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April 2, 2024

New Hampshire Supreme Court  
Advisory Committee on Rules  
1 Charles Doe Drive  
Concord, NH  
03301

Re: Docket 2024-001, Supreme Court Rule 54 (4)

Submitted via e-mail to [rulescomment@courts.state.nh.us](mailto:rulescomment@courts.state.nh.us) as a .pdf attachment

Justice Donovan and Members of the Advisory Committee on Rules:

Thank you for addressing this proposed change to Supreme Court Rule 54 (4). The issue of continuity and consistency in the rules that govern our courts is vitally important. Our court rules lay the groundwork and establish the basic expectations for all who appear in our courts. No matter your level of experience, these rules should be easily found and understood by experienced New Hampshire attorneys, *pro se* litigants, *pro se* defendants and those visiting counsel appearing *pro hac vice*.

I support the request in docket 2024-001. As you read this letter I believe you will see that the proposed change in 2024-001 is only the tip of the iceberg. Indeed, I hope this Committee will see the need for more extensive review and action and will consider going beyond the recommendation in 2024-001. That will be no easy task; however, sooner action will better serve our courts, our attorneys and, ultimately, all who appear in our courts.

## Background

### Rule 51

Supreme Court Rule 51, Rule-Making Procedures, sets forth the mechanics of rulemaking "...in the areas of procedure in all courts and shall apply to all amendments or additions to such rules." Sup. Ct. R. 51 at section 1 [emphasis in bold added]. The Scope and Purpose contained in Rule 51 clearly presents the goal of the Supreme Court when it says that the "Supreme Court seeks to ensure:

- (a) Minimal disruption to court practice by limiting the frequency of rule changes;
- (b) Rules are regularly reviewed to consider and reflect current developments, needs, and changes;
- (c) Adoption and amendment of rules proceed in an orderly, transparent and uniform manner;
- (d) The public, the bench and the bar receive notice and an opportunity to comment on proposed rule suggestions;
- (e) Adequate notice of adoption, effective date and revisions to the rules;
- (f) The rules are clear, definite in application and consistent with each other.”

Sup Ct R. 51 at section 1.

The remaining sections of Rule 51 (sections 2 through 7) then go on to address definitions (section 2), Committee composition (section 3) and the processes employed by the Committee to discharge its rulemaking responsibilities (sections 4 through 7).

### **Rule 54**

Supreme Court Rule 54, Administrative Judges and Administrative Council, establishes the “position of administrative judge and an administrative council for the judicial branch.” Sup Ct. R. 54 (1). Relevant to the issue now before this Committee, Rule 54 (4) (c) addresses the responsibilities of the administrative judge in “Issuing superior court or Circuit court administrative orders as may be required **from time to time** to carry out the responsibilities of the office.” Sup. Ct. R. 54 (4) (c) [emphasis in bold added]. This ability to issue administrative orders must, however, be read in conjunction with the initial part of Rule 54 (4) which instructs that the actions of the administrative judge are “**subject to the policies, rules, orders and guidelines established by the supreme court.**” Sup. Ct. R. 54 (4) [emphasis in bold added].

### **Cumulative effects of Rule 51 and Rule 54**

The cumulative effect of the Rules is to establish a clear and orderly method for the recommendation, evaluation and implementation of rules necessary to meet the goals outlined in Rule 51. Additionally, the “big picture” view of this process also clearly shows the Supreme Court’s intent to limit the use of administrative rules to those “**required from time to time.**” Sup. Ct. R. 54 (4) [emphasis in bold added].

### **The Current Situation**

It is my opinion that the current situation surrounding the state of court administrative orders appears to be one of confusion which appears to have developed through convenience. That may sound harsh; however, please note that I do not say this in a derogatory manner nor to cast aspersions. In fact, I believe that the state of our administrative orders developed over the years as a quiet and small state judiciary developed into a busier and more task intensive judiciary. It’s the nature of organizational expansion. Minor tasks or changes, in the past, were addressed by orders and the cycle kept repeating itself bringing us to the point we are today.

