NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

INVITATION FOR PUBLIC COMMENT

The New Hampshire Supreme Court Advisory Committee on Rules (Committee) is considering the following proposals: (1) a new rule within the Supreme Court Rules establishing criteria for a petition to approve a corporation formed under RSA 292:1-a for the purpose of providing professional legal services to the poor, see Appendix A; (2) amendments to Rules 1 – 19 of the New Hampshire Rules of Criminal Procedure, see Appendix B; (3) amendments to Rule 3.3 of the Circuit Court – Family Division Rules, see Appendix C; and (4) a new rule within the Circuit Court – Family Division Rules governing the titling of pleadings in delinquency matters, see Appendix D.

Additional information concerning the proposals may be found on the Committee's webpage under #2022-014, #2023-012, and #2023-013. The applicable section of the Committee's webpage is available at: https://www.courts.nh.gov/resources/committees/advisory-committee-rules/committee-materials-docket-number.

Comments on the proposals that the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee by email, regular mail, or hand delivery, for receipt on or before the dates set forth on the following page. The email

address is rulescomment@courts.state.nh.us. The mailing and physical address for comments submitted to the Committee is:

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Comments on the proposals to amend Rules 1 – 19 of the New Hampshire Rules of Criminal Procedure may be submitted at any time on or before October 23, 2023. Comments on the other proposals may be submitted at any time on or before November 21, 2023.

New Hampshire Supreme Court
Advisory Committee on Rules

By: Patrick E. Donovan, Chairperson
and Timothy A. Gudas, Secretary

September 22, 2023

APPENDIX A

Amend the title of Supreme Court Rule 41 ("~~Limited Liability Entities [Repealed]~~"), a rule that was previously repealed in its entirety, and replace it with the following new title and text:

RULE 41. Petition to Approve Corporation Providing Legal Services to the Poor

Pursuant to RSA 292:1-a, five or more persons of lawful age may associate together by articles of agreement to form a corporation, without a capital stock, for the purpose of providing professional legal services to the poor; provided, however, that no such corporation shall commence business until its articles of agreement and by-laws, and such other information as may be required, have been submitted to the supreme court for approval and such court has authorized it to commence business upon finding that it is a responsible organization. Any organization seeking authorization from the Supreme Court to operate under this statute must file a petition with the clerk of the Supreme Court that includes, at a minimum, the following:

(a) A description of the organization's structure;

(b) The types of legal and non-legal services the organization will perform;

(c) The names of all New Hampshire bar members employed by or regularly performing legal work for the organization;

(d) The criteria used to determine potential clients' eligibility for legal services;

(e) The major source of the organization's funds;

(f) Whether the organization accepts funds from or on behalf of its clients;

(g) The existence and extent of malpractice insurance that will cover any attorneys providing legal services;

(h) An acknowledgement that the organization has registered, or will register, with the Charitable Trusts Unit of the New Hampshire Attorney General's office as required by RSA 7:28; and

(i) A copy of the organization's articles of agreement and by-laws.

An organization is not precluded from providing any other or additional information it believes will help the Supreme Court determine whether the organization is providing legal services to the poor and is a responsible organization. Consistent with RSA 292:1-a, authorization to commence business may, after hearing, be revoked or suspended for just cause. The actual practice of law by an organization approved by the Supreme Court pursuant to this rule shall be conducted solely by members of the New Hampshire bar in good standing, unless a Supreme Court rule permits otherwise.

APPENDIX B

Amend Rules 1 – 19 of, and the preamble to, the New Hampshire Rules of Criminal Procedure as follows (deletions are in ~~strikethrough~~ format; additions are in **[bold and brackets]**):

PREAMBLE

These rules are adopted by the Supreme Court of New Hampshire pursuant to the authority established in Part II, Article 73-A of the New Hampshire Constitution. They ~~took~~ **[take]** effect on January 1, ~~2016~~ **[2024]** and apply to **[all]** criminal actions ~~pending or~~ filed ~~in circuit court or superior court in Cheshire and Strafford Counties~~ on or after that date. ~~They took effect in Belknap County on July 1, 2016 and apply to criminal actions pending or filed in circuit court or superior court in Belknap County on or after that date. They took effect in Merrimack County on January 1, 2017 and apply to criminal actions pending or filed in circuit court or superior court in Merrimack County on or after that date. They took effect in the remaining counties as of the date set forth by Supreme Court Order pursuant to RSA 592-B:2, III. See October 17, 2016 felonies first implementation order at http://www.courts.state.nh.us/supreme/orders/10-17-16-Order.pdf, and are now in effect in all counties.~~ In exceptional circumstances, when the court finds that the application of these rules to cases pending as of the effective date would not be feasible or would work an injustice, the court may exempt such cases from the application of these rules or from a particular rule.

Rule 1. Scope and Interpretation

(a) Scope. These rules govern the procedure in ~~circuit court-district division~~ **[Circuit Court – District Division]** and ~~superior courts~~ **[Superior Courts]** when a person is charged as an adult with a crime or violation.

(b) Interpretation. These rules shall be construed to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Comment

These rules apply to all proceedings in which a person is charged as an adult with an offense, whether a crime, such as a felony or a misdemeanor, or a violation. See RSA 625:9. The rules establish a uniform system of procedure for the ~~circuit court-district division~~ **[Circuit Court – District Division]** and ~~superior courts~~ **[Superior Courts]**, except as otherwise specifically provided. The rules do not govern juvenile proceedings or collateral proceedings such as habeas corpus or mandamus. The rules are subject to suspension by the court when the interest of justice so requires. See Rule 37. However, a court's power to suspend a rule may be limited by the state or federal constitution, state statutes or common law.

Rule 2. Adoption and Effective Date; Applicability

(a) Adoption. The Supreme Court adopts these rules pursuant to Part II, Article 73-A of the New Hampshire Constitution.

(b) Effective Date. These rules govern all proceedings filed ~~or pending in the circuit court-district division and superior courts in Strafford and Cheshire Counties~~ on or after January 1, ~~2016~~ **[2024]**. ~~These rules govern all proceedings filed or pending in the circuit court-district division and superior courts in Belknap County on or after July 1, 2016. These rules govern all proceedings filed or pending in the circuit court-district division and superior courts in Merrimack County or or after January 1, 2017. These rules govern all proceedings filed or pending in the circuit court-district division and superior courts in Carroll, Coos and Grafton Counties on or after April 1, 2017. These rules govern all proceedings filed or pending in the circuit court-district division and superior courts in Hillsborough County on or after September 1, 2017. These rules govern all proceedings filed or pending in the circuit court-district division and superior courts in Rockingham and Sullivan Counties on or after October 1, 2017. In exceptional circumstances, when the court finds that the application of these rules to cases pending as of the effective date would not be feasible or would work an injustice, the court may exempt such cases from the application of these rules or from a particular rule.~~

(c) ~~In Strafford and Cheshire Counties, pursuant to RSA 592-B:2, III, all felony and any directly related misdemeanor or violation-level offenses alleged to have occurred on or after January 1, 2016 shall be initiated in superior court. All felony and any directly related misdemeanor or violation-level offenses alleged to have occurred before January 1, 2016 shall be initiated in circuit court.~~

~~In Belknap County, pursuant to RSA 592-B:2, III all felony and any directly related misdemeanor or violation-level offenses alleged to have occurred on or after July 1, 2016 shall be initiated in superior court. All felony and any directly related misdemeanor or violation-level offenses alleged to have occurred before July 1, 2016 shall be initiated in circuit court.~~

~~In Merrimack County, pursuant to RSA 592-B:2, III all felony and any directly related misdemeanor or violation-level offenses alleged to have occurred on or after January 1, 2017 shall be initiated in superior court. All felony and any directly related misdemeanor or violation-level offenses alleged to have occurred before January 1, 2017 shall be initiated in circuit court.~~

~~In Carroll, Coos and Grafton Counties, pursuant to RSA 592-B:2, III all felony and any directly related misdemeanor or violation-level offenses alleged to have occurred on or after April 1, 2017 shall be initiated in superior court. All felony and any directly related misdemeanor or violation-level offenses alleged to have occurred before April 1, 2017 shall be initiated in circuit court.~~

~~In Hillsborough County, pursuant to RSA 592-B:2, III all felony and any directly related misdemeanor or violation-level offenses alleged to have occurred on or after September 1, 2017 shall be initiated in superior court. All felony and any directly related misdemeanor or violation-level offenses alleged to have occurred before September 1, 2017 shall be initiated in circuit court.~~

~~In Rockingham and Sullivan counties, pursuant to RSA 592-B:2, III all felony and any directly related misdemeanor or violation-level offenses alleged to have occurred on or after October 1, 2017 shall be initiated in superior court. All felony and any directly related~~

~~misdemeanor or violation-level offenses alleged to have occurred before October 1, 2017 shall be initiated in circuit court.~~

Rule 3. Complaint, Arrest Warrant, Arrest, Summons and Release Prior to Arraignment

(a) Complaint. The ~~complaint~~ **[Complaint]** is a **[signed]** written statement of the essential facts constituting the offense charged. A ~~circuit court-district division~~ **[Circuit Court – District Division]** ~~complaint~~ **[Complaint]** charging a class A misdemeanor or felony shall be signed under oath, provided that a ~~complaint~~ **[Complaint]** filed by a police officer, as defined in RSA 106-L:2, I, for a violation-level offense or a class B misdemeanor shall not require an oath. ~~A superior court complaint charging a misdemeanor or felony is not required to be signed under oath.~~ Unless otherwise prohibited by law, the court may permit a ~~complaint~~ **[Complaint]** to be amended if no additional or different offense is charged and if substantial rights of the ~~defendant~~ **[Defendant]** are not prejudiced.

(b) Issuance of Arrest Warrant. If it appears from a sworn application for an arrest warrant that there is probable cause to believe that an offense has been committed in the State of New Hampshire, and that the ~~defendant~~ **[Defendant]** committed the offense, an arrest warrant for the ~~defendant~~ **[Defendant]** may be issued.

(c) Arrest. When a person is arrested with a warrant, the ~~complaint~~ **[Complaint]**, and the return form documenting the arrest shall be filed ~~in~~ **[with the Circuit Court]** ~~a court of competent jurisdiction without unreasonable delay~~ **[in compliance with these rules]**. If a person is arrested without a warrant, the ~~complaint~~ **[Complaint]** shall be filed ~~without delay~~ **[in compliance with these rules]** and, if the person is detained in lieu of bail, an affidavit or statement signed under oath, if filed electronically that complies with Gerstein v. Pugh, 420 U.S. 103 (1975) must be filed.

(d) Summons. When the ~~complaint~~ **[Complaint]** charges a felony, a summons may not be issued. In any case in which it is lawful for a peace officer to make an arrest for a violation or misdemeanor without a warrant, the officer may instead issue a written summons in hand to the ~~defendant~~ **[Defendant]**. In any other case in which an arrest warrant would be lawful, upon the request of the State, the person authorized by law to issue an arrest warrant may issue a summons. A summons shall be in the form required by statute. See RSA 594:14. If a ~~defendant~~ **[Defendant, after receiving notice of the hearing date,]** fails to appear as required by the summons, a warrant may be issued. A person who fails to appear in response to a summons may be charged with a misdemeanor as provided by statute. Upon issuance of a summons, the ~~complaint~~ **[Complaint]** and summons shall be filed with a court of competent jurisdiction without unreasonable delay but no later than 14 days prior to the date of arraignment.

