

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, June 2, 2023** 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.

Written comments on any of the proposed amendments must be submitted to the secretary of the Committee no later than **May 16, 2023**. Comments may be emailed to the Committee on or before **May 16, 2023** at:

rulescomment@courts.state.nh.us

Comments may also be mailed or delivered to the Committee at the following address by **May 16, 2023**:

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.

ANY PERSON WHO WISHES TO ATTEND THE JUNE 2, 2023 PUBLIC HEARING REMOTELY SHOULD NOTIFY THE CLERK OF COURT AS FAR IN ADVANCE AS POSSIBLE SO THAT THE REQUIRED EQUIPMENT CAN BE AVAILABLE.

The amendments being considered concern the following rules:

I. 2022-001 Supreme Court Rule 37(20)

(This proposed amendment, submitted by the Attorney Discipline Office, addresses public access to Attorney Discipline Office files relating to grievances and referrals.)

Proposed Action: Amend Supreme Court Rule 37(20) as set forth in Appendix A.

II. 2023-004 New Hampshire Rule of Evidence 1101(b)

(This proposed amendment would exempt probable cause hearings in involuntary emergency admission (IEA) cases from the Rules of Evidence.)

Proposed Action: Amend New Hampshire Rule of Evidence 1101(b) as set forth in Appendix B.

III. 2023-005 New Hampshire Rule of Evidence 804(b)

(This proposed amendment would restore the exception to the hearsay rule that governs statements made by deceased persons in actions by or against representatives of the deceased person.)

Proposed Action: Amend New Hampshire Rule of Evidence 804(b) as set forth in Appendix C.

New Hampshire Supreme Court
Advisory Committee on Rules

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

March 17, 2023

APPENDIX A

Amend Supreme Court Rule 37(20) as follows (deletions are in ~~strikethrough~~ format; additions are in **[bold and brackets]**):

(20) Confidentiality and Public Access - Matters Initiated On Or After April 1, 2000:

Applicability Note: Section 20 shall apply to records and proceedings in all matters initiated on or after April 1, 2000.

[(a) The Attorney Discipline Office shall maintain a public file relating to a grievance or referral.

(1) The public file shall consist of:

(A) for non-docketed matters, the grievance, voluntary response(s) from the respondent attorney, if any, the non-docket letter, the grievant's request for reconsideration and response(s) thereto, if any, and any written decision of the Complaint Screening Committee;

(B) for docketed matters that are not referred to disciplinary counsel for formal proceedings, the complaint, mandatory response(s) from the respondent attorney, complainant's or respondent's requests for reconsideration, if any, and any responses(s) thereto, and any written decision of the Complaint Screening Committee; and

(C) for matters that result in formal proceedings, the documents referenced in the index of record maintained by the Hearings and Professional Conduct Committees.

(2) The public file shall not include:

(A) the work product, internal memoranda, and deliberations of the Attorney Discipline Office, the Hearings Committee or the Professional Conduct Committee; or

(B) where a disciplinary matter is initiated by referral, or by a grievance from a non-client, confidential information relating to the respondent attorney's client or clients, unless waived by the client or required by Order of the Supreme Court or Professional

Conduct Committee. Nothing in this provision, however, shall restrict a respondent attorney's ability to disclose otherwise confidential client information pursuant to Rule of Professional Conduct 1.6 for purposes of defending him or herself in disciplinary proceedings.

(3) The public file for matters covered by subsections (a)(1)(A), (B), (C) of this rule shall be available for public inspection and copying at the expense of the member of the public seeking such copies at a rate approved by the Supreme Court.]

~~(a)~~**[(b)]** Grievance outside the Jurisdiction of the Attorney Discipline System or Not Meeting the Requirements for Docketing as a Complaint:

(1) A grievance against a person who is not subject to the rules of professional conduct shall be returned to the grievant. No file on the grievance will be maintained.

(2) ~~All records and materials~~ **[The public file]** relating to a grievance determined by the attorney discipline office or the complaint screening committee not to meet the requirements for docketing as a complaint shall be available for public inspection **[and copying at the expense of the member of the public seeking such copies]** ~~(other than work product, internal memoranda, and deliberations)~~ beginning 30 days after correspondence is sent to the respondent attorney who is the subject of the grievance and the respondent attorney has the opportunity to provide a reply to be filed in the public record. The records and material shall be maintained at the attorney discipline office for two (2) years from the date of the original filing. After this two-year period, the records shall be destroyed.

(3) Index of Complaints. The attorney discipline office shall maintain an index of complaints docketed against each attorney, which shall contain pertinent information, including the outcome of the complaint. No index of grievances that are not docketed as complaints shall be maintained.

~~(b)~~**[(c)]** Grievance Docketed as Complaint: ~~All records and proceedings~~ **[The public file]** relating to a complaint docketed by the attorney discipline system shall be available for public inspection **[and copying at the expense of the member of the public seeking such copies]** ~~(other than work product, internal memoranda, and deliberations)~~ upon the earliest of the following:

(1) When the Attorney Discipline Office general counsel, the complaint screening committee or the professional conduct committee finally disposes of a complaint;

- (2) When disciplinary counsel issues a notice of charges;
- (3) When the **[attorney discipline office or the]** professional conduct committee files a petition with the supreme court, except as provided by section (11) regarding resignations; or
- (4) When the respondent attorney, prior to dismissal of a complaint or the issuance of a notice of charges, requests that the matter be public.

~~(d)~~**[(d)]** Records may be destroyed after:

- (1) three years of the date of notice of dismissal; or
- (2) three years of the date of an annulment in accordance with Rule 37A; or
- (3) five years after the death of the attorney-respondent.

