



The mission of the RCC is to work to establish a common ground with the administration through positive communication on issues regarding the needs and rehabilitation of residents, their interaction with staff, and their return to society.

January 13, 2023

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 amendment to New Hampshire Rules of Criminal Procedure

Justice Donovan and Rules Sect'y Platt:

On behalf of the Resident Communication Committee's Legislative Subcommittee, please find attached a proposed amendment to New Hampshire Rules of Criminal Procedure: Rule 11 - Pleas, Rule 12 - Discovery, and Rule 14 - Notices.

Brief summary:

The Resident Communication Committee's (RCC) Legislative Subcommittee proposes the following suggested rules amendment to ensure effective and meaningful written acknowledgment of plea offer(s) to, and from, client by counsel. The proposed rules amendment is the product of collaboration and research conducted amongst the prison population, and available case law demonstrating the need and efficacy of these amendments. The rules amendment is intended to align with constitutional standards by ensuring that the State's plea offer(s) is presented in writing to, and acknowledged by, the criminal defendant and to ensure that the details communicated within it are clearly outlined with specificity.

Additional details:

Failure to provide minimally competent representation can constitute a violation of a defendant's Sixth Amendment Right, pursuant to Strickland v. Washington, 466 U.S. 668 (1984). The same failure can constitute an ethical violation for the lawyer and be subject to sanctions. See generally Model Rules of Prof'l Conduct R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); R.1.4 (b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

The U.S. Supreme Court granted certiorari on an issue related to the effective assistance of counsel in plea bargain negotiations, addressing what remedy should be available to a criminal defendant who was provided ineffective assistance during plea negotiations but who was later convicted pursuant to constitutional procedures. See Cooper v. Lafler, 376 Fed. Appx. 563, 574-75 (6th Cir. 2010) (Affirming the District Court's

grant of Habeas relief where ineffective assistance of counsel, in providing incorrect legal advice, caused the defendant to reject a favorable plea deal and proceed to trial, where he was convicted), cert. granted, 131 S. Ct. 856 (U.S. Jan. 7, 2011) ; Frye v. Missouri, 311 S.W.3d 350, 353, 361 (Mo. Ct. App. 2010) (Reversing the judgment entered on the guilty plea and deeming it withdrawn, finding ineffective assistance of counsel where defense counsel failed to communicate and offer to plead to an amended misdemeanor charge to the defendant), cert. granted, 131 S. Ct. 856 (U.S. Jan. 7, 2011).

SCOTUS holds that due process requires a record “adequate for any review that may be later sought”, Boykin v. Alabama, 395 U.S. 238, 244 (1969), and does not permit protection of the federally guaranteed rights to be relegated to “collateral proceedings that seek to probe murky memories.” Ibid. As such, due process requires a State, in accepting a plea of guilty, to make a contemporaneous record adequate “to show that [the defendant] had intelligently and knowingly pleaded guilty.” id., at 241.

State v. O’Leary, 128 NH 661, 662-63 (1986) Confusion as to which plea offer(s) were actually offered and operative, to which the trial court doubted that there was a plea agreement to enforce.

Ortiz v. Lopez, No. 03-1503(SEC) (D. P.R. 2005) Petitioner testified counsel did not inform him of an offer for a guilty plea. Petitioner indicated he saw counsel on few occasions prior to his trial and was never visited by him at the penal institution. Counsel informed petitioner at trial that thirty (30) years were offered but the offer had to be changed to homicide for any sentencing time to be less. Petitioner testified it was not until the last day of trial counsel told him about the offered thirty years. Before that time, petitioner had not heard anything about a thirty-year plea offer and he was never informed nor provided orientation thereof. Petitioner testified he would not have gone to trial on first degree murder had he known about the thirty-year offer.

Conclusion:

These are not new and emerging issues, as the criminal trial courts are aware which have long been presented to review the challenges brought before it, either unknown or unclear plea negotiations of alleged ineffective counsel because a contemporaneous record, as proposed here, was not preserved detailing such negotiations. This rule amendment will afford meaningful plea negotiations, alleviating challenges to them in the court dockets, promoting equal justice by ensuring a fair and expedient process in alignment with the standards of professional conduct and of constitutional due process. Having written acknowledgment of plea offer(s) is the next step in the evolution of criminal practice and procedure.

If you have any questions, please feel free to reach out to RCC liaison Timothy Martin at timothy.t.martin@doc.nh.gov or 603.271.1852.

Thank you for your time and consideration of this proposed amendment change and for scheduling any necessary hearing on the matter.

Sincerely,

Resident Communication Committee

Tim Martin, RCC liaison

Applicable Rule Commentary

NH – New Hampshire State and Federal Court Rules

- The New Hampshire Rules of Criminal Procedure
 - o Client-Lawyer Relationship
 - Rule 1.4 Client Communications
 - (a) A lawyer shall:
 - o (2) reasonably consult with the client about the matters by which the client's objectives are to be accomplished
 - o (3) keep the client reasonably informed about the status of the matter

Commentary

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer, See Rule 1.2(a)

NH – New Hampshire State and Federal Court Rules

- The New Hampshire Rules of Criminal Procedure
 - o Client-Lawyer Relationship
 - Rule 1.4 Client Communications
 - o Annotations
 - o Commentary Comment
 - Attorneys seeking to determine the scope of the duty to communicate this under this rule should also review ABA Comment 5 to Rule 2.1. That Comment states that when a matter is likely to involve litigation, Rule 1.4 may require a lawyer "to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." This comment may prove important given the overlap of Rule 2.1 and 1.4, the increasingly important role of alternative dispute resolution in litigation, and the implications this duty might have for a lawyer's civil liability.
- Commentary
 - o Comment
 - [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that a lawyer offer advice if the course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty that the client has indicated in unwarranted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Proposed amendment to New Hampshire Rules of Criminal Procedure

Explanation: Matter added to current amendment appears in *[bold Italics]*

NH – New Hampshire State and Federal Court Rules

- The New Hampshire Rules of Criminal Procedure
 - o IV, Arraignment, Pleas and Pretrial Proceedings
 - Rule 11, Pleas
 - (a)(3) Misdemeanors and Enhanced Violations
 - o ***[(F) The defendant received Acknowledgement and Proof of Notice of Plea Offer(s) initiated by the State.]***
 - (b)(2) Pleas
 - ***[(F) The defendant received Acknowledgement and Proof of Notice of Plea Offer(s) initiated by the State.]***

NH – New Hampshire State and Federal Court Rules

- The New Hampshire Rules of Criminal Procedure
 - o IV, Arraignment, Pleas and Pretrial Proceedings
 - Rule 12. Discovery
 - (b) (3) (D) ***[The Court shall address the defendant and defendant's counsel, if any, and determine on the record to the existence of Acknowledgement and Proof of Notice of Plea Offer(s) initiated by the State towards early resolution of the case.]*** If a plea agreement is not reached at the dispositional conference, the matter will be set for trial.

NH – New Hampshire State and Federal Court Rules (Superior Court Rules)

- The New Hampshire Rules of Criminal Procedure
 - o IV, Arraignment, Pleas and Pretrial Proceedings
 - Rule 14 – Notices
 - (b)
 - o (1)
 - ***[(C) Acknowledgment and written notice of plea]***