Rule 4. Initial Proceedings in Circuit Court-District Division

(a) Filing of Complaint.

(1) If the ~~defendant~~ **[Defendant]** is not detained prior to arraignment, the ~~complaint~~ **[Complaint]** shall be filed no later than fourteen (14) days prior to the date of arraignment. **[If a statute or an administrative order require specific scheduling timeframes for the arraignment, the Complaint shall be filed as soon as possible prior to the arraignment.]**

(2) If the ~~defendant~~ **[Defendant]** is detained pending arraignment, the ~~complaint~~ **[Complaint]** shall be filed ~~prior to commencement of~~ **[no later than one (1) hour prior to]** the arraignment.

(3) In all cases where the ~~defendant~~ **[Defendant]** may enter a plea by mail and a summons has been issued to the ~~defendant~~ **[Defendant]** and in which the ~~defendant~~ **[Defendant]** has entered a plea of "not guilty" with the Division of Motor Vehicles, if the Division of Motor Vehicles has not received the ~~complaint~~ **[Complaint]** directly from the police agency and has forwarded the ~~defendant's~~ **[Defendant's]** "not guilty" plea to the designated court, the ~~complaint~~ **[Complaint]** must be filed with the court not later than fifteen days from the date of the court's written notice to the law enforcement agency directing that the ~~complaint~~ **[Complaint]** be filed. Any ~~complaint~~ **[Complaint]** filed with the court after the filing date has passed shall be summarily dismissed by the court unless good cause is shown.

(4) In all cases alleging, as a violation level offense, a violation of RSA 318-B:2-c, II, III or IV where the ~~defendant~~ **[Defendant]** may enter a plea by mail directly with the court, if the ~~defendant~~ **[Defendant]** has entered a plea of "not guilty" or if the ~~defendant~~ **[Defendant]** has entered a plea of "guilty" or "no contest," the ~~complaint~~ **[Complaint]** must be filed with the court not later than fifteen days from the date of the court's written notice to the law enforcement agency directing that the ~~complaint~~ **[Complaint]** be filed. Any ~~complaint~~ **[Complaint]** filed with the court after the filing date has passed shall be summarily dismissed by the court unless good cause is shown.

(b) Initial Appearance.

(1) If the ~~defendant~~ **[Defendant]** is not detained prior to arraignment, ~~his or her~~ **[their]** arraignment shall be scheduled no earlier than thirty-five (35) days from the time of ~~his or her~~ **[their]** release with a written summons or by the bail commissioner, unless otherwise required by law, by administrative order or requested by a party. The ~~circuit court~~ **[Circuit Court]** shall use its best efforts to schedule a single arraignment day each week for ~~defendants~~ **[Defendants]** who are not incarcerated.

(2) If the ~~defendant~~ **[Defendant]** is detained pending arraignment, ~~his or her~~ **[their]** arraignment shall be scheduled within 24 hours, excluding weekends and holidays unless the person was arrested between 8:00 a.m. and 1:00 p.m. and the person's attorney is not available in which case the arraignment shall take place within 36 hours of arrest, ~~Saturdays, Sundays and holidays excluded~~ **[excluding weekends and holidays]**.

(c) Waiver of Arraignment.

(1) A ~~defendant~~ **[Defendant]** charged with a class A misdemeanor or a felony may waive arraignment only if ~~he or she is~~ **[they are]** represented by counsel and ~~files~~ **[file]** with the

court prior to the ~~date of~~ arraignment a written waiver signed by the ~~defendant~~ **[Defendant]** and ~~his or her~~ **[their]** counsel. If not signed by the ~~defendant~~ **[Defendant]**, counsel for the ~~defendant~~ **[Defendant]** may certify the following:

(A) That the charges and potential penalties have been discussed with the ~~defendant~~ **[Defendant]**;

(B) That the personal information of the ~~defendant~~ **[Defendant]** is accurate;

(C) That the ~~defendant~~ **[Defendant]** has been advised and understands that existing bail orders remain in effect pending disposition of the case or modification by the court; ~~and~~

(D) That the ~~defendant~~ **[Defendant]** understands that ~~he is~~ **[they are]** entitled to an arraignment conducted by the ~~Court~~ **[court]** but is waiving that arraignment **[;]**~~.~~

[(E) That the Defendant has been advised and understands their privilege against self-incrimination;

(F) That the Defendant has been advised and understands their right to retain counsel and the right to have an attorney appointed by the court pursuant to Rule 5 if they are unable to afford an attorney; and

(G) For felony level charges only: That the Defendant has been advised and understands their right to a probable cause hearing that will be conducted Pursuant to Rule 6.]

(2) A ~~defendant~~ **[Defendant]** charged with a class B misdemeanor or violation for which an appearance is mandated may waive arraignment if ~~he or she~~ **[they]** ~~files~~ **[file]** with the court prior to ~~the date of~~ **[the]** arraignment a written waiver signed by the ~~defendant~~ **[Defendant]**.

(d) In cases where the ~~defendant~~ **[Defendant]** is not detained, arraignment may be continued without the personal appearance of the ~~defendant~~ **[Defendant]** or the entry of an appearance by counsel upon timely motion made in writing if the court is satisfied with the terms of bail. However, absent an appearance by counsel on behalf of the ~~defendant~~ **[Defendant]**, no case in which a ~~defendant~~ **[Defendant]** is charged with a class A misdemeanor or felony shall be continued for arraignment to a date less than thirty (30) days before trial.

(e) Gerstein Determination. If the ~~defendant~~ **[Defendant]** was arrested without a warrant and is held in custody, or if the ~~defendant~~ **[Defendant]** was arrested pursuant to a warrant that was not issued by a judge and is held in custody, the court shall require the ~~state~~ **[State]** to demonstrate probable cause for arrest. This determination may be made at the ~~circuit court district division~~ **[Circuit Court]** arraignment, but in any event, must be made within forty-eight hours of the ~~defendant's~~ **[Defendant's]** arrest, ~~Saturdays, Sundays and holidays excluded.~~ **[excluding weekends and holidays.]**

(1) The ~~state~~ **[State]** may present proof by way of sworn affidavit or by oral testimony. Oral testimony, if submitted, shall be under oath and recorded.

(2) The ~~defendant~~ **[Defendant]** does not have the right to be present, present evidence or cross-examine witnesses. The proceeding shall be non-adversarial.

(3) The court shall make a written finding on the issue of probable cause. The finding and the affidavit shall become part of the public record, shall be available to the ~~defendant~~ **[Defendant]** and must be filed with the appropriate court on the next business day.

(4) If a motion to seal the affidavit has been filed with the request for a Gerstein determination, the court shall rule on the motion to seal when ruling on the issue of probable cause.

(f) Copy of Complaint. No later than at the time of the first appearance in court, the ~~defendant~~ **[Defendant]** shall be provided with a copy of the ~~complaint~~ **[Complaint(s).]**

(g) Arraignments on Misdemeanors and Violations. The following procedures apply to arraignments on misdemeanors and violations.

(1) Any misdemeanor ~~complaint~~ **[Complaint]** filed with the court without specification of the classification shall be presumed to be a class B misdemeanor unless specified by law or unless the State files a ~~notice of intent to seek class A misdemeanor penalties~~ **[Notice of Intent to Seek Class A Misdemeanor Penalties form]** before or at the time of arraignment **[with proof that a copy was provided to the Defendant by the State]**. ~~Such notice shall be on a court-approved form.~~

(2) If the ~~defendant~~ **[Defendant]** is charged with a **[felony,]** misdemeanor or violation, the court shall inform the ~~defendant~~ **[Defendant]** of the nature of the charges, the possible penalties, **[the privilege against self-incrimination, and]** the right to retain counsel~~, and in~~ **[. In felony and]** class A misdemeanor cases, the **[court shall inform the Defendant of the]** right to have an attorney appointed by the court pursuant to Rule 5 if the ~~defendant~~ **[Defendant]** is unable to afford an attorney.

[(A) For cases with a felony charge(s), the court shall enter a no plea on the felony charge(s) and the felony charge(s) shall be scheduled for a probable cause hearing.]

[(B) For cases without a felony charge(s) the] ~~The~~ ~~defendant~~ **[Defendant]** shall be asked to enter a plea of guilty, not guilty, or, with the consent of the court, nolo contendere. If a ~~defendant~~ **[Defendant]** refuses to plead or if a court refuses to accept a plea of guilty **[or nolo contendere,]** the court shall enter a plea of not guilty. Upon entry of a plea of not guilty, the case shall be scheduled for trial.

(h) ~~Circuit Court District Division Appearance on Felonies. If the defendant is charged with a felony, the defendant shall not be called upon to plead. The court shall inform the defendant of the nature of the charges, the possible penalties, the privilege against self-incrimination, the right to retain counsel, and the right to have an attorney appointed by the court pursuant to Rule 5 if the defendant is unable to afford an attorney. The court shall inform the defendant of the right to a probable cause hearing that will be conducted pursuant to Rule 6. If the defendant is represented by counsel, and if the State and defense notify the court that each is satisfied with the terms of bail, the arraignment may be continued until the probable cause hearing.~~

(i) **[h]** The court may issue a bench warrant for the arrest of any ~~defendant~~ **[Defendant]** who **[, after receiving notice of the hearing date,]** fails to appear on the designated date

for ~~his~~ **[their]** appearance, or who fails to answer by waiver or who fails to comply with any order of the Court.

Comment

Rule 4(e) provides for a detention hearing to satisfy the Fourth Amendment requirements as set forth in County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991), and Gerstein v. Pugh, 420 U.S. 103 (1975).

Rule 5. Appearance and Appointment of Counsel in Circuit Court-District Division and Superior Court

(a) In any case where a person is arrested for a class A misdemeanor and/or felony and appears before a bail commissioner, prior to the ~~defendant's~~ **[Defendant's]** release or detention, the bail commissioner shall provide the ~~defendant~~ **[Defendant]** with oral and written notice that, if ~~he or she is~~ **[they are]** unable to afford counsel, counsel will be appointed prior to that arraignment, if requested, subject to the ~~state's~~ **[State's]** right of reimbursement for expenses related thereto.

In any case where a person arrested for a class A misdemeanor is released with a written summons, the summons shall provide the defendant with written notice that, if ~~he or she is~~ **[they are]** unable to afford counsel, counsel will be appointed prior to the arraignment, if requested, subject to the ~~state's~~ **[State's]** right of reimbursement for expenses related thereto. The summons shall also provide the person with written notice of the process for obtaining court-appointed counsel.

