same made by the defendant's counsel, weekends and holidays excluded." Bolded emphasis in quote added.
  - If an individual is detained based on an offer of proof 597:2 IV (a) directs that the arrestee "may request a subsequent bail hearing where live testimony is presented to the court." The request for in-court testimony may be "made by oral motion" or "by written motion" in accordance with 597:2 IV (b).
  - An arrestee who remains detained by a Court has, under RSA 597:2 X (a), "the right to" a hearing in Circuit Court within 36 hours of filing a Motion to Reconsider.
  - Bail may also be appealed to the Superior Court in accordance with 597:6-e II and requires a decision "within 36 hours of the filing of the appeal" under 597:2 X (b).
  - Additional reviews of bail orders are available under Rule 43 of the New Hampshire Rules of Criminal Procedure which allows for Motions for Reconsideration at any time in any proceeding when an arrestee can present "points of law or fact that the court has overlooked or misapprehended."
  - Under 597:6-e III an arrestee "may appeal to the supreme court from a court's release or detention order, or from a decision denying revocation or amendment of such an order" and "[T]he appeal shall be determined promptly."

- In Superior Court cases:

    - Bail in most cases is initially set by a Bail Commissioner (unless such services are declined by the arrestee).

    - If an arrestee declines the services of a Bail Commissioner or is held (detained) then the arrestee is brought before a Superior Court for a "Felonies First" arraignment. An arrestee is typically represented by counsel at this hearing. Rule 4 of the New Hampshire Rules of Criminal Procedure mandates that a detained individual must have an arraignment "scheduled within 24 hours, excluding weekends and holidays unless the person was arrested between 8:00 a.m. and 1:00 p.m. and the person's attorney is not available in which case the arraignment shall take place within 36 hours of arrest, Saturdays, Sundays and holidays excluded." Bail is addressed at this arraignment.

    - If an individual is detained based on an offer of proof 597:2 IV (a) directs that the arrestee "may request a subsequent bail hearing where live testimony is presented to the court." The request for in-court testimony may be "made by oral motion" or "by written motion" in accordance with 597:2 IV (b).

    - Additional reviews of bail orders are available under Rule 43 of the New Hampshire Rules of Criminal Procedure which allows for Motions for Reconsideration at any time in any proceeding when an arrestee can present "points of law or fact that the court has overlooked or misapprehended."

    - Under 597:6-e III an arrestee "may appeal to the supreme court from a court's release or detention order, or from a decision denying revocation or amendment of such an order" and "[T]he appeal shall be determined promptly."

I hope this letter clarifies the many opportunities available to an individual to have bail reviewed, modified and appealed. These many protections, put in place by our legislature and courts through statutes and rules, protect a defendant's due process rights on many levels and eliminates any need for this proposed Rule.

Thank you for your attention on this matter.

11/24/21

Paul Halvorsen
Merrimack County Attorney

New Hampshire Public Defender

10 FERRY STREET, SUITE 202, CONCORD, NH 03301 TEL: (603) 224-1236 FAX: (603) 226-4299

June 30, 2020

Loretta S. Platt
Secretary, Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, N.H. 03301

Re: Proposed Amendment to Rule of Criminal Procedure 12

Dear Ms. Platt:

I am the Director of Litigation for the New Hampshire Public Defender. Part of my job is to keep abreast of obstacles our attorneys are facing in practice, and to attempt to find solutions. We have one such issue at present that, we submit, should be addressed by a rule change.

In felony cases, the defendant's first appearance is in Superior Court. In some of these cases, the State will seek to preventively detain the defendant, that is, ask the court to hold them without bail until their trial. In others, the State will ask for a higher amount of cash or corporate surety bail than the defendant can afford to post, which will result in their indefinite detention. The need for effective advocacy in such situations is acute.

In other cases, including class A misdemeanors brought in Circuit Court, the State similarly relies on the defendant's criminal record to argue for preventive detention or an amount of cash or corporate surety bail that the defendant cannot post. Moreover, at both court levels, the State will rely on the defendant's record to argue in favor of certain restrictive bail conditions, such as an order that they not have contact with an alleged victim or a witness.

The State has exclusive access to the defendant's criminal record. These records are maintained by the New Hampshire Department of Safety. They are also maintained in a national database called the NCIC. Before any bail hearing, the State will run a criminal record check. And, if the State determines preventive detention or high bail is appropriate, and the defendant has a record, it will use the record to advocate to the presiding judge that the defendant should be held in jail until trial. This results in the defendant losing their housing, benefits, job, and possibly, important rights with respect to children. Once the presiding judge issues a bail order, it is very difficult as a practical matter to gain further review of it or to reverse it.

The problem is not that the State relies on these records to advocate its position on bail. The problem is that our attorneys are not uniformly provided a copy of the client's record before the arraignment. In a survey of our managers, the practice with respect to this issue is different in nearly every county. In our largest county, Hillsborough, the practice differs in North as compared to South, despite the commonality in administration and, presumably, office policy.

The general rule is that, in all but one county, Rockingham, our attorneys do not routinely get a copy of their client's criminal records before an arraignment at which the State is requesting preventive detention or cash bail that the client will not be able to post, or is relying on the record to substantiate a restrictive bail condition. This renders our representation deficient. In two counties, the prosecutors provide a summary of the record. At first blush, this seems sufficient, but in one instance we know of, the summary turned out to be inaccurate, and the client was detained. Beyond that, a prosecutor and a defense attorney may have opposing interpretations of the information in a record report, or draw different inferences, meaning that the prosecutor has not provided all the information a defense attorney may deem relevant.

In our federal court, this is not an issue. Under Local Rule 16.1, "[p]rior to or during the course of the initial appearance, the United States Probation and Pretrial Service Office shall, to the extent in their possession, provide the government with two (2) copies of the defendant's criminal record report. Upon receipt, the government shall provide a copy of that report to counsel for the defendant, it being presumed that defense counsel has made a request for this information pursuant to Fed. R. Crim. P. 16(a)(1)(D)." Thus, federal counsel has their client's criminal record before arraignment.

Accordingly, we propose the following as an amendment to Rule of Criminal Procedure 12. Under our proposal, this would be entitled "Discovery of Criminal Record at Arraignment or Bail Hearing" and it would be Rule 12(a). Rule 12(b) would be "Circuit Court – District Division" and Rule 12(c) would be "Superior Court."

> Prior to arraignment or any bail hearing, in any felony or class A misdemeanor case in which the State relies on the defendant's criminal record to seek preventive detention, cash or corporate surety bail, or a restrictive bail condition, the State shall provide to the defense the defendant's current criminal record, to the extent reasonably available to the State, in either electronic or paper form.

I want to thank you in advance for considering this matter. Having done these arraignments, the field is not level where the prosecution can refer to a powerful document that the defense attorney and their client cannot see, study, and discuss in advance of the hearing.

As always, I welcome any questions the Committee may have.

Sincerely,

/s/ David M. Rothstein
David M. Rothstein
Director of Litigation
New Hampshire Public Defender
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Salem Police Department

30th November 2021

New Hampshire Supreme Court Advisory on Rules
1 Charles Doe Drive
Concord, N.H. 03301

Sent via U.S. Mail, and via email to rulescomment@courts.state.nh.us

Re: Proposed change to N.H. Rule of Criminal Procedure 12
Discovery of Defendant's Criminal Record

Dear Advisory Committee Members,

Thank you for the opportunity to provide my objection and input on the proposed amendment of the New Hampshire Rules of Criminal Procedure, Rule 12. I specifically write concerning the amendment that would require the State to provide a defendant's criminal record prior to arraignment and prohibit the State from referring to the record if it was not provided within the proposed Rule's parameters.

I have seen comments and replies from other prosecutors, including Merrimack County Attorney Paul A. Halvorsen. I concur with his opposition, so I will not use this space to repeat or duplicate the viewpoints and reasoning he well-articulated. I do wish to speak to the practicality and actual impact of putting such a rule in place.

In the circuit courts, the proposed rule would seem to have the most significant impact on the arraignments of incarcerated defendants. These are individuals who were arrested and detained until the court's next sitting. In my experience, at this initial stage of the proceeding, the vast majority of these cases involve *pro se* litigants. At their first appearance, *pro se* defendants are given the option: conduct the arraignment without counsel or continue the hearing one weekday for the appointment and appearance of counsel.

My focus is on those instances where an incarcerated defendant requests the appointment of counsel. My experience is that, in almost every one of these instances, I have no advance notice about who is representing the defendant. It is the rule, not the exception, where counsel just appears at the arraignment – either in person, by phone or video. And that is when I first learn who is representing the defendant. I do not receive any advance notification from the Court. I am not contacted in advance by defense counsel. Instead, the defense lawyer just appears.

