THE STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON RULES

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NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Agenda – June 3, 2022

1. PUBLIC HEARING

2022-001 Supreme Court Rules 37 and 37A
See Appendix A (March 7, 2022 ADO executive summary, proposed amendments with explanations)

NOTE: Complete ADO submission including exhibits can be found at https://www.courts.nh.gov/sites/g/files/ehbemt471/files/inline-documents/sonh/supreme-court-rules-37-and-37a-proposed-amendments-submitted-by-attorney-discipline-office.pdf

(a) Supreme Court Rule 37(8)

This proposal would give the Attorney Discipline Office (ADO) "reciprocal" subpoena power, which would allow the ADO to issue a subpoena in this jurisdiction where the issuance of a subpoena has been duly approved under the law of another jurisdiction.

(b) Supreme Court Rule 37(14)

This proposal addresses the procedure for attorneys who seek reinstatement and requires that any applicant seeking reinstatement have taken and passed the Multistate Professional Responsibility Examination (MPRE) within one year of the filing of the petition for reinstatement.

(c) Supreme Court Rule 37(20)

This proposal would clarify what records of the ADO are public, authorize members of the public to obtain copies of public records at their expense, and permit disclosure of relevant confidential information to the New Hampshire Public Protection Fund.

(d) Supreme Court Rule 37(21)

This proposal would repeal Rule 37(21) which the ADO believes is no longer necessary because it applies to matters "initiated on or before April 1, 2000.")

(e) Supreme Court Rule 37A(III)(b)(5)(F)

This proposal would amend Rule 37A(III)(b)(5)(F) to allow the ADO to move for conditional default against respondents who fail to timely furnish discovery.

(f) Supreme Court Rule 37A(V)

This proposal would allow attorneys to request annulments, not only of reprimands, but also of public censures.

2. DISCUSSION AND VOTE ON PUBLIC HEARING ITEMS

(a) Supreme Court Rule 37(8)
(b) Supreme Court Rule 37(14)
(c) Supreme Court Rule 37(20)
(d) Supreme Court Rule 37(21)
(e) Supreme Court Rule 37A(III)(b)(5)(F)
(f) Supreme Court Rule 37A(V)

3. APPROVAL OF MARCH 11, 2022 MINUTES OF PUBLIC HEARING AND MEETING

DRAFT March 11, 2022 minutes
See Appendix B

4. ITEMS STILL PENDING BEFORE THE COMMITTEE

(a) 2016-009 and
2021-008 New Hampshire Rule of Professional Conduct 8.4(g)

At its March 11, 2022 meeting, the Committee voted to table this item until its June meeting to allow the NH Bar Association Board of Governors to review an amendment jointly proposed by the Attorney Discipline Office and the Ethics Committee of the Bar Association. On April 20, 2022, the Rules Committee received a letter from the Chair of the Bar Association's Ethics Committee advising that the Bar's Board of Governors had approved an agreement between the ADO and the Ethics Committee proposing a definition of "primary purpose" as used in Rule 8.4(g).

See Appendix C (July 15, 2019 Supreme Court order and April 20, 2022 letter from Chair, NHBA Ethics Committee)

(b) 2020-006 New Hampshire Rule of Criminal Procedure 12(a)(1)-Discovery; State's Obligation to Provide Copies to Defendant of his Criminal Record

At its March 11, 2021 meeting, the Committee received a report from the Rule 12(a)(1) subcommittee that reported its opposing views on the proposed amendment. Two issues proved challenging: (1) confidentiality; and (2) whether exclusion of the record should be the remedy if the State fails to produce the record prior to a bail hearing without good cause. The subcommittee proposed two rules that did and did not include exclusion as a remedy. Because there is some confusion about the language approved by the Committee at its March meeting, the Committee should take a formal vote.

See Appendix D (March 4, 2022 Report of Subcommittee)

(c) 2020-009 New Hampshire Rule of Criminal Procedure 12 – Discovery; Evidence of Other Crimes, Wrongs or Acts

At its March 11, 2021 meeting, the Committee received a report from the subcommittee that set forth the proposed amendments and that could serve as "legislative history." The Committee should take a formal vote to approve the amendments.

See Appendix E (March 8, 2022 Report of Subcommittee)

(d) 2021-006 MCLE Pro Bono Subcommittee Report

At its December meeting, the Committee agreed to create a subcommittee to discuss a rule amendment that would provide CLE credit for pro bono work. Justice Donovan, Judge Delker and Susan Lowry volunteered to serve on the subcommittee.

(e) 2022-004 Supreme Court Rule 37(9-A) and 37(9-B)

See Appendix F (May 16, 2022 Report of Subcommittee)

5. NEW BUSINESS

(a) 2022-005 Circuit Court-Family Division Rules that impose 10-day deadline

See Appendix G (email from Paula Werme)

(b) 2022-006 New Hampshire Rule of Professional Conduct 3.8

See Appendix H (Proposed amendment submitted by NHBA Ethics Committee)

NOTE: Complete submission can be found at: https://www.courts.nh.gov/resources/court-committees/advisory-committee-rules/committee-materials-docket-number/2022

6. REMAINING MEETING DATES

Friday, September 16, 2022
Friday, December 9, 2022

APPENDIX A

NEW HAMPSHIRE SUPREME COURT
ATTORNEY DISCIPLINE OFFICE

Brian R. Moushegian
General Counsel

Mark P. Cornell
Deputy General Counsel

Andrea Q. Labonte
Assistant General Counsel

Sara S. Greene
Disciplinary Counsel

Elizabeth M. Murphy
Assistant Disciplinary Counsel

March 7, 2022

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

Re: Proposed Amendments to Supreme Court Rule 37 and 37A

Dear Justice Donovan:

Dear Justice Donovan,

Enclosed is a Memorandum prepared by myself, and Brian Moushegian, General Counsel of the Attorney Discipline Office ("ADO"), regarding various proposed changes to Supreme Court Rules 37 and 37A, which govern the discipline system in New Hampshire. The Memorandum describes in detail the background for each proposed amendment, and contains the language of the current Rule(s), as well as proposed amendments with strikethroughs, etc.

