

**NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES**

Minutes of Friday, December 8, 2023 Public Hearing and Meeting
NH Supreme Court
Supreme Court Courtroom
1 Charles Doe Drive
Concord, NH 03301

The public hearing was called to order at 1:00 p.m. by Justice Donovan, Committee Chair. The following Committee members were present:

Abigail Albee, Esq., Hon. R. Laurence Cullen, Hon. N. William Delker, Justice Patrick E. Donovan, Sean P. Gill, Esq., Jeanne Herrick, Esq., Charles Keefe, Esq., Derek Lick, Esq., Susan Lowry, Esq., Representative Robert J. Lynn, Terri Peterson, Senator Donna Soucy, and Janet Spalding. Timothy Gudas, Secretary to the Committee, and Lisa Merrill, Recording Secretary, were also present.

1. PUBLIC HEARING

Members of the public were invited to speak about proposed rule changes in dockets 2022-014, 2023-012, 2022-007, 2023-009, and 2023-013.

A. 2022-014, New Hampshire Supreme Court Rule 41

Justice Donovan summarized the proposed rule that would establish criteria for petitioners seeking Supreme Court approval of organizations under RSA 292:1-a (voluntary corporations formed for the purpose of providing professional legal services to the poor). The Committee received no public comment on the amendment.

Justice Donovan inquired, and it was confirmed, that the proposed rule provides that “five or more persons of lawful age may associate together by articles of agreement to form a corporation” because the proposed rule follows the language in the statute. Justice Donovan also noted a typo with respect to the capitalization of the word “Supreme Court.”

No one from the public addressed the Committee regarding the proposed rule.

B. 2023-012, New Hampshire Rules of Criminal Procedure 1-19

Justice Donovan summarized the proposed rule amendments reflecting the repeal of “Felonies First.” The Committee received a host of comments from criminal defense practitioners and prosecutors.

Superior Court Administrator Karen Gorham and Circuit Court Senior Administrator Heather Kulp addressed the Committee summarizing the process, nature, and intent of their proposed amendments to Rules of Criminal Procedure 1-19. They indicated that many of the proposed amendments were necessary to implement the “rewind” of Felonies First mandated by recent legislation.

Attorney Kulp explained the methodology used with input from various stakeholders. She cited use of the LEAN process to simplify and streamline tasks. She recognized several Superior Court and Circuit Court employees in attendance and thanked them for their contributions.

Attorney Gorham provided a handout to the Committee which set forth modifications to the proposed amendments to Rules 6(a)(6) and 12(a)(1) in response to a number of public comments on the proposed amendments. She summarized several changes and welcomed feedback.

Attorney Gorham cited Rule 3(a) regarding the signing of Circuit Court complaints under oath that is required by statute under 592-A:7, as is Rule 4(g)(1) regarding the notice of intent to seek class A misdemeanor penalties under RSA 625:9. The statutory requirements were unchanged by the Felonies First rewind legislation.

Attorney Kulp talked about bind over details in the new process and Attorney Gorham spoke about case processing.

Attorney Kulp referenced Rule 4(a)(2) where comments were received about logistical challenges. The current rule requires that the complaint shall be filed prior to commencement of the arraignment, without a definition of “prior to commencement.” Prior to commencement ensures that the court can meet its obligation as the keeper of the record and meet the obligation that all parties have time to review the complaint before the hearing. Attorney Kulp noted that the concerns expressed in Rule 4(a)(2) were similar to those expressed in Rule 4(a)(1) regarding the timeframe. Judge Delker noted comments about what happens when the timeline is not followed. Attorney Kulp replied that the judge retains discretion on how to handle that situation.

Assistant Merrimack County Attorney Steven Endres addressed the Committee and referred to his letter dated October 19, 2023, proposing changes to, and identifying disagreement with, several proposed amendments to the Rules of Criminal Procedure and to Circuit Court - Family Division Rule 3.13.

He noted that the current language in paragraph 3(d), Summons, is not in line with recent statutory changes in RSA 594:14. With reference to Rule 4, he stated that the 14-days and one-hour timeframes do not appear to have any statutory basis; they appear to originate from the Rules of Criminal Procedure.

