

NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

PUBLIC HEARING NOTICE

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 12:30 p.m. on Friday, December 9, 2022 at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar as the Committee considers whether to recommend that the Supreme Court adopt proposed amendments to several court rules.

Comments on any of the proposed amendments which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before December 1, 2022 or may be submitted at the hearing on December 9, 2022. Comments may be emailed to the Committee on or before December 1, 2022 at:

rulescomment@courts.state.nh.us

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

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

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

The amendments being considered concern the following rules:

I. 2022-006 New Hampshire Rule of Professional Conduct 3.8

(This proposed amendment, submitted by the NHBA Ethics Committee, would “proactively provide guidance to prosecutors regarding their obligations”

upon the discovery of “new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted.”)

Proposed Action: Amend N.H. Rule of Professional Conduct 3.8 as set forth in Appendix A.

II. 2022-008 New Hampshire Rule of Criminal Procedure 19

(This proposed amendment makes clear that, unless otherwise allowed by statute or rule, cases and/or proceedings shall not be transferred between the Circuit Court and the Superior Court.)

Proposed Action: Amend New Hampshire Rule of Criminal Procedure 19 as set forth in Appendix B.

III. 2022-011 Supreme Court Rules 53.1, 53.2, and 53.3

(These proposed amendments revise CLE requirements for certain members of the bar.)

Proposed Action: Amend Supreme Court Rules 53.1, 53.2, and 53.3 as set forth in Appendix C.

IV. 2022-012 Supreme Court Rule 53.4

(This proposed amendment, submitted by the Bar Association, “is intended to formalize and align the NHMCLE waiver process for annual NHMCLE requirements with the current waiver process for annual NH Supreme Court fees and Trust Account Compliance filing.”)

Proposed Action: Amend Supreme Court Rule 53.4 as set forth in Appendix D.

New Hampshire Supreme Court
Advisory Committee on Rules

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

October 26, 2022

APPENDIX A

Amend New Hampshire Rule of Professional Conduct 3.8 as follows (new material is in **bold and brackets**; deleted material is in ~~strike-through~~):

Rule 3.8. Special Responsibilities of a Prosecutor

[(a)] The prosecutor in a criminal case shall:

~~(a)~~ **[(1)]** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

~~(b)~~ **[(2)]** make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

~~(c)~~ **[(3)]** not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

~~(d)~~ **[(4)]** make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

~~(e)~~ **[(5)]** not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

~~(1)~~ **[(i)]** the information sought is not protected from disclosure by any applicable privilege;

~~(2)~~ **[(ii)]** the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

~~(3)~~ **[(iii)]** there is no other feasible alternative to obtain the information;

~~(f)~~ **[(6)]** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a

substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

[(b) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or prosecutorial authority in the jurisdiction where the conviction occurred, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,
(i) promptly request that the Court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(c) When a prosecutor knows of clear and convincing evidence establishing that a defendant convicted in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

(d) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (c) or (d), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.]

[THE ETHICS COMMITTEE HAS PROVIDED THE FOLLOWING ETHICS COMMITTEE COMMENT THAT ADDRESSES THE PROPOSED AMENDMENTS TO RULE 3.8. THE COMMENT IS PROVIDED HERE FOR INFORMATIONAL PURPOSES ONLY — ETHICS COMMITTEE COMMENTS ARE NOT ADOPTED BY THE SUPREME COURT.]

ETHICS COMMITTEE COMMENT

Paragraphs (b) and (c) are not intended to suggest any existing deficiency in how New Hampshire prosecutors conduct themselves. These paragraphs instead are intended to proactively provide guidance to prosecutors regarding their obligations regarding post-conviction evidence. Paragraph (d) is intended to provide safe harbor to prosecutors who make judgments regarding evidence in good faith, and that even when wrong, should not be subject to discipline. It is

recommended that a prosecutor who chooses not to disclose post-conviction evidence pursuant to Paragraphs (b) or (c) record the reasons in writing.