In light of this commonplace scenario, the Advisory Committee should proceed cautiously in legislating what information the State must provide to the defense prior to an arraignment. How can the State be compelled to provide information to defense counsel when the lawyer is often a mystery?

9 Veterans Memorial Parkway, Salem, New Hampshire 03079 (603) 893-1911 Fax (603) 894-4861

Respectfully, it is my recommendation that you make no such rule on this matter. Like so much else that occurs within the courthouse, this issue should be left to the practitioners. It does not need legislating. In 100 of 100 cases, if a defense lawyer timely contacted me in advance of an arraignment and asked for their client's criminal record, I would provide it. But that takes someone from the defense identifying themselves and making a request.

At one point earlier this year, I conducted an in-custody arraignment where the defendant asked that his hearing be continued a day and that the Court appoint counsel to represent him. That same morning or afternoon, the Circuit Court appointed the public defender's office to represent the defendant. The next morning, a public defender appeared for the hearing. There was no prior contact by the public defender to my office, and I did not know who the defendant's lawyer was before the hearing started. As I made my bail request, the public defender objected when I started to recite the defendant's criminal record. In objecting, the public defender cited some order from a superior court judge in arguing that she was entitled to a copy of the defendant's criminal record before the arraignment. Where I did not provide the criminal record in advance, the defense argued, I should be blocked from providing the Court with that information. The Court overruled the objection, noting it was important for the Court to learn of the defendant's record before deciding bail.

Again, talking first on a practical level, how can one provide records to another without knowing who is the opposing counsel? And as I relayed to the Court, if the defense wanted the record, why didn't the defense counsel just reach out to ask me for it? No different than seeking additional discovery, if counsel wants something, just ask for it. And if the parties cannot resolve the issue, then it falls to the Court to act. Rulemaking on this specific issue is not required.

Aside from the issue of practicality, please allow me to address the real-world impact of imposing a sanction that a prosecutor cannot inform a court about a defendant's record if the record is not provided to the defense in advance.

Individuals who are dangerous and/or pose a flight risk are most often those defendants who are in custody at arraignment. It is bad public policy to restrict a judge from hearing relevant information before deciding bail. Literally, people's lives often hang in the balance.

As you are aware, the Supreme Court is presently reviewing the case involving a Hampton woman who, in October, was denied a domestic violence petition she sought against an ex-boyfriend. A month later, the man shot her as she left work. Imagine having such a defendant before the courts for a domestic violence-related offense and barring the prosecutor from talking about his criminal record. Why? This rule serves to do more harm than good and seeks to solve something that is not a problem.

Restricting the Court's receipt of relevant information for its consideration before it sets bail is a risky, dangerous business. It further exposes our citizens and communities to undue harm.

Thank you for your attention to this matter.

Sincerely,

Jason B. Grosky
Prosecuting Attorney
Salem Police Department

JBG/jbg

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December 1, 2021

New Hampshire Supreme Court Advisory Committee on Rules
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Rulescomment@courts.stat.nh.us

Re: OPPOSITION to Rule Change to N.H. Rule of Criminal Procedure 12

Dear Advisory Committee Members:

I write in opposition on behalf of my client, the New Hampshire Police Association, of the proposed rule change to N.H. Rule of Criminal Procedure 12 regarding Discovery of Defendant's Criminal Record. The New Hampshire Police Association is a domestic non-profit corporation and fraternal organization representing active and retired members of the law enforcement community throughout the State of New Hampshire (hereinafter "NHPA"). The membership in the NHPA covers a cross section of our State from Berlin in the North, to Salem in the South, to Hampton in the East and Hanover in the West. We represent law enforcement in large cities, small towns, State institutions, and county facilities. We would like to begin by thanking the people serving on this Committee for their time, energy and expertise in this important matter.

The NHPA is in support of defendants being provided with their criminal record as soon as is reasonable and practical. However, the proposed rule change we believe could adversely impact victim's safety and as a result we stand in opposition as the rule change is unnecessary and unduly burdensome on the prosecution without advancing victim safety.

The NHPA support the Nashua, Hollis, Hudson and other police departments that are in opposition to the suggested rule change. County Attorney Paul Halvorsen's, November 24, 2021 correspondence and supplement of even date, provide compelling rationale for not adopting the proposed rule change and provides such a rule may be difficult if not impossible to implement as a practical matter. I attach a copy of the County Attorney's correspondence for ease of reference.

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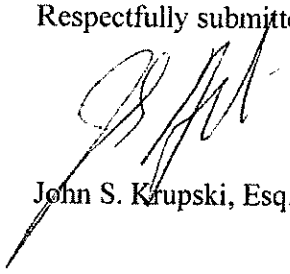
Tel. (603) 410-6011
Fax (603) 505-4652

Thank you for allowing the NHPA to address our opposition to the proposed rule change. If I can be any assistance to the Committee please feel free to contact me.

Respectfully submitted,



John S. Krupski, Esq.

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November 24, 2021

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

Via email: rulescomment@courts.state.nh.us

Re: Proposed change to N.H. Rule of Criminal Procedure 12 — Discovery of Defendant's Criminal Record (referenced as 2020-006 for a December 10, 2021, public hearing)

Dear Advisory Committee Members,

For the reasons set forth in this letter, I wish to express my opposition to the proposed amendment of the New Hampshire Rules of Criminal Procedure Rule 12; specifically the amendment which would require the State to provide a defendant's criminal record prior to arraignment and would prohibit the State from referencing the record if it was not provided within the parameters set out by the proposed Rule. I believe this proposed rule is overly broad and therefore subject to various interpretations, is difficult to comply with, and unnecessarily limits the amount of relevant information at the judge's disposal. Let me begin my comments by describing the process and some background so that this proposed rule is in context.

The vast majority of people who are arrested are released on personal recognizance bail by a bail commissioner or on a hand summons by the police. Those individuals are generally arraigned as court schedules allow. It is uncommon for the State to attempt to amend bail at those arraignments. The proposed rule would minimally affect those cases.

In a small number of cases a person is held either as required by statute or based on the bail parameters set by the bail commissioner. These tend to be the more serious cases, either felonies or misdemeanors, where the arrested person presents a clear danger to the community or unreasonable risk of flight. When a person is arrested and detained by a bail commissioner, they

must be brought before the court "without unreasonable delay." RSA 594:20-a. The statute goes further to require "All persons shall appear no later than 24 hours after arrest, or no later than 36 hours after arrest if arrested between 8:00 a.m. and 1:00 p.m. and the person's attorney is unable to attend an arraignment on the same day [...] "

In Merrimack County, arraignments on detained individuals are via video with the House of Corrections. The "video arraignments" were not triggered by COVID-19, these hearings have been occurring by video between the Circuit Courts and the House of Corrections for around 20 years. See Larose v. Superintendent, Hillsborough County Correction Admin., 142 N.H. 364, (1997) [finding video arraignments did not violate due process], see also Circuit Court Administrative Order 2011-16 [creating a presumption of arraignment by video for incarcerated defendants]. Once the Felonies First program was implemented the Superior Court also began video arraignments for detained defendants.

Each Court has a designated timeslot with the respective House of Corrections to do their video arraignments. For example, Franklin Circuit Court is scheduled for 10am, Concord Circuit Court at 11am, Superior Court at 1pm, and so on. The judge appears in court, the prosecutor may be in court or may appear by video and the defendant remains at the House of Corrections. A defense attorney, if retained or already appointed based on a defendant's request, may appear at court, via video from counsel's office or via video from the House of Corrections.

At a video arraignment the defendant may request an attorney for the first time. Of course, it is impossible to instantly provide a defendant with an attorney at the video arraignment, so following Koleta Nygn & a. v. Manchester District Court, Case No. 2011-0464 (Decided April 18, 2012) the Supreme Court's Advisory Committee of Rules addressed the issue of court appointed counsel at bail hearings initially through interim District Court Rules. See N.H. Supreme Court Order Adopting Temporary Amendments to Court Rules dated February 20, 2014. These rules were eventually subsumed by the Rules of Criminal Procedure, and the process of initial arraignments and counsel is addressed in Rule 5.

Should a defendant apply for an attorney prior to the video arraignment, the court may appoint an attorney; however, the State (prosecution) may not be notified of this appointment. If a defendant privately hires an attorney, that attorney may simply show up at the video arraignment with no prior notice to the prosecution. Additionally, if there is a defense attorney, the defense attorney may appear either in court or by video from their office or from the House of Corrections. The resulting reality is that the prosecutor may not know if a defendant is represented until the video arraignment begins or where defense counsel may be during, or indeed before, a scheduled arraignment hearing.