He expressed concern with the one-hour timeframe. Justice Donovan asked Attorney Endres if he had a timeframe in which the complaint should be filed. Attorney Endres suggested as soon as reasonably possible.

Merrimack County Attorney Paul Halvorsen referenced his letter of October 19, 2023, setting forth his position with respect to the proposed amendments to the Rules of Criminal Procedure citing the importance of consistency.

Judge Delker asked whether adding language to Rule 4(a)(2) would address Attorney Halvorsen's concerns. He suggested adding "except for good cause shown," in the event a complaint cannot meet the one-hour deadline set forth in the proposed amendment. Attorney Halvorsen suggested it may and discussed the need for consistency throughout the Rules of Criminal Procedure. He also addressed Rule 12's regulation of discovery in criminal cases and, in particular, the application of the proposed amendments when violations are split. He proposed including language permitting a limited remand back to the Circuit Court.

Judge Delker asked Attorney Gorham how the prosecutor will know whether the charge ID number matches the complaint if there is a change. She responded that the proposal reduces the confusion among court staff. By keeping the charge ID number on the indictment, it reduces confusion. When the bind over is sent to the Superior Court, it is also sent to the prosecuting agency, so they receive all of the information. When the Superior Court receives it, they will open a case and send the prosecuting agency the new case number with the same charge ID.

C. 2022-007, New Hampshire Rule of Criminal Procedure 11(c)

Justice Donovan summarized the proposed amendment that addresses conditional guilty pleas. With no written or verbal feedback received, Justice Donovan asked Committee members for comments. None were provided.

D. 2023-009, New Hampshire Rule of Criminal Procedure 15(b)(3)

Justice Donovan reviewed the proposed amendment that would require motions in limine in Superior Court to be filed fifteen calendar days, rather than five calendar days, before the final pretrial conference.

Attorney Keefe submitted a letter to the Committee from the New Hampshire Association of Criminal Defense Lawyers (NHACDL) regarding the proposed rule amendment. The NHACDL urged the Committee to reject the proposed rule amendment and to keep the rule as written.

E. 2023-013, Circuit Court – Family Division Rule 3.3

Circuit Court Deputy Administrative Judge Susan Ashley addressed the Committee and explained that the proposed changes to Circuit Court- Family Division Rule 3.3 would ensure timely and specific discovery in delinquency cases.

Justice Donovan noted that Prosecuting Attorney Alicia O'Rourke submitted a letter on behalf of the Town of Pembroke Police Department opposing the proposed rule.

F. 2023-013, Circuit Court – Family Division Rule 3.13

Judge Ashley addressed the Committee with respect to the proposed amendment to Family Division Rule 3.13 and indicated that the proposal sought to provide consistency with respect to juvenile filings. Attorney Halvorsen also addressed the Committee and indicated that the proposal needed more clarity.

2. DISCUSSION AND VOTE ON PUBLIC HEARING ITEMS

A. 2022-014, Supreme Court Rule 41

A proposal was made to capitalize Supreme Court throughout the proposed rule to maintain consistency. Upon motion by Judge Delker and seconded by Attorney Gill, the Committee voted unanimously to amend the proposed rule to capitalize Supreme Court throughout the rule.

With no further discussion and on motion by Judge Delker and seconded by Attorney Gill, the Committee voted unanimously to recommend that the Court adopt the proposed rule as amended with respect to capitalization.

B. 2023-012 New Hampshire Rules of Criminal Procedure 1-19

At Justice Donovan's suggestion, the Committee considered each of the proposed amendments one by one.

Preamble: Judge Delker moved to recommend adoption of the Preamble to New Hampshire Rules of Criminal Procedure 1-19, which was seconded by Attorney Keefe. With no further discussion, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 1: With no further discussion, on motion by Attorney Keefe and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 2: With no discussion or comment, on motion by Attorney Albee and seconded by Ms. Peterson, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 3: Judge Delker recommended and moved adding the word “prosecutor or a” to the second sentence of Rule to 3(a) to provide for the filing of a complaint by “a prosecutor or a police officer.” On motion by Representative Lynn, and seconded by Senator Soucy, the Committee voted unanimously to recommend that the Court adopt the proposed amendments, with the further change to Rule 3(a) to include “prosecutor or a” as proposed by Judge Delker.