~~(d)~~**[(e)]** Proceedings for Reinstatement or Readmission: When an attorney seeks reinstatement or readmission pursuant to section (14), **[the Attorney Discipline Office shall maintain a public file relating to such reinstatement or readmission. The public file shall not include the work product, internal memoranda, and deliberations of the Attorney Discipline Office, the Hearings Committee or the Professional Conduct Committee. The public file shall consist of the documents referenced in the index of record maintained by the Hearings and Professional Conduct Committees. The public file relating to reinstatement or readmission shall be available for public inspection and copying at the expense of the member of the public seeking such copies at a rate approved by the Supreme Court.]** ~~the records, with the exception of the bar application, and the proceedings before the hearing panel and the professional conduct committee shall be public (other than work product, internal memoranda, and deliberations).~~

~~(e)~~**[(f)]** Proceedings Based upon Conviction or Public Discipline: If the investigation is predicated upon a conviction of the respondent for a crime or upon public discipline imposed upon the respondent in another jurisdiction, the entire file pertaining to the crime or the public discipline, other than the work product, internal memoranda, and deliberations of the attorney discipline system, shall be available for public inspection.

~~(f)~~**[(g)]** Proceedings Alleging Disability: All proceedings involving allegations of disability on the part of a New Hampshire licensed attorney shall be kept confidential until and unless the supreme court enters an order suspending said attorney from the practice of law pursuant to section (10), in which case said order shall be public.

~~(g)~~**[(h)]** Protective Orders: Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise confidential or privileged information concerning the complainant, a witness, the attorney, or other persons. In order to protect the legitimate privacy interests of such persons, the professional conduct committee, may, upon request, or on its own initiative, issue a protective order prohibiting the disclosure of confidential, malicious, personal, privileged information or material submitted in bad faith. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the professional conduct committee. The professional conduct committee shall act upon the request within a reasonable time. Any person aggrieved by a decision on a protective order may, within thirty (30) days of the decision, request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the court has acted or the period for requesting court review has expired.

~~(h)~~**[(i)]** Disclosure to Authorized Agency: The attorney discipline office may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to authorized agencies investigating qualifications for admission to practice or fitness to continue practice, to law enforcement agencies investigating qualifications for government employment, **[to the New Hampshire Public Protection Fund,]** and to law enforcement agencies authorized to investigate and prosecute violations of the criminal law. If the attorney discipline office decides to answer a request for relevant information, and if the attorney who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the attorney discipline office shall send to the attorney at his or her last known address, by certified mail, a notice that information had been requested and by whom, together with a copy of the information that the attorney discipline office proposes to release to the requesting agency. The attorney discipline office shall inform the subject attorney that the information shall be released at the end of ten (10) days from the date of mailing the notice unless the attorney obtains a supreme court order restraining such disclosure. Notice to the attorney, as provided in this section, shall not be required prior to disclosure of relevant information that is otherwise confidential **[to the New Hampshire Public Protection Fund or]** to law enforcement agencies authorized to investigate and prosecute violations of the criminal law.

~~(i)~~**[(j)]** Disclosure to Supreme Court for Rule 36 Review: The attorney discipline office shall disclose relevant information that is otherwise confidential to the supreme court, upon its request, in connection with the court's review of applications under Supreme Court Rule 36.

~~(j)~~**[(k)]** Disclosure to National Discipline Data Bank: The clerk of the supreme court shall transmit notice of all public discipline imposed on an attorney by

the supreme court or the professional conduct committee (upon notice from said committee), or the suspension from law practice due to disability of an attorney, to the National Discipline Data Bank maintained by the American Bar Association.

~~(k)~~**(l)** Disclosure to Lawyers Assistance Program: The Attorney Discipline Office shall have the power to disclose otherwise confidential information to the New Hampshire Lawyers Assistance Program whenever the Attorney Discipline Office determines that such disclosure would be in the public interest.

~~(j)~~**(m)** Duty of Participants: All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this rule.

Nothing in this section prevents a grievant from disclosing publicly the underlying conduct of an attorney which he or she believes violates the rules of professional conduct or is otherwise inappropriate. The immunity from civil liability provided by section (7) does not apply to such disclosures. This section does prohibit a grievant, however, from disclosing publicly the fact that a grievance or complaint against the attorney about the conduct had been filed with the attorney discipline system pending the grievance or complaint becoming public in accordance with the provisions of this section.

~~(m)~~**(n)** Violation of Duty of Confidentiality: Any violation of the duty of confidentiality imposed by section (20) may result in action of the professional conduct committee at the request of the non-violating party or on its own motion. That action may consist of opening the file and the proceedings earlier than would have been the case under section (20), terminating the proceedings with or without public comment, or such other action as the professional conduct committee deems appropriate in the circumstances.

~~(n)~~**(o)** With respect to records to be made available for public inspection under this Rule or Rule 37A, final disciplinary decisions of the professional conduct committee and the supreme court shall be made available for public inspection electronically via the internet; all other records shall be made available **[for public inspection and copying at the expense of the member of the public seeking such copies at a rate approved by the Supreme Court.]** ~~for public inspection only at the attorney discipline office.~~

APPENDIX B

Amend New Hampshire Rule of Evidence 1101 as follows (deletions are in ~~strike through~~ 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**].

APPENDIX C

Amend New Hampshire Rule of Evidence 804 as follows (deletions are in ~~strike through~~ format; additions are in **[bold and brackets]**):

Rule 804. Exceptions to the Rule Against Hearsay - When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had - or, in a civil case, whose predecessor in interest had - an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) ~~Other Exceptions. (Transferred to Rule 807)~~ **[Statement of a Deceased Person. In an action, suit, or proceeding by or against the representatives of a deceased person, a statement made by the deceased person:**

(1) in good faith;

(2) based upon personal knowledge; and

(3) under circumstances indicating that it is trustworthy.]

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused - or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result.