Prior to any scheduled arraignment the prosecutor must prepare. This includes receiving and reviewing reports and other documents from the arresting agency, preparing and reviewing complaints and then filing complaints along with the supporting affidavit. The prosecutor must also formulate an appropriate bail argument based on information received from several sources including, but not limited to, victims, police officers and quite possibly prosecutors from other jurisdictions where a defendant may have additional (pending) cases. All of these prosecution activities usually occur during a time when the regularly scheduled morning court docket is in

progress and thereby means that the prosecutor may often need to accomplish this work while in court as opposed to while being in their office. The prosecutor, while in court, is not likely to have immediate access to a fax machine[1] and may not have immediate access to a document scanner, computer[2] or even a telephone.

At the arraignment in there is often a contested bail hearing. The Judge will have read the Gerstein Affidavit; however, the judge must now make a choice about whether to release or detain the defendant. A bail decision, especially one depriving a person of their liberty, is one of the most difficult decisions a judge must make. In some cases this decision may literally have life and death consequences for a defendant or a victim. Indeed, members of the Advisory Committee may remember a case from 1998 where a defendant was released on bail where relevant facts were apparently not known to all parties and the result was a domestic violence related murder/suicide.

Understanding the process and background I will move to some of my more specific concerns.

Overly Broad and Subject to Various (and Inconsistent) Interpretations

The proposed rule does not define terms and leaves overly broad room for interpretation. For example, the proposed Rule says: "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 [...]." We must then ask a threshold question: "What constitutes a 'defendant's criminal record?'" Are we simply talking about the NCIC printout? A prosecutor may be personally aware that a defendant was convicted of other offenses, can the prosecutor mention those convictions or is that part of the defendant's "criminal record?" If referencing prior convictions based on personal knowledge, what would a prosecutor need to provide to defense counsel? Must a copy of the conviction from the Court be provided? Additionally, multiple failures to appear do not appear on criminal records, but a prosecutor may have participated in prior cases where a defendant had failed to appear. Is that part of the "criminal record?" Can a prosecutor mention other open cases known to the prosecutor or are those part of the "criminal record," too?

Compliance with the Proposed Rule is, at best, Difficult

My concerns about difficulties of compliance include but are not limited to:

- Knowledge of Representation: How will the State know if a defendant is represented by appointed or retained counsel or will be acting *pro se*? Prior to an initial hearing a prosecutor is typically unable to speak to a defendant who is detained at a House of Corrections. It is also true that defense counsel seldom file appearances prior to most

[1] Criminal records, as protected materials, must be transmitted by the most reliably secure method available. A stand-alone facsimile machine used on a telephone line is a secure method as it is point-to-point and does not pass through intermediate devices.

[2] Should a prosecutor have access to a computer (or other devices such as a telephone) while in court the access to a secure network or scanner is not assured. Device use may be further limited by the courts or by court activity.

arraignments. A criminal record is a private document, so simply sending it to the Public Defender with the hope that they represent the person is not a solution.

- What Constitutes an Opportunity to Review a Record: The proposed Rule indicates that a record concerning a defendant must be sent "prior to any hearing such that defense counsel will be given an opportunity to review said records with the defendant … ." How much time constitutes an "opportunity to review" a record? Is one hour enough? How about 30 minutes? Is 15 minutes overly short to constitute an "opportunity to review?" It is important to remember that in the vast majority of these cases, the defendant is at the jail and their counsel is very likely already busy with a morning docket. Assuming that counsel for the State is aware of an assigned/appointed counsel simply sending a record to a defense counsel's office may not get it into defense counsel's hands. What constitutes adequate presentation to defense counsel? If electronic (i.e. facsimile) transmission to a defense counsel's office constitutes notice what time is used to start the clock ticking to measure an opportunity to review the document with defense counsel's client? If defense counsel is unable to review the record with their client because of defense counsel's schedule, but the State has provided it in a timely manner, will the State be able to utilize the record? For *pro se* individuals how are records sent to them when they are being held at the House of Corrections?

I believe that these areas of concern are just the visible top of the compliance difficulties iceberg. The number of involved parties, the number of delivery options mean that the permutations involving compliance difficulties are many and are so varied that the production of an easily workable rule is clearly elusive.

The Proposed Rule Deprives the Court of Relevant Information

The proposed Rule instructs: "If the State fails to provide said copies as described herein, the State **shall be prohibited** from referencing any such records…" (emphasis in **bold** added). In reality, the impact of the proposed rule is to limit the amount of relevant information the Judge has when making the very important decision regarding bail. This could potentially result in individuals who present a danger to the community being released, not because there was something we were not aware of, but because there was something the judge was prohibited by rule from knowing. Ironically, should this proposed rule be adopted, the judicial system will be in a position where a bail commissioners had access to more complete, relevant and appropriate information than will the judges.

It is worth noting that language very similar to this proposed rule appeared as a July 14, 2020 Superior Court Administrative Order (2020-006). The administrative order states that it would be "fundamentally unfair" to allow the State to cite potentially substantive documents at arraignment or bail hearings which the defense does not have access to. However, this overlooks the following facts: (1) the defendant, having been present for the events that constitute his existing record, is absolutely aware of that record, (2) at the time of a hearing addressed by the proposed rule the State has police reports, witness statements, and sometimes even photographs or video to which a defendant does not have access, and (3) the defense often has access to

information regarding the defendant's ties to the community, family situation, and information to which the State has no access. These structural limitations are why there are several statutory and procedural safeguards already in place allowing for subsequent hearings, reconsideration, and appeals.

Additionally, shortly after Superior Court Administrative Order 2020-006 was signed, the New Hampshire Legislature amended RSA 597:2 III to say, in relevant part: [3]

> "III. When considering whether to release or detain a person, the court shall consider the following issues:
>
> (a) Safety of the public or the defendant. If a person is charged with any criminal offense, an offense listed in RSA 173-B:1, I, or a violation of a protective order under RSA 458:16, III, or after arraignment, is charged with a violation of a protective order issued under RSA 173-B, the court may order preventive detention without bail, or, in the alternative, may order restrictive conditions including but not limited to electronic monitoring and supervision, only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public. In determining whether release will endanger the safety of that person or the public, the court may consider all relevant factors presented pursuant to paragraph IV."

Paragraph IV of that statute was also amended to read:

> "IV (a) Evidence in support of preventive detention shall be made by offer of proof at the initial appearance before the court. At that time, the defendant may request a subsequent bail hearing where live testimony is presented to the court.
>
> (b) At any subsequent hearing, such testimony may be presented via video conferencing, unless the court determines that witness testimony in court is necessary. A request by the defendant for in-court testimony shall be made by oral motion at the initial hearing or by written motion prior to any subsequent hearing. Any order granting the defendant's request shall be distributed to the parties at least 48 hours prior to any subsequent hearing.
>
> (c) There shall be a rebuttable presumption that an alleged victim of the crime shall not be required to testify at the bail hearing. Nothing in this section shall preclude an alleged victim from voluntarily testifying at such hearing. The state may present evidence of statements made in the course of an investigation through a law enforcement officer."

[3] Emphasis in underlined text shown in quoted text from paragraphs III and IV (including subsections) was added.

Clearly, the legislature recognized that there should be no limitation to the relevant information provided to the judge prior to making the important decision about bail. This legislative action effectively (and clearly) nullified the Court's Administrative Order. This legislative action stands for the proposition that when a judge is making a decision about whether or not to hold or release a potentially dangerous individual they should have all the relevant facts. When reading the proposed rule there is a clear appearance that the proposed rule attempts to reinstate the Administrative Order over the actions of the elected Legislature. As the proposed rule has the effect of restricting or limiting or overturning legislative actions the proposed rule may implicate an issue of separation of powers.