(b) In any case in which a ~~defendant~~ **[Defendant]** appears before a bail commissioner pursuant to paragraph a, the ~~defendant~~ **[Defendant]** shall also be provided with a Request for a ~~lawyer~~ **[Lawyer]** form (financial statement) in order to apply for counsel at arraignment. The bail commissioner shall request the ~~defendant~~ **[Defendant]** to complete the Request for a ~~lawyer~~ **[Lawyer]** form prior to ~~his or her~~ **[their]** release or detention, in which case the bail commissioner shall forward the Request for a ~~lawyer~~ **[Lawyer]** form to the court or the ~~defendant~~ **[Defendant]** may return the Request for a ~~lawyer~~ **[Lawyer]** form directly to the court in which ~~his or her~~ **[their]** arraignment is scheduled. If the ~~defendant~~ **[Defendant]** is financially eligible, counsel shall be appointed within 24 hours, excluding weekends and holidays, from the date of the receipt of the request by the court but not later than the filing of the ~~complaint~~ **[Complaint]**. The court shall inform appointed counsel immediately of the appointment (1) by telephone, facsimile or electronically if the ~~defendant~~ **[Defendant]** is detained or (2) by telephone, electronically or by first-class mail if the ~~defendant~~ **[Defendant]** is not detained.

Nothing herein shall prevent a ~~defendant~~ **[Defendant]** charged with a class A misdemeanor or felony and who is unable to afford counsel from requesting counsel at any time after arrest by completing a Request for a ~~lawyer~~ **[Lawyer]** form and submitting it to the court having jurisdiction over the matter. The court shall act on the request for counsel within 24 hours, excluding weekends and holidays, from the date the request is submitted but not later than the filing of the ~~complaint~~ **[Complaint]**. If the ~~defendant~~ **[Defendant]** is financially eligible, the court shall inform counsel immediately of the appointment (1) by telephone, facsimile or electronically if the ~~defendant~~ **[Defendant]** is detained or (2) by telephone, electronically or by first-class mail if the ~~defendant~~ **[Defendant]** is not detained.

(c) In any case where the ~~defendant~~ **[Defendant]** is charged with a class A misdemeanor or felony and appears at arraignment without counsel, the court shall inform the ~~defendant~~ **[Defendant]**, in writing or on the record, of the offense with which ~~he is~~**[they are]** charged and the possible penalties, of ~~his or her~~**[their]** privilege against self-incrimination, ~~his or her~~**[their]** right to be represented by counsel throughout the case, and that if ~~he or she is~~ **[they are]** unable to afford counsel, counsel will be appointed, if requested, subject to the ~~state's~~ **[State's]** right to reimbursement for expenses related thereto.

Except as provided in subsection (f) or (g) of this rule, unless the ~~defendant~~**[Defendant]** waives the presence of counsel at the arraignment in writing or on the record, the court shall take no other action at the arraignment aside from (1) advising the ~~defendant~~ **[Defendant]** of the charges against ~~him or her~~ **[them]** and entering a ~~pro forma~~ plea of not guilty (or no plea ~~in~~**[on]** a felony ~~case~~ **[charge]** ~~if filed in the circuit court~~) on the ~~defendant's~~**[Defendant's]** behalf, and (2) informing the ~~defendant~~**[Defendant]** that the issue of bail and any other issue requiring an adversary hearing will not be addressed until ~~his or her~~ **[their]** counsel is present.

(d) If a ~~defendant~~ **[Defendant]** who is not detained indicates a financial inability to obtain counsel and a desire for appointed counsel, the court shall instruct the ~~defendant~~ **[Defendant]** to complete a Request for a ~~lawyer~~ **[Lawyer]** form prior to leaving the courthouse and, if eligible, counsel shall be appointed no later than 24 hours from the date of the request. The court shall inform counsel of the appointment as soon as reasonably possible by telephone, facsimile or electronically. A bail hearing shall be scheduled at the request of the ~~defendant~~ **[Defendant]**.

(e) If a ~~defendant~~ **[Defendant]** who is detained indicates a financial inability to obtain counsel and a desire for appointed counsel, the court shall instruct the ~~defendant~~ **[Defendant]** to complete a Request for a ~~lawyer~~ **[Lawyer]** form immediately and, if eligible, counsel shall be appointed immediately. The court shall inform counsel of the appointment immediately in person, if present, or by telephone or electronically if counsel for the detained ~~defendant~~ [**Defendant]** is unavailable at the court at the time of the arraignment. A bail hearing, at which the ~~defendant's~~ **[Defendant's]** counsel is present, shall be held within 24 hours of a written or oral request for same made by the ~~defendant's~~ **[Defendant's]** counsel, ~~weekends and holidays excluded~~ **[excluding weekends and holidays]**.

(f) Nothing in this rule shall prevent the court from reducing a detained or non-detained ~~defendant's~~ **[Defendant's]** bail or conditions of bail without ~~his or her~~ **[their]** counsel present, but if the ~~state~~ **[State]** opposes such reduction, it shall have the right to be heard in argument before the court makes a decision. Any such reduction shall be without prejudice to the ~~defendant's~~ **[Defendant's]** right to a further bail hearing, with counsel present, as specified in subsections (d) or (e) of this rule.

(g) Nothing in this rule shall prevent the court from increasing a detained or non-detained ~~defendant's~~ **[Defendant's]** bail or conditions of bail without the presence of counsel when the court makes a specific finding that such increase is necessary to reasonably assure the appearance of the ~~defendant~~ **[Defendant]** as required or that release without such increase will endanger the safety of the ~~defendant~~ **[Defendant]** or any other person or the community. Any such increase in bail or conditions of bail shall be without prejudice to the ~~defendant's~~ **[Defendant's]** right to a further bail hearing, with counsel present, as specified in subsections (d) or (e) of this rule.

(h) Withdrawal. Except as is provided in (i) below, no attorney shall be permitted to withdraw an appearance after the case has been assigned for trial or hearing, except upon motion granted by the court for good cause shown, and on such terms as the court may order. Any motion to withdraw filed by counsel shall set forth the reasons for the motion but shall be effective only upon approval of the court. A factor which may be considered by the court in determining whether good cause to withdraw has been shown is the client's failure to pay for the attorney's services. Whenever the court approves the withdrawal of

appointed defense counsel, the court shall appoint substitute counsel forthwith and notify the ~~defendant~~ **[Defendant]** of said appointment.

(i) Withdrawal of Appointed Counsel. If appointed counsel in a criminal matter must withdraw due to a conflict of interest as defined by Rules 1.7(a), 1.9(a) and (b), and/or 1.10 (a), (b), and (c) of the New Hampshire Rules of Professional Conduct, counsel shall forward a Notice of Withdrawal to the court and substitute counsel shall be appointed forthwith. Court approval of a withdrawal shall not be required in this circumstance unless the Notice of Withdrawal is filed less than twenty days from the date of a trial, in which case court approval shall be required. Automatic withdrawal shall not be allowed and court approval shall be required if the basis for withdrawal is a breakdown in the relationship with the client, the failure of the client to pay legal fees, or any other conflict not specifically set forth in Rules 1.7(a), 1.9(a) and (b), and/or 1.10(a), (b), and (c) of the New Hampshire Rules of Professional Conduct.

(j) Automatic Withdrawal of Court-Appointed Counsel. In all criminal cases, the appearance of counsel for the ~~defendant~~ **[Defendant]** shall be deemed to be withdrawn thirty days after sentence is imposed unless the sentence imposed was a deferred sentence or unless a post-sentencing motion is filed within said thirty-day period. Where a deferred sentence is imposed, the appearance of counsel for the ~~defendant~~ **[Defendant]** shall be deemed to be withdrawn thirty days after the deferred sentence is brought forward or suspended. Where a post-sentencing motion is filed within thirty days after imposition of sentence, the appearance of counsel for the ~~defendant~~ **[Defendant]** shall be deemed to be withdrawn thirty days after the court rules on said motion. Provided, however, that in any criminal case in which an appeal to the supreme court is filed, trial counsel shall remain responsible for representing the ~~defendant~~ **[Defendant]** in the supreme court pursuant to Supreme Court Rule 32.

(k) Continuity of Counsel in Circuit and Superior Courts. Where a ~~defendant~~ **[Defendant]** in a criminal case has filed a ~~financial affidavit~~ **[Request for a Lawyer form]** and has been determined to be eligible for court-appointed counsel in the ~~circuit court~~ **[Circuit Court]**, the ~~defendant~~ **[Defendant]** shall not be required to file a new ~~financial affidavit~~ **[Request for a Lawyer form]** upon the appeal or ~~transfer~~ **[bind over]** of the same case to the ~~superior court~~ **[Superior Court]** unless facts are brought to the court's attention indicating that there has been a substantial change in the ~~defendant's~~ **[Defendant's]** financial circumstances. Notwithstanding subsection (j) of this rule, when counsel appears for a ~~defendant~~ **[Defendant]** in a criminal case in the ~~circuit court~~ **[Circuit Court]**, said appearance shall be deemed to continue upon any appeal or ~~transfer~~ **[bind over]** of the same case to the ~~superior court~~ **[Superior Court]** and until the case is finally disposed of in the trial courts.

(l) Multiple Representation

(1) A lawyer shall not represent multiple ~~defendants~~ **[Defendants]** if such representation would violate the Rules of Professional Conduct.

(2) A lawyer shall not be permitted to represent more than one ~~defendant~~ **[Defendant]** in a criminal action unless:

(A) The lawyer investigates the possibility of a conflict of interest early in the proceedings and discusses the possibility with each client; and

(B) The lawyer determines that a conflict is highly unlikely; and

(C) The lawyer notifies the court of the multiple representation and a hearing on the record is promptly held. The court shall inquire into all relevant facts, including, but not limited to, the following:

(i) Evidence of the lawyer's discussion of the matter with each client;

(ii) Evidence of each client's informed consent to multiple representation based on the client's understanding of the entitlement to conflict-free counsel;

(iii) A written or oral waiver by each client of any potential conflict arising from the multiple representation; and

(D) The court finds by clear and convincing evidence that the potential for conflict is very slight.

(m) Counsel of Record; Bail. An attorney shall not post bail or assume any bail obligations in a case in which the attorney is counsel of record.

Rule 6. Probable Cause Hearing

(a) Circuit Court-District Division Probable Cause Hearing

~~(1)~~ Jurisdiction. A probable cause hearing shall be scheduled in accordance with this rule in any case which is beyond the trial jurisdiction of the ~~circuit court-district division~~ **[Circuit Court- District Division]** and in which the ~~defendant~~ **[Defendant]** has not been indicted.

~~(2)~~ Scheduling. **[If the Defendant is in custody on the instant charge(s),]** ~~The~~ **[the]** court shall hold a probable cause hearing within ten **[(10)]** days **[, excluding weekends and holidays,]** following the **[date of the]** arraignment ~~if the defendant is in custody~~. **[If the Defendant is not in custody on the instant charge(s),]** ~~The~~ **[the]** court shall hold the hearing within ~~twenty~~**[thirty (30)]** days **[, excluding weekends and holidays, following the date]** of the arraignment ~~if the defendant is not in custody~~.

