

Proposed Amendment to Rule of Evidence 1101(b)

Submitted by:

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Proposed Rule Change:

To amend Rule of Evidence 1101(b) to explicitly exempt probable cause hearings in involuntary emergency admission (IEA) cases from the Rules of Evidence as shown in Attachment A.

Purpose of Proposed Change:

Under RSA chapter 135-C, “any person” may petition for another person’s admission to the state mental health system on the grounds that the person is a danger to himself or others as a result of mental illness. RSA 135-C:27; RSA 135-C:28, I. Petitioners are often mental health clinicians, but may also be family members, police officers, neighbors, or friends. The petition must state the specific act or actions which the petitioner or a witness observed which warrant the admission. RSA 135-C:28, I. Initially, the petition is reviewed by a physician, physician’s assistant, or APRN approved by the Department of Health and Human Services. RSA 135-C:28, I. If the clinician determines that the person subject to the petition meets the criteria for admission, the clinician completes a certificate of admission, thereby admitting the person to the state mental health services system and authorizing his or her detention. Id.

Within three days after a certificate of admission is completed, however, the person subject to an IEA petition is entitled to a hearing to determine whether there was probable cause for the admission. See RSA 135-C:31, I; Doe v. Comm’r of New Hampshire Dep’t of Health & Hum. Servs., 174 N.H. 239, 252-53, (2021) (holding that certificate of admission is the triggering event for probable cause hearing). Thus, the probable cause hearing frequently occurs within a few days of the event or events which prompted the petition. The person sought to be admitted is entitled to court-appointed counsel at the hearing. See RSA 135-C:22. There is no such right for petitioners and neither DHHS nor any of the state’s hospitals or mental health centers provide counsel to represent petitioners. In our experience presiding over thousands of these hearings, a petitioner has been represented by counsel on fewer than ten occasions.

RSA ch. 135-C does not explicitly exempt IEA probable cause hearings from the technical rules of evidence. Cf. RSA 169-C:12 (providing that, in hearings under Child Protection Act, court is not bound by technical rules of evidence). Nor are IEA probable cause hearings among the “miscellaneous proceedings” to which the rules explicitly do not apply. See N.H. R. Evid. 1101(d)(3). Thus, some judicial officers have held that the rules of evidence apply to IEA probable cause hearings. See N.H. R. Evid. 1101(b) (rules of evidence apply to all civil and criminal proceedings unless otherwise provided).

However, IEA probable cause hearings are analogous to other preliminary probable cause determinations to which the rules of evidence do not apply. See N.H. R. Evid. 1101(d)(3) (exempting preliminary examinations in criminal cases, juvenile certification proceedings, proceedings with respect to bail, and issuance of warrants from rules of evidence). Indeed, the maximum period of detention on an IEA is ten days, not counting Saturdays or Sundays, RSA 135-C:32, while the maximum period of detention resulting from a bail hearing or a probation or parole revocation may be far longer. Additionally, the Supreme Court has observed that the probable cause standard itself is non-technical and incorporates the consideration of hearsay:

Probable cause may be based upon circumstantial or hearsay evidence, and it may be established by demonstrating by some *credible evidence* the fact at issue. While the preponderance standard allows for the balancing of evidence from both sides, the probable cause standard only requires the trier of fact to look at the totality of the circumstances, to determine whether the evidence goes beyond a mere suspicion.

Petition of Preisendorfer, 143 N.H. 50, 54–55 (1998) (discussing probable cause in the context of placement of a person’s name on central child abuse registry; citations, quotations, and alterations omitted); see also State v. Carroll, 131 N.H. 179, 186–88 (1988) (noting that hearsay may establish probable cause to issue warrant and that probable cause standard is not “technical” but is instead based on the “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act”). Based on these considerations, other judicial officers have held that the Rules of Evidence do not apply to IEA probable cause hearings.

The applicability of the Rules of Evidence can substantially impact consideration of IEA petitions when one or more of the predicate acts alleged in the petition was not personally witnessed by the petitioner. In such cases, the rule against hearsay, if the court finds that it applies, may prohibit the court from considering the predicate act for admission alleged in the petition. See N.H. R. Evid. 802. For example, if the hearsay rule applies, an IEA petition filed by a police officer based on her investigation of dangerous acts committed by the petitionee may not be upheld, even though the same investigation, based

on hearsay, could be sufficient to warrant the petitionee's detention on bail in a criminal case. Strict application of the rules of evidence is particularly burdensome given that virtually all petitioners in these cases are not represented by counsel and have extremely limited time to prepare the case between the events precipitating the IEA and the probable cause hearing.

