

March 27, 2024

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

Re: Docket 2024-001

Via email: rulescomment@courts.state.nh.us

Dear Justice Donovan and Advisory Committee on Rules,

I wanted to supplement my January 29, 2024 letter since the original letter focused on Circuit Court Administrative Order 2024-02 and Superior Court Administrative Order 2020-06. Since those administrative orders were rescinded by Circuit Court Administrative Order 2023-03 and Superior Court Administrative Order 2024-01, I did not want the Rules Committee to think the issue I raised was moot.

I believe that as an attorney, there should be one place to turn to for instructions on courtroom procedure, and that should be the rules of the respective court. Unfortunately, in New Hampshire, in addition to the court rules there are administrative orders which supplement, and at times outright contradict, published rules. What makes matters worse for a practitioner is that the administrative orders are not easy to find and it is difficult to determine if they are still in effect.

The superior court administrative orders can all be found on the “Superior Court” tab of the judicial branch website, and thankfully those orders have recently been classified as “active” and “obsolete” orders. However, the orders are only searchable by title, not content, so it is difficult to find an active administrative order unless you know the title or the title contains keywords.

Circuit court administrative orders can be found on-line under the “Circuit Court” tab of the judicial branch website. These orders are again searchable by title, but not content. There are additional orders under the “Circuit Court- District Division” tab, the “Circuit Court – Family Division” tab, and the “Circuit Court – Probate Division” tab. The additional orders are not searchable, even by title.

When I counted all the Administrative Orders in early February 2024, I found approximately 76 “active” administrative orders on the Superior Court website and 267 administrative orders on the Circuit Court website. There were an additional 20 administrative orders on the “Circuit Court - District Division” website, 18 on the “Circuit Court - Family Division” website, and 13 on the “Circuit Court – Probate Division” website. This is just shy of 400 administrative orders.

Certainly, the vast majority of these administrative orders address judicial assignments, bail commissioner appointments and revocations, and have nothing to do with the court rules.

However, some contain substantive procedures in court which are covered by court rules. I am certainly aware that many of the administrative orders existed *prior* to the current court rules. However, these are still active orders which have the potential to create confusion. I believe it is time to “clean up” the current administrative orders. In addition, if an administrative order sets forth a process to be followed in court, that process should really be memorialized in the court rules and go through the rulemaking process of Supreme Court Rule 51.

Here are some of the supplements / contradictions in the rules and administrative orders I have noticed:

Probable Cause Hearings

New Hampshire Rules of Criminal Procedure Rule 6(a)(2) requires that a probable cause hearing be held within 10 days if a defendant is in custody and within 30 days following arraignment if the defendant is not in custody.

District Court Administrative Order 91-03 sets forth a different timeframe. The order requires that a probable cause hearing be held within 10 days if the defendant is in custody and within 20 days following arraignment if the defendant is not in custody.

This Order can be found on the Circuit Court, District Division administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-06/ao9103.pdf>

Gerstein Determination

New Hampshire Rules of Criminal Procedure Rule 4(e)(1) allows the State to present proof by way of sworn affidavit or by oral testimony. Rule 4(e)(3) requires the court to make a written finding on probable cause.

District Court Administrative Order 91-01 limits this rule by requiring “Proof shall be by sworn affidavit” and does not explicitly allow oral testimony. The order does not require the court to make written findings.

This Order can be found on the Circuit Court, District Division administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-06/dcao91-01-amended.pdf>

Public Filming

The New Hampshire Supreme Court has recognized that our State Constitution gives the press a presumptive right of access to judicial proceedings and court records, limited, however, by the necessity that it be balanced against a criminal defendant’s fundamental right to a fair trial. See Keene Publishing Corp. v. Cheshire County Super. Ct., 119 N.H. 710, 711 (1979); Keene Pub. Corp. v. Keene Dist. Ct., 117 N.H. 959, 961 (1977).

In January 2001 two Dartmouth College professors were brutally murdered in their home in Hanover, NH by two Vermont teens. The case generated world-wide publicity. At the time, Superior Court Rule 78 addressed “Photographing, Recording, and Broadcasting” and read: “(a) Except as specifically provided in these rules, or by order of the Presiding Justice, no person shall within the courtroom take any photograph, make any recording, or make any broadcast by radio, television or other means in the course of any proceeding. (b) Official court reporters and authorized recorders, are not prohibited by section (a) of this rule from making voice recordings for the sole purpose of discharging their official duties.”