[If the Circuit Court receives verification [copy(ies) of Indictment(s) with the corresponding Circuit Court case number and charge ID appearing on said document(s)] that the Defendant has been indicted on a pending felony Complaint(s), the Circuit Court will not hold the probable cause hearing for the indicted charge(s). The probable cause hearing shall remain scheduled for any unindicted felony charge(s).]

~~The probable cause hearing shall not be held if the defendant is notified before the hearing of an indictment on the charge that would have been the subject of the hearing or if the clerk of the Circuit Court receives reliable information that the defendant has been indicted on the charge which would have been the subject of the hearing.~~ A probable cause hearing may be adjourned for reasonable cause.

~~(3)~~ Notice to Defendant. The court shall inform the ~~defendant~~ **[Defendant]** of the ~~complaint~~ **[Complaint(s)]**, the right to counsel, and the right to a probable cause hearing. The court shall also tell the ~~defendant~~ **[Defendant]** that there is no obligation to make a statement and that any statement may be used against the ~~defendant~~ **[Defendant]**.

~~(4)~~ Evidence. The Rules of Evidence shall not apply at the hearing. The ~~defendant~~ **[Defendant]** may cross-examine adverse witnesses, testify and introduce evidence. If the ~~defendant~~ **[Defendant]** elects to be examined, the ~~defendant~~ **[Defendant]** shall be sworn, but it shall always be a sufficient answer that the ~~defendant~~ **[Defendant]** declines to answer the question; and if at any time the defendant declines to answer further, the examination shall cease. The parties may request sequestration of the witnesses.

~~(5)~~ Finding of Probable Cause. If the **[Circuit]** ~~court~~ **[Court]** determines that there is probable cause to believe that a charged offense**[(s)]** has**[/have]** been committed and the ~~defendant~~ **[Defendant]** committed it**[/them]**, the court shall ~~hold the defendant to answer in superior court~~ **[bind over such charged offenses, together with any directly related misdemeanors and violations to the Superior Court which shall have jurisdiction]**.

~~(6)~~ Finding of No Probable Cause. If the ~~court~~ **[Circuit Court]** determines that there is no probable cause to believe that a charged offense**[(s)]** has**[/have]** been committed or that the ~~defendant~~ **[Defendant]** committed it**[/them]**, the court shall ~~dismiss the complaint and discharge the defendant~~ **[make a finding of no probable cause found on that/those charged offense(s)]**. The **[finding of no probable cause]** ~~discharge of the defendant~~ shall

not preclude the State from instituting a subsequent prosecution for the same offense**[(s)]** or another offense.

~~(7)~~ Waiver. A ~~defendant~~ **[Defendant]** may waive the right to a probable cause hearing. The waiver shall be in writing. **[The court shall make a finding of probable cause waived on the charged offense(s). The court shall bind over such charged offenses, together with any directly related misdemeanors and violations to the Superior Court which shall have jurisdiction.]**

~~(8)~~ Upon ~~indictment~~ **[Indictment,]** ~~or~~ finding of probable cause, **[or waiver of probable cause,]** the **[felony level]** ~~complaint~~ **[Complaint(s) (which were indicted/probable cause found or waived) and any misdemeanor and violation level charges that are directly related to those felonies]** shall be so marked~~,~~ **[. Within ten (10) days of the finding,]** ~~and~~ the clerk of the Circuit Court shall thereafter ~~send~~ **[bind over the charge(s)]** to the clerk of the Superior Court ~~any bail or bond pertaining thereto, along with a copy of such complaint where possible~~.

(b) ~~Superior Court~~

~~(1) A defendant may challenge probable cause during the period from arrest to indictment by motion requesting a probable cause hearing under the following conditions:~~

~~(A) A complaint has been filed in superior court;~~

~~(B) The defendant has not been indicted by the grand jury; and~~

~~(C) The defendant asserts a claim that a material element of the charge is without factual basis or that the charge is legally insufficient to constitute a felony offense.~~

~~(2) Upon review of the motion, the court shall determine whether a hearing is necessary to assist the court in its determination of probable cause. A request for a hearing shall not be unreasonably denied. If a hearing is scheduled, it shall be held as soon as the court docket permits, but in any event within 10 days of filing of the motion if the defendant is incarcerated and within 20 days of the filing of the motion if the defendant is not incarcerated.~~

~~(3) A probable cause hearing shall be scheduled:~~

~~(A) If an arrest is supported by an affidavit or statement filed under oath that was filed under seal, and the affidavit remains under seal at the time of the request for a probable cause hearing, or~~

~~(B) If a court determines discovery should not be provided in accordance with the timelines set forth in RSA 592-B:6, II and the defendant has not been indicted.~~

~~(4) If a hearing is held, the state shall bear the burden of proving there is probable cause to believe that a felony has been committed and that the person charged has committed it. At the hearing, the accused may cross-examine witnesses and present evidence.~~

~~(5) Finding of Probable Cause. If the court determines that there is probable cause to believe that a charged offense has been committed and the defendant committed it, the court shall hold the defendant to answer for action by the grand jury.~~

~~(6) Finding of No Probable Cause. If the court determines that there is no probable cause to believe that a charged offense has been committed or that the defendant committed it, the court shall dismiss the complaint and discharge the defendant. The discharge of the~~

~~defendant shall not preclude the state from instituting a subsequent prosecution for the same offense or another offense.~~

Comment

A preliminary examination allows a ~~defendant~~ **[Defendant]** to challenge the decision of the prosecuting authorities to limit the ~~defendant's~~ **[Defendant's]** liberty pending consideration of the matter by a grand jury. State v. Arnault, 114 N.H. 216 (1974); Jewett v. Siegmund, 110 N.H. 203 (1970). The preliminary examination is not a trial on guilt or innocence. It is merely an examination to determine if the State can establish that there is enough evidence to proceed to trial. In essence, it is a hearing to determine whether probable cause exists. See State ex rel McLetchie v. Laconia Dist. Court, 106 N.H. 48 (1964).

Courts and parties should note that RSA 596-A:3 requires the court to caution a ~~defendant~~ [**Defendant]** about the right to counsel and the right to remain silent.

Rule 7. Definitions

[(a) Circuit Court Complaint. The initiating charging document filed in Circuit Court for felonies, misdemeanors, and violations.]

~~(a)~~**[(b)]** Superior Court ~~Complaint~~ **[Information]**. ~~The initiating~~ **[A]** charging document filed in ~~superior court~~**[Superior Court]** for ~~felonies and~~ misdemeanors **[and violations]** over which the ~~superior court~~ **[Superior Court]** has jurisdiction.

~~(b)~~ **[(c)]** Indictment. **[An Indictment shall be returned by a grand jury and shall be prosecuted in Superior Court.]** Felonies and misdemeanors punishable by a term of imprisonment exceeding one year shall be charged by an ~~indictment~~ **[Indictment]**. Misdemeanors punishable by a term of imprisonment of one year or less may be charged in an ~~indictment~~ **[Indictment]**. ~~An indictment shall be returned by a grand jury and shall be prosecuted in superior court.~~ **[An Indictment must indicate either the corresponding Circuit Court case number and charge ID or the words "Direct Indictment" if no Circuit Court case exists.]**

~~(c)~~ Misdemeanor Appealed to Superior Court. When a **[class A]** misdemeanor conviction is appealed to ~~superior court~~ **[Superior Court]**, the charging document is the **[Circuit Court]** ~~complaint~~ **[Complaint]** that was filed in the ~~circuit court district division~~ **[Circuit Court-District Division]**.

Rule 8. The Grand Jury

(a) Summoning Grand Juries. The ~~superior court~~ **[Superior Court]** shall order a grand jury to be summoned and convened at such time and for such duration as the public interest requires, in the manner prescribed by law. The grand jury shall consist of no fewer than twelve nor more than twenty-three members. The grand jury shall receive, prior to performing its duties, instructions relative thereto and shall be sworn in accordance with law. Such instructions may be given by a justice of the ~~superior court~~ **[Superior Court]**, by utilization of a prerecorded audio or video presentation created for this purpose, or by a combination of use of a recording and instruction by a justice.

(b) Conduct of Proceedings

(1) State's counsel or the foreperson of the grand jury shall swear and examine witnesses. The State shall present evidence on each matter before the grand jury.

(2) The grand jury's role is to diligently inquire into possible criminal conduct. The grand jury may also consider whether to return an indictment on a felony or misdemeanor.

(3) Upon request, a grand jury witness shall be given reasonable opportunity to consult with counsel.

(4) If twelve or more grand jurors find probable cause that a felony or misdemeanor was committed, the grand jury should return an indictment.

(5) Upon application of the Attorney General or upon the court's own motion, a justice of the ~~superior court~~ **[Superior Court]** may authorize a stenographic record of the testimony of any witness before a grand jury to be taken by a sworn and qualified reporter. Disclosure of such testimony may be made only in accordance with Supreme Court Rule 52.

(6) A grand juror, interpreter, stenographer, typist who transcribes recorded testimony, attorney for the State, or any person to whom disclosure is made under paragraph (C) below, shall not disclose matters occurring before the grand jury, except:

(A) As provided by the Supreme Court rules;

(B) To an attorney for the State for use in the performance of such attorney's duties;

(C) To such state, local or federal government personnel as are deemed necessary by an attorney for the State to assist in the performance of such attorney's duty to enforce state criminal law;

(D) When so directed by a court in connection with a judicial proceeding;

(E) When permitted by the court at the request of an attorney for the State, when the disclosure is made by an attorney for the State to another grand jury in this state; or

(F) When permitted by a court at the request of an attorney for the State upon a showing that such matters may disclose a violation of federal criminal law or the criminal law of another state, to an appropriate official of the federal government or of such other state or subdivision of a state, for the purpose of enforcing such law.

(c) Notice to Defendant. If the grand jury returns a no true bill after consideration of a charge against a ~~defendant~~ **[Defendant]** who is incarcerated or is subject to bail conditions, the court shall immediately notify the ~~defendant~~ **[Defendant]** or counsel of record. If the

grand jury returns an ~~indictment~~ **[Indictment]**, the ~~defendant~~ **[Defendant]** shall be notified by mail unless the court issues a capias for the ~~defendant's~~ **[Defendant's]** arrest.

(d) Indictment.

(1) Case initiated in Circuit Court-District Division. The ~~superior court~~ **[Superior Court]** will dismiss without prejudice and vacate bail orders in all cases in which an ~~indictment~~ **[Indictment]** has not been returned ninety days after the matter is bound over, unless, prior to that time, the prosecution files a motion seeking an extension of time and explaining why the extension is necessary.

(2) ~~Case initiated in Superior Court. The superior court will dismiss without prejudice all felony complaints and enhanced misdemeanors in which an indictment has not been returned within 90 days of the complaint being filed, unless, prior to that time, the prosecution files a motion seeking an extension of time and explaining why the extension is necessary or the defendant waives speedy indictment in writing. If no other charges remain pending in the case after dismissal the court shall vacate all bail orders.~~

(3) ~~If a warrant has issued for the defendant's failure to appear at arraignment on complaints filed before indictment, or any other pre-indictment hearing in superior court, the indictment deadline in paragraph (2) shall not apply. The superior court will dismiss without prejudice all felony complaints and enhanced misdemeanors if the defendant has not been indicted within 60 days after the defendant has appeared in superior court to answer to the charge. If no other charges remain pending in the case after dismissal the court shall vacate all bail orders.~~

Comment

Rule (b)(6) restates the traditional rule of grand jury secrecy. This paragraph is based on Federal Rule of Criminal Procedure 6 and prohibits grand jurors, interpreters, stenographers, typists who transcribe recorded testimony or an attorney for the State, or any person to whom disclosure is made under the rule, from disclosing information received except under a few narrow circumstances. It is important, however, to note that this rule does not bar a witness from later revealing the substance of the witness's testimony before a grand jury.