Many of the sticky spots or conflicts, for lack of better terms, were identified in recent comments submitted to the Advisory Committee on Rules.<sup>1</sup> The impact, dare I say confusion, resulting from the current structure of administrative orders was highlighted to me just the other day when I became aware of an order issued by a Circuit Court where reference was made to a Circuit Court administrative order that had been rescinded. The immediate impact was that information that should have been before a judge was not able to be presented. I elaborate on this later in this letter.

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<sup>1</sup> I read the submissions from Attorney Endres in Advisory Committee on Rules docket 2024-001 as well as his recent supplemental letter dated March 27, 2024 (not yet available on the Committee’s web site as of the date of this letter), and I incorporate his comments and concerns by reference. I need not, however, repeat them unless necessary to amplify or illustrate my observations.

### **An Extensive and Unchecked Administrative Order Process Circumvents the Rulemaking Process**

This is the main issue addressed by 2024-001. The effect of the broad use of administrative orders in place of using the rulemaking process is to fracture and disperse governing directives to the point where effective and efficient court operations is threatened. The existing administrative order process and utilization of that process yields a pseudo-rule system that is parallel to, and at times in opposition to, the process I believe was envisioned by our Supreme Court. Use of administrative orders may also run afoul of the public and open procedures envisioned by the rulemaking process. Indeed, I do not believe the public has any way to exercise any check or balance on orders issued by the courts that in effect amend or modify a rule or initiate what should be a rule subject to the rulemaking process. Expansive use of administrative order may result in:

- Conflicts or friction between several administrative orders and, I believe, between administrative orders and rules. See the contents of the letter of Attorney Endres dated March 27, 2024 (supplementing his letter of January 29, 2024).
- A difficulty in ascertaining what governing material is current and what is not – a difficulty that seems to extend to the bench. I comment on this below in discussing events in docket
- Bypassing the rulemaking process thereby challenging public confidence in our process. If it is difficult for practitioners to decipher rules and resultant expectations located throughout dispersed sources I can only imagine how difficult it is for those appearing *pro se* who are expected to know, follow and apply the rules.

### **Some Approaches to Some Possible Solutions – Observations that Support 2024-001 Included**

I may not have perfect or even the most correct solutions to the situations we face. Indeed, a large system wide review and revamp of administrative orders might be warranted. None-the-less, I do wish to make some initial observations/recommendations/suggestions in the hopes of bettering our court system:

- Follow the intent of the governing rules. Whether stated or implied, these rules (i.e. 51 and 54), exist to ensure an open and transparent process exists. To the extent that implications within the existing rules are not effective specific rules might be warranted.
- Strictly limit the use of any administrative orders. Frankly, if something in the way of a courtroom process needs to be addressed by an order, it may be assumed that a permanent rule is probably warranted. I discuss this in more detail below.
- Review all existing administrative orders. Remove those that conflict with statutes, court rules or other appropriate administrative orders. Given the score upon score (possibly hundreds) of orders this could be a giant, but I believe necessary, task.
- Consolidate, catalog and index all administrative orders. Consolidating, cataloging and indexing orders accomplishes two things. First, orders would be immediately searchable (more on this in a minute). Second, the issuance of such orders may be reduced as each order would be subject to increased internal review or scrutiny thereby hopefully asking the question as to whether or not the considered order is truly necessary.
  - Frankly, consolidation appears needed especially in the Circuit Court system. Right now administrative orders are split between at least four separate web pages. Circuit Court at <https://www.courts.nh.gov/our-courts/circuit-court/administrative-orders>, District Division at <https://www.courts.nh.gov/our-courts/circuit-court/district-division/orders>, Family Division at <https://www.courts.nh.gov/our-courts/circuit-court/district-division/orders> and Probate Division at <https://www.courts.nh.gov/our-courts/circuit-court/probate-division/administrative-orders>. I have no idea how many of the score upon score of orders (dare I say hundreds?) within these separate

collections are duplicative, overlap or conflict. To be honest I did not have time to do a side-by-side comparison.