Paragraph (b)'s "reasonable probability" standard should be interpreted consistently with how courts have applied that standard in the context of the prosecution's failure to disclose exculpatory evidence to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). See, e.g., *United States v. Peake*, 874 F.3d 65, 69 (1st Cir. 2017) (explaining that to get a new trial in this context, "the defendant need demonstrate only a reasonable probability that, had the evidence been disclosed to the defense in a timely manner, the result of the proceeding would have been different"); see also *State v. Shepherd*, 159 N.H. 163, 170-71 (2009) (applying the reasonable probability standard to new trial motion under state law where prosecution did not knowingly withhold *Brady* material). In that context, the United States Supreme Court has equated the reasonable probability standard with "something sufficient to 'undermine confidence in the outcome of the trial.'" *United States v. Mathur*, 624 F.3d 498, 504 (1st Cir. 2010) (quoting *Kyles v. Whitney*, 514 U.S. 419, 434 (1995)). Similarly, Paragraph (h)'s "clear and convincing evidence" standard should be interpreted consistently with how that phrase has been used in existing caselaw.

The Committee also notes that by its plain terms, Paragraph (g) may require a prosecutor to take action with respect to a conviction obtained in a jurisdiction in which the prosecutor is not admitted to the practice of law and/or has little or no knowledge regarding how the criminal justice system functions. While prosecutors should undertake reasonable efforts to fulfill their obligations under Paragraph (b), a prosecutor's inability, despite such reasonable efforts, to identify an appropriate court or authority to which to disclose post-conviction evidence should not subject the prosecutor to discipline under this Rule. Nor is there any expectation that prosecutors seek admission *pro hac vice* in another jurisdiction to fulfill their obligations.

Under paragraph (c), if the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted. In situations where these steps are unlikely to redress the wrongful conviction, the prosecutor may need to take more direct steps such as seeking a Writ of Coram Nobis or a Writ of Habeas Corpus depending upon the specifics of the circumstances.

APPENDIX B

Amend New Hampshire Rule of Criminal Procedure 19 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strike through~~):

Rule 19. Transfer of Cases

[(1)] When any party files a motion in any superior court ~~or circuit court-~~~~district division~~ requesting the transfer of a case, or of a proceeding therein, **[to another superior court,]** ~~there pending to another court,~~ the presiding judge may, after giving notice and an opportunity for a hearing to all parties, order such transfer.

[(2) When any party files a motion in any circuit court – district division requesting the transfer of a case, or of a proceeding therein, to another circuit court – district division, the presiding judge may, after giving notice and an opportunity for a hearing to all parties, order such transfer.

(3) Unless otherwise allowed by statute or rule, a case shall not be transferred from circuit court to superior court or from superior court to circuit court. If the parties agree to resolve a case pending in circuit court or superior court in the other trial court, the State must initiate a new case in that court by filing a complaint and filing a notice of nolle prosequi for the original case.]

APPENDIX C

Amend New Hampshire Supreme Court Rules 53.1, 53.2, and 53.3 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strike-through~~):

New Hampshire Supreme Court Rule 53

Rule 53.1—NHMCLE Requirement

A. *Purpose.* Continuing legal education CLE improves the administration of justice and benefits the public interest. Regular participation in CLE programs strengthens the professional skills of practicing lawyers, affords them periodic opportunities for professional self-evaluation and enhances the quality of legal services rendered to the public. This Rule requires active members of the New Hampshire Bar to participate in additional legal study throughout their careers.

B. *Amounts Required*

1. *In General* – Every ~~person~~ **[lawyer]** covered by this rule shall complete 720 minutes (twelve hours) of CLE in each reporting year. At least 120 minutes (two hours) of CLE shall be in the area of legal ethics, professionalism or the prevention of malpractice, substance abuse or attorney-client disputes.