In addition to Rule 78, the trial judge sitting in Grafton County Superior Court had “an administrative policy” prohibiting media access to the courtrooms in which he presided in Grafton and Coos Counties. WMUR, among other news outlets, filed paperwork in order to film proceedings involving the murders of the Dartmouth professors in Grafton County, and their request was denied. WMUR brought suit in the Supreme Court to: “challenge each of the trial court's rulings, as well as the constitutional validity of the administrative policy applied in Grafton and Coos Counties.” See Petition of WMUR Channel 9, 148 N.H. 644, 646 (2002). The Supreme Court held:

“While the superior court rule and its guidelines leave the final decision to allow cameras in the courtroom to each individual judge, they do not authorize administrative orders or policies automatically excluding cameras or imposing heavy burdens on the media to justify allowing cameras into a courtroom. In Cotter v. Wright, 145 N.H. 568, 570 (2000), we explained that the superior court cannot unilaterally amend its rules by administrative order. The administrative policy prohibiting electronic access in the Grafton and Coos County Superior Courts violates the guidelines promulgated for Superior Court Rule 78, and, therefore, we find it to be invalid. As a result, the trial court's orders based upon this administrative policy must be reversed.” Id. at 648.

The Supreme Court also found that common law had advanced to accept cameras as important in the reporting of public court proceedings, and that “to the extent Superior Court Rule 78 conflicts with this reality, it is no longer valid.” Id. at 650.

As a direct result of this case, the Rules Committee addressed courtroom photography. Currently the New Hampshire Rules of Criminal Procedure Rule 46 addresses photography, recording, and broadcasting of criminal court proceedings. Circuit Court, District Division Rule 1.4; Circuit Court, Family Division Rule 1.29; Circuit Court, Probate Division Rule 78; and Superior Court Rule 204 also address photography, recording, and broadcasting of court proceedings. All of these rules are identical. None of the rules address photography outside of the courtroom in other areas of the courthouse, presumably since filming outside of the courtroom does not implicate a defendant’s right to a fair trial and is therefore more difficult to restrict under the State Constitution.

Despite the Supreme Court’s clear guidance in Petition of WMUR Channel 9, New Hampshire Circuit Court Order 2011-03 augments the rules regarding filming in courtrooms and

prohibits the use of “cameras or audio equipment” at any time in the “court’s lobby or anywhere in the public area of the court’s leased premises” at the 8th Circuit, District Division, Keene Court. The order further requires that, absent an emergency, all requests to bring cameras into a courtroom shall be made “no later than 48 hours prior to the court hearing sought to be provided.” The order also includes language that members of the public entering courthouses “will be expected to conduct... business expeditiously and leave the premises immediately thereafter...”

This Order can be found on the Circuit Court administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-05/administrativeordercircuitcourt-2011-03.pdf>

Circuit Court Order 2011-03 has been adopted by the Superior Court for the Cheshire County Superior Court by Superior Court Administrative Order 2011-41.

This Order can be found on the Superior Court’s active administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-08/sup-ct-admin-order-2011-41.pdf>.

New Hampshire Circuit Court Administrative Order 2011-15 appears to expand 2011-03 to all circuit court locations and prohibits the use of “cameras or audio equipment” in the “lobby or other public, non-courtroom, area of any courthouse.” In addition, this order retains the “48 hour” notice and continues the order to “conduct business expeditiously and leave the premises immediately thereafter.”

This Order can be found on the Circuit Court administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-05/administrativeordercircuitcourt-2011-15.pdf>

Both of the above Circuit Court Administrative Orders (2011-03 and 2011-15) were superseded by Circuit Court Administrative Order 2011-17, but since there is no way to “shepardize” administrative orders a practitioner may not know the orders have been superseded. In addition, the Superior Court Administrative Order 2011-41, which adopted the now superseded Circuit Court Order 2011-03, still exists as an “active” Superior Court Order.

Circuit Court Administrative Order 2011-17 retains the original language that no cameras or audio equipment may not be used in the lobbies, etc... but adds an exception “when the presiding judge after consultation with the Administrative Judge and the appropriate office responsible for providing security at the courthouse...” may designate a “staging area” in the lobby “where cameras or audio equipment may be located.” The order does not specifically allow the “use” of cameras in the staging area. This order eliminates the “48 hour” notice requirement to film in court and does not contain language about leaving the premises at the conclusion of one’s business.

This Order can be found on the Circuit Court administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-05/administrativeordercircuitcourt-2011-17.pdf>

There does not appear to be any active administrative orders in the superior court addressing filming in lobbies, except 2011-41, that I was able to find.

Pro-Hac Vice

The New Hampshire Rules of Criminal Procedure Rule 42(b) sets forth the process for a foreign attorney applying to appear pro hac vice. The process requires the foreign lawyer to file certain paperwork with the court and identify an active member of the NH Bar “who will be associated with the applicant and present at any trial or hearing.”

