

#2022-002

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February 24, 2022

Hon. Patrick E. Donovan, Chair
Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Proposed Changes to Supreme Court Rule 47

Dear Justice Donovan and Members of the Rules Committee,

As the Committee is likely aware, New Hampshire's indigent defense system is in crisis. Public defenders are carrying significantly higher caseloads and are being compensated at a lower rate than many of their county attorney counterparts, resulting in an unprecedented number of departures from that organization. Contract counsel are also taking more cases than anticipated and have reached their limit. And attorneys who have accepted indigent defense cases on an assigned counsel basis are unable or unwilling to accept more of these cases.

Compensation to public defender attorneys and contract counsel rates are within the domain of the Legislature, and it is certainly our hope that the Legislature takes action to correct the pay inequities necessary to a constitutionally adequate indigent defense system.

However, the assigned counsel rate is set by the New Hampshire Supreme Court as set forth in Rule 47. There may be a number of reasons why attorneys cannot be persuaded to accept assigned counsel cases. But one of the most significant barriers is the assigned counsel rate of \$60.00 per hour, which was set in 1992. In the thirty years since that rate was established by the Court, the dollar had an average inflation rate of 2.34% per year, producing a cumulative price increase of 95.52%. In other words, while the cost of running a law office and paying staff, rent, phones, computers, and other office overhead has close to doubled in the past thirty years, the compensation rate for the attorneys assigned to these cases has stayed the same. For lawyers with active practices and retained clients, it is nearly impossible to justify accepting a court-appointed case on an assigned counsel basis.

It is time to review these rates and increase them. Hopefully, the long overdue increase in assigned counsel rates will spur New Hampshire lawyers to accept more assigned counsel cases and help mitigate the ongoing indigent defense crisis. Information on the potential cost of these changes will be submitted by Judicial Council staff under separate cover.

Attached please find our proposed changes to Rule 47. These proposed changes have the unanimous support of New Hampshire Bar Association Board of Governors and have been endorsed by the New Hampshire Judicial Council.

Respectfully,

A handwritten signature in black ink, appearing to read "R. E. Samdperil", enclosed within a rectangular box.

Richard E. Samdperil
Vice-chair, New Hampshire Judicial Council

A handwritten signature in black ink, appearing to read "Sandra Cabrera", written in a cursive style.

Sandra L. Cabrera
President-elect, New Hampshire Bar Association

The provisions of this rule shall apply only to preparation for and proceedings in all courts in which assigned counsel is appointed to represent indigent criminal defendants.

(1) Itemization of Bills. All bills related to fees and expenses must be itemized as to the time spent and expenses incurred on each case, and there shall be no separate charge for overhead. A copy of the Notice of Appointment of Counsel order on appointment or other supporting document must be attached to the bill with each submission.

(2) Fees. Maximum compensation is limited as follows:

(a) Time properly chargeable to case: ~~\$400-125.00~~ per hour for major crime cases (capital murder, homicide, aggravated felonious sexual assault, felonious sexual assault ~~and~~, first degree assault, class A felony robbery, and felony arson); ~~\$125.00~~ per hour for Supreme Court appeals; and ~~\$60-90.00~~ per hour for all other cases. The paralegal hourly rate shall not exceed ~~\$35.00~~ \$40.00 and shall be included with fees of counsel for the purposes of determining the maximum fee on any case. ~~Travel time to and from meetings with an incarcerated defendant shall be compensable; otherwise, travel time is not a compensable event unless expressly authorized by the court in advance for exceptional circumstances.~~

(b) Maximum fee for misdemeanors: ~~\$1,400~~ \$2,000.00.

(c) Maximum fee for aggravated felonious sexual assault, felonious sexual assault, and first degree assault: ~~\$8,000~~ \$12,500.00, and for all other felonies: ~~\$4,100~~ \$5,500.00.

(d) Maximum fee (per co-counsel) for homicides under RSA 630:1-2: \$20,000.00

(e) Maximum fee for Supreme Court appeal: ~~\$2,000~~ \$10,000.00.

~~_____~~ (3) Travel time. Travel time to and from court hearings and to and from meetings with an incarcerated defendant shall be compensable; otherwise travel is not a compensable event unless expressly authorized by the court in advance for exceptional circumstances. Travel time shall not count toward the maximum fees set forth above.

Only upon an express, written finding of good cause and exceptional circumstances by the court will the maximum fees be exceeded or will additional fees be authorized. All petitions to exceed the maximum fee guidelines must be approved prior to the guidelines being exceeded; provided, however, that the court may waive the requirement for prior approval when justice so requires.

When counsel represents more than one client on any particular day, the hours spent shall be allocated accordingly, including any travel time. Representation of more than one client on the same day and in the same court shall be noted on the bills submitted. All bills shall be reviewed by the judge who presided over the case, if practicable.

When assigned counsel is appointed in ~~district circuit~~ court, that counsel shall continue as counsel of record for all purposes (such as motions to reduce bail, waiver of indictments, etc.) until and unless new counsel is appointed by the superior court. The appointment of counsel shall occur in accordance with RSA 604-A:2, II. The public defender shall be appointed if that office is available. In the event that the public defender program is not available, the appointment of a

contract attorney shall occur, if such an attorney is available. Lastly, in the event that neither the public defender nor a contract attorney is available, the appointment of a qualified attorney under RSA 604-A:2, I, shall occur.

The adequacy of the rates prescribed by this rule may, upon request of the supreme court, be reviewed periodically by the advisory committee on rules, and shall be reviewed at least every four years. The rates shall reflect inflation increases and other costs since the prior rate change.

~~(43)~~ Expenses - Reimbursable. In addition to the fees and fee caps listed in Section (2), above, investigative, expert, or other necessary services may be compensated only upon a finding of necessity and reasonableness by a justice of the appropriate court in accordance with RSA 604-A:6, made prior to said expense being incurred.

(a) Except for those services for which rates are established by the supreme court, the presiding justice may consider, but shall not be bound by, the prevailing rates or any rates established by a licensing agency or professional association in approving fees for services specified above.

(b) Rates for stenographers and deposition services shall be established by the supreme court. The cost of copies of depositions and transcripts shall be fifty cents (.50) per page.

(c) Rates for the services of interpreters for all parties and the court shall be established by the supreme court.

(d) No cost for investigative, expert, or other necessary services as initially approved may be exceeded prior to a subsequent finding of necessity by a justice of the appropriate court.

(e) All bills for investigative, expert, or other necessary services shall be reviewed by the judge who presided over the case, if practicable.

(f) Attorneys shall be reimbursed for the mileage expenses incurred in representing their client at the standard mileage reimbursement rate currently allowed by the Internal Revenue Service. Requests for reimbursement of mileage expenses shall specify the actual number of miles traveled.

~~(g) With the exception of calls from incarcerated defendants, t~~The expense of telephone calls shall not be reimbursed.

(h) In cases appealed to the supreme court, attorneys shall be reimbursed for the actual reasonable costs (not including labor) of reproducing and binding the notice of appeal or other appeal document, any appendix and briefs, whether done in-house or by an outside printer.

(i) No reimbursement will be paid for overhead expenses including photocopies (other than as provided in subdivision (3)(h) of this rule), postage, fax and secretarial services.

—~~(54)~~ Deadline for Filing Bills with Court. All bills related to fees and expenses must be submitted no later than sixty days after the close of the case. The court may allow late filing for good cause shown, when justice so requires.

NOTE: Appointed counsel for witnesses is covered under Rule 48 of the Supreme Court Rules.