[2. *Active Status Lawyers Volunteering for Pro Bono Cases -- Active Membership Status lawyers who volunteer for assigned, pro bono cases for the purpose of representing indigent parties through 603 Legal Aid, NH Legal Assistance, and the Disability Rights Center may claim up to three hundred and sixty (360) general minutes of continuing legal education credit per reporting period at the rate of sixty (60) CLE minutes for every 300 billable-equivalent minutes of pro bono representation provided to a client. CLE ethics minutes cannot be earned from pro bono service. Pro bono minutes approved for CLE minutes will be reported to the NHMCLE Coordinator by the directors of the above-named entities on or before April 1 of each year. CLE minutes performed after April 1 will be applied to the following reporting year.]*

~~2.~~ **[3.]** *Return to Active Membership Status* -- Lawyers who are suspended or have selected inactive membership status with the New Hampshire Bar Association for more than two (2) consecutive reporting years are required to complete 360 minutes of additional CLE upon

returning to active membership status. Lawyers may complete the additional credits during the reporting year in which they return to active membership status or in the reporting year immediately preceding. Lawyers shall report completion of these credits by such method as the NHCLE Board shall prescribe.

C. *Reporting Year* -- The reporting year shall be the period from June 1 to May 31. The annual NHCLE affidavit filing period shall be June 1 to July 1 following the end of the reporting year, and reporting shall be done in the manner specified in Rule 53.3.

D. *Carry Over of Excess Minutes* -- If a lawyer has completed more than 720 minutes of CLE in a reporting year commencing after the effective date of this rule, the excess minutes may be used to fulfill the requirement of Rule 53.1 (B) for the reporting year next following only. Ethics credits may be brought forward to meet the ethics requirement only when not utilized to meet any minimum requirement in the year earned.

E. *Qualifying Activities* -- To satisfy the requirements of Rule 53, every person covered by this rule shall seek out educational activity of significant intellectual and practical content reasonably directed at maintaining or enhancing his or her professional knowledge, skills and values.

Rule 53.2—Lawyers Subject to or Exempt from Certification and Fulfillment Requirements

A. Annual Certification Requirement.

1. All lawyers in any New Hampshire Bar Association active membership status at any time during the reporting year must make an annual certification as prescribed in Rule 53.3. Such certification may, if applicable, indicate an exemption from the minimum credit requirements for the reporting period under provisions of Rule 53.2 (B).

2. The certification requirement of this rule shall not apply to any full-time judge, full-time magistrate, **[judicial referee,]** full-time marital master, judicial referee, the state reporter appointed pursuant to RSA 505:1, or any full-time supreme, superior, and circuit court clerk or deputy clerk who occupies such position at any time during the reporting year **[in the State of New Hampshire]**.

3. The certification requirement of this rule shall not apply to any part-time judge, part-time magistrate, part-time marital master, **[part-time judicial referee]** or any part-time supreme, superior and circuit court clerk or deputy

clerk; unless such individual was in the active practice of law at any time during the reporting year **[in the State of New Hampshire]**.

[4. The certification requirement of this rule shall not apply to any attorney who has elected New Hampshire Bar Association Limited Active Status membership as certified by the directors of 603 Legal Aid, NH Legal Assistance, or the Disability Rights Center.

5. The certification requirement of this rule shall not apply to lawyers first admitted to New Hampshire practice on or after December 1 of that reporting year but must do so in any subsequent reporting year during which they hold any New Hampshire Bar Association active membership status for an aggregated total of more than six (6) months during the reporting year.

6. The certification requirement of this rule shall not apply to lawyers on active duty for the United States Armed Forces for more than three (3) months of the reporting year.

7. The certification requirement of this rule shall not apply to lawyers who change from any New Hampshire Bar Association active membership status to any inactive membership status before December 1 of any reporting year, and who maintain inactive membership status for the remainder of that reporting year, but must do so in any subsequent reporting year during which they hold any New Hampshire Bar Association active membership status for an aggregated total of more than six (6) months during the reporting year.

8. The certification requirement of this rule shall not apply to lawyers who are elected State or Federal officials not engaged in the practice of law during a reporting year, but must do so in any subsequent reporting year during which they hold any New Hampshire Bar Association active membership status for an aggregated total of more than six (6) months during the reporting year.]

B. Exemptions From the Minimum CLE Requirement.

1. Those exempt from annual certification requirements under Rule 53.2(A)(2)[,] ~~or 53.2(A)(3)[,~~ **53.2(A)(4), 53.2(A)(5), 53.2(A)(6), 53.2(A)(7) or 53.2(A)(8)]** are not required to meet the minimum CLE requirements of Rule 53.1 (B)(1) for that reporting year.