My serious concerns about limiting information at bail hearings, as suggested by the proposed rule, is bolstered by a tragic event in NH that is known to many in the legal community. Unfortunately, there was a well-known incident in 1998 in which a District Court's bail order was amended in Superior Court which resulted in a dangerous man, Mr. James Golightly, being released. Shortly after being released, Mr. Golightly murdered his former girlfriend, Ms. Traci Winship, and then killed himself. The decision to agree to release Mr. Golightly was made by an individual who apparently did not have all the relevant facts and, it appears, the judge reducing bail also did not have all the relevant facts on which to base the Court's decision. Following this tragedy the New Hampshire Legislature amended RSA 597:6-e via HB216 (1999) and SB382 (2000) to require that when a bail decision is appealed to a Superior Court judge, the moving party must provide that judge with all of the information the District Court judge had when making the bail decision.[4] The premise is simple: a judge making a decision should have all the relevant information available.[5]

During the discussion and testimony on HB216 (1999) individuals in opposition to that bill indicated that the bill was not necessary, because "most judges want to see records prior to proceedings, already." When asked "How do we assure the judge will look at them?" the suggestion was "You could require the prosecutor to supply the court with the person's records." See Testimony of Andy Schulman available at RELATIVE TO RELEASE CONDITIONS PENDING TRIAL FOR DEFENDANTS IN DOMESTIC VIOLENCE, STALKING, OR PROTECTIVE ORDER VIOLATION CASES, HB216, 1999 SESSION (N.H. 1999)

[4] RSA 596:6-e is clear. It says, in relevant parts, that while the issue of a bail review/appeal "shall be determined promptly" no action can be taken on a review/appeal "until the moving party has provided to the superior court certified copies of the complaint, affidavit, warrant, bail slip, and any other court orders relative to each charge for which a release or detention order was issued by a justice, or a bail commissioner." Emphasis in underlined text added.

[5] A report issued by The National Institute of Justice [NIJ], in discussing issues involving domestic violence, instructs: "Judges should understand that if an abuser has a prior record for **any** crime, he is a high-risk domesticviolence offender, not a low-risk "first" offender. Judges should demand access to prior criminal and abuse histories before fashioning civil orders, making pretrial release decisions, or sentencing abusers." Extracted from Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges" at page 23 available at Practical Implications of Current Domestic Violence Research (ojp.gov) (emphasis in **bold** text in the original, emphasis in underlined text added.) The NIL report also instructs: "For judges to make safe decisions about bail, sentencing or fashioning civil orders, they must insist on appropriate information about abusers" prior activities, including those associated with increased risk for lethality." *Id* at page 28, emphasis in underlined text added.

HTTP://GENCOURT.STATE.NH.US/SOFS_ARCHIVES/1999/HOUSE/HB216H.PDF (JANUARY 27, 1999 HEARING, REMARKS OF ANDY SCHULMAN, PAGE 12, PARAGRAPH 2). Ironically, with the proposed rule now before the Advisory Committee on Rules, it appears that we are moving away from the common sense and best practice suggestion requiring that records be provided to the judges in favor of prohibiting those same records from being provided.

If we limit or put prerequisite requirements upon the State's use of a criminal history at a bail hearing, where does it end? Would we also limit the State's ability to present the victim's input to the court unless it is provided to the defendant in advance? Would we prevent the State from referring to information from the police that is not contained in the Gerstein Affidavit unless that information is documented and provided to the defense? Would we prevent the State from presenting relevant and informative photographs at bail hearings unless they have been provided? The bigger question is whether or not we will similarly limit the information a defendant is allowed to present with regard to their ties to the community, medical issues, personal obligations, employment, and so on, unless that information is documented and provided to the prosecutor in advance?

In closing I want to make it clear that I recognize the position many defense attorneys may find themselves in during a bail hearing where they are faced with addressing a defendant's record. However, the remedy should not be to keep important, relevant and probative information on the issue of bail away from a judge. The remedy should be that the defense attorney can come back and have a subsequent bail hearing once they have had time to further review and vet information presented at the initial hearing. Indeed, in Circuit Court this remedy already exists in RSA 597:2(X), which grants a hearing on a "motion to reconsider" bail for detained individuals within 36 hours; and in RSA 597:6-e which allows for an additional "prompt" hearing at the defendant's request. This remedy exists in Superior Court as well through a motion to reconsider or an appeal to the New Hampshire Supreme Court pursuant to RSA 597:6-e.[6]

I don't believe anyone wants to limit the amount of relevant information judges receive. No one I know wants to impair a judge's ability to make the right decision regarding releasing or detaining a defendant. No one wants to put at risk a victim of domestic violence or a victim of a non-DV offense through the release of a dangerous person. Unfortunately, this proposed rule may do those very things.

Paul Halvorsen
Merrimack County Attorney

[6] Please reference my supplemental letter, also dated November 24, 2021, for detailed summary of the bail review and appeal options available to a defendant.

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November 24, 2021

New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Via email: rulescomment@courts.state.nh.us

Ref: Proposed change to N.H. Rule of Criminal Procedure 12 — Discovery of Defendant's Criminal Record (referenced as 2020-006 for a December 10, 2021, public hearing)

Dear Advisory Committee Members:

This letter supplements my separate submitted letter also dated November 24, 2021.

This letter specifically addresses part of Attorney Rothstein's June 30, 2020, letter to the Advisory Committee on Rules suggesting the proposed change to Rule 12. A copy of Attorney Rothstein's letter is at Attachment #1.

Please allow me call your attention to the last line on page 1 of Attorney Rothstein's letter. For ease of reference that portion is highlighted within Attachment #1. That line, referring to bail orders, alleges that "Once the presiding judge issues a bail order, it is very difficult, as a practical matter to gain further review of it or to reverse it." Rothstein letter at page 1 para 4. I do not believe that Attorney Rothstein's comment reflects the current state of the bail process which, in both Circuit and Superior Courts, allows many opportunities to review, modify and appeal bail. It is worthy to note that there have been several recent legislative

changes to bail related statutes in the last several years impacting, clarifying and expanding protections afforded an arrestee (defendant). Please let me summarize the many protections currently afforded an arrestee:

- In Circuit Court cases:
  - Bail in most cases is initially set by a Bail Commissioner (unless such services are declined by the arrestee).
  - If an arrestee declines the services of a Bail Commissioner or is held (detained) then the arrestee must be brought before a Circuit Court Judge under strict statutory time limits outlined in RSA 594:20-a (i.e. "...no later than 24 hours after arrest ... [Saturday, Sundays and holidays excepted])".
  - If, after appearing before a judge, an arrestee remains detained and was not represented at the initial appearance Rule 5(e) of the Rules of Criminal Procedure mandates "A bail hearing, at which the defendant's counsel is present, **shall** be held within 24 hours of a written or oral request for same made by the defendant's counsel, weekends and holidays excluded." Bolded emphasis in quote added.
  - If an individual is detained based on an offer of proof 597:2 IV (a) directs that the arrestee "may request a subsequent bail hearing where live testimony is presented to the court." The request for in-court testimony may be "made by oral motion" or "by written motion" in accordance with 597:2 IV (b).
  - An arrestee who remains detained by a Court has, under RSA 597:2 X (a), "the right to" a hearing in Circuit Court within 36 hours of filing a Motion to Reconsider.
  - Bail may also be appealed to the Superior Court in accordance with 597:6-e II and requires a decision "within 36 hours of the filing of the appeal" under 597:2 X (b).
  - Additional reviews of bail orders are available under Rule 43 of the New Hampshire Rules of Criminal Procedure which allows for Motions for Reconsideration at any time in any proceeding when an arrestee can present "points of law or fact that the court has overlooked or misapprehended."
  - Under 597:6-e III an arrestee "may appeal to the supreme court from a court's release or detention order, or from a decision denying revocation or amendment of such an order" and "[T]he appeal shall be determined promptly."

- In Superior Court cases:

    - Bail in most cases is initially set by a Bail Commissioner (unless such services are declined by the arrestee).

    - If an arrestee declines the services of a Bail Commissioner or is held (detained) then the arrestee is brought before a Superior Court for a "Felonies First" arraignment. An arrestee is typically represented by counsel at this hearing. Rule 4 of the New Hampshire Rules of Criminal Procedure mandates that a detained individual must have an arraignment "scheduled within 24 hours, excluding weekends and holidays unless the person was arrested between 8:00 a.m. and 1:00 p.m. and the person's attorney is not available in which case the arraignment shall take place within 36 hours of arrest, Saturdays, Sundays and holidays excluded." Bail is addressed at this arraignment.

    - If an individual is detained based on an offer of proof 597:2 IV (a) directs that the arrestee "may request a subsequent bail hearing where live testimony is presented to the court." The request for in-court testimony may be "made by oral motion" or "by written motion" in accordance with 597:2 IV (b).

    - Additional reviews of bail orders are available under Rule 43 of the New Hampshire Rules of Criminal Procedure which allows for Motions for Reconsideration at any time in any proceeding when an arrestee can present "points of law or fact that the court has overlooked or misapprehended."

    - Under 597:6-e III an arrestee "may appeal to the supreme court from a court's release or detention order, or from a decision denying revocation or amendment of such an order" and "[T]he appeal shall be determined promptly."

I hope this letter clarifies the many opportunities available to an individual to have bail reviewed, modified and appealed. These many protections, put in place by our legislature and courts through statutes and rules, protect a defendant's due process rights on many levels and eliminates any need for this proposed Rule.