The proposed amendment to the Rules of Evidence would clarify that the Rules do not apply to IEA probable cause hearings, putting such hearings par with other preliminary hearings and probable cause determinations. The amendment would permit the Court to determine what evidence is reliable and what weight to give such evidence, permitting both parties some flexibility in presenting their cases when they have not had the opportunity for extensive preparation or, in the case of virtually all petitioners, the benefit of counsel. It would also permit the Court to evaluate probable cause in the same non-technical, commonsense manner that it does in other contexts, such as issuing arrest warrants. Given the nature of the probable cause determination, exempting these hearings from the rules is consistent with the goal of the rules to aid in "ascertaining the truth and securing a just determination." See N.H. R. Evid. 102

Additionally, exempting IEA probable cause hearings from the Rules of Evidence would not undermine the "significant safeguards to minimize the risk of erroneous deprivation of liberty due to civil commitment" provided by the IEA statute. Doe, 174 N.H. at 251 (quotation and alterations omitted). These include the requirement that an IEA generally must be based on acts occurring within the 40 days preceding the completion of the petition, RSA 135-C:27, and the petitionee must be examined by an approved clinician within 3 days of the completion of the petition, RSA 135-C:28, I, ensuring that an IEA is only based on contemporaneous evidence of dangerousness. See Doe, 174 N.H. at 251. Additionally, a person may only be detained after a licensed clinician, approved by a designated receiving facility or a community mental health program, certifies that the patient meets the criteria for an IEA, see RSA 135-C:28, I, safeguarding against detentions based on personal grudges or medical or mental health conditions which do not warrant involuntary treatment. See, e.g., RSA 135-C:2, X (excluding epilepsy, intoxication, and substance use disorders from definition of "mental illness" for purposes of IEA). Additional protections include the right to a probable cause hearing within 3 days, RSA 135-C:31, I, the right to court-appointed counsel, RSA 135-C:22, and the right at the hearing to present evidence, cross-examine witnesses, and have a recording made of the hearing. See RSA 135-C:43. Most importantly, a person subject to IEAs would still be entitled to the full panoply of procedural safeguards associated with a non-emergency involuntary admission, including a clear and convincing standard of proof, if the petitioner sought to extend the detention beyond ten days. See RSA 135-C:32 (limiting detention on IEAs to ten business days); In re Richard A., 146 N.H. 295, 298-300 (2001) (describing procedural safeguards for admissions pursuant to RSA 135-C:34-:54).

Finally, amending the Rules of Evidence to exempt IEA probable cause hearings from the application of the rules is consistent with the protective and rehabilitative purpose of the involuntary commitment statutes, by ensuring that the technical application of the rules does not impair the ability of petitioners to protect the safety of individuals experiencing a mental health crisis or their communities. See RSA 135-C:1 (describing purpose of statute).

For all the foregoing reasons, I respectfully request that the Committee consider amending the Rules of Evidence as shown in Attachment A. I do not request expedited processing of this request.

Attachment A

Amend New Hampshire Rule of Evidence 1101 as follows (deletions are in ~~strikethrough~~ format; additions are in **[bold and brackets]**):

Rule 1101. Applicability of Rules

- (a) *Courts*. These rules apply to the proceedings in the district and probate divisions of the circuit court, the superior court, and the supreme court.
- (b) *Proceedings Generally*. These rules apply generally to all civil and criminal proceedings unless otherwise provided by the constitution or statutes of the State of New Hampshire or these rules.
- (c) *Rule of Privilege*. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.
- (d) *Rules Inapplicable*. The rules (other than with respect to privileges) do not apply in the following situations:
 - (1) *Preliminary Questions of Fact*. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.
 - (2) *Grand Jury*. Proceedings before grand juries.
 - (3) *Miscellaneous Proceedings*. Proceedings for extradition or rendition; preliminary examinations in criminal cases; juvenile certification proceedings under RSA 169-B:24; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; proceedings with respect to parole revocation or probation violations; recommittal hearings; domestic relations cases within the jurisdiction of the Family Division of the Circuit Court; civil domestic violence and stalking proceedings; **probable cause hearings for involuntary emergency admissions under RSA 135-C:31**].