

The State of New Hampshire Circuit Court



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August 28, 2023

Hon. Patrick E. Donovan, Chair
Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Changes to Family Division Rules, Section 3—Juvenile Delinquency and
Children in Need of Services

Dear Justice Donovan and Members of the Rules Committee,

The Circuit Court proposes revising Family Division Rule 3.3—Discovery, and adding Family Division Rule 3.13—Pleading Requirement, to align discovery and pleadings in Delinquency cases with statutory requirements.

A. Revision to Family Division Rule 3.3

The proposed revision to Family Division Rule 3.3 in Attachment A serves two main purposes: (1) to ensure discovery is provided to counsel for the juvenile upon receipt of an appearance; and (2) to ensure that the voluntary needs assessment is included as mandatory discovery for juveniles in Delinquency proceedings.

Such revisions square not only with the overall intent behind the comprehensive juvenile justice system that has as its primary concern the welfare of the child,¹ but with the

¹ See In re Trevor G., 166 N.H. 52, 54 (2014); see also RSA 169-B:1; RSA 169-D:1.

intent behind the enactment of Senate Bill 94 in furthering dispositions tailored to address the individual needs of the juvenile in Delinquency cases.²

(1) Providing discovery to counsel for the juvenile upon receipt of an appearance.

Family Division Rule 3.3 has been in effect since 2007 without change. It mandates that the prosecution provide discovery to the juvenile's attorney within seven (7) days after arraignment.³ This language fails to account for recent changes in statutory law regarding earlier appointment of counsel. In 2021, Senate Bill 143 was enacted to provide appointment of counsel in Delinquency matters upon receipt of the petition.⁴ The impetus behind this legislation was to ensure the arraignment would be meaningful and to spark negotiations in the Delinquency case.⁵ Rule 3.3, as currently written, interferes with the purpose of the earlier appointment of counsel. In practice, statewide training instructs prosecutors to provide discovery to counsel for the juvenile as soon as such counsel is appointed and files an appearance. Such practical application should be reflected in Rule 3.3 to clarify any discrepancies and ensure uniformity across the State. Moreover, the proposed rule change will ensure that discovery is provided to the specific assigned counsel, as opposed to the New Hampshire Public Defender at large when generally appointed, reducing any unnecessary delay.

(2) Including the voluntary needs assessment as mandatory discovery in Delinquency proceedings.

Effective starting January 1, 2022, Senate Bill 94 amended RSA 169-B:10 to promote the goal of positive youth development through assessments and referrals in hopes of diverting youth from court involvement.⁶ For those juveniles requiring court involvement, "dispositions should be tailored to address the individual needs of youth and, therefore, the court should utilize needs assessments for the purpose of determining appropriate services and supports when making dispositional decisions."⁷ Thus, prior to a Delinquency petition being filed, the prosecutor or arresting agency must refer the juvenile for a voluntary needs assessment.⁸ When a Delinquency matter is initiated, the

² See Laws 2021, 220:1, IV.

³ See Fam. Div. R. 3.3(A).

⁴ See Laws 2021, 207:2; see also RSA 169-B:7, III (requiring notice of appointment of counsel be sent to counsel and petitioner by electronic mail and first class mail on date of appointment).

⁵ See An Act Adopting Omnibus Legislation relative to Certain Agency Requests, SB 143, 2021 Session (N.H. 2021) (Feb. 11, 2021 hearing, Remarks of Moira O'Neill, then-Child Advocate) (explaining that "[p]roviding representation beginning at the earliest time ensures adequate protection of children's rights"); see also An Act Adopting Omnibus Legislation relative to Certain Agency Requests, SB 143, 2021 Session (N.H. 2021) (Feb. 11, 2021 hearing, Remarks of Michael Skibbie, Policy Director of the Disability Rights Center) (advocating for the immediate appointment of attorneys in Delinquency cases, particularly where "decisions are made as soon as a judge begins to deal with a case").

⁶ See Laws 2021, 220:1.