To summarize, the proposals would:

- Amend Rule 37(8) to give the ADO "reciprocal" subpoena power, which would allow the ADO to issue a subpoena in this jurisdiction where a subpoena has been duly approved under the law of another disciplinary jurisdiction;

- Create a "reinstatement form" for applicants for reinstatement to the Bar to fill out and attach to their motion for reinstatement under Rule 37(14)(b). Rule 37(14)(b), as currently written, references a "reinstatement form," but one does not exist. The ADO requests a

subcommittee to work towards drafting the form and presenting it to the Committee.

- Amend Rule 37(20) to:
  - define what constitutes the ADO's "public file," depending on the stage at which it resolves in the discipline process;
  - allow the ADO to provide otherwise confidential documents to the Public Protection Fund;
  - provide that members of the public, in addition to a right to "inspect" the public file, may also make copies of same, and the ADO may transmit same through email or hard copy; and
  - renumber paragraphs as necessary.

- Delete Rule 37(21), which is no longer necessary, as it applied to matters "initiated on or before April 1, 2000;"

- Amend Rule 37A(III)(a)(2) to allow the ADO to move for conditional default against Respondents who fail to timely furnish discovery; and

- Amend Rule 37A(V) to allow attorneys to request annulments not only of reprimands, but also of public censures.

Thank you for your consideration.

Sincerely,

Brian R. Moushegian
General Counsel

and

Sara S. Greene
Disciplinary Counsel

RULE 37(8) –

Rule 37(8): ADO Discovery and Subpoena Power

Background:

Occasionally, the ADO has the need to issue a subpoena in another jurisdiction. Domesticating a subpoena, depending on the jurisdiction, can involve varying court procedures. For example, many states (though not New Hampshire) have adopted the Uniform Interstate Depositions and Discovery Act (UIDDA). Fortunately for the ADO, the majority of disciplinary agencies have provisions in their rules that allow the discipline agency to domesticate a foreign subpoena issued by another jurisdiction's disciplinary agency. (*See* Exhibit 2 hereto, Sup. Jud. Ct. R. 4:01, Section 22, Massachusetts's rule for reciprocal subpoena power). The ADO has availed itself of this procedure several times.

New Hampshire, however, has no such "reciprocal subpoena" rule to assist our sister disciplinary agencies in similar efforts. Including such a rule will allow the ADO to domesticate a subpoena duly issued in another jurisdiction for a pending discipline matter.

Current Rule:

(8) *Discovery and Subpoena Power:*

(a) At any stage prior to the filing of a notice of charges, attorneys from the attorney discipline office may issue subpoenas and subpoenas *duces tecum* to summon witnesses with or without documents.

(b) At any stage after the filing of a notice of charges, attorneys from the attorney discipline office, counsel for respondent attorneys and respondent attorneys representing themselves may issue subpoenas and subpoenas *duces tecum* to summon witnesses with or without documents, and may conduct additional discovery, including, but not limited to, interrogatories and depositions. Notice of the issuance of any such subpoena shall be served on the opposing party.

(c) *Access to Court Records*

(1) *General Rule.* At any stage, attorneys from the attorney discipline office may submit a written request seeking access to records relevant to its investigation into a pending disciplinary matter to a clerk of court. If the records requested by the attorney discipline office do not include any confidential documents or confidential information, the clerk shall provide prompt and complete access to the records, and if requested, copies of the relevant documents. If the records requested by the attorney discipline office include any confidential documents or confidential information, the attorney discipline office shall follow the procedures set forth in section (2).

(2) *Access to Confidential Documents and Confidential Information.*

(A) If the attorney discipline office seeks access to confidential or sealed records, the attorney discipline office need not file a motion to intervene, but shall:

(i) file a written request to gain access to the records explaining how the records are relevant in a pending disciplinary action; and

(ii) file a motion to seal along with the written request.

(B) The court shall promptly provide to all of the parties in the underlying court action notice and copies of the written request and motion to seal.

(C) The parties in the underlying court action shall have 10 days from the date of the notice to file a written objection to the disclosure of the requested materials.

(D) If none of the parties in the underlying court action object to the disclosure of the requested materials within 10 days of the filing of the written request and if the production of records pursuant to this rule does not contravene any statutes governing the production of confidential materials, the court may disclose the materials to the attorney discipline office. If none of the parties object but the court nevertheless is disinclined to release the records to the attorney discipline office, the court shall hold a non-public hearing, at which the attorney discipline office must demonstrate good cause for access to the records.

(E) If one or more parties in the underlying court action object to the disclosure of the requested materials, the court shall promptly schedule a non-public hearing, at which the attorney discipline office must demonstrate good cause for access to the records.