Rule 9. Waiver of Indictment

An offense that is punishable by a term of imprisonment exceeding one year may be prosecuted by ~~a complaint~~ **[an Information]** with a ~~waiver~~ **[Waiver]** of ~~indictment~~ **[Indictment]**. Waiver of ~~indictment~~ **[Indictment]** is not permitted for offenses punishable by death. If the charge proceeds by a ~~waiver~~ **[Waiver]** of ~~indictment~~ **[Indictment]**, the ~~defendant~~ **[Defendant]** shall be informed of the nature of the charge and the right to have the charge presented to a grand jury. The waiver must be in open court and on the record.

Rule 10. Arraignment in Superior Court

(a) Arrest on a ~~Charge Originating~~ **[Direct Indictment]** in Superior Court. Any person who is arrested on a warrant issued pursuant to an ~~indictment~~ **[Indictment]** ~~or complaint~~ and who is not released on bail set by a bail commissioner shall be taken before the ~~superior court~~ **[Superior Court]** without unnecessary delay. Such persons shall be taken before the ~~superior court~~ **[Superior Court]** no later than 24 hours after the arrest, Saturdays, Sundays and holidays excepted, or no later than 36 hours after arrest if arrested between 8:00 a.m. and 1:00 p.m. and the person's attorney is unable to attend an arraignment on the same day, Saturdays, Sundays, and holidays excepted. Such persons shall be entitled to a bail hearing at that time. If the person is released prior to being taken before the ~~superior court~~ **[Superior Court]**, the person shall be directed to appear no more than twenty days after arrest, in ~~superior court~~ **[Superior Court]** for arraignment at a stated time and date.

(b) ~~Probable Cause Determination. If the defendant was arrested without a warrant and is held in custody, or if the defendant was arrested pursuant to a warrant that was not issued by a judge and is held in custody, the court shall require the state to demonstrate, by affidavit or by statement filed under oath if filed electronically, probable cause for arrest. This determination must be made within forty-eight hours of the defendant's arrest Saturday, Sunday and holidays excepted.~~

~~(1) The court shall make a written finding on the issue of probable cause. The written finding and affidavit or statement filed under oath if filed electronically shall become part of the public record, shall be available to the defendant, and must be filed with the appropriate court on the next business day.~~

~~(2) If a motion to seal the affidavit or statement filed under oath if filed electronically has been filed with the request for a probable cause determination, the court shall rule on the motion to seal when ruling on the issue of probable cause.~~

(c) ~~Copy of complaint. The complaint shall be filed in Superior Court by the county attorney, attorney general or their designee 48 hours prior to arraignment, for non-incarcerated defendants, and no later than arraignment for incarcerated defendants. The defendant shall be provided with a copy of the complaint.~~

(d) **[(b)]** Arraignment. Arraignment shall be conducted in open court. The court shall read the ~~indictment~~ **[Indictment]** or ~~complaint~~ **[Information, if any,]** to the ~~defendant~~ **[Defendant]** or state to the ~~defendant~~ **[Defendant]** the substance of the charge. If the ~~defendant~~ **[Defendant]** appears without counsel, the court shall inform the ~~defendant~~ **[Defendant]** of the possible penalties, the privilege against self-incrimination, the right to retain counsel, and the right to have an attorney appointed by the court pursuant to Rule 5 if the ~~defendant~~ **[Defendant]** is unable to afford an attorney. The ~~defendant~~ **[Defendant]** shall be called upon to plead to the charge, unless unrepresented by counsel, in which case a plea of not guilty shall be entered on the ~~defendant's~~ **[Defendant's]** behalf. If a ~~defendant~~ **[Defendant]** refuses to plead or if a court refuses to accept a plea of guilty, the court shall enter a plea of not guilty. Upon entry of a plea of not guilty, the case shall be scheduled for a dispositional conference.

(e) **[(c)]** Waiver of Arraignment. A ~~defendant~~ **[Defendant]** who is represented by an attorney may enter a plea of not guilty and waive formal arraignment as follows. Before the arraignment hearing, the attorney shall file a written statement signed by the ~~defendant~~

[Defendant] certifying that the ~~defendant~~ **[Defendant]** has reviewed a copy of the ~~indictment~~ **[Indictment]** or ~~complaint~~ **[Information]**. The attorney shall further certify that the ~~defendant~~ **[Defendant]** read the ~~indictment~~ **[Indictment]** or ~~complaint~~ **[Information]** or that it was read to the ~~defendant~~ **[Defendant]**, and that the defendant understands the substance of the charge and the possible penalties, waives formal arraignment, and pleads not guilty to the charge.

(f) **[(d)]** Arraignment on Misdemeanor Appeal. No arraignment shall be held on a misdemeanor appeal. Upon the filing of a misdemeanor appeal in ~~superior court~~ **[Superior Court]**, a hearing notice consistent with these rules shall be issued. The date of the issuance of a hearing notice shall be the equivalent of an arraignment and entry of not guilty plea for the purpose of determining deadlines.

Rule 11. Pleas

(a) Circuit Court-District Division

(1) Violations. A plea of guilty or nolo contendere to a violation may be accepted by the court without formal hearing unless the violation carries a statutorily enhanced penalty upon a subsequent conviction subjecting the ~~defendant~~ **[Defendant]** to incarceration.

(2) Plea by Mail. In all cases in which a ~~defendant~~ **[Defendant]** may enter a plea by mail pursuant to RSA 262:44, the ~~defendant~~ **[Defendant]** may enter a plea by mail in accordance with the procedures provided by RSA 502-A:19-b.

(3) Misdemeanors and Enhanced Violations. Before accepting a plea of guilty or, with the consent of the court, a plea of nolo contendere, to any misdemeanor, or to a violation that requires the ~~defendant~~ **[Defendant]** to appear for arraignment and that carries a statutorily enhanced penalty upon a subsequent conviction, the court shall personally address the ~~defendant~~ **[Defendant]** and determine on the record that:

(A) There is a factual basis for the plea;

(B) The ~~defendant~~ **[Defendant]** understands the crime charged and the factual basis of that charge;

(C) The ~~defendant's~~ **[Defendant's]** plea is knowing, intelligent and voluntary;

(D) The ~~defendant's~~ **[Defendant's]** plea is not the result of any unlawful force, threats or promises; and

(E) The ~~defendant~~ **[Defendant]** understands and waives the statutory and constitutional rights as set forth in the Acknowledgement and Waiver of Rights form.

(4) Acknowledgment and Waiver of Rights Forms. The appropriate Acknowledgment and Waiver of Rights form shall be read and signed by the ~~defendant~~ **[Defendant]**, counsel, if any, and the presiding justice.

(b) Superior Court

(1) Deadlines for Filing Plea Agreements. The court may establish deadlines for the filing of plea agreements.

(2) Pleas. Before accepting a plea of guilty or, with the consent of the court, a plea of nolo contendere, to any felony, misdemeanor, or violation that carries a statutorily enhanced penalty upon a subsequent conviction, the court shall personally address the ~~defendant~~ **[Defendant]** and determine on the record that:

(A) There is a factual basis for the plea;

(B) The ~~defendant~~ **[Defendant]** understands the crime charged and the factual basis of that charge;

(C) The ~~defendant's~~ **[Defendant's]** plea is knowing, intelligent and voluntary;

(D) The ~~defendant's~~ **[Defendant's]** plea is not the result of any unlawful force, threats or promises; and

(E) The ~~defendant~~ **[Defendant]** understands and waives the statutory and constitutional rights as set forth in the Acknowledgement and Waiver of Rights form.

(3) Acknowledgment and Waiver of Rights Forms. The appropriate Acknowledgment and Waiver of Rights form shall be read and signed by the ~~defendant~~ **[Defendant]**, counsel, if any, and the presiding justice.

(c) Negotiated Pleas – Circuit Court-District Division and Superior Courts

(1) Permissibility. If the court accepts a plea agreement, the sentence imposed by the court shall not violate the terms of the agreement.

(2) Court's Rejection of Negotiated Plea. If the court rejects a plea agreement, the court shall so advise the parties, and the ~~defendant~~ **[Defendant]** shall be afforded the opportunity to withdraw the plea of guilty or nolo contendere.

(3) Sentence Review. See Rule 29(k)(14)(c).

Comment

This rule should be read in conjunction with Rule 29 regarding sentencing.

Rule 11(a)(3) and (a)(4), applicable to ~~circuit court~~ **[Circuit Court]** pleas, and Rule 11(b)(2) and (b)(3), applicable to ~~superior court~~ **[Superior Court]** pleas, address the colloquy required between the court and ~~defendant~~ **[Defendant]** in cases where incarceration upon conviction is possible. In sum, these provisions require the record to reflect that a factual basis for the charge exists; the defendant understands the crime charged and its factual basis; the plea is knowing, intelligent, and voluntary; the plea is not the result of threats or promises; and the ~~defendant~~ **[Defendant]** appreciates the constitutional rights being waived as part of the plea. In practice, the factual basis for the charge referred to in Rule 11(a)(3)(A) and (b)(2)(A) is provided by the State in its offer of proof during the plea hearing. The rule reflects the constitutional requirement that the trial court affirmatively inquire, on the record, into the ~~defendant's~~ **[Defendant's]** volition in entering the plea. Boykin v. Alabama, 395 U.S. 238 (1969); Richard v. MacAskill, 129 N.H. 405 (1987). For a plea to be knowing, intelligent, and voluntary, the ~~defendant~~ **[Defendant]** must understand the essential elements of the crime to which a guilty plea is being entered. State v. Thornton, 140 N.H. 532, 537 (1995). To find that a plea has been intelligently made, the court must fully apprise the ~~defendant~~ **[Defendant]** of the consequences of the plea and the possible penalties that may be imposed. State v. Roy, 118 N.H. 2 (1978); State v. Manoly, 110 N.H. 434 (1974). A ~~defendant~~ **[Defendant]** need not be apprised, however, of all possible collateral consequences of the plea. State v. Elliott, 133 N.H. 190 (1990); see State v. Chace, 151, N.H. 310, 313 (2004) (~~defendant~~ **[Defendant]** need not be advised that loss of license will be collateral consequence of pleading guilty to DWI). In Padilla v. Kentucky, 559 U.S. 356 (2010), the Supreme Court made clear counsel's obligation to ensure that a ~~defendant~~ **[Defendant]** understands the deportation implications, if any, of a conviction. If the record does not reflect that a plea is voluntarily and intelligently made, it may be withdrawn as a matter of federal constitutional law. Boykin, 395 U.S. at 238.