~~2. Lawyers first admitted to New Hampshire practice on or after December 1 of the reporting year are not required to meet the minimum CLE requirements of Rule 53.1(B) for that reporting year, but must do so in any subsequent reporting year during which they hold any New Hampshire Bar Association active membership status for an aggregated total of more than six (6) months during the reporting year.~~

~~3. Lawyers on active duty for the United States Armed Forces for more than three (3) months of the reporting year are not required to meet the minimum CLE requirements of Rule 53.1(B) for that reporting year.~~

~~4. Lawyers who change from any New Hampshire Bar Association active membership status to any inactive membership status before December 1 of any reporting period, and who maintain inactive membership status for the remainder of that reporting period are not required to meet the minimum CLE requirements of Rule 53.1(B) for that reporting year, but must do so in any subsequent reporting year during which they hold any New Hampshire Bar Association active membership status for an aggregated total of more than six (6) months during the reporting year.~~

~~5. Lawyers who are elected State or Federal officials not engaged in the practice of law during a reporting year are not required to meet the minimum CLE requirements of Rule 53.1(B) for that reporting year, but must do so in any subsequent reporting year during which they hold any New Hampshire Bar Association active membership status for an aggregated total of more than six (6) months during the reporting year.~~

6.[2.] Lawyers may be exempted from meeting the minimum CLE requirements of Rule 53.1 (B)(1), in whole or in part, by the NHMCLE Board, upon petition, for compelling reasons. Such reasons may include, but are not limited to, financial, physical, or other hardship which prevents compliance with this rule during the period of such hardship.

53.3—Reporting and Affidavit of Compliance with Rule 53

A. On or before July 1 of each year, every lawyer having been in any New Hampshire Bar Association active membership status at any time during the immediately preceding June 1 - May 31 reporting year and not exempt pursuant to Rule 53.2(A)(2)[,] **or [53.2(A)(3), 53.2(A)(4), 53.2(A)(5), 53.2(A)(6), 53.2(A)(7) or 53.2(A)(8)]** shall file an Affidavit of Compliance with the NHMCLE Board, in such form as the NHMCLE Board shall prescribe, concerning either his or her completion of CLE during the previous reporting year, or the basis for his or her claim of exemption under Rule 53.2(B). A lawyer who has inadvertently neglected to report in their initial Affidavit of Compliance all credits earned in the immediately preceding reporting year can reopen the initial Affidavit of Compliance once within thirty days of the initial filing, but not later than July 31.

Lawyers may engage in and report CLE performed after the close of the reporting year and prior to the filing of an Affidavit of Compliance, provided that such CLE may not also be used to satisfy the requirement for the reporting year in which it is performed.

B. Each such lawyer shall maintain such records or certificates of attendance as may be required to substantiate his or her compliance or exemption for a period of two (2) years following the close of a reporting year.

C. The court shall assess each lawyer in New Hampshire Bar Association active membership status as of the assessment date an annual sum to support the administration of Rule 53.

D. Lawyers exempt under Rule 53.2(B) who wish to claim NHMCLE credit for activities completed during a reporting year for which such exemption applies (e.g., for purposes of carrying over such credits pursuant to Rule 53.1(D)) may do so by either (1) filing an Affidavit of Compliance for the reporting year in which the activity was completed, or (2) reporting such activities on the Affidavit of Compliance filed for the following reporting year if no exemption is then available.

E. The NHMCLE Board shall from time to time audit the Affidavits of Compliance filed by lawyers in accordance with this rule to determine whether the information reported is accurate and/or to determine whether the activities reported are qualifying activities. The NHMCLE Board may select Affidavits of Compliance for audit based on apparent deficiencies in the Affidavits, or based on any other factor that the NHMCLE Board, in its discretion, deems appropriate. Affidavits may also be selected for audit on a random basis. The NHMCLE Board shall notify a lawyer whose Affidavit of Compliance has been selected for audit of the reporting period or periods to be audited. The NHMCLE Board shall request that, within thirty (30) days of the notification, the lawyer provide information about the CLE activities reported and/or evidence to substantiate that the lawyer completed the CLE activities reported. If the information provided by the lawyer is insufficient to establish that the Affidavit of Compliance is accurate and/or that the activities reported are qualifying activities, the NHMCLE Board shall notify the lawyer of the issue(s) involved and invite the lawyer to submit a written response. If, upon consideration of the lawyer's response and any other facts and circumstances that the NHMCLE Board considers pertinent, the NHMCLE Board determines that a lawyer's Affidavit of Compliance is inaccurate and/or deficient, it shall determine whether the lawyer should be required to take remedial action, and if so, the remedial action required. The decision of the NHMCLE Board as to the remedial action required shall be final.