Thank you for your attention on this matter.

Paul Halvorsen
Merrimack County Attorney

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August 19, 2021

New Hampshire Supreme Court Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301
rulescomment@courts.state.nh.us

Re: N.H. Rule of Criminal Procedure 12 – Discovery of Defendant's Criminal Record

Dear Advisory Committee Members,

We write in joint opposition as the Nashua, Hollis, and Hudson Police Departments to the proposed rule change to N.H. Rule of Criminal Procedure 12 regarding Discovery of Defendant's Criminal Record.

While we do not object to providing a defendant with his or her criminal record as soon as we can, we are concerned that this proposed rule would adversely impact victims' safety. There are several practical concerns that would make it difficult or impossible for prosecutors in the Nashua District Court to comply with this proposed rule change if it were enacted. The primary concerns are with video arraignments and 36-hour bail hearings pursuant to RSA 597:2, X (a). A defendant's criminal record is a vital piece of the puzzle for the judge to consider when making a determination on bail, particularly in light of ensuring the safety of the defendant, the victim, and the community.

Defendants who are arrested overnight or on weekends, and either held preventatively or held on cash bail that they are unable to post by the bail commissioner, or who refuse the services of the bail commissioner, are transported to the Hillsborough County House of Corrections ("Valley Street Jail") to await a video arraignment the next court day. When these defendants appear in front of the Nashua District Court judge for their 10:00am video arraignment, the vast majority of the time they are unrepresented. The prosecutor who reviews the file before the arraignment makes the determination of what the State will request for bail. The proposed rule would require the State to provide the defendant with his or her criminal record if it plans to ask for preventative detention, high cash bail, or restrictive bail conditions.

or phone call. On its face, it might be difficult to see why the State might ask for the defendant to be held in preventative detention. However, the defendant's criminal record puts it into context when there is a history of domestic violence arrests and convictions for the judge to understand why the defendant who has demonstrated an inability to comply with the court's orders is a danger to the victim.

RSA 597:2, III(a) provides that the court may consider "all relevant factors" in determining whether releasing a defendant would endanger that person or the public. In contrast, the proposed rule seeks to limit the information available to the judge on the basis of a procedural discovery violation. The proper remedy would be to continue the bail hearing to give the defense attorney an opportunity to obtain and review discovery before requesting a further a bail hearing. *See State v. Stickney*, 148 N.H. 232 (2002).

Ultimately, there are very few cases in district court where the prosecutor will request preventative detention. At the end of the day, this proposed rule weighs withholding information that the defendant already knows against the safety of a victim. The only person involved with the hearing who does not know the defendant's record is the judge. In those select situations, the judge should have all of the information available to make an appropriate determination about whether that defendant is a danger to himself or herself, or to a victim, or to the community.

Michael Carignan
Chief of Police
Nashua Police Department

APPENDIX F

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.

APPENDIX G

APPENDIX G

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.]

2021 - 005

SUPREME COURT RULE 40

Proposed amendment submitted by Attorney Sara Greene and Attorney Jeanne Herrick

Supreme Court Rule 40(8)(f)(5) Deferral of Impairment Cases

(A) If the [**matter has not been dismissed or resolved without formal discipline**] and the committee [**determines**] ~~finds during the course or upon completion of an investigation~~ that (1) there is probable cause to believe that misconduct, as specified in the [**complaint**]~~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 [**to**] 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~~complaint 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. [**Additionally, the committee may bring forward the complaint at any time prior to successful completion of the terms of deferral upon determining that the judge is not participating in professional treatment, counseling, after-care, and/or other assistance program recommended in the evaluation or failing to comply with other conditions established by the committee. Prior to the complaint being brought forward, however, the judge shall be afforded an opportunity to appear before the committee to demonstrate that he or she has successfully complied with the terms of the deferral.**] 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) [**The committee may vote to defer notification to the Reporter of deferred resolution for such period of time as it deems necessary.**] 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.

2021-005

Supreme Court Rule 40 – Procedural Rules of Committee on Judicial Conduct - Deferred Discipline December 10th Public Hearing Comment

November 30, 2021
From: Brian Scott <brian.scottccms@gmail.com>

To whom it may concern,

I am in full support of the Proposed deferred Discipline amendment to Rule 40. As a former practicing member of the Massachusetts bar and a current mental health clinician, I have both lived and treated the strains and stigma attorneys live with. No matter the field of practice (I worked in both criminal and transactional areas), there is tremendous, suffocating pressure upon attorneys to maintain a veneer of perfection. pervasive need to be anything but myself. When I practiced in commercial real estate, I needed to be bigger, more capable, more affable, smarter, than the next associate. I needed to hold and build relationships for the benefits of clients and partners. I lost sight of myself and what my values were. I needed to be the smartest person in the room. Consequently, the pressure to be perfect at all times was too intense. It brought with it intense anxiety, panic attacks and a back breaking, cratering depression. The weight of despair was hidden under the synthetic plasticity of nice suits, high salaries and alcohol fueled client dinners and parties. It's a world where asking for help is seen as weakness.

The amendment to Rule 40 serves as a paradigm shift in that it brings resources to passionate, capable, and strong attorneys in New Hampshire who live in fear every day of being "discovered," "found out" and further self stigmatizing labels. Prior generations of attorneys, mine included, may have viewed the strains and pressures of being an attorney as a badge of honor, but the newer generations have it right: being open and honest about our mental health challenges as attorneys makes the profession more inclusive and safer for attorneys and clients alike. Had a mechanism like this existed when I was practicing, it is more than likely I would have stayed in the profession.

Best,
--
Brian Scott (he, him,his),Esq., MS.
10 Cedar Street, Suite 34| Woburn, MA 01801
Phone: (617) 913 6430

2021-005

NHLAP
NEW HAMPSHIRE
125 Airport Road, Suite. 5B, Concord, NH 03301 • (603)-491-0282 • www.lapnh.org

December 1, 2021

Testimony in support of:

Supreme Court Rule 40(8)(f)(5) Deferral of Impairment Cases

Dear Mr. Chairman and members of the Advisory Rules Committee,

My name is Jill O'Neill, I am the executive director of the New Hampshire Lawyers Assistance Program. The New Hampshire Lawyers Assistance Program supports the passage of the proposed deferred discipline amendment to Rule 40.

With the passage of the proposed deferred discipline rule, New Hampshire will further acknowledge that legal professionals, like other people, are susceptible to developing mental health, substance use, and other co-occurring disorders. In some cases, but not all cases, mental health, and substance use disorders may impair a professional's ability to practice.

With the passage of the proposed deferred discipline rule, New Hampshire will further affirm that mental health and substance use disorders are treatable conditions. The American Society of Addiction Medicine defines judges and lawyers as safety-sensitive workers because of the amount of public trust that is implied and the depth of the effect from potential impairment. The American Society for Addiction Medicine indicates that "safety-sensitive workers, do best when offered cohort-specific treatment. Participation in group therapy and/or support groups by individuals who have similar work issues and who conduct themselves under the same professional codes of ethical behavior is essential." Further, staff that work with safety-sensitive workers need training specific to the cohort and a variety of therapeutic skills (e.g., learning how to circumvent argumentation with attorneys who are patients under their care.) The utilization of profession-specific therapy in specialized treatment centers with qualified therapists is considered best practice.

With the passage of the proposed amendment to Rule 40, New Hampshire will further affirm its commitment to protecting the public from impaired professionals. "Monitoring programs that are independent of licensure and credentialing bodies provide a means of continuous support and advocacy for the patient whose career is a safety-sensitive occupation. Research has shown that such programs dramatically improve long-term prognoses as well," (ASAM Criteria: Treatment Criteria for Addictive, Substance-Related, and Co-Occurring Conditions: Sensitive-Safety Occupations.) Many subgroups of

safety-sensitive workers have profession-specific recovery monitoring programs. The New Hampshire Lawyers Assistance Program has a professional monitoring program that serves law students and lawyers. Now underway, the NHLAP is enhancing current professional monitoring program protocols to incorporate, to the extent applicable to the legal profession, the:

- Federation of State Physician Health Programs Guidelines
- American Society of Addiction Medicine Public Policy Statements on Impairment, appropriate evaluation and treatment, discrimination based on illness, and confidentiality
- ASAM's detailed positions on impairment and length of monitoring

In closing, the public, policymakers, regulatory agencies, and professional associations should be assured that legal professionals with mental health, substance use, and other co-occurring disorders that have been appropriately evaluated, adequately treated, and have received or are receiving evidenced-based continuing care and monitoring to ensure they are in sustained remission and unimpaired.