(F) *Protective Orders.* Whenever the court discloses records pursuant to this rule, the court shall issue a protective order governing the disclosure and use of the records. The protective order shall provide that:

(i) the attorney discipline office shall not disclose such records to any person except as necessary in connection with the prosecution or defense of the disciplinary matter;

(ii) any person to whom disclosure is made shall acknowledge in writing prior to the disclosure that he or she has been made aware of and agrees to comply with the protective order;

(iii) at the conclusion of the disciplinary proceeding, each party shall return to the attorney discipline office that party's copy of the records, whereupon the attorney discipline office shall destroy said records; and

(iv) thereafter, the attorney discipline office shall submit an affidavit to the court stating that said records have been destroyed. The Court may modify the foregoing terms of a protective order, or impose such additional terms as may be necessary in a particular case.

(G) Any and all confidential documents and confidential information obtained by the attorney discipline office pursuant to this rule shall be subject to a protective order, as set forth in section (F) of this rule, and shall be available to the respondent in a disciplinary matter, to the adjudicatory bodies of the attorney discipline system, and to the attorney discipline office's and

> respondent's potential or actual witnesses, including those witnesses designated as experts, as part of formal and informal disciplinary proceedings. To the extent confidential documents or confidential information obtained pursuant to this rule are utilized during a disciplinary hearing or other proceeding, such hearing or proceeding shall be closed to the public during any disclosure of, testimony or discussion involving the confidential document or confidential information. Such confidential records shall otherwise remain sealed and shall not, absent further court order, become part of the public file maintained by the attorney discipline office.

Proposed Amendment:

The amendment would add language empowering the ADO to domesticate a subpoena from another jurisdiction's attorney discipline office. It would place that provision at subsection (c), and renumber the section addressing court records as subsection (d).

(8) *Discovery and Subpoena Power:*

(a) At any stage prior to the filing of a notice of charges, attorneys from the attorney discipline office may issue subpoenas and subpoenas *duces tecum* to summon witnesses with or without documents.

(b) At any stage after the filing of a notice of charges, attorneys from the attorney discipline office, counsel for respondent attorneys and respondent attorneys representing themselves may issue subpoenas and subpoenas *duces tecum* to summon witnesses with or without documents, and may conduct additional discovery, including, but not limited to, interrogatories and depositions. Notice of the issuance of any such subpoena shall be served on the opposing party.

(c) Whenever a subpoena is sought in this state pursuant to the law of another jurisdiction for use in lawyer discipline or disability proceedings, and where the issuance of a subpoena has been duly approved under the law of the other jurisdiction, attorneys from the attorney discipline office may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents.

(dc) *Access to Court Records*

(1) *General Rule.* At any stage, attorneys from the attorney discipline office may submit a written request seeking access to records relevant to its investigation into a pending disciplinary matter to a clerk of court. If the records requested by the attorney discipline office do not include any confidential documents or confidential information, the clerk shall provide prompt and complete access to the records, and if requested, copies of the relevant documents. If the records requested by the attorney discipline office include any confidential documents or confidential information, the attorney discipline office shall follow the procedures set forth in section (2).

(2) *Access to Confidential Documents and Confidential Information.*

(A) If the attorney discipline office seeks access to confidential or sealed records, the attorney discipline office need not file a motion to intervene, but shall:

(i) file a written request to gain access to the records explaining how the records are relevant in a pending disciplinary action; and

(ii) file a motion to seal along with the written request.

(B) The court shall promptly provide to all of the parties in the underlying court action notice and copies of the written request and motion to seal.

(C) The parties in the underlying court action shall have 10 days from the date of the notice to file a written objection to the disclosure of the requested materials.

(D) If none of the parties in the underlying court action object to the disclosure of the requested materials within 10 days of the filing of the written request and if the production of records pursuant to this rule does not contravene any statutes governing the production of confidential materials, the court may disclose the materials to the attorney discipline office. If none of the parties object but the court nevertheless is disinclined to release the records to the attorney discipline office, the court shall hold a non-public hearing, at which the attorney discipline office must demonstrate good cause for access to the records.

(E) If one or more parties in the underlying court action object to the disclosure of the requested materials, the court shall promptly schedule a non-public hearing, at which the attorney discipline office must demonstrate good cause for access to the records.

(F) *Protective Orders.* Whenever the court discloses records pursuant to this rule, the court shall issue a protective order governing the disclosure and use of the records. The protective order shall provide that:

(i) the attorney discipline office shall not disclose such records to any person except as necessary in connection with the prosecution or defense of the disciplinary matter;

(ii) any person to whom disclosure is made shall acknowledge in writing prior to the disclosure that he or she has been made aware of and agrees to comply with the protective order;

(iii) at the conclusion of the disciplinary proceeding, each party shall return to the attorney discipline office that party's copy of the records, whereupon the attorney discipline office shall destroy said records; and

(iv) thereafter, the attorney discipline office shall submit an affidavit to the court stating that said records have been destroyed. The Court may modify the foregoing terms of a protective order, or impose such additional terms as may be necessary in a particular case.

(G) Any and all confidential documents and confidential information obtained by the attorney discipline office pursuant to this rule shall be subject to a

protective order, as set forth in section (F) of this rule, and shall be available to the respondent in a disciplinary matter, to the adjudicatory bodies of the attorney discipline system, and to the attorney discipline office's and respondent's potential or actual witnesses, including those witnesses designated as experts, as part of formal and informal disciplinary proceedings. To the extent confidential documents or confidential information obtained pursuant to this rule are utilized during a disciplinary hearing or other proceeding, such hearing or proceeding shall be closed to the public during any disclosure of, testimony or discussion involving the confidential document or confidential information. Such confidential records shall otherwise remain sealed and shall not, absent further court order, become part of the public file maintained by the attorney discipline office.

