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Admitted in NH, MA & NY

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*Via electronic filing system*

Timothy A. Gudas, Clerk  
New Hampshire Supreme Court  
1 Charles Doe Drive  
Concord, New Hampshire 03301

**RE: Case No. R-2023-0004**  
**Proposed Amendment to Rule 1101(d) of the New Hampshire Rules of Evidence**

Dear Clerk Gudas:

This letter is in response to the New Hampshire Supreme Court's September 21, 2023 request for comments regarding the proposed amendment to Rule 1101(d) of the New Hampshire Rules of Evidence. The proposed amendment would exempt Involuntary Emergency Admission (IEA) hearings from the Rules of Evidence. We respectfully submit the following comments in opposition to the proposed amendment.

We are the four (and only) attorneys handling IEA cases for the entire state of New Hampshire. This includes hospital emergency departments, Designated Receiving Facilities, and county correctional facilities throughout the state. We have multiple decades of collective experience representing thousands of individuals in the behavioral health system, and particularly in IEA hearings. Two of us spoke at the June 2, 2023 Advisory Committee meeting against the proposed amendment, as reflected in the minutes. All four of us strongly believe that the Rules of Evidence should remain applicable to these hearings.

There is a notion that IEA hearings should be exempt from the Rules of Evidence because they are analogous to other proceedings that are preliminary in nature, such as Probable Cause hearings in criminal cases under Rule 6, N.H. R. Crim. P. But unlike these other hearings, IEA hearings are not preliminary; rather, they are final hearings on the question of whether, at the time the IEA petition was filed, an individual was potentially dangerous to themselves or others as a result of their mental condition arising from mental illness. The term "probable cause" in RSA 135-C:31 refers to the standard of proof the petitioner must meet; it does not define the proceeding as preliminary. Indeed, "probable cause" is the lowest legal standard of proof, a lesser standard than a preponderance of the evidence. If a court finds that this low legal standard is met, the confinement that has already occurred - often in a small, windowless room within a hospital emergency department - will be prolonged. That the IEA involuntary admission period (10 days, excluding weekends) can be extended though the filing of a second petition only underscores the need for maintaining the protection afforded by the Rules of Evidence.

While we certainly acknowledge that friends, family members, and others who file IEA petitions generally do so out of genuine concern for the petitionee, such is not always the case. For instance, on a number of occasions, we have seen what we believe to be inappropriate uses of the IEA process - e.g., petitions filed by possibly abusive partners or family members as a means of control. Even assuming the petitioner's good

intentions, the petitions frequently contain references to statements by out-of-court declarants or witnesses, some or all of whom are not identified, and whose information and credibility therefore cannot be challenged.

Our clients are already at a disadvantage in that the majority of hearings are still being held telephonically, without a video component. If we cannot make objections under the Rules of Evidence to exclude inadmissible information, it is all but guaranteed that petitioners will not have to produce any competent evidence whatsoever to meet their already minimal burden of proof. As a result, individuals will be wrongfully detained.

In sum, the Rules of Evidence are essential for our clients to have effective representation and meaningful access to the courts. This means ensuring that petitioners meet a bare minimum evidentiary burden that establishes some justification for the deprivation of liberty and loss of autonomy our clients have already endured by the time they are heard, and will potentially experience after the hearing as well.

Thank you for your consideration.

Very truly yours,

By: /s/ Ellen Purcell

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