

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

Minutes of Friday, December 9, 2022 Public Hearing and Meeting
NH Supreme Court
Supreme Court Courtroom
1 Charles Doe Drive
Concord, NH 03301

The public hearing was called to order at 12:30 p.m. by Justice Donovan, Committee Chair. The following Committee members were present:

Abigail Albee, Esq., Hon. N. William Delker, Justice Patrick E. Donovan, Hon. Michael H. Garner, Sean P. Gill, Esq., Sara Greene, Esq., Jeanne Herrick, Esq., Charles Keefe, Esq., Janet Spalding, and Charles Stewart. Lorrie Platt, Esq., Secretary to the Committee, and Lisa Merrill, Recording Secretary, were also present.

1. PUBLIC HEARING

Members of the public were invited to speak about proposed rule changes in dockets 2022-006, 2022-008, 2022-011, and 2022-012.

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

Geoffrey W. Ward, Senior Assistant Attorney General, testified against the proposed rule referencing a December 5, 2022 letter submitted by the N.H. Department of Justice (DOJ) to the Committee expressing concerns about the proposed changes and the obligation of prosecutors when new evidence is discovered post-conviction. Attorney Ward noted that the proposed rule could expose a prosecutor to liability. County Attorneys Marcie Hornick, Paul Halvorsen, and Assistant County Attorney Steven Endres joined Attorney Ward in opposition to the rule amendment.

In its letter, the DOJ proposed several alternatives, including that prosecutors disclose to the sentencing court and to the defendant any new, credible, and material evidence that creates a reasonable likelihood that a defendant is innocent. Justice Donovan asked Attorney Ward whether he was asking the Committee to reject the amendment. In response, Attorney Ward indicated that he preferred that the Committee reject the proposed amendment or, in the alternative, that the Committee adopt the proposals set forth in the DOJ letter.

Attorney Halvorsen testified in opposition to the proposed amendment citing concerns similar to those expressed by Attorney Ward.

Attorney Endres also testified against the proposed rule, stating that the language is too broad and obligates prosecutors to investigate new evidence, potentially in other jurisdictions, with limited resources and little, if any, understanding of the evidence provided in the original prosecution.

Attorney Geoffrey Gallagher of Concord testified in support of the proposed rule change, noting that its purpose is to provide guidance to prosecutors when new credible and material evidence comes to light that creates a reasonable probability that the defendant was convicted of a crime that he or she did not commit. Attorney Gallagher informed the Committee that much of the language in his proposal mirrors the language adopted by the American Bar Association model rule. He explained that the Ethics Committee's proposal changes the language of the ABA model rule from "reasonable likelihood" to "reasonable probability" to more closely track the language in Brady v. Maryland, 373 U.S. 83 (1963).

Judge Delker directed a question to Attorney Gallagher about the requirement that a prosecutor share newly discovered evidence with other jurisdictions. Does the rule obligate a prosecutor to refer it to the jurisdiction that investigated and prosecuted the case? Attorney Gallagher urged caution when determining who should review the newly discovered evidence, observing that when defendants file ineffective assistance claims they are not represented by counsel who represented them at the underlying trials that resulted in their convictions.

Attorney Gill requested clarification about a prosecutor's obligation to investigate newly discovered evidence, observing that in many offices prosecutors may only remain for a few years and that many cases may involve voluminous records. He observed that it could be difficult to determine whether newly discovered evidence was new, credible and material if the recipient did not have some context in which to evaluate it. Attorney Gallagher replied that once a prosecutor is made aware of new evidence, it is incumbent upon the prosecutor to take action. The evidence must be new, credible and material, creating a reasonable probability that a convicted defendant did not commit the offense.

Attorney Gallagher concluded his testimony by reminding the Committee that everyone involved in the criminal justice system has an interest in making sure a defendant is not wrongfully convicted.

Attorney Donna Brown of Manchester testified in support of the proposed rule, noting that prosecutors in the federal courts frequently deal with the "two-hat" argument when evidence of prosecutorial misconduct reveals that exculpatory information has not been disclosed to a criminal defendant.