Rule 12. Discovery

(a) Circuit Court-District Division

(1) At the ~~defendant's~~ **[Defendant's]** first appearance before the court, the court shall inform the ~~defendant~~**[Defendant]** of ~~his or her~~ **[their]** ability to obtain discovery from the State. Upon request, ~~in misdemeanor and violation level cases~~, the ~~prosecuting attorney~~ **[State]** shall furnish the ~~defendant~~ **[Defendant]** with the following:

(A) A copy of records of statements or confessions, signed or unsigned, by the ~~defendant~~ **[Defendant]**, to any law enforcement officer or agent;

(B) A list of any tangible objects, papers, documents or books obtained from or belonging to the ~~defendant~~ **[Defendant]**; and

(C) A statement as to whether or not the foregoing evidence, or any part thereof, will be offered at the trial.

(2) Not less than fourteen days prior to trial, the State shall provide the ~~defendant~~ **[Defendant]** with:

(A) a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, it anticipates introducing at trial; and

(B) all exculpatory materials required to be disclosed pursuant to the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, including State v. Laurie, 139 N.H. 325 (1995).

(3) Not less than seven days prior to trial, the ~~defendant~~ **[Defendant]** shall provide the State with a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, the ~~defendant~~ **[Defendant]** anticipates introducing at trial.

(4) Except for good cause shown, not less than fourteen days prior to trial, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must provide the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose. The party shall also provide access to all statements, reports or other materials that the proponent of Rule 404(b) evidence will rely on to prove the commission of such other crimes, wrongs or acts.

(5) Sanctions for Failure to Comply. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including but not limited to:

(A) ordering the party to provide the discovery not previously provided;

(B) granting a continuance of the trial or hearing;

(C) prohibiting the party from introducing the evidence not disclosed;

(D) assessing the costs and attorneys fees against the party or counsel who has violated the terms of this rule.

(b) Superior Court. The following discovery and scheduling provisions shall apply to all criminal cases in the superior court unless otherwise ordered by the presiding justice.

(1) Pretrial Disclosure by the State. ~~If a case is initiated in superior court, the State shall provide the materials specified in RSA 592-B:6. In addition,~~ **[If a case is originated by Direct Indictment,** within forty-five calendar days after the entry of a not guilty plea by the ~~defendant~~ **[Defendant]**, the State shall provide the ~~defendant~~ **[Defendant]** with the materials specified below. If a case is originated in ~~circuit court-district division~~ **[Circuit Court-District Division]**, within ten calendar days after the entry of a not-guilty plea by the ~~defendant~~ **[Defendant]**, the State shall provide the ~~defendant~~ **[Defendant]** with the materials specified below.

(A) A copy of all statements, written or oral, signed or unsigned, made by the ~~defendant~~ **[Defendant]** to any law enforcement officer or the officer's agent which are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(B) Copies of all police reports; statements of witnesses; and to the extent the State is in possession of such materials, results or reports of physical or mental examinations, scientific tests or experiments, or any other reports or statements of experts, as well as a summary of each expert's qualifications, with the exception of drug testing results from the New Hampshire State Forensic Laboratory, which shall be provided within ten court days from the date of indictment, or such other date as may be authorized in the dispositional conference order.

(C) The ~~defendant's~~ **[Defendant's]** prior criminal record.

(D) Copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places that are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(E) All exculpatory materials required to be disclosed pursuant to the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, including State v. Laurie, 139 N.H. 325 (1995).

(2) Pretrial Disclosure by the Defendant

Not less than sixty calendar days prior to jury selection if the case originated in Superior Court or not less than thirty calendar days prior to jury selection if the case originated in Circuit Court-District Division or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the ~~defendant~~ **[Defendant]** shall provide the State with copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the ~~defendant~~ **[Defendant]** as evidence at the trial or hearing.

(3) Dispositional Conferences. The purpose of the dispositional conference is to facilitate meaningful discussion and early resolution of cases.

(A) Unless the State does not intend to make a plea offer, in which case it shall so advise the ~~defendant~~ **[Defendant]** within the time limits specified herein, the State shall provide a written offer for a negotiated plea, in compliance with the Victim's Rights statute, RSA 21-M:8-k, to the defense, no less than fourteen (14) days prior to the dispositional conference. The defense shall respond to the State's offer no later than ten (10) days after receipt.

(B) The judge shall have broad discretion in the conduct of the dispositional conference.

(C) The State, ~~defendant~~ **[Defendant]**, and ~~defendant's~~ **[Defendant's]** counsel, if any, shall appear at the dispositional conference. The State and the ~~defendant~~ **[Defendant]** shall be

represented at the dispositional conference by an attorney who has full knowledge of the facts and the ability to negotiate a resolution of the case. Counsel shall be prepared to discuss the impact of known charges being brought against the ~~defendant~~ **[Defendant]** in other jurisdictions, if any.

(D) If a plea agreement is not reached at the dispositional conference, the matter shall be set for trial. The court may also schedule hearings on any motions discussed during the dispositional conference. Counsel shall be prepared to discuss their availability for trial or hearing as scheduled by the court.

(E) Evidence of conduct or statements made during the dispositional conference about the facts and/or merits of the case is not admissible as evidence at a hearing or trial.

(F) If the case may involve expert testimony from either party, both sides shall be prepared to address disclosure deadlines for: all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by the expert witness; a summary of each such expert's qualifications; rebuttal expert reports and qualifications; and expert depositions. Except for good cause shown, the failure of either party to set expert witness disclosure deadlines at the dispositional conference may be grounds to exclude the expert from testifying at trial.

(4) Exchange of Information Concerning Trial Witnesses

(A) Except for good cause shown,

(i) not less than 60 days prior to jury selection, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must provide the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose. The party shall also provide access to all statements, reports or other materials that the proponent of Rule 404(b) evidence will rely on to prove the commission of such other crimes, wrongs or acts.

(ii) not less than 45 days prior to jury selection, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must file a motion to admit such evidence. The motion must identify the evidence and articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose.

(iii) not less than 30 days prior to jury selection, a party shall file a motion to exclude evidence it believes constitutes Rule 404(b) evidence if no motion to admit the evidence has been filed by the opposing party. A motion to exclude filed pursuant to this provision must identify with specificity the evidence the party seeks to be excluded under Rule 404(b).

(B) Not less than twenty calendar days prior to the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the State shall provide the ~~defendant~~ **[Defendant]** with a list of the names of the witnesses it anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to paragraph (b)(1) of this rule, the State shall provide the ~~defendant~~ **[Defendant]** with all statements of witnesses the State anticipates calling at the trial or hearing. At this same time, the State also shall furnish the ~~defendant~~ **[Defendant]** with the results of New Hampshire criminal record checks for all of the State's trial or hearing witnesses other than those witnesses who are experts or law enforcement officers.

(C) Not later than ten calendar days before the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than two calendar days prior to such hearing, the ~~defendant~~ **[Defendant]** shall provide the State with a list of the names of the witnesses the ~~defendant~~ **[Defendant]** anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the ~~defendant~~ **[Defendant]** shall provide the State with all statements of witnesses the ~~defendant~~ **[Defendant]** anticipates calling at the trial or hearing. Notwithstanding the preceding sentence, this rule does not require the ~~defendant~~ **[Defendant]** to provide the State with copies of or access to statements of the ~~defendant~~ **[Defendant]**.

(D) For purposes of this rule, a "statement" of a witness means:

(i) a written statement signed or otherwise adopted or approved by the witness;

(ii) a stenographic, mechanical, electrical or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement; and

(iii) the substance of an oral statement made by the witness and memorialized or summarized within any notes, reports, or other writings or recordings, except that, in the case of notes personally prepared by the attorney representing the State or the ~~defendant~~ **[Defendant]** at trial, such notes do not constitute a "statement" unless they have been adopted or approved by the witness or by a third person who was present when the oral statement memorialized or summarized within the notes was made.

(5) Protection of Information not Subject to Disclosure. To the extent either party contends that a particular statement of a witness otherwise subject to discovery under this rule contains information concerning the mental impressions, theories, legal conclusions or trial or hearing strategy of counsel, or contains information that is not pertinent to the anticipated testimony of the witness on direct or cross examination, that party shall, at or before the time disclosure hereunder is required, submit to the opposing party a proposed redacted copy of the statement deleting the information which the party contends should not be disclosed, together with (A) notification that the statement or report in question has been redacted and (B) (without disclosing the contents of the redacted portions) a general statement of the basis for the redactions. If the opposing party is not satisfied with the redacted version of the statement so provided, the party claiming the right to prevent disclosure of the redacted material shall submit to the court for in camera review a complete copy of the statement at issue as well as the proposed redacted version, along with a memorandum of law detailing the grounds for nondisclosure.

(6) Motions Seeking Additional Discovery. Subject to the provisions of paragraph (b)(8), the discovery mandated by paragraphs (b)(1), (b)(2), and (b)(4) of this rule shall be provided as a matter of course and without the need for making formal request or filing a motion for the same. No motion seeking discovery of any of the materials required to be disclosed by paragraphs (b)(1), (b)(2) or (b)(4) of this rule shall be accepted for filing by the clerk of court unless said motion contains a specific recitation of: (A) the particular discovery materials sought by the motion; (B) the efforts which the movant has made to obtain said materials from the opposing party without the need for filing a motion; and (C) the reasons, if any, given by the opposing party for refusing to provide such materials. Nonetheless, this rule does not preclude any party from filing motions to obtain additional discovery. Except with respect to witnesses or information first disclosed pursuant to paragraph (b)(4), all motions seeking additional discovery, including motions for a bill of particulars and for depositions, shall be filed within sixty calendar days if the case originated in Superior Court, or within

forty-five calendar days if the case originated in Circuit Court – District Division after the ~~defendant~~ **[Defendant]** enters a plea of not guilty. Motions for additional discovery or depositions with respect to trial witnesses first disclosed pursuant to paragraph (b)(4) shall be filed no later than seven calendar days after such disclosure occurs.

(7) Continuing Duty to Disclose. The parties are under a continuing obligation to supplement their discovery responses on a timely basis as additional materials covered by this rule are generated or as a party learns that discovery previously provided is incomplete, inaccurate, or misleading.

(8) Protective and Modifying Orders. Upon a sufficient showing of good cause, the court may at any time order that discovery required hereunder be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing of good cause, in whole or in part, in the form of an ex parte written submission to be reviewed by the court in camera. If the court enters an order granting relief following such an ex parte showing, the written submission made by the party shall be sealed and preserved in the records of the court to be made available to the Supreme Court in the event of an appeal.

(9) Sanctions for Failure to Comply. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including, but not limited to: (A) ordering the party to provide the discovery not previously provided; (B) granting a continuance of the trial or hearing; (C) prohibiting the party from introducing the evidence not disclosed; and (D) assessing costs and attorney's fees against the party or counsel who has violated the terms of this rule.

Comment

The amendments adopted on December 22, 2022, and taking effect on March 1, 2023, apply only to cases filed on or after March 1, 2023.