⁷ Id. at IV.

⁸ See RSA 169-B:10, I-a.

information within that assessment is vital to developing a plan tailored to the juvenile's needs.⁹ The assessment, therefore, is critical for counsel for the juvenile to assess the case, and delaying its release runs contrary to the intent of the statutory changes.¹⁰ Rule 3.3 should be revised to include the voluntary needs assessment as part of mandatory discovery in Delinquency cases, in order to avoid any confusion as to the discoverability of the assessment and when it is to be provided. The proposed rule change adds a sub-section for Delinquency cases that expressly includes the voluntary needs assessment as part of Rule 3.3 discovery.¹¹ Providing the assessment in discovery, however, does not render the report admissible beyond what RSA 169-B:10 contemplates.

In addition, the language in RSA 169-B:10 directly supports providing the assessment upon receipt of appearance of counsel for the juvenile. RSA 169-B:10 provides that law enforcement will make a referral for the voluntary needs assessment, and DHHS will complete such assessment and send its recommendations to the referring agency, who then decides whether or not to file a petition. RSA 169-B:10, I-a also provides for counsel to receive the assessment at this pre-filing period:

[The] report and recommendations shall be provided to the minor, the minor's parent or guardian, *the minor's attorney*, and the referring entity and shall include the department's specific recommendation regarding whether a petition should be filed and any recommendations for supports and services.¹²

However, because attorneys are not appointed until a petition is actually filed, there is no attorney to receive the recommendations at the pre-court phase anticipated in RSA 169-B:10, I-a. As a result, although the assessment is available to the minor and prosecution before the filing of a petition, counsel for the juvenile would not be privy to it until appointed and an appearance is filed. The appearance, therefore, triggers the release of the assessment as part of discovery. The proposed rule change seeks to align the process outlined in RSA 169-B:10 with current practice.

⁹ See Relative to Juvenile Diversion Programs, SB 94, 2021 Session (N.H. 2021) (Mar. 10, 2021, Remarks of Moira O'Neill, then-Child Advocate) (explaining that “[b]y providing children with a voluntary needs assessment prior to entry into the system, either they will be diverted from the system or once adjudicated, will have an individualized program designed to address the problems identified in the assessment”).

¹⁰ See *id.* (noting the assessment “would also ensure that those advocating for the child, whether it be an attorney or a parent, are not left wondering what the child's needs are and whether they are getting appropriate care to meet those needs”).

¹¹ The proposed changes to Rule 3.3 also align with the revisions to Family Division Rule 3.6, dealing with conditions of release, that shifted the focus of probation from general rule monitoring to coaching and mentoring youth toward achieving their individualized plan. See Fam. Div. R. 3.6 (eff. July 1, 2022).

¹² RSA 169-B:10, I-a(e) (emphasis added).

The proposed revisions to Family Division Rule 3.3 make clear that the voluntary needs assessment was intended to be part of standard discovery, and that such discovery is to be sent upon notification of appointment of counsel and receipt of the individual counsel's appearance for the juvenile.

B. Proposed New Rule 3.13—Pleading Requirement

The Circuit Court was also made aware, by defense counsel Lisa Wolford, Esq., that on occasion juvenile prosecutors use criminal titles (i.e., State v. [child's name]) when filing Delinquency pleadings. She suggested a court rule to designate proper titling of pleadings. RSA 169-C:6, II, already requires that the Delinquency petition must be entitled "In the interest of _____, a minor." The Circuit Court proposes a new rule, 3.13—Pleading Requirements, which will require all Delinquency pleadings to be similarly entitled. See Attachment B.

The Circuit Court consulted with the Juvenile Justice Transformation Group, which includes representation from the court, DHHS, public defender, juvenile prosecution and the Office of the Child Advocate, who are in favor of these two changes to Family Division Rules.

ATTACHMENT A

Proposed Revision to Family Division Rule 3.3

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. 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. 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.

ATTACHMENT B

Proposed Addition to 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.”