Sincerely,

Jill O'Neill, Executive Director

New Hampshire Lawyers Assistance Program

2021-005

Supreme Court Rule 40 – Procedural Rules of Committee on Judicial Conduct - Deferred Discipline December 10th Public Hearing Comment

From: Kim Lamontagne <kim@kimlamontagne.net>
Sent: Wednesday, December 1, 2021 12:36 PM
To: Lorrie Platt <LPlatt@courts.state.nh.us>
Subject: December 10th Public Hearing Comments, Proposed Deferred Discipline Amendment to Rule 40.

Good afternoon,

I am contacting you to provide testimony and a recommendation that the "Proposed Deferred Discipline Amendment to Rule 40" **ought to pass.**

I am the President and CEO of Kim LaMontagne LLC and I teach leaders how to decrease stigma and normalize the conversation about mental health in the workplace.

For 25 years, I operated as a high performing executive in the workplace while living with undisclosed depression, anxiety, suicidal thoughts, and alcohol misuse. I was the leader, trailblazer, trainer, and the one many looked up to for guidance. I was also a chameleon in the workplace.

Outwardly, it appeared as if I was a star employee with a perfect life. Inwardly, I was filled with shame, fear, anxiety, self-loathing, and the imposter syndrome.

Although I never consumed alcohol during the day, I lived with shame because I could not control my evening drinking. I feared speaking openly about my mental health and alcohol misuse because of fear of judgment, retribution, or job loss. I was afraid to damage my professional integrity and lose my seat at the corporate table.

I remained silent because of this and never asked for help. I learned that silence is toxic and that silence, fear, shame, and stigma almost cost me my life in 2013.

At 12 years sober and healthy, I now teach leaders how to understand mental health, decrease stigma, shift the workplace culture, and encourage open dialog about mental health.

What I have learned is:

1. My story is not unique.
2. Employees living with a mental health condition rarely feel their work is a place of safety.
3. Employees are afraid to ask for help because of fear of judgment, retribution, or job loss.
4. Employees thrive when they are in a safe environment.
5. Stigma and discrimination thrive on lack of knowledge and understanding.
6. Leaders lead by example and have the power to transform the workplace culture.
7. Mental health and substance misuse do not discriminate.

Legal professionals are met with a large amount of stress, expectations, competition, and are

responsible for life changing decisions. The American Bar Association has acknowledged mental health and well being as a major concern and developed the ABA Well Being Pledge.

Lawyers and judges are not immune from experiencing a mental health episode or an issue with alcohol or substance misuse. Given the high profile nature of their jobs, many in the legal profession do not acknowledge a mental health issue and do not seek treatment. This only exacerbates the problem and never addresses the underlying conditions.

In the traditional workplace, most HR departments have clear policies that address return to work after a health episode. Does every workplace also have clear return to work policies for those who have experienced a mental health episode?

Roughly 75 % of medium to large organizations offer an Employee Assistance Program, yet the national EAP usage rate is 3.5-5% because of fear, shame, and stigma. Removing stigma, creating a pathway that encourages treatment, and providing actionable steps one can take to recover and reintegrate into the workplace is critical.

Recovery and reintegration is possible if people are given the chance. Once the shame, stigma, and fear of mental illness is removed and replaced with understanding, knowledge, support, and guidance, it will illustrate a clear commitment to normalizing mental health and creating pathways to recovery for all.

For those who are in the position and willing to seek treatment, it is imperative that the road to treatment is accessible, supportive, and without stigma. We must create and sustain a "culture of safety" within all workplaces (including legal) that encourages open dialog about mental health. We must acknowledge and celebrate every step of recovery, provide peer support, and a clearly defined step by step process for reintegration back into the workforce. When a person in recovery feels safe, seen, heard, and understood, they are more prone to succeed in their journey of recovery.

The NH Lawyer's Assistance Program plays a critical role in supporting legal professionals experiencing mental health and substance misuse issues. The program provides confidential access to peer support, resources, counseling and is a key component of addressing lawyer mental well being.

Thank you for taking the time to read this testimony.
Regards,
Kim LaMontagne

APPENDIX H

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 I

APPENDIX I

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.

#2021-004

The State of New Hampshire
Circuit Court

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,

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. **<u>Strategies</u>**
   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

#2021-004

September 9, 2021

Justice Patrick E. Donovan

Chair, Advisory Committee on Rules

Lorie Platt

Secretary, Advisory Committee on Rules

One Charles Doe Dr

Concord, NH 03301

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

Justice Donovan and Committee Secretary Platt:

We the undersigned private citizens, who are employed as NH Juvenile Probation and Parole Officers wish to formally state our objection to the proposed changes to rule 3.6. We believe that our attached submission, which was a collaborative effort of the majority of officers in the field, is a better alternative and was dismissed by the transformation team without appropriate consideration. The combined field experience of the officers working with NH youth far outweighs the theories being put forth by the Annie Casey Foundation's project, which draws its conclusions from urban areas of the country. We are proposing a set of probation rules for youth that are clear and concise and are what the 80 plus officers in the field who were involved in creating them believe are the minimum standard for safety, effectiveness, and equity. We thank you in advance for your consideration.

The effects of SB94 and SB96 will significantly reduce the number of youth entering the court system, and the youth who do ultimately end up being adjudicated delinquent and placed on conditional release will need clear directions. Basic tenants of rehabilitating youth who have gotten to this stage are refraining from the use of alcohol and other substances, attending school, and following parent's/custodians rules such as a curfew. We believe that the transformation team's proposed rule changes fail to provide for the requisite level of supervision to keep communities safe and ensure victims interests are addressed appropriately. We ask that you adopt our submission as a reasonable alternative.

Respectfully Submitted

Petition to Oppose Changes to Conditions of Release (probation rules) for Court involved Juveniles

We the undersigned: Juvenile Probation Parole Officers wish to express our objection to the proposed changes to rule 3.6 wherein the current rules are reduced to 5 rules. We do not represent the Division in this petition only our own perspectives and opinions as private citizens and experienced JPPOs. We believe the changes will put the community and officers in significant danger and impede the ability to supervise delinquent youth safely and adequately. We hereby call upon The Supreme Court Advisory Committee on rules to oppose the proposed changes to the Juvenile Conditions of Release (probation rules) being reduced to only 5 rules. These proposed changes drive the Juvenile Justice System away from supporting victims' rights; safety of juveniles, families and JPPO's; safety of the NH citizens; and accountability for ones actions. Attached you will find a copy of the current Conditions of Release form 1341 and a counter proposal the undersigned JPPO's are supporting. This **counter** proposal was created by a team of NH Juvenile Probation Parole Officers from across the state.

Date	Signature	Printed Name	Area/Comment
9.1.21	Denise Langevin	Denise Langevin	
9-1-21	C Hekor	Aaron Hekor	
9-2-21	Laura Mackay	Laura Mackay	
9/2/21		Daniel Kinsley	
9/2/21	Jessica Walker	Jessica Walker	
9/2/21	Annala Fortunato	Annala Fortunato	
9/3/21	Jacqueline Whitehead	Jacqueline Whitehead	

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Date	Signature	Printed Name	Area/Comment
9/7/21		TIM LENHAM	NEWPORT/CLAREMONT
9/8/21	Jodi Varney	Jodi Varney	claremont
9/9/21	Ashley Mills	ASHLEY MILLS	CLAREMONT

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Date	Signature	Printed Name	Area/Comment
9/1/21		Daniel Maradosa	Manchester PO
9/2/21		Dominic Bennett	Manchester PO

Document 1

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Date	Signature	Printed Name	Area/Comment
9/2/2021		Todd R. Neumann	
9/2/2021		Danielle Caloo	
9/3/2021		Krista Connolly	

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Date	Signature	Printed Name	Area/Comment
8/25/21		Tyler Colby	Concord JPPO
8/25/21		Jennifer Anker	Concord JPPO
8/25/21		Jaylee Shaver	Concord JPPO.
8/25/21		Verona Tarsoli	Concord JPPO
8/25/21		Raymond Parker	Concord JPPO
8/25/21		Melissa Kimball	Concord JPPO
9/3/21		Dawn Perreault	Laconia JPPO

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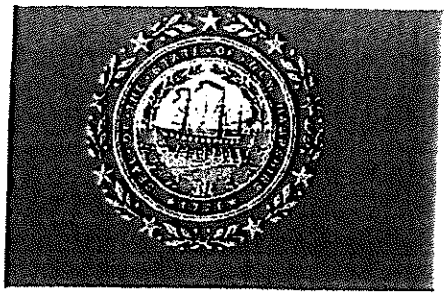
Date	Signature	Printed Name	Area/Comment
8-24-21		P. Gaber	
8/24/21		Chris Murphy	
8/24/21		Travis Brunelle	
8/24/21		Geoffrey Hilder	
8/24/21		Kimberly Tardy	
8/25/21		[illegible]	
8/25/21		James Plumer	
9/1/21		Jeff Trahant	
9/1/21		Amber Reil	
9/1/21		Nicole Jordan	
9/1/21		Joshua Huntley	
9/1/21		Tara Kizirian	
9/1/21		Leah Estes	



Conditions of Release

Juvenile Justice Services

Docket#:_____

Name: _____ DOB: _____

Address: _____ Phone: _____

By the order of the _____Court on: _____ I have been placed on Conditional Release (probation) for a period of: _____or until: _____under the supervision of a Juvenile Probation and Parole Officer (JPPO). Pursuant to Rule 3.6 of the NH Family Division Rules, the Court has ordered the following conditions and I agree to comply with these stated terms:

1 I will be of good behavior, comply with all court orders, obey all laws, notify JPPO of law enforcement contact and cooperate with my parent or any person having responsibility for my care.