Judge Delker also recommended striking from Rule 3(b) the words for an offense committed “in the State of New Hampshire.” On motion by Representative Lynn and seconded by Attorney Keefe, the Committee voted unanimously to recommend that the Court adopt the proposed amendments to Rule 3(b), with the further change to strike the words “in the State of New Hampshire” in Rule 3(b).

In response to Attorney Endres’ observation, Judge Delker recommended and moved to alter proposed Rule 3(c) with respect to the use and placement of commas. More specifically, Judge Delker moved that the last two lines of 3(c) should provide “...an affidavit, or statement signed under oath if filed electronically,” Representative Lynn seconded the motion, which carried by a unanimous vote of the Committee. The Committee then voted unanimously to recommend that the Court adopt the proposed amendments, with that further change.

With respect to Rule 3(d), the Committee discussed adding language and striking other language to make the proposed amendments more consistent with RSA 594:14. On motion by Judge Cullen and seconded by Representative Lynn, the Committee voted unanimously to add the following language after the first sentence of Rule 3(d): “In any case in which a peace officer has probable cause to believe that a person has committed a misdemeanor or violation, the officer may issue to the person in hand a written summons in lieu of arrest.” In turn, the Committee voted unanimously to strike the original third sentence of Rule 3(d). The Committee then voted unanimously to recommend that the Court adopt the proposed amendments to Rule 3(d), with those further changes.

Rule 4: With no discussion or comment, and upon motion by Attorney Keefe and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed amendments to Rule 4.

Rule 5: With no discussion or comment, and upon motion by Attorney Albee and seconded by Ms. Spalding, the Committee voted unanimously to recommend that the Court adopt the proposed amendments to Rule 5.

Rule 6: Justice Donovan reviewed proposed amendments to Rule 6(a)(2) and asked Attorney Kulp to explain the basis for adding “excluding weekends and holidays” to the rule. Attorney Kulp explained that the amendment was intended to require the scheduling of a probable cause hearing within 10 business days when a defendant remains in custody following his or her arrest and within 30 business days when a defendant is not in custody.

On motion by Attorney Keefe and seconded by Attorney Albee, the Committee voted unanimously to recommend that the Court adopt the proposed amendments to Rule 6(a)(6), with the further changes set forth in the handout submitted by Attorney Gorham.

Discussion ensued about the rest of Rule 6.

Some Committee members expressed concern about language in Rule 6(a)(2) reading “excluding weekends and holidays.” A motion made by Attorney Lowry and seconded by Representative Lynn to strike that language was held for further discussion. Attorney Kulp stated that the Circuit Court intended for the applicable timeframe to be 10 business days.

Justice Donovan asked for a motion to amend the proposal with the addition of the word “business” and with the striking of “excluding weekends and holidays.” Attorney Lick stated that he would favor such a motion, but he then withdrew that comment. After further discussion, Attorney Keefe made a motion to strike “excluding weekends and holidays” in the two places that it appeared in the proposed amendments; the motion was seconded by Representative Lynn. The Committee then voted to recommend that the Court adopt the proposed amendments to Rule 6, with the further changes to strike “excluding weekends and holidays” in both places in Rule 6(a)(2). Judge Delker and Senator Soucy were opposed to the further changes to Rule 6(a)(2).

Rule 7: With no discussion or comment provided, on motion by Judge Delker and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 8: With no discussion or comment provided, on motion by Attorney Lowry and seconded by Attorney Gill, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 9: With no discussion or comment provided, on motion by Attorney Keefe and seconded by Senator Soucy, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 10: With no discussion or comment provided, on motion by Judge Delker and seconded by Attorney Lick, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 11: With no discussion or comment provided, on motion by Attorney Gill and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 12: Justice Donovan noted a proposal to modify the proposed amendments to change Rule 12(a)(1). The language of the modification was included in the handout submitted by Attorney Gorham. On motion by Judge Delker and seconded by Attorney Keefe, the Committee voted unanimously to recommend that the Court adopt the proposed amendments to Rule 12(a)(1), with the further changes as set forth in the handout submitted by Attorney Gorham.