Attorney Gary Apfel of Lebanon, testified on behalf of the New Hampshire Criminal Defense Lawyers, in support of the proposed rule. He raised points about the importance of disclosing exculpatory evidence, public perception, and professionalism. Attorney Apfel also provided the Committee with a letter setting forth the thoughts and concerns of the NHCDL in greater detail.

Attorney James Moir of Concord testified in support of the rule noting that there needs to be an obligation by prosecutors to disclose new information. Attorney Moir described his experience representing the defendant in State v. Laurie and how New Hampshire case law has addressed the problems associated with prosecutorial misconduct and undisclosed exculpatory evidence.

UNH Law Professor Albert Scherr testified in support of a proposed rule change, observing that prosecutors are unregulated. He offered to submit a letter in support of the proposed rule or an alternative proposal that addresses the same subject. Professor Scherr stated that attorneys representing criminal defendants must receive new information post-conviction as soon as possible, and expressed concern about the “good faith” language in section (d) of the proposed rule.

Attorney Cynthia Mousseau of the New England Innocence Project testified in support of the proposed rule change echoing many of the concerns expressed by previous speakers, including the “good faith” language. Attorney Mousseau acknowledged that the proposed rule may create additional work for prosecutors but stated that the proposed rule reinforces a prosecutor’s obligation to serve all citizens.

Justice Donovan asked Attorney Mousseau for her opinion on the language set forth in the draft proposal. She expressed a few concerns but thought the rule would go a long way in revealing and resolving wrongful convictions.

Mr. Stewart asked about the number of cases throughout New England in which a defendant was found innocent post-conviction. Attorney Mousseau reported that several cases in Massachusetts had been found and a few in Vermont.

Marc Hathaway, Sullivan County Attorney, addressed the Committee in favor of a rule that addresses the problems associated with the discovery of new evidence, post-conviction, that undermines the integrity of a conviction. Attorney Hathaway expressed concerns with some of the broad language in the proposed rule, but reminded the Committee that the criminal justice system fails whenever an innocent person is convicted, and when new and credible evidence comes to light it must be disclosed to the defendant and defense counsel as soon as it is discovered. He expressed concern that adopting the

proposed rule would suggest that the Court has lost confidence in the State's prosecutors.

Mr. Jay Simkin spoke to the Committee briefly noting that his comments were not about Rule 3.8, or any of the proposed rules on the public hearing agenda. Justice Donovan thanked Mr. Simkin and stated that the public hearing was to comment on proposed rule changes outlined in the Public Hearing Notice.

Speaking remotely via conference phone, Mr. Andre Bisasor of Attleboro, Massachusetts, spoke in support of the proposed rule citing the importance of accountability of prosecutors.

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

With no comments or testimony from members of the public, Justice Donovan reviewed with the Committee the proposed amendment submitted on behalf of Superior Court Chief Justice Tina Nadeau regarding the physical transfer of case files from the circuit court to the superior court and vice versa.

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

No testimony was received at the public hearing.

Attorney Gary Apfel of Lebanon submitted a letter dated December 1, 2022, on behalf of the New Hampshire Criminal Defense Lawyers, in opposition to the proposed amendment to Supreme Court Rule 53.1. In the letter, he expressed concern that indigent clients may not receive the same high standard of services from legal professionals who do not meet continuing legal education requirements.

D. 2022-012 Supreme Court Rule 53.4

No testimony or comments were received.

2. DISCUSSION AND VOTE ON PUBLIC HEARING ITEMS

A. 2022-006 NH Rule of Professional Conduct 3.8

Justice Donovan stated that perhaps other Committee members, like he, were not prepared to vote on the rule amendment and recommended formation of a subcommittee to study the proposal. On motion by Attorney Greene and seconded by Attorney Albee, the Committee unanimously voted to form a subcommittee. The subcommittee will consist of Judge Delker, Attorney

Greene, Attorney Herrick, Attorney Gill and Attorney Keefe.¹ The subcommittee will provide its report and any suggested revisions to the proposed rule in advance of the Committee's March meeting.

Supreme Court Rule 3.8 will be placed on the agenda for the June 2023 public hearing.