2 I will attend school as required by my education plan and follow all school rules.

3 I will not consume or possess alcohol or illegal or mind altering substances nor possess items deemed contraband by a JPPO.

4 I will not possess, control, or receive any weapon, explosive device, or firearm.

5 I will meet with a JPPO as directed and follow any curfew/home restriction directives.

6 I will submit to reasonable searches of my person, residence, and all property within my possession including school lockers, motor vehicles, electronic devices and social media accounts.

7 I will comply with the additional terms and conditions indicated below:

- ☐ a. I will submit to drug and alcohol testing.
- ☐ b. I will attend and meaningfully participate in counseling/treatment services.
- ☐ c. I will comply with an agreed upon restorative action plan to make the victim whole.
  d. I will obtain a travel permit from a JPPO in advance of out of State travel.
- ☐ e. You shall not associate with/be at_____.
- ☐ f. Other orders:_____.

Parent/Guardian/Custodian: I will support and help in my child's successful completion of all probation requirements, including creating and following his/her plan of care.

I have received a copy my conditions of release. I have read or had them read to me and have discussed these conditions with a JPPO. By signing below I am indicating that I understand the conditions of release and that they are mandated by the Court. I acknowledge I am agreeing to obey these conditions and that failure to comply with any of the stated terms/conditions could result in further court action as required by NH law.

Youth: _____Date:_____ Parent: _____Date:_____ Parent: _____Date:_____

JPPO: _____Date_____ Printed: _____Phone #:_____

APPENDIX J

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

DRAFT

Minutes of September 10, 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 1:00 p.m. by Justice Donovan, Committee Chair. The following Committee members attended the meeting: Abigail Albee, Esq.; Hon. R. Laurence Cullen; Hon. N. William Delker; Hon. Michael Garner; Sean Gill, Esq.; Sara S. Greene, Esq.; Jeanne P. Herrick, Esq.; Derek Lick, Esq.; Susan A. Lowry, Esq.; Ari Richter; Senator Donna M. Soucy; and Janet L. Spalding. Lorrie Platt, Esq., Secretary to the Committee, was also present.

1. Approval of Minutes of June 4, 2021 Meeting

Upon motion made and seconded, the Committee approved the minutes of its June 4, 2021 meeting. Senator Soucy and Janet Spalding abstained because they were not present for the June meeting.

2. Items Pending Before the Committee

(a) 2016-009 New Hampshire Rule of Professional Conduct 8.4

In its July 15, 2019 order amending Rule 8.4, the Supreme Court provided that the Committee would review the amended rule after it had been in effect for two years and provide the Court with its recommendations, if any, upon completing this review.

Sara Greene, disciplinary counsel for the Attorney Discipline Office, reported that the ADO has just recently received one grievance, still confidential, which implicates this rule. The Committee also invited comment from Attorney James Allmendinger, a member of the Bar Association's Ethics Committee, who was in attendance at the meeting. He advised that the Ethics Committee took no position on review of the rule but would like to be involved if further review were conducted.

After further discussion, the Committee voted upon motion made and seconded to advise the Court that no further action was necessary at this time.

Judge Garner inquired whether a complete review of the effect of the rule could be done without soliciting input from the public. Upon motion made by Attorney Lick, who had voted with the prevailing side on the earlier motion, and duly seconded, the Committee then voted to reconsider its earlier vote.

Upon further motion made and seconded, the majority of the Committee voted to invite public comment on the impact of Rule 8.4(g) since its 2019 amendment. It will be included on the docket of the Committee's December public hearing.

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

In 2020, the Office of the New Hampshire Public Defender submitted a proposal to amend the rules of criminal procedure regarding the State's obligation to notify the defendant of its intention to offer Rule 404(b) evidence at trial. A subcommittee, consisting of Judge Delker, Judge Garner and Attorney Keefe, reviewed the proposal, including the scope of the required notice and its application in the Circuit Court, and submitted its report and recommended language.

Judge Delker explained that the issue can arise late in trial. The subcommittee determined that the existing rule when applied in the superior court sets the disclosure deadline too early. The new rule would require disclosure 60 days before jury selection. Forty-five days before jury selection, the party seeking to admit Rule 404(b) evidence must file a motion to admit the evidence. Thirty days before trial a party can file a motion to exclude the evidence.

A separate provision would be applicable to the circuit court. It would require that not less than 14 days before trial, a party seeking to admit Rule 404(b) evidence must provide to the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the evidence is offered and the supporting reasoning as well as include all statements, reports or other materials that the proponent will rely on to prove the act(s).

Upon motion made and seconded, the Committee voted to send the proposed amendment out for public comment at its December public hearing.

(c) 2021-003 Proposed Amendment to New Hampshire Rule of Evidence 902

Judge Schulman submitted a proposal, modelled upon Federal Rule of Evidence 902, to expand the rule governing self-authenticating records to

include certified records generated by an electronic process or system and certified data copied from an electronic device, storage medium or file.

Upon motion made and seconded, the Committee voted to send the proposed amendment out for public comment at its December public hearing.

(d) 2021-004 Proposed Amendment to Circuit Court – Family Division Rule 3.6

The Committee considered a proposal submitted by Judge Ashley, deputy administrative judge of the Circuit Court to amend Circuit Court Family Division Rule 3.6. Judge Ashley wrote that the proposed amendment "is intended to consolidate and reduce" the number of rules of juvenile probation that currently apply to every youth on probation. On September 9, 2021, the Committee received a submission from several current juvenile probation and parole officers who opposed this amendment. Judge Garner reported to the Committee that he had forwarded the submission to Judge Ashley, who was not aware of this opposition.

Upon motion made and seconded, the Committee voted to put the proposed amendment out for public comment at its December public hearing and to invite the parties to submit additional materials.

(e) 2021-005 Proposal by Judicial Conduct Committee to Amend Supreme Court Rule 40

The JCC has proposed an amendment to Supreme Court Rule 40, which sets forth the JCC's procedural rules regulating the investigation and litigation of judicial conduct. The proposed amendment seeks to add a "Deferral of Impairment Case" option in cases involving less serious instances of judicial misconduct arising from substance misuse or mental health disorders. Sara Greene observed that the Attorney Discipline Office has similar procedures for diverting attorney misconduct resulting from similar impairments. The committee discussed, and Jeanne Herrick and Sara Greene agreed to serve on, a subcommittee to review the proposal and suggest revisions to mirror Board of Medicine and PCC rules.

Upon motion made and seconded, the Committee voted to send the JCC's proposal out for public comment at its December public hearing.

3. New Business

(a) Justice Donovan provided a report of the action taken by the Supreme Court in response to the Rules Committee's July 1, 2021 report to the Court.

(i) Supreme Court Rule 12-A(1): The Court adopted the Committee's recommendation to approve an amendment to Supreme Court Rule 12A(1), which expands the pool of qualified mediators necessary to mediate Supreme Court appeals. The amendment was implemented by a Supreme Court order on September 13, 2021.

(ii) Superior Court Rule 207: The Court adopted a recommended technical rule change to Superior Court Rule 207 to remove references designating the specific location of the Business and Commercial Dispute Docket. The amendment was implemented by a Supreme Court order on September 13, 2021. The Superior Court will now designate the location of the BCDD by way of an administrative Superior Court order.

(iii) Superior Court Rule 12(g): Summary Judgment: The Supreme Court proposed edits to Superior Court Rule 12(g)'s amendments, which were recommended by the Advisory Committee. The Court's edits were reviewed, and approved by the subcommittee to Rule 12(g).