– RULE 37(14)(b) –

Rule 37(14)(b) Reinstatement Following Suspension of More Than Six Months.

Background

Rule 37(14), which governs procedures for attorneys who seek reinstatement (following suspension), or readmission (following disbarment) was significantly revised several years ago. It was broken up into three sections: Rule 37(14)(a) addresses reinstatement after a suspension of six months or less, Rule 37(14)(b) addresses reinstatement after a suspension of over six months, and Rule 37(14)(c) addresses readmission after a disbarment or a resignation while under disciplinary investigation.

Rule 37(14)(b) references a "reinstatement form" as a required filing for an applicant seeking reinstatement. This is a very common requirement in most disciplinary jurisdictions when an applicant seeks to practice law after a suspension or disbarment. Such forms request detailed information about an applicant. Examples from other jurisdictions (Massachusetts, Maine, and Hawaii) are attached hereto as Exhibits 5-7.

However, the reinstatement form was never actually created in New Hampshire. Since the time of the Rule's amendment, several applicants have applied for reinstatement, inquired about the "form," only to be told there is none. Disciplinary Counsel Sara Greene can update the Committee further about these issues at the next meeting.

The ADO would like the Rules Advisory Committee to appoint a working subcommittee to draft a proposed reinstatement form for the Committee's consideration and ultimately the Court's approval. Supreme Court Clerk Tim Gudas advises that he would like to be part of the subcommittee.

The proposed amendment to this rule will require that any applicant have taken and passed the Multistate Professional Responsibility Examination (MPRE) *within one year* of a motion for reinstatement. There is currently no such time requirement; the current rule requires only that the applicant have passed the MPRE "after entry of the order of suspension." That means an applicant could be suspended in 2021, take and pass the MPRE in 2022, and apply for reinstatement in 2040, relying on an results from an ethics test taken over 15 years prior. If an applicant's burden under Rule 37(14)(b) is to demonstrate by clear and convincing evidence, *inter alia*, that (s)he has requisite "learning in the law," the passing of the MRPE should be reasonably close in time to the request for reinstatement.

Current Rule:

(1) An attorney suspended by the court for misconduct, other than for disability, for more than six months shall be reinstated only upon order of the court. No attorney may petition for reinstatement until the period of suspension has expired.

(2) Petition. An attorney who seeks reinstatement following suspension of more than six months shall file a petition for reinstatement with the court. The petition shall be accompanied

by a completed reinstatement form and the requisite filing fee. The petition shall be under oath and shall:

(A) specify with particularity the manner in which the petitioner has fully complied with the terms and conditions set forth in all prior disciplinary orders; and

(B) certify that the petitioner has taken the Multistate Professional Responsibility Examination after entry of the order of suspension, and has received a passing grade as established by the board of bar examiners.

(3) Initial Review of Petition and Reinstatement Form. The court will review the petition and reinstatement form to determine whether the certifications required by subsection (2) of this rule have been provided and whether the reinstatement form is complete. If so, the court shall refer the petition and reinstatement form to the professional conduct committee, and shall provide a copy of the petition and reinstatement form to the attorney discipline office.

(4) Publication of Notice of Petition. If the court refers the petition to the professional conduct committee, the professional conduct committee shall cause a notice to be published in a newspaper with statewide circulation, a newspaper with circulation in the area of the petitioner's former primary office, and in the New Hampshire Bar News, that the petitioner has moved for reinstatement. The notice shall also be posted on the judicial branch website. The notice shall invite anyone to comment on the petition by submitting said comments in writing to the professional conduct committee within twenty (20) days of publication. All comments shall be made available to the petitioner. Where feasible, the professional conduct committee shall give notice to the original complainant.

(5) Hearing. Upon receipt of the petition, the professional conduct committee may either recommend reinstatement or refer the petition to the hearings committee for prompt appointment of a hearing panel.

(A) The hearing panel chair shall conduct and hold a prehearing conference within thirty (30) days of the appointment of the hearing panel.

(B) The hearings committee shall conduct a hearing within 120 days of the appointment of the hearing panel.

(C) The petitioner shall bear the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competence, and learning in the law required for admission to practice law in this State and that the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive to the public interest.

(D) Attorneys from the attorney discipline office may participate in the hearing to present evidence and to cross-examine the petitioner and any witnesses.

(E) At the conclusion of the hearing, the hearing panel shall promptly file with the professional conduct committee a report containing its findings and recommendations and the record of the proceedings.

(6) Review by the Professional Conduct Committee. Following receipt of the report, the professional conduct committee shall:

(A) review the report of the hearing panel and the record;

(B) allow the filing of written memoranda by disciplinary counsel and the petitioner;

(C) review the hearing transcript;

(D) hold oral argument if requested by a party or ordered by the Committee; and

(E) file its own findings and recommendations with the court, together with the record, and provide a copy of the recommendations and findings to the petitioner.

(7) Final Order by the Court. Following receipt of the recommendation and the record from the professional conduct committee:

(A) the court shall notify the petitioner and disciplinary counsel that they must, within 30 days of the court's order, identify any legal or factual issues the parties wish the court to review;

(B) if neither party identifies an issue for review, the court may act upon the recommendations without further proceedings;

(C) if either party identifies an issue for review, the court may issue a scheduling order setting forth a briefing schedule;

(D) the court shall, after filing of any briefs and oral arguments, make such order as justice may require.