Judge Delker noted that written comments had proposed language changes to Rule 12(a)(2). Without further discussion or comment on Rule 12, on motion by Representative Lynn and seconded by Attorney Gill, the Committee voted unanimously to recommend that the Court adopt the rest of the proposed amendments to Rule 12, as initially proposed and without further changes.

Rule 13: With no discussion or comment provided, on motion by Judge Delker and seconded by Ms. Spalding, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 14: With no discussion or comment provided, on motion by Senator Soucy and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 15: With no discussion or comment provided, on motion by Judge Cullen and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 16: With no discussion or comment provided, on motion by senator Soucy and seconded by Ms. Peterson, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 17: With no discussion or comment provided, on motion by Representative Lynn and seconded by Attorney Keefe, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Rule 18: Judge Delker questioned whether the language, "Every offense shall be prosecuted in the county or judicial district in which it was committed" was intended to read "circuit" instead of "district." Attorney Kulp responded that the term "judicial district" was used because RSA 490:F-4 refers to Circuit Court jurisdiction for district and family cases as "judicial district."

With no further discussion or comment, on motion by Attorney Lick and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed amendment, without further change.

Rule 19: With no further discussion or comment, on motion by Attorney Lick and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

Attorney Lick asked to circle back to discussion concerning Rule 6 for the Committee to consider whether the Circuit Court would benefit from extending the deadline for scheduling probable cause hearing to 40 days, when a defendant is not being detained. A motion by Attorney Lick and seconded by Attorney Keefe failed.

C. 2022-007, New Hampshire Rule of Criminal Procedure 11(c)

Justice Donovan reviewed the proposed changes and asked for comments. Attorney Keefe expressed support for the proposed changes. With no further discussion or comment, on motion by Attorney Keefe and seconded by Attorney Albee, the Committee voted unanimously to recommend that the Court adopt the proposed amendments.

D. 2023-009, New Hampshire Rule of Criminal Procedure 15(b)(3)

Justice Donovan reviewed the proposed amendment to require the filing of motions in limine 15 calendar days prior to trial. Attorney Keefe referenced the letter submitted to the Committee today from the New Hampshire Association of Criminal Defense Lawyers urging the Committee to keep the rule as is.

On motion by Representative Lynn and seconded by Attorney Lowry, the Committee voted unanimously to amend the proposed amendment from fifteen calendar days to ten calendar days. On motion by Judge Delker and seconded by Attorney Keefe, the Committee voted unanimously to recommend that the Court adopt the proposed amendment, with that change.

E. 2023-013, Circuit Court – Family Division Rule 3.3

Justice Donovan summarized the proposed amendments and noted a letter from the Town of Pembroke Police Department. Judge Ashley addressed the Committee offering her availability for questions regarding the proposed amendments.

Merrimack County Attorney Halvorsen opposed the proposed amendments as unnecessary and duplicative because RSA 169-B:10 requires the needs assessment to be provided to the minor, the minor's parents, and the

minor's attorney and makes the needs assessment inadmissible in court without the minor's consent.

Judge Delker inquired about the need for the proposed amendments. Judge Ashley explained that the amendments would specify that the State must produce a needs assessment to the juvenile's attorney as discovery in juvenile cases, when any such assessment has been conducted.

Representative Lynn asked Judge Ashley about changing the language in paragraph B to read, "For Delinquency proceedings under RSA 169-B, discovery shall include the voluntary needs assessment outlined in RSA 169-B:10, if such assessment has been done." Judge Ashley responded that such language sounded reasonable. Attorney Halvorsen noted that the amendments appear to mandate a needs assessment when, in fact, an assessment is not always necessary in juvenile cases. Justice Donovan asked whether adding language in a new subparagraph (3) stating, "This rule shall not be construed to require the completion of a voluntary needs assessment" would eliminate any confusion. Both Judge Ashley and Attorney Halvorsen approved of the recommendation.