APPENDIX D

Amend New Hampshire Supreme Court Rule 53.4 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strike-through~~):

53.4. Sanctions and Appeal

A. Delinquency -

1. Notice of Delinquency - On August 2, following the annual reporting date, any lawyer not in compliance with this rule shall be assessed a delinquency fee by the NHMCLE Board. Thereafter, the Board shall send a notice to the lawyer notifying the lawyer of the delinquency fee and directing the lawyer to comply with this rule for the prior reporting period.

2. On or before September 15 following the annual reporting date, the NHMCLE Board shall report to the Supreme Court the name of any lawyer who still has not complied with the requirements of the rule, or who has failed to certify that the lawyer is exempt from the requirements and/or has not paid any outstanding delinquency fee. Upon receiving this report, the court shall initiate a proceeding to suspend the lawyer from the practice of law.

B. Reinstatement -

1. Upon correction of the delinquency and payment to the NHMCLE Board of the delinquency fee, the delinquent lawyer shall be recorded as in compliance by the NHMCLE Board. However, if the lawyer shall have been suspended due to such delinquency, the suspended lawyer must also submit a petition to the Supreme Court for reinstatement. The petition for reinstatement shall be accompanied by the required filing fee.

2. If reinstatement is requested more than one year after the date of the order suspending the person from the practice of law in this State, then the request shall be accompanied by evidence of continuing competence and learning in the law, and evidence of continuing moral character and fitness. Said evidence shall be attached to the petition for reinstatement. If the evidence of continuing competence and learning in the law, and evidence of continuing moral character and fitness, are satisfactory to the court, the court may order reinstatement upon such conditions as it deems appropriate.

If the evidence of continuing competence and learning in the law is not satisfactory to the court, the court shall refer the petition for reinstatement to the professional conduct committee for review. The professional conduct committee shall review the petition and conduct such proceedings as it deems necessary to make a recommendation to the court as to whether the petition

should be granted. The professional conduct committee shall file its recommendation and findings, together with the record, with the court. Following the submission of briefs, if necessary, and oral argument, if any, the court shall enter a final order.

If the evidence of continuing moral character and fitness is not satisfactory to the court, the court shall order the applicant to file with the committee on character and fitness and with the clerk of the supreme court the petition and questionnaire referred to in Supreme Court Rule 42 VI(c). Further proceedings shall be governed by Rule 42.

[C. Waivers – The NHMCLE Board may in any case in which to do otherwise would result in hardship or injustice, waive the CLE requirement in whole or in part, waive affidavit filing and waive delinquency fees assessed for non-filing of the affidavit, provided the request is made before delinquent payor’s names have been forwarded to the NH Supreme Court as mandated by NH Supreme Court Rule 42A. The NHCLE Waiver Committee (Committee), a subcommittee of the NHMCLE Board, will consider the waiver requests. Such decisions by the Committee are deemed representative of the NHMCLE Board as a whole. Any lawyer whose waiver request is denied by the Committee may submit a written request for review of the denied request to the NHMCLE Board. Such requests must be made in writing and sent to the attention of the NHMCLE Program Coordinator within 30 days from the date of the waiver committee decision. Waivers are considered for the reporting period in which the waiver is requested by the lawyer. No more than three (3) waivers, in a five (5) year period, will be considered unless otherwise waived by the NHMCLE Board.]

~~€~~**[D.]** False Statements - Should the NHMCLE Board have reasonable grounds to believe that a lawyer has knowingly misrepresented his or her CLE activity, the Board shall notify the Attorney Discipline Office of the New Hampshire Supreme Court forthwith.