Proposed Rule:

(1) An attorney suspended by the court for misconduct, other than for disability, for more than six months shall be reinstated only upon order of the court. No attorney may petition for reinstatement until the period of suspension has expired.

(2) Petition. An attorney who seeks reinstatement following suspension of more than six months shall file a petition for reinstatement with the court. The petition shall be accompanied by a completed reinstatement form and the requisite filing fee. The petition shall be under oath and shall:

(A) specify with particularity the manner in which the petitioner has fully complied with the terms and conditions set forth in all prior disciplinary orders; and

(B) certify that the petitioner has taken the Multistate Professional Responsibility Examination after entry of the order of suspension and within one year of the filing of the

petition for reinstatement and has received a passing grade as established by the board of bar examiners.

(3) Initial Review of Petition and Reinstatement Form. The court will review the petition and reinstatement form to determine whether the certifications required by subsection (2) of this rule have been provided and whether the reinstatement form is complete. If so, the court shall refer the petition and reinstatement form to the professional conduct committee, and shall provide a copy of the petition and reinstatement form to the attorney discipline office.

(4) Publication of Notice of Petition. If the court refers the petition to the professional conduct committee, the professional conduct committee shall cause a notice to be published in a newspaper with statewide circulation, a newspaper with circulation in the area of the petitioner's former primary office, and in the New Hampshire Bar News, that the petitioner has moved for reinstatement. The notice shall also be posted on the judicial branch website. The notice shall invite anyone to comment on the petition by submitting said comments in writing to the professional conduct committee within twenty (20) days of publication. All comments shall be made available to the petitioner. Where feasible, the professional conduct committee shall give notice to the original complainant.

(5) Hearing. Upon receipt of the petition, the professional conduct committee may either recommend reinstatement or refer the petition to the hearings committee for prompt appointment of a hearing panel.

(A) The hearing panel chair shall conduct and hold a prehearing conference within thirty (30) days of the appointment of the hearing panel.

(B) The hearings committee shall conduct a hearing within 120 days of the appointment of the hearing panel.

(C) The petitioner shall bear the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competence, and learning in the law required for admission to practice law in this State and that the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive to the public interest.

(D) Attorneys from the attorney discipline office may participate in the hearing to present evidence and to cross-examine the petitioner and any witnesses.

(E) At the conclusion of the hearing, the hearing panel shall promptly file with the professional conduct committee a report containing its findings and recommendations and the record of the proceedings.

(6) Review by the Professional Conduct Committee. Following receipt of the report, the professional conduct committee shall:

(A) review the report of the hearing panel and the record;

(B) allow the filing of written memoranda by disciplinary counsel and the petitioner;

(C) review the hearing transcript;

(D) hold oral argument if requested by a party or ordered by the Committee; and

(E) file its own findings and recommendations with the court, together with the record, and provide a copy of the recommendations and findings to the petitioner.

(7) Final Order by the Court. Following receipt of the recommendation and the record from the professional conduct committee:

(A) the court shall notify the petitioner and disciplinary counsel that they must, within 30 days of the court's order, identify any legal or factual issues the parties wish the court to review;

(B) if neither party identifies an issue for review, the court may act upon the recommendations without further proceedings;

(C) if either party identifies an issue for review, the court may issue a scheduling order setting forth a briefing schedule;

(D) the court shall, after filing of any briefs and oral arguments, make such order as justice may require.

-RULE 37(20)

Rule 37(20) – Formal Proceedings; Format of Pleadings and Documents: Confidentiality and Public Access - Matters Initiated On Or After April 1, 2000:

Background:

This Rule change would remove a section, Rule 37(21), for disciplinary matters initiated "on or before April 1, 2000." That section was necessary when the disciplinary rules were first drafted in 2004, but is no longer necessary.

This Rule would clarify Rule 37(20), governing public access to ADO files for matters initiated "on or after April 1, 2000," to:

(1) provide that the ADO may provide otherwise confidential documents to the Public Protection Fund, just as it can to agencies authorized to investigate violations of criminal statutes;
(2) amend what constitutes the "public file" maintained by the ADO;
(3) provide that members of the public, in addition to a right to "inspect" such public file, may also make or receive copies of same. This issue has become particularly troublesome recently, following Orders of the PCC relevant to a litigated matter in which the ADO was sued in Superior Court. Those Orders are attached hereto as Exhibits 3-4 . The PCC has interpreted the current rule to mean that members of the public may only inspect the public file, but they cannot make copies of it, nor can the ADO forward copies, electronically or otherwise, to members of the public. For example, a witness (or a newspaper representative) will seek a copy of a Hearing Panel Report following a trial, but the ADO cannot mail or email a copy to such persons nor can such persons make a copy of the Report. Eventually, when a matter is final, such Report is accessible on the ADO website, but that process can sometimes take one year or more from the time that a Hearing Panel issues a report. In addition, members of the public occasionally want to see additional public file materials that are not posted on the website at all (i.e. an expert report, or the initial grievance); and
(4) Renumber paragraphs based on the deletion of Rule 37(21)

Current Rule:

(20) Confidentiality and Public Access - Matters Initiated On Or After April 1, 2000:

Applicability Note: Section 20 shall apply to records and proceedings in all matters initiated on or after April 1, 2000.