Rule 13. Discovery Depositions

(a) By Agreement. In criminal cases either party may take the deposition of any witness, other than the ~~defendant~~ **[Defendant]**, by agreement of the parties and with the assent of the witness, except as prohibited by statute.

(b) Finding by Court. The court in its discretion may permit either party to take the deposition of any witness, except the ~~defendant~~ **[Defendant]**, in any criminal case upon a finding by a preponderance of the evidence that such deposition is necessary:

(1) To preserve the testimony of any witness who is unlikely to be available for trial due to illness, absence from the jurisdiction, or reluctance to cooperate; or

(2) To ensure a fair trial, avoid surprise, or for other good cause shown.

In determining the necessity, the court shall consider the complexity of the issues involved, other opportunities or information available to discover the information sought by the deposition, and any other special or exceptional circumstances that may exist.

(c) Expert Witness. In any felony case either party may take a discovery deposition of any expert witness who may be called by the other party to testify at trial.

(d) Witnesses Under Sixteen Years of Age. No party in a criminal case shall take the discovery deposition of a victim or witness who has not achieved the age of sixteen years at the time of the deposition.

(e) Fees for Lay Witnesses. Deposition witnesses under subpoena shall be entitled to witness fees as in any official proceeding unless expressly waived by the parties with the agreement of the witness.

(f) Subpoena duces tecum. If a subpoena duces tecum is to be served on the deponent, the notice to the adverse party must be served before service of the subpoena, and the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment.

(g) Scope of Depositions. The deponent in a deposition shall ordinarily be required to answer all questions not subject to privilege or excused by the statute relating to depositions, and it is not grounds for refusal to answer a particular question that the testimony would be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege.

Comment

Under paragraph (b), upon a finding of necessity by a preponderance of the evidence, the trial court may order a deposition over a party's objection. The New Hampshire Supreme Court has addressed trial courts' application of the necessity standard in several reported cases. See, e.g., State v. Sargent, 148 N.H. 571 (2002); State v. Howe, 145 N.H. 41 (2000); State v. Hilton, 144 N.H. 470 (1999); State v. Ellsworth, 142 N.H. 710 (1998); State v. Chick, 141 N.H. 503 (1996); State v. Rhoades, 139 N.H. 432 (1995).

Rule 14. Notices

(a) Circuit Court-District Division. In addition to the notice requirements in (c), affirmative defenses must be raised by written notice at least five days in advance of trial.

(b) Superior Court. In addition to the notice requirements in (c), the following notice requirements apply in ~~superior court~~ **[Superior Court]**.

(1) The State's Notice Obligations

(A) Extended Term Sentences. Notice that an extended term of imprisonment may apply pursuant to RSA 651:6 shall be provided to the ~~defendant~~ **[Defendant]** in writing at least twenty-one days prior to the commencement of jury selection.

(B) Alibi. The State may have further notice obligations under Rule 14(b)(2)(C) regarding alibi witnesses.

(2) The Defendant's Notice Obligations

(A) General Notice Obligations. If the ~~defendant~~ **[Defendant]** intends to rely upon any defense specified in the Criminal Code, the ~~defendant~~ **[Defendant]** shall within sixty calendar days if the case originated in ~~superior court~~ **[Superior Court]**, or thirty calendar days if the case originated in ~~circuit court-district division~~ **[Circuit Court-District Division]**, after the entry of a plea of not guilty, or within such further time as the court may order for good cause shown, file a notice of such intention setting forth the grounds therefor with the court and the prosecution. If the ~~defendant~~ **[Defendant]** fails to comply with this rule, the court may exclude any testimony relating to such defense or make such other order as the interest of justice requires.

(B) Prior Sexual Activity of Victim. Not less than forty-five days prior to the scheduled trial date, any ~~defendant~~ **[Defendant]** who intends to offer evidence of specific prior sexual activity of the victim with a person other than the ~~defendant~~ **[Defendant]** shall file a motion setting forth with specificity the reasons that due process requires the introduction of such evidence and that the probative value thereof to the ~~defendant~~ **[Defendant]** outweighs the prejudicial effect on the victim. If the ~~defendant~~ **[Defendant]** fails to file such motion, the ~~defendant~~ **[Defendant]** shall be precluded from relying on such evidence, except for good cause shown.

(C) Alibi. If a ~~defendant~~ **[Defendant]** intends to rely upon the defense of alibi, notice shall be provided to the State in writing of such intention within sixty calendar days if the case originated in ~~superior court~~ **[Superior Court]**, or thirty calendar days if the case originated in ~~circuit court-district division~~ **[Circuit Court-District Division]** of the plea of not guilty and a copy of such notice shall be filed with the clerk. The notice of alibi shall be signed by the ~~defendant~~ **[Defendant]** and shall state the specific place where the ~~defendant~~ **[Defendant]** claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom the ~~defendant~~ **[Defendant]** intends to rely to establish such alibi. Within ten days after the receipt of such notice of alibi from the ~~defendant~~ **[Defendant]**, the prosecution shall furnish the ~~defendant~~ **[Defendant]**, or counsel, in writing with a list of the names and addresses of the witnesses upon whom the prosecution intends to rely to establish the ~~defendant's~~ **[Defendant's]** presence at the scene of the alleged offense. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information required by this rule, the party shall forthwith notify the other party, or counsel, of the existence and

identity and address of such additional witness. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party regarding the ~~defendant's~~ **[Defendant's]** absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the ~~defendant~~ **[Defendant]** to testify concerning the alibi notwithstanding the failure to give notice. The court may waive the requirements of this rule for good cause shown.

(3) Notice of Use of Criminal Record During Trial. If a party plans to use or refer to any prior criminal record during trial, for the purpose of attacking or affecting the credibility of a party or witness, the party shall first furnish a copy of the same to the opposing party, or to counsel, and then obtain a ruling from the court as to whether the opposing party or a witness may be questioned with regard to any conviction for credibility purposes. Evidence of a conviction under this rule will not be admissible unless there is introduced a certified record of the judgment of conviction indicating that the party or witness was represented by counsel at the time of the conviction unless counsel was waived.

(c) Special Notice Requirements. The following notice requirements apply in all criminal proceedings in either ~~circuit court-district division~~ **[Circuit Court-District Division]** or ~~superior court~~ **[Superior Court]**.

(1) In any case in which a road or way is alleged to be a "way," as defined in RSA 259:125, or a public highway, a party shall notify the opposing party or counsel at least ten days prior to trial if said "way" or public highway must be formally proved; otherwise, the need to formally prove said "way" or public highway will be deemed to be waived.

(2) Whenever a party intends to proffer in a criminal proceeding a certificate executed pursuant to RSA 318-B:26-a(II), notice of an intent to proffer that certificate and all reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least twenty-five days before the proceeding begins. An opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection within ten days upon receiving the adversary's notice of intent to proffer the certificate. A failure to comply with the time limitations regarding the notice of objection required by this section shall constitute a waiver of any objection to the admission of the certificate. The time limitations set forth in this section shall not be relaxed except upon a showing of good cause.

(3) If counsel or the State has a bona fide question about the competency of a ~~defendant~~ **[Defendant]** to stand trial, counsel or the State shall notify the court. In addition, the court for good cause may raise the issue on its own. When such a bona fide question arises, the court shall proceed in accordance with RSA 135:17, RSA 135:17-a, and any other applicable statutes.

Comment

Rule 14(b)(1)(A), requiring the ~~state~~ **[State]** to provide notice that it may seek an extended term of imprisonment under RSA 651:6, derives from current Superior Court Rule 99-A and RSA 651:6(III). An extended term may be imposed upon a ~~defendant~~ **[Defendant]** if notice is lawfully provided and the court or jury finds that the prerequisites have been met. See Apprendi v. New Jersey, 530 U.S. 466 (2000); State v. Russell, 159 N.H. 475 (2009). Rule 14(b)(1)(A) reflects the developments in this area of the law. Rule 14(b)(1)(A) provides that in every case in which a prosecutor may seek the imposition of an extended term of imprisonment pursuant to RSA 651:6, the prosecutor must give notice to the ~~defendant~~ **[Defendant]** prior to the commencement of the trial. In any case in which there

exists the possibility that the court may sua sponte impose an extended term, notice must be given by the trial judge prior to the commencement of the trial. State v. Toto, 123 N.H. 619 (1983).

Rule 15. Pretrial Motions

(a) Circuit Court-District Division

(1) General. For the general rules governing motions in Circuit Court-District Division, see Circuit Court-District Division Rule 1.8.

(2) Motions to Suppress.

(A) Whenever a motion to suppress evidence is filed before trial in any criminal case, the court will determine, in its discretion, whether to hear the motion in advance of trial or at the trial when the evidence is offered.

(B) If a hearing is held in advance of trial, neither the prosecution nor the ~~defendant~~ **[Defendant]** shall be entitled to a further hearing by the court on the same issue at the trial. If the evidence is found to be admissible in advance of trial, it will be admitted at the trial without further hearing as to its admissibility. If the evidence is found to be inadmissible, it will not be admitted at the trial and the prosecution shall not refer to such evidence at any time thereafter. The justice presiding at the pretrial hearing need not be disqualified from presiding at the trial. Objections to the court's ruling in advance of trial admitting the evidence shall be noted by the court and the trial shall proceed as scheduled.

(C) All motions to suppress evidence filed in advance of trial shall be in writing and shall specifically set forth all the facts and grounds in separate numbered paragraphs upon which the motions are based. Such motions shall be filed before the commencement of the trial. The court, in its discretion, may grant such a motion after trial commences.

(D) Upon request of any party, the court shall make sufficient findings and rulings to permit meaningful appellate review.

(3) Motions to Continue. For rules governing motions to continue in Circuit Court-District Division, see Circuit Court-District Division Rule 1.8-A.

(b) Superior Court

(1) Pretrial Motions. The deadline for filing all pretrial motions other than discovery related motions, including but not limited to motions for joinder or severance of offenses, motions to dismiss, motions to suppress evidence, Daubert motions, and other motions relating to the admissibility of evidence that would require a substantial pretrial hearing, shall be sixty days after entry of a plea of not guilty **[in Superior Court]** or fifteen days after the dispositional conference, whichever is later.

(2) Motions to Suppress. Except for good cause shown, motions to suppress shall be heard in advance of trial. If a hearing is held in advance of trial, neither the prosecution nor the ~~defendant~~ **[Defendant]** shall be entitled to a further hearing by the court on the same issue at the trial. If the evidence is found to be admissible in advance of trial, it will be admitted at the trial without further hearing as to its admissibility. If the evidence is found to be inadmissible on behalf of the prosecution, the prosecution shall not refer to such evidence at any time in the presence of the jury, unless otherwise ordered by the court. Objections to the court's ruling in advance of trial admitting the evidence shall be transferred on appeal after trial and not in advance of trial except in the discretion of the court in exceptional circumstances. Every motion to suppress evidence:

(A) shall be filed in accordance with section (b)(1) of this rule;

(B) shall be in writing and specifically set forth all the facts and grounds in separate numbered paragraphs upon which the motion is based; and

(C) shall be signed by the ~~defendant~~ **[Defendant]** or counsel and verified by a separate affidavit of the ~~defendant~~ **[Defendant]** or such other person having knowledge of the facts upon which the affidavit is based. Upon request of any party, the court shall make sufficient findings and rulings to permit meaningful appellate review.