B. 2022-008 Supreme Court Rule of Criminal Procedure 19

On motion by Attorney Keefe and seconded by Judge Delker, the Committee unanimously voted to recommend the adoption of the proposed rule amendment.

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

On motion by Attorney Gill and seconded by Judge Delker, the Committee recommended that the Court adopt the proposed rule amendments, as submitted. Attorney Keefe opposed the motion.

D. 2022-012 Supreme Court Rule 53.4

On motion by Mr. Stewart and seconded by Attorney Albee, the Committee unanimously voted to recommend to the Court the adoption of the proposed amendment.

3. NEW BUSINESS

A. 2022-013 Supreme Court Rule 51

Justice Donovan reviewed the proposed amendment to Rule 51, which streamlines the work of the Advisory Committee on Rules. Discussion ensued about communication to the public prior to public hearings.

On motion by Attorney Albee and seconded by Attorney Greene, the Committee unanimously voted to establish a subcommittee to review Supreme Court Rule 51 and to work with the Secretary to the Committee to address concerns that include improving notice of Committee meetings and public hearings. The subcommittee will consist of Justice Donovan, Judge Garner, and Attorney Albee.

The proposed rule will be available for public comment at the June 2023 meeting following the subcommittee's report, which will be provided in advance of the March 10, 2023 meeting.

¹ Attorney Gill was appointed to the subcommittee after the close of the meeting.

B. 2022-014 Voluntary Corporations Formed for the Purpose of Providing Professional Legal Services to the Poor (RSA 292:1-a)

Justice Donovan proposed formation of a subcommittee to review the statute and the response from the Attorney General. On motion by Attorney Greene and seconded by Attorney Herrick, the Committee unanimously voted to table the topic to its March 10, 2023 meeting.

C. Justice Donovan provided an update about action taken by the Court on rule amendments recommended by the Committee, including the following:

- N.H. Rule of Professional Conduct 1.0 - def. of “primary purpose.”
The Court did not adopt this proposed amendment.
- N.H. Rule of Criminal Procedure 12 – State’s obligation to provide copies of defendant’s criminal record. The Court did not adopt this proposed amendment.
- N.H. Rule of Criminal Procedure 12 – Discovery; Evidence of Other Crimes, Wrongs or Acts. The Court adopted this proposed amendment.
- Supreme Court Rule 40 – Procedural Rules of Committee on Judicial Conduct: Deferred Discipline. The Court adopted this proposed amendment.
- Supreme Court Rule 37(8)
The Court adopted this proposed amendment, adding “duces tecum.”
- Supreme Court Rule 37(14)(b)(2)(B)
The Court adopted this proposed amendment.
- Supreme Court Rule 37(20)
The Court returned this proposed amendment to the Rules Committee for further review and consideration of comments received by the Court.

Justice Donovan will appoint a subcommittee, to include Attorney Greene and other Committee members who are available and willing to serve, to provide a report and any proposed amendment at the Committee’s March 10, 2023 meeting.

- Supreme Court Rule 37(21)
The ADO withdrew the proposed amendment.
- Supreme Court Rule 37A(III)(b)(5)(F)
The Court did not adopt this proposed amendment.
- Supreme Court Rule 37A(V)
The Court adopted this proposed amendment.
- Supreme Court Rule 35
The court approved the new rule that applies to the pilot paraprofessional program enacted by the legislature.
- Supreme Court Rule 37(9-A) and 37(9-B)
The Court adopted this proposed amendment.
- Supreme Court Rule 50-A
Trust Accounting Certification Requirement
Given the technical nature of the proposed amendment, Justice Donovan referred this directly to the Court. The Court received no submissions in response to its order inviting comment and approved the proposed amendment.

4. 2023 MEETING DATES

Friday, March 10, 2023

Friday, June 2, 2023

Friday, September 15, 2023

Friday, December 8, 2023

On motion by Attorney Greene and seconded by Attorney Keefe, the Committee unanimously voted to adjourn. Meeting adjourned at 3:04 p.m.

Respectfully submitted,

Lisa Merrill, Recording Secretary