- Catalog administrative orders into two categories: The categories could, for example, be labeled “Court Administration” and “Court Operations.”

- **Court Administration Orders:** This category would contain truly administrative items on relatively benign topics such as judge assignments. Administrative orders within the Court Administration category could be clearly marked with an expiration date or, if necessary for a long duration, later rescinded as warranted. However, each expired or rescinded order should be clearly marked as such so anyone researching the court’s orders would be able to see the status of an order at a glance.
- **Court Operations Orders:** This category would contain **temporary** orders impacting courtroom or courthouse operations or processes that any litigant would be expected to know and follow. Control of administrative orders within the Court Operations category would be exercised through a mandated expiration period. For example, all orders might use a most reasonable 180-day expiration period (and that expiration date should be clearly shown in the order). That 180-day expiration date would be extended **only** if a request for rule was **requested and docketed** through the Advisory Committee on Rules and the docketed number is annotated on the operations administrative order. The operations administrative order would be rescinded on final action on the docket request for a rule. The 180-day period allows ample time for an appropriate submission to, and docketing by, the Rules Committee. This process is also the foundation of the suggested change contained in docket 2024-001.

- Post the consolidated, cataloged and indexed orders in a unified and common system within the existing court web sites. Consistent structure within the court system is needed – in my opinion that does not appear to exist with the current structure. Right now the Superior Court does have some degree of orderly postings. See the page at <https://www.courts.nh.gov/our-courts/superior-court/orders> . The Circuit Court page at <https://www.courts.nh.gov/our-courts/circuit-court/administrative-orders> appears to be less orderly. Differences in the structure of these web pages are immediately obvious. Let me give you some example of incongruent structure and also what I believe is a recent real-world impact of the lack of common structure:

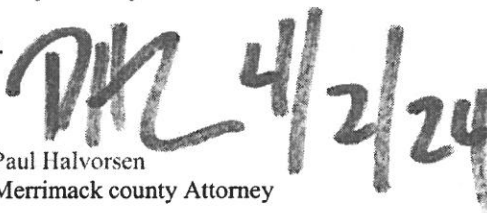
- The Superior Court page shows “Active,” “Obsolete” and “Business and Commercial...” sections while the Circuit Court pages kind of leaves you searching for the status of any individual order.
- It appears that only the administrative orders within the general Circuit Court Division is searchable by key word. See that page at <https://www.courts.nh.gov/our-courts/circuit-court/administrative-orders>. However, the available “filter by keyword” search seems to search only the titles of the available documents and not the text of the documents. No “filter by keyword” option of any type (title or content) is available within the District Division, Family Division and Probate Division web pages and if it is available I could not find it. The lack of search functionality that searches within a document reduces the possibility of finding what you seek.
- The impact of the Circuit Court structure appears to result in miscommunication to the point where even judges appear unaware of what orders are active or have been rescinded. For example, Circuit Court Order 2024-02 (from 01/02/24) was rescinded

by Circuit Court Order 2024-03 (02/08/24). That status of orders appears to have been missed in a recent court hearing held on March 29, 2024, where a judge cites to Order 2024-02 even though 2024-02 had been rescinded approximately 7-weeks prior to the March 29, 2024, court hearing.<sup>2</sup> As I read documents from that hearing, which are appended to this letter, the apparently incorrect application of a rescinded order appears to have resulted in the court not considering what may have been relevant information necessary for the setting of bail in a DV case involving felony and misdemeanor charges where bail was changed from \$2,500.00 cash to personal recognizance.

### Summary and Conclusion

I know this letter in support of 2024-001 goes a bit beyond my support of the suggested rule amendment. However, knowing about and understanding the bigger picture lends support to the proposal addressed within 2024-001 and identifies a larger systemic issue that looms large over our judicial system.

Thank you for taking the time to review my comments.

  
Paul Halvorsen  
Merrimack county Attorney

Attachment: Court Order and Criminal Order of Protection/Bail with associated cover letter in docket  
(6-pages)

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<sup>2</sup> Reference case is docket

. See attached documents.