(a) Grievance outside the Jurisdiction of the Attorney Discipline System or Not Meeting the Requirements for Docketing as a Complaint:

(1) A grievance against a person who is not subject to the rules of professional conduct shall be returned to the grievant. No file on the grievance will be maintained.

(2) All records and materials relating to a grievance determined by the attorney discipline office or the complaint screening committee not to meet the requirements for docketing as a complaint shall be available for public inspection (other than work product, internal memoranda, and deliberations) beginning 30 days after correspondence is sent to the respondent attorney who is the subject of the grievance and the respondent attorney has the opportunity to provide a reply to be filed in the public record. The records and material shall be maintained at the attorney discipline office for two (2) years from the date of the original filing. After this two-year period, the records shall be destroyed.

(3) Index of Complaints. The attorney discipline office shall maintain an index of complaints docketed against each attorney, which shall contain pertinent information, including the outcome of the complaint. No index of grievances that are not docketed as complaints shall be maintained.

(b) Grievance Docketed as Complaint: All records and proceedings relating to a complaint docketed by the attorney discipline system shall be available for public inspection (other than work product, internal memoranda, and deliberations) upon the earliest of the following:

(1) When the Attorney Discipline Office general counsel, the complaint screening committee or the professional conduct committee finally disposes of a complaint;

(2) When disciplinary counsel issues a notice of charges;

(3) When the professional conduct committee files a petition with the supreme court, except as provided by section (11) regarding resignations; or

(4) When the respondent attorney, prior to dismissal of a complaint or the issuance of a notice of charges, requests that the matter be public.

(c) Records may be destroyed after:

(1) three years of the date of notice of dismissal; or

(2) three years of the date of an annulment in accordance with Rule 37A; or

(3) five years after the death of the attorney-respondent.

(d) Proceedings for Reinstatement or Readmission: When an attorney seeks reinstatement or readmission pursuant to section (14), the records, with the exception of the bar application, and the proceedings before the hearing panel and the professional conduct committee shall be public (other than work product, internal memoranda, and deliberations).

(e) Proceedings Based upon Conviction or Public Discipline: If the investigation is predicated upon a conviction of the respondent for a crime or upon public discipline imposed upon the respondent in another jurisdiction, the entire file pertaining to the crime or the public discipline, other than the work product, internal memoranda, and deliberations of the attorney discipline system, shall be available for public inspection.

(f) Proceedings Alleging Disability: All proceedings involving allegations of disability on the part of a New Hampshire licensed attorney shall be kept confidential until and unless the supreme court enters an order suspending said attorney from the practice of law pursuant to section (10), in which case said order shall be public.

(g) Protective Orders: Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise confidential or privileged information concerning the complainant, a witness, the attorney, or other persons. In order to protect the legitimate privacy interests of such persons, the professional conduct committee, may, upon request, or on its own initiative, issue a protective order prohibiting the disclosure of confidential, malicious, personal, privileged information or material submitted in bad faith. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the professional conduct committee. The professional conduct committee shall act upon the request within a reasonable time. Any person aggrieved by a decision on a protective order may, within thirty (30) days of the decision, request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the court has acted or the period for requesting court review has expired.

(h) Disclosure to Authorized Agency: The attorney discipline office may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to authorized agencies investigating qualifications for admission to practice or fitness to continue practice, to law enforcement agencies investigating qualifications for government employment, and to law enforcement agencies authorized to investigate and prosecute violations of the criminal law. If the attorney discipline office decides to answer a request for relevant information, and if the attorney who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the attorney discipline office shall send to the attorney at his or her last known address, by certified mail, a notice that information had been requested and by whom, together with a copy of the information that the attorney discipline office proposes to release to the requesting agency. The attorney discipline office shall inform the subject attorney that the information shall be released at the end of ten (10) days from the date of mailing the notice unless the attorney obtains a supreme court order restraining such disclosure. Notice to the attorney, as provided in this section, shall not be required prior to disclosure of relevant information that is otherwise confidential to law enforcement agencies authorized to investigate and prosecute violations of the criminal law.

(i) Disclosure to Supreme Court for Rule 36 Review: The attorney discipline office shall disclose relevant information that is otherwise confidential to the supreme court, upon its request, in connection with the court's review of applications under Supreme Court Rule 36.

(j) Disclosure to National Discipline Data Bank: The clerk of the supreme court shall transmit notice of all public discipline imposed on an attorney by the supreme court or the professional conduct committee (upon notice from said committee), or the suspension from law practice

due to disability of an attorney, to the National Discipline Data Bank maintained by the American Bar Association.

(k) Disclosure to Lawyers Assistance Program: The Attorney Discipline Office shall have the power to disclose otherwise confidential information to the New Hampshire Lawyers Assistance Program whenever the Attorney Discipline Office determines that such disclosure would be in the public interest.

(l) Duty of Participants: All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this rule.

Nothing in this section prevents a grievant from disclosing publicly the underlying conduct of an attorney which he or she believes violates the rules of professional conduct or is otherwise inappropriate. The immunity from civil liability provided by section (7) does not apply to such disclosures. This section does prohibit a grievant, however, from disclosing publicly the fact that a grievance or complaint against the attorney about the conduct had been filed with the attorney discipline system pending the grievance or complaint becoming public in accordance with the provisions of this section.