On motion by Representative Lynn and seconded by Attorney Lick, the Committee voted unanimously to amend paragraph B of the proposed amendments by adding a new subparagraph (3) with the language proposed by Justice Donovan. On motion by Representative Lynn and seconded by Attorney Lick, the Committee voted unanimously to recommend that the Court adopt the proposed amendments, with the addition of the new subparagraph (3).

F. 2023-013, Circuit Court – Family Division Rule 3.13

Merrimack County Attorney Halvorsen addressed the Committee asking that guidance be more specific. Justice Donovan suggested first initial of first name and first initial of second name. Judge Ashley asked that full names be used to which Attorney Halvorsen agreed.

On motion by Senator Soucy and seconded by Representative Lynn, the Committee voted unanimously to amend the language of the proposed rule to specify inclusion of the full first name and the full last name of the juvenile. On motion by Ms. Peterson and seconded by Representative Lynn, the Committee voted unanimously to recommend that the Court adopt the proposed rule, with that change.

3. NEW BUSINESS

A. 2022-015, Supreme Court Rule 53.1(B)(2)

Justice Donovan referenced a proposed amendment submitted by Attorney Lawrence Vogelman on behalf of Veterans Legal Justice.

On motion by Attorney Lowry and seconded by Attorney Keefe, the Committee voted unanimously to invite Attorney Vogelman to the next meeting to discuss the proposal.

B. 2023-016, Supreme Court Rule 37(5)(a)

Justice Donovan referenced a proposed amendment submitted by Julian Jefferson, Chair of the Complaint Screening Committee, and Brian Moushegian, Attorney Discipline Office General Counsel, requesting a change to the composition of the Complaint Screening Committee. More specifically, the proposed amendment would increase the number of lawyer committee members from 5 to 6 to reduce potential delays in the Committee's consideration of matters before it. Following a short discussion, on motion by Attorney Lick and seconded by Attorney Albee, the Committee voted unanimously in support of the proposed amendment, but Justice Donovan noted that the proposed amendment would be subject to a 90-day public comment period without a public hearing.

C. 2023-017, Supreme Court Rule 50

Attorney Lick summarized his November 13, 2023 submission to the Committee requesting changes to Rule 50(1)(A).

On motion by Attorney Lick and seconded by Senator Soucy, the Committee voted unanimously in support of the proposed amendment, but Justice Donovan noted that the proposed amendment would be subject to a 90-day public comment period without a public hearing.

D. 2023-018, Supreme Court Rule 37(20)

Attorney Lick referenced his proposed rule amendment, noting that the Attorney Discipline Office reviewed the proposal and had no objection to the proposed changes. On motion by Attorney Lick and seconded by Attorney Keefe, the Committee voted unanimously to establish a 90-day public comment period and to add it to the June 14, 2024 public hearing.

4. ADDITIONAL BUSINESS

A. Supreme Court Rule 42

Attorney Sherry Hieber, General Counsel of the Office of Bar Admissions, addressed the Committee and answered questions. The Board of Bar Examiners considered the four-attempt limit a few years ago and supported keeping that limit for all candidates except those seeking admission by motion without examination. In Committee docket # 2020-002, the Committee recommended to the Court, and the Court subsequently adopted, an amendment that eliminated the four-attempt limit only for candidates seeking admission by motion without examination. The Committee was recently asked to consider eliminating the four-attempt limit for all categories of candidates. On motion by Judge Delker and seconded by Attorney Lowry, the Committee voted to table the discussion. Attorney Albee abstained.

5. REMAINING 2024 MEETING DATES

Friday, March 8, 2024
Friday, June 14, 2024
Friday, September 13, 2024
Friday, December 13, 2024

On motion made by Attorney Lick and seconded by Justice Donovan, the Committee voted to adjourn at 3:20 p.m.