(3) Motions in Limine. The parties shall file all motions in limine no less than five calendar days prior to the final pretrial conference. For purposes of this paragraph, a motion which seeks to exclude the introduction of evidence on the ground that the manner in which such evidence was obtained was in violation of the constitution or laws of this state or any other jurisdiction shall be treated as a motion to suppress and not a motion in limine.

(4) Motions to Continue

(A) Except in exceptional circumstances, all requests for continuances or postponements by the ~~defendant~~ **[Defendant]** in a criminal case shall be in writing signed by the ~~defendant~~ **[Defendant]** and counsel. The request shall include an express waiver of the ~~defendant's~~ **[Defendant's]** right to a speedy trial as it relates to the motion.

(B) A court may rule on a contested motion to continue without a hearing provided that both parties have had an opportunity to inform the court of their respective positions on the motion.

(C) The court shall rule on assented-to motions to continue expeditiously. Notwithstanding the agreement of the parties, the court shall exercise its sound discretion in ruling on such motions.

(D) Where a trial has been scheduled in one case prior to the scheduling of another matter in another court where an attorney or party has a conflict in date and time, the case first scheduled shall not be subject to a continuance because of the subsequently scheduled matter which is in conflict as to time and date except as follows:

(i) A subsequently scheduled case involving trial by jury in a ~~superior~~**[Superior]** or ~~federal district court~~ **[Federal District Court]**, or argument before the Supreme Court.

(ii) The court finds the subsequently scheduled case should take precedence due to the rights of a victim under RSA 632-A:9.

(iii) The court finds that the subsequently scheduled case should take precedence due to a ~~defendant's~~ **[Defendant's]** rights to speedy trial or other constitutional rights.

(iv) Unusual circumstances causing the respective courts to agree that an order of precedence other than the above shall take place.

(E) Other grounds for continuance may be illness of a ~~defendant~~ **[Defendant]**, defense attorney, or prosecutor; want of material testimony, documents, or other essential evidence; unavoidable absence of an essential witness; and such other exceptional grounds as the court may deem to be in the interest of justice.

Rule 16. Videotape Trial Testimony

(a) The State may move to take videotape trial testimony of any witness, including the victim, who was sixteen years of age or under at the time of the alleged offense. Any victim or other witness who was sixteen years of age or under at the time of the offense may also move to take videotape trial testimony. The court shall order videotape trial testimony if it finds by a preponderance of the evidence that:

(1) The child will suffer emotional or mental strain if required to testify in open court; or

(2) Further delay will impair the child's ability to recall and relate the facts of the alleged offense.

(b) Videotape trial testimony taken pursuant to this rule shall be conducted before the judge at such a place as ordered by the court in the presence of the prosecutors, the ~~defendant~~ **[Defendant]** and counsel, and such other persons as the court allows. Examination and cross-examination of the child shall proceed in the same manner as permitted at trial. Such testimony shall be admissible into evidence at trial in lieu of any other testimony by the child.

(c) Unless otherwise ordered by the court for good cause shown, no victim or witness whose testimony is taken pursuant to this section shall be required to appear or testify at trial.

(d) The attorney general or a county attorney conducting the prosecution in a criminal case may take the deposition of any witness the prosecution intends to call at the trial, if it is determined by a justice of the ~~superior court~~ **[Superior Court]** that:

(1) The ~~defendant~~ **[Defendant]** in the case in which the deposition is sought has been arrested or bound over to the grand jury or has been indicted, and

(2) There is reason to believe the life or safety of the witness is endangered because of the witness's willingness or ability to testify, and the testimony expected from the witness is material to the prosecution of the case.

Comment

Paragraphs (a) through (c) of Rule 16 derive from RSA 517:13-a, I through III. Paragraph (d) derives from RSA 517:14-a. The New Hampshire Supreme Court has held that once a videotaped trial deposition has been taken under RSA 517:13-a, it is not per se admissible at trial; rather, the court must make a specific finding at the time of trial that the deponent continues to be "unavailable" to testify for Confrontation Clause purposes. State v. Peters, 133 N.H. 791 (1986). The status of this rule is uncertain in light of the new standards relative to confrontation clause rights as articulated by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004), and its progeny.

Rule 17. Subpoenas

(a) For Attendance of Witnesses; Form; Issuance. A subpoena for court hearings, depositions, or trials may be issued by the clerk of any court or any justice as defined by statute. A notary may issue a subpoena for depositions only. A subpoena shall comply with the form required by statute and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(b) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein at the time and place specified therein.

(c) Service. Service of a subpoena shall be made by reading the subpoena to the person named or by giving that person in hand an attested copy thereof. A subpoena may be served by any person who is eighteen years of age or older.

(d) Subpoena for Out-of-State Witnesses. A subpoena for witnesses located outside the state shall be issued in accordance with RSA ch. 613.

(e) Contempt. Failure to obey a subpoena without adequate excuse may be punishable by contempt of court.

(f) Motions to Quash. An individual may request that the court quash a subpoena on the grounds of improper service, hardship, or otherwise as provided by law. Notice of the motion must be served on all parties. The court shall notify all parties of any hearing on the motion and the decision.

Comment

Rule 17(a) derives from RSA 516:1 through 516:4. RSA 516:3 provides in pertinent part that any justice may issue writs for witnesses in any pending New Hampshire case. Under this statute, a justice of the peace may issue a subpoena for witnesses, even if the justice is an attorney for one of the parties. See Hazelton Company v. Southwick Construction Company, 105 N.H. 25 (1963).

Rule 17(b) permits a party to seek production of books, papers, documents or other objects through the service of a subpoena duces tecum.

The first sentence of paragraph (c) sets forth the appropriate methods of service and is a consistent restatement of RSA 516:5. This paragraph reflects the ~~state's~~ **[State's]** statutory exemption from the requirement of tendering witness fees in advance of trial or hearing. State v. Tebetts, 54 N.H. 240 (1874). Paragraphs (c) and (e) extend this principle to cases in which counsel has been appointed for the ~~defendant~~ **[Defendant]** or in which a ~~defendant~~ **[Defendant]** demonstrates an inability to pay the fees and mileage allowed by law.

Rule 17(d) addresses the summoning of witnesses located outside the state and reflects the procedure for summoning out-of-state witnesses established by the Uniform Act, RSA ch. 613. The rule recognizes the current practice whereby applications to summon out-of-state witnesses may be made ex parte. A party is not required by law or rule to give notice of its intent to summon a witness regardless of whether the witness is located in the state.

Rule 18. Venue

(a) *Venue Established*. Every offense shall be prosecuted in the county or judicial district in which it was committed. If part of an offense is committed in one county, and part in another, the offense may be prosecuted in either county.

(b) *Change of Venue*. If a court finds that a fair and impartial trial cannot be had in a county or judicial district in which the offense was committed, it may, upon the motion of the ~~defendant~~ **[Defendant]**, transfer the case to another county or judicial district where a fair and impartial trial may be had.

Rule 19. Transfer of Cases

(1) When any party files a motion in any superior court requesting the transfer of a case, or of a proceeding therein, to another superior court, the presiding judge may, after giving notice and an opportunity for a hearing to all parties, order such transfer.

(2) When any party files a motion in any ~~circuit court – district division~~ **[Circuit Court-District Division]** requesting the transfer of a case, or of a proceeding therein, to another ~~circuit court – district division~~ **[Circuit Court-District Division]**, ~~the presiding~~ **[a]** judge may, after giving notice and an opportunity for a hearing to all parties, order such transfer.

(3) Unless otherwise allowed by statute or rule, a case shall not be transferred from ~~circuit court~~ **[Circuit Court]** to ~~superior court~~ **[Superior Court]** or from ~~superior court~~ **[Superior Court]** to ~~circuit court~~ **[Circuit Court]**. If the parties agree to resolve a case pending in ~~circuit court~~ **[Circuit Court]** or ~~superior court~~ **[Superior Court]** in the other trial court, the State must initiate a new case in that court by filing a ~~complaint~~ **[Complaint (Circuit Court) or Information (Superior Court)]** and **[by nolle prossing or]** filing a notice of nolle prosequi for the original ~~case~~ **[charges]**.

Comment

Rule 19 contemplates the transfer of whole cases, or of particular proceedings in cases, even in the absence of a related pending case or proceeding in the county to which transfer is sought. The rule provides a method whereby a party may ask a court to transfer cases for a plea as well as for trial. This rule should be distinguished from Rule 18, which provides for change of venue to insure a fair and impartial trial.

APPENDIX C

Amend Rule 3.3 of the Circuit Court - District Division Rules as follows ((deletions are in ~~strikethrough~~ format; additions are in **[bold and brackets]**):

Rule 3.3 – Discovery

A. ~~Within seven (7) days after the arraignment~~ **[Upon receipt of appearance of counsel for the juvenile]**, the prosecutor shall furnish the juvenile's attorney or the juvenile and parent(s), if the juvenile has no attorney, with the following:

(1) A copy of records of statements or confessions, signed or unsigned, by the juvenile, to any law enforcement officer or officer's agent;

(2) A list of any tangible objects, papers, documents or books obtained from or belonging to the juvenile;

(3) A list of names of witnesses, including experts and their reports;

(4) Copies of any lab reports;

(5) All exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995).

(6) Notification of the State's intention to offer at trial, pursuant to NH Rule of Evidence 404B, evidence of other crimes, wrongs, or acts committed by the juvenile, as well as copies of or access to all statements, reports, or other materials that the State will rely on to prove the commission of such other crimes, wrongs, or acts; and

(7) A statement as to whether the foregoing evidence, or any part thereof, will be offered at the adjudicatory hearing.

[

B. For Delinquency proceedings under RSA 169-B, discovery shall include the voluntary needs assessment outlined in RSA 169-B:10.

(1) If a Delinquency petition is filed prior to the completion of the voluntary needs assessment, the prosecutor shall furnish the juvenile's attorney or the juvenile and the parent(s), if the juvenile has no attorney, with the assessment as soon as it is received.

(2) Confidentiality and admissibility of the voluntary needs assessment shall be determined by RSA 169-B:10.]

C. ~~B.~~ Within fourteen (14) days after the arraignment, the juvenile shall provide the prosecutor with a list of names of witnesses, including experts and their reports and copies of any lab reports, that the juvenile anticipates introducing at the adjudicatory hearing.

D. ~~C.~~ In the event of a petition filed by a party other than the State, the above discovery rules shall apply, except that the petitioner shall forward materials to the juvenile or attorney, and the juvenile or the juvenile's attorney shall forward materials to the petitioner within the applicable time frames.

APPENDIX D

Add the following new rule **[in brackets and bold]** within the Circuit Court – Family Division Rules:

[Rule 3.13—Pleading Requirements

All pleadings and other submissions to the court in delinquency matters shall be entitled, "In the interest of _____, a minor."]