(m) Violation of Duty of Confidentiality: Any violation of the duty of confidentiality imposed by section (20) may result in action of the professional conduct committee at the request of the non-violating party or on its own motion. That action may consist of opening the file and the proceedings earlier than would have been the case under section (20), terminating the proceedings with or without public comment, or such other action as the professional conduct committee deems appropriate in the circumstances.

(n) With respect to records to be made available for public inspection under this Rule or Rule 37A, final disciplinary decisions of the professional conduct committee and the supreme court shall be made available for public inspection electronically via the internet; all other records shall be made available for public inspection only at the attorney discipline office.

Proposed Amendment:

(20) Confidentiality and Public Access ~~–Matters Initiated On Or After April 1, 2000:~~

~~Applicability Note: Section 20 shall apply to records and proceedings in all matters initiated on or after April 1, 2000.~~

(a)The Attorney Discipline Office shall maintain a public file relating to a grievance. The public file shall not include the work product, internal memoranda, and deliberations of the Attorney Discipline Office, the Hearings Committee or the Professional Conduct Committee. The public file shall consist of:

(1) for non-docketed matters, the grievance, voluntary response(s) from the respondent attorney, if any, the non-docket letter, the grievant's request for reconsideration and response(s) thereto, if any, and any written decision of the Complaint Screening Committee;

(2) for docketed matters that are not referred to disciplinary counsel for formal proceedings, the complaint, mandatory response(s) from the respondent attorney, complainant's or respondent's requests for reconsideration, if any, and any responses(s) thereto, and any written decision of the Complaint Screening Committee; and

(3) for matters that result in formal proceedings, the documents referenced in the index of record maintained by Clerk of the Hearings and Professional Conduct Committees.

(b~~a~~) Grievance outside the Jurisdiction of the Attorney Discipline System or Not Meeting the Requirements for Docketing as a Complaint:

(1) A grievance against a person who is not subject to the rules of professional conduct shall be returned to the grievant. No file on the grievance will be maintained.

(2) ~~All records and materials~~The public file relating to a grievance determined by the attorney discipline office or the complaint screening committee not to meet the requirements for docketing as a complaint shall be available for public inspection and copying at the expense of the member of the public seeking such copies ~~(other than work product, internal memoranda, and deliberations)~~ beginning 30 days after correspondence is sent to the respondent attorney who is the subject of the grievance and the respondent attorney has the opportunity to provide a reply to be filed in the public record. The records and material shall be maintained at the attorney discipline office for two (2) years from the date of the original filing. After this two-year period, the records shall be destroyed.

(3) Index of Complaints. The attorney discipline office shall maintain an index of complaints docketed against each attorney, which shall contain pertinent information, including the outcome of the complaint. No index of grievances that are not docketed as complaints shall be maintained.

(b~~c~~) Grievance Docketed as Complaint: ~~All records and proceedings~~The public file relating to a complaint docketed by the attorney discipline system shall be available for public inspection and copying at the expense of the member of the public seeking such copies ~~(other than work product, internal memoranda, and deliberations)~~ upon the earliest of the following:

(1) When the Attorney Discipline Office general counsel, the complaint screening committee or the professional conduct committee finally disposes of a complaint;

(2) When disciplinary counsel issues a notice of charges;

(3) When the attorney discipline office or the professional conduct committee files a petition with the supreme court, except as provided by section (11) regarding resignations; or

(4) When the respondent attorney, prior to dismissal of a complaint or the issuance of a notice of charges, requests that the matter be public.

(dc) Records may be destroyed after:

(1) three years of the date of notice of dismissal; or

(2) three years of the date of an annulment in accordance with Rule 37A; or

(3) five years after the death of the attorney-respondent.

(ed) Proceedings for Reinstatement or Readmission: When an attorney seeks reinstatement or readmission pursuant to section (14), the Attorney Discipline Office shall maintain a public file relating to such reinstatement or readmission. The public file shalll not include the work product, internal memoranda, and deliberations of the Attorney Discipline Office, the Hearings Committee or the Professional Conduct Committee. The public file shall consist of the documents referenced in the index of record maintained by Clerk of the Hearings and Professional Conduct Committees.

~~the records, with the exception of the bar application, and the proceedings before the hearing panel and the professional conduct committee shall be public (other than work product, internal memoranda, and deliberations).~~

(fe) Proceedings Based upon Conviction or Public Discipline: If the investigation is predicated upon a conviction of the respondent for a crime or upon public discipline imposed upon the respondent in another jurisdiction, the entire file pertaining to the crime or the public discipline, other than the work product, internal memoranda, and deliberations of the attorney discipline system, shall be available for public inspection.

(gf) Proceedings Alleging Disability: All proceedings involving allegations of disability on the part of a New Hampshire licensed attorney shall be kept confidential until and unless the supreme court enters an order suspending said attorney from the practice of law pursuant to section (10), in which case said order shall be public.

(hg) Protective Orders: Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise confidential or privileged information concerning the complainant, a witness, the attorney, or other persons. In order to protect the legitimate privacy interests of such persons, the professional conduct committee, may, upon request, or on its own initiative, issue a protective order prohibiting the disclosure of confidential, malicious, personal, privileged information or material submitted in bad faith. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the professional conduct committee. The professional conduct committee shall act upon the request within a reasonable time. Any person aggrieved by a decision on a protective order may, within thirty (30) days of the decision, request that the supreme court review the matter. The material in question shall

remain confidential after the committee has acted upon the request for protective order until such time as the court has acted or the period for requesting court review has expired.