(iv) Rules Governing the Dismissal of Actions in the Trial Courts: The Supreme Court decided to retain the Advisory Committee's recommendations with respect to rules governing the voluntary and involuntary dismissal of actions.

(v) New Hampshire Rule of Criminal Procedure 12 - Discovery of Criminal Defendant's Record: The Supreme Court referred proposed amendments to this Rule back to the Advisory Committee for further evaluation. The Committee discussed the need for additional input from the bar, bench and public with respect to how the proposed amendments will impact proceedings in the Circuit Courts and whether recent legislative amendments to RSA 597 conflict with the proposed amendments to Rule 12. Upon a motion made and seconded, the Committee agreed to put out the proposed amendments for further public comment at its December public hearing.

(b) The Committee discussed whether subcommittees created by the Advisory Committee on Rules should be required to provide a brief report explaining the reasons for any proposed action that they recommend be taken on proposed amendments and agreed that the requirement be adopted.

5. Adjournment

Upon motion made and seconded, the Committee voted to adjourn the meeting. The next public meeting of the Committee is scheduled for Friday, December 10, 2021. The meeting will include a public hearing, which will begin at 12:30 p.m.

APPENDIX K

NEW HAMPSHIRE
SUPREME COURT

REPORT ON THE RECOMMENDATIONS OF THE CRIMINAL DEFENSE TASK FORCE

October 27, 2021

One Charles Doe Drive
Concord, N.H. 03301

NEW HAMPSHIRE SUPREME COURT REPORT ON THE RECOMMENDATIONS OF THE CRIMINAL DEFENSE TASK FORCE

Background:

In September 2021, Chief Justice Gordon MacDonald requested that Associate Justice Patrick Donovan form and chair a task force, comprised of members of the New Hampshire bench and bar,[1] to assess the current crisis facing indigent defendants in the New Hampshire criminal justice system. The Court acknowledges the essential and difficult work that all members of the criminal justice system perform on a daily basis. Their commitment to maintaining the integrity of New Hampshire's criminal justice system during this difficult time has been nothing short of remarkable, and the Court recognizes that some measure of assistance is needed. Accordingly, the Criminal Defense Task Force's purpose was to identify and recommend measures that the Judicial Branch should consider and adopt to address the acute shortage of criminal defense attorneys willing to represent indigent defendants.

Process:

The Task Force met remotely on two occasions for several hours. Members learned that both the Public Defender's Office (PDO) and County Attorneys across the State are confronting dangerously high caseloads. For example, approximately 2,000 criminal cases now pending in the Circuit Courts need appointed counsel, yet several PDO offices have already reached maximum capacity and cannot accept additional cases. To that latter point, the PDO has lost 28 attorneys in the last 14 months due, in large part, to crushing caseloads. In addition, the Judicial Council has more than 118 new cases requiring appointed counsel. Another 300 cases need to be re-assigned because two contract attorneys have left the program.

After careful consideration, the Task Force drafted several recommendations, which Justice Donovan conveyed to the other members of the Supreme Court. The Court has approved and adopted the following recommendations and reports the measures that have been taken to date.

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[1] The following members of New Hampshire's bench and bar participated in the Criminal Defense Task Force: Associate Justice Patrick E. Donovan (chair), Chief Justice of the Superior Court Tina L. Nadeau, Administrative Judge of the Circuit Court David D. King, Attorney General John Formella, Deputy Attorney General Jane Young, Judicial Council Executive Director Sarah Blodgett, Judicial Council Chair Nina Gardner, Public Defender's Office Executive Director Randy Hawkes, Public Defender's Office Director of Legal Services Tracy Scavarelli, Strafford County Attorney Thomas Velardi, New Hampshire Association of Criminal Defense Lawyers President Robin Melone, Manchester City Solicitor Emily Rice, New Hampshire Bar Association Executive Director George Moore. The Supreme Court thanks the Task Force members for their time and efforts.

Recommendations and Responses:

1. Increase Public Awareness: *The present crisis needs to be publicized.*

Efforts to publicize the criminal defense crisis have already commenced with New Hampshire Public Radio interviews of Judicial Council Chair Nina Gardner and New Hampshire Association of Criminal Defense Lawyers (NHACDL) President Robin Melone. Efforts to inform and alert legislative leaders likewise need to be made, with the recommended participation of Chief Justice MacDonald and Attorney General John Formella, within the next two weeks. The New Hampshire *Bar News* intends to report on the current state of criminal defense shortages in its monthly publication.

2. Early Case Resolution (ECR): *ECR programs are a necessity given the present overwhelming caseloads that are challenging all participants in the criminal justice system.*

Strafford County Attorney Tom Velardi and PDO Executive Director Randy Hawkes are willing to meet, in person, with the County Attorneys and PDO managers to describe the process, ask for their support, and request that these programs be implemented on a statewide basis. Chief Justice MacDonald and Attorney General Formella are willing to participate in these presentations. The Task Force noted that the ECR message should stress that parties will meaningfully engage in a process that promotes justice and includes victim input. It was also noted that the Hillsborough County Attorney's Office is hiring two additional prosecutors for ECR purposes.

3. Additional Funding: *Additional funding needs to be secured to support contract attorneys.*

Funds from the Governor's Office for Emergency Relief and Recovery (GOFERR) have been approved to reimburse contract attorneys for past administrative costs associated with their increased caseloads. The Judicial Council is prepared to seek supplemental appropriations for increased funding for the PDO program. The Judicial Council is in the process of seeking $2,066,000 in American Rescue Plan Act of 2021 funds for up to ten new, temporary attorneys to assist with current caseload challenges, additional temporary assistance for contract attorneys, and criminal defense training. That request was approved by the Joint Legislative Fiscal Committee on October 22, 2021, and will be on the agenda for the October 27, 2021 Governor and Council meeting. The Task Force also believes that a request for salary adjustments for PDO attorneys, to the extent necessary to align their salaries with those of their counterparts throughout the rest of the criminal justice field, should be made to the Legislature. The Judicial Council will work with the Attorney General's Office and other partners to prepare and advocate for this request.

4. Scheduling: *A brief pause in criminal cases would allow practitioners to better assess caseloads.*

The Task Force noted that a pause in trial courts, while it would not reduce caseloads or resolve cases, would provide all criminal practitioners with an opportunity and time to properly evaluate their caseloads. The Court recommends that the Administrative Judges of the trial courts schedule a one-time, one-week pause on all criminal cases in the trial courts during the month of January 2022.

5. Recruitment Efforts: *Judges in the trial courts have and should consider making personal overtures by way of an email or letter to criminal practitioners in their counties to accept contract and/or pro bono criminal cases.*

The Task Force noted that Judge Kissinger has successfully recruited a number of practitioners to accept cases in Merrimack County. Judges Temple and Coburn are making similar efforts in Hillsborough County. The Task Force believes that additional outreach efforts should be made to recently retired practitioners. Letters from Chief Justice MacDonald will assist in this effort. The Task Force recommends, and the Court approves, investigating a manner and method by which malpractice coverage can be secured for retired practitioners willing to accept cases on a *pro bono* basis.

6. Training: *Criminal defense training and mentoring needs to be provided to expand the number of attorneys representing indigent clients.*

The Judicial Council has secured GOFFER funding for criminal defense training. The Task Force believes that training should be developed that focuses on both felony and misdemeanor-level offenses; however, training alone will not secure competent counsel. Mentors with sufficient experience should be identified for attorneys accepting cases following such training. To that end, NHACDL members should be recruited as instructors and mentors. The Bar Association is willing to provide the facility and support necessary to conduct such training. A two-hour training video created by the PDO Program is also available to train out-of-state criminal defense practitioners who are new to New Hampshire.

7. Rule Changes: *Administrative and other temporary rule changes could encourage more attorneys to represent indigent defendants.*

The Supreme Court will propose administrative rules in the Circuit Courts that will permit attorneys to sign and execute waivers and acknowledgments on behalf of informed clients in criminal cases. The Court supports an administrative, temporary amendment to New Hampshire Rules of Criminal Procedure 42(b)(1), which will waive the requirement that bar members appear with *pro hac vice* counsel in criminal cases involving indigent defendants. The Court will also propose temporary administrative rules waiving the fee requirement in such cases. The Court will also propose a temporary amendment to Supreme Court Rule 53 to provide CLE credits to attorneys accepting indigent defense cases on a pro bono basis. Although the Task Force was not confident that such

proposals will significantly increase the number of qualified attorneys willing to accept these cases, the Court noted that similar proposals have been adopted successfully in a number of other states.