Superior Court Administrative Order 12 sets forth a different process by which out of state attorneys do not file any paperwork other than an appearance. However, the order requires that “a member of the NH Bar has first entered an appearance and filed a written Motion seeking Court approval of the appearance of out-of-state counsel.”

This Order can be found on the Superior Court’s active administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-08/sup-ct-admin-order-12.pdf>

Sealed Pleadings

The New Hampshire Rules of Criminal Procedure Rule 50 sets forth a comprehensive framework for the filing of confidential documents and sets forth the process to file a motion to seal. Rule 50(b)(4) requires that “a party filing a confidential document shall identify the document in the caption of the pleading so as not to jeopardize the confidentiality of the document but in sufficient detail to allow a party seeking access to the confidential document to file a motion to unseal...”

Superior Court Administrative Order 2014-07 and Circuit Court Administrative Order 2014-55, which are identical orders, supplement the rules by requiring any pleading filed under seal to be captioned “in a manner that provides sufficient information to identify the general subject matter of the pleading without disclosing the specific information the party is seeking to maintain as confidential.” Furthermore, the caption of the pleading “shall be docketed on the public index and shall be available to the public.”

This Order can be found on the Superior Court’s active administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-08/sup-ct-admin-order-2014-07.pdf>

This Order can be found on the Circuit Court administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2022-01/AdministrativeOrderCircuitCourt-2014-55.pdf>

Clerks of Court

RSA Chapter 499 is entitled “Clerks of Court.” In addition to that chapter, there are numerous statutes which reference the clerk of court and require the clerk to take some action. There are also Superior Court Rules, specifically Superior Court Administrative Rule 1-6 which sets forth the “authority of clerks.” I don’t believe there is an equivalent circuit court rule setting forth the authority of a circuit court clerk.

With reference to appointment of counsel, RSA 604-A:2, I says: “If after review of the financial statement under oath and application of the rules established pursuant to RSA 604-A:10, IV the court is satisfied that the defendant is financially unable to obtain counsel, the court shall appoint counsel to represent him or her...” Superior Court Administrative Rule 1-6, I(f) grants the clerk of court authorization in “Selecting counsel when appointment of counsel is ordered by the court and appointing and selecting counsel to serve as guardian ad litem in domestic and equity matters.”

That authority is supplemented by Superior Court Administrative Order 2011-45, which authorizes “Clerks and Deputy Clerks” to “perform the ministerial act of determining eligibility for appointment of counsel.” “Any adult defendant charged with a felony or Class A misdemeanor, who is found to be eligible for appointed counsel may be ordered to reimburse the state through the Office of Cost Containment pursuant to RSA 604-A:9 I and Office of Cost Containment Administrative Rule 1005. In all such cases the Clerk, Deputy Clerk and Superior Court E-Filing Center are authorized to apply the judge’s electronic or facsimile signature to the Notification of Eligibility and Liability form.”

This Order can be found on the Superior Court’s active administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-08/sup-ct-admin-order-2011-45.pdf>

Under Circuit Court Administrative Order 2023-04 when there is a vacancy in a Circuit Court Clerk position, the Circuit Court Administrator II is authorized to conduct official acts of clerk of court.

This Order can be found on the Circuit Court administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2023-03/administrativeordercircuitcourt-2023-04.pdf>

Under Circuit Court Administrative Order 2015-13 “in the absence of a judicial officer, Clerks of Court, or in the absence of the Clerk of Court the Associate Clerks or Deputy Clerks of Court, are hereby authorized to vacate bench warrants and civil orders of arrest by the Court in the

following limited circumstances...” This appears to grant Circuit Court Clerks powers which are not granted to Superior Court Clerks either through the rules or administrative orders.

This Order can be found on the Circuit Court administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-09/administrativeordercircuitcourt-2015-13.pdf>

Criminal Motion Practice

The New Hampshire Rules of Criminal Procedure Rule 35 addresses filings with the court. Specifically, Rule 35(i)(1) requires that in Superior Court “any answer or objection to a motion must be filed within ten days of the filing of the motion. Failure to object shall not, in and of itself, be grounds for granting a motion.”

Superior Court Administrative Order 2014-04 essentially repeats this language: “Unless otherwise expressly provided by statute, court rule or order, in all criminal cases any objection to a motion shall be filed within ten (10) days after the filing of the motion. Failure to object shall not, in and of itself, be grounds for granting the motion”

This Order can be found on the Superior Court’s active administrative orders at:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-08/sup-ct-admin-order-2014-04.pdf>

In closing, my goal in proposing an amendment to Supreme Court Rule 54(4) was to have the courts follow the quasi-legislative process set forth in Supreme Court Rule 51 instead of issuing administrative orders regarding court procedure. This would assure that when court procedures are implemented they are subject to public input and centralized publication.

Sincerely,



Steven Endres
NH Bar # 14894