(ih) Disclosure to Authorized Agency: The attorney discipline office may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to authorized agencies investigating qualifications for admission to practice or fitness to continue practice, to law enforcement agencies investigating qualifications for government employment, to the New Hampshire Public Protection Fund, and to law enforcement agencies authorized to investigate and prosecute violations of the criminal law. If the attorney discipline office decides to answer a request for relevant information, and if the attorney who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the attorney discipline office shall send to the attorney at his or her last known address, by certified mail, a notice that information had been requested and by whom, together with a copy of the information that the attorney discipline office proposes to release to the requesting agency. The attorney discipline office shall inform the subject attorney that the information shall be released at the end of ten (10) days from the date of mailing the notice unless the attorney obtains a supreme court order restraining such disclosure. Notice to the attorney, as provided in this section, shall not be required prior to disclosure of relevant information that is otherwise confidential to the New Hampshire Public Protection Fund or to law enforcement agencies authorized to investigate and prosecute violations of the criminal law.

(ji) Disclosure to Supreme Court for Rule 36 Review: The attorney discipline office shall disclose relevant information that is otherwise confidential to the supreme court, upon its request, in connection with the court's review of applications under Supreme Court Rule 36.

(kj) Disclosure to National Discipline Data Bank: The clerk of the supreme court shall transmit notice of all public discipline imposed on an attorney by the supreme court or the professional conduct committee (upon notice from said committee), or the suspension from law practice due to disability of an attorney, to the National Discipline Data Bank maintained by the American Bar Association.

(lk) Disclosure to Lawyers Assistance Program: The Attorney Discipline Office shall have the power to disclose otherwise confidential information to the New Hampshire Lawyers Assistance Program whenever the Attorney Discipline Office determines that such disclosure would be in the public interest.

(ml) Duty of Participants: All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this rule.

Nothing in this section prevents a grievant from disclosing publicly the underlying conduct of an attorney which he or she believes violates the rules of professional conduct or is otherwise inappropriate. The immunity from civil liability provided by section (7) does not apply to such disclosures. This section does prohibit a grievant, however, from disclosing publicly the fact that a grievance or complaint against the attorney about the conduct had been filed with the

attorney discipline system pending the grievance or complaint becoming public in accordance with the provisions of this section.

(n~~m~~) Violation of Duty of Confidentiality: Any violation of the duty of confidentiality imposed by section (20) may result in action of the professional conduct committee at the request of the non-violating party or on its own motion. That action may consist of opening the file and the proceedings earlier than would have been the case under section (20), terminating the proceedings with or without public comment, or such other action as the professional conduct committee deems appropriate in the circumstances.

(o~~n~~) With respect to records to be made available for public inspection under this Rule or Rule 37A, final disciplinary decisions of the professional conduct committee and the supreme court shall be made available for public inspection electronically via the internet; all other records shall be made available for public inspection only at the attorney discipline office.

**delete Rule 37(21) addressing matters initiated before April 1, 2000

**renumber 37(22) as 37(21)

-RULE 37A(III)(a)(2)

Rule 37A(III)(a)(2) – Formal Proceedings; Format of Pleadings and Documents

Background:

Rule 37A(III) governs formal disciplinary proceedings, i.e., the litigation phase of a discipline matter that has been referred from the Complaint Screening Committee to Disciplinary Counsel. These Rules, however, are not exhaustive in that they do not address all litigation tools and procedural requirements. For example, the Rule contains no 10-day deadline for responding to a motion, no references to motions to compel, etc.

This flexibility is consistent with the notion that disciplinary matters are *sui generis,* and not properly characterized as solely civil in nature. Nonetheless, there are instances where the absence of certain procedural rules in Rule 37 has caused significant delay in proceedings and waste of judicial resources. Recently, a Respondent simply ignored discovery requests from the ADO over a year after a Notice of Charges issued. After the ADO's motion to compel was granted by the Hearing Panel Chair, and an Order issued, the Respondent violated the Order. He then failed to appear for a duly noticed deposition. This was a case that eventually led to a 9-day hearing with 13 witnesses. This Respondent had filed an Answer (and thus did not default on the charging document), but essentially ceased participating in the process.

Respondents in disciplinary matters have a duty to cooperate with the discipline authority under Rule 8.1. Though the disciplinary rules need not exhaustively parallel civil procedure rules, the ADO believes that it should have the power to file a motion for conditional default where a Respondent simply ceases to cooperate in the discovery process. This procedure would be that currently set forth in Superior Court Rule 29(d), and would include the time frame therein to allow a Respondent to cure the conditional default and avoid a final default.

Current Rule:

Rule 37A(III)(b)(5)(F) – *Discovery*

(5) Discovery.

(A) Discovery shall be available to the disciplinary counsel. Discovery shall also be available to the respondent, provided that an answer has been filed. All such requests shall be in writing.

(B) On written request the following information, if relevant or reasonably calculated to lead to the discovery of admissible evidence in the matter, and if within the possession, custody or control of the disciplinary counsel, the respondent or respondent's counsel, is subject to discovery and shall be made available for inspection and copying as set forth in this rule:

(i) A writing or any other tangible object, including those obtained from or belonging to the respondent;

(ii) Signed written statements, or taped statements, if any, by any witness, including the respondent;

(iii) Results or reports of mental or physical examinations and of scientific tests or experiments made in connection with the matter;

(iv) Names, addresses and telephone numbers of all persons known to have relevant information based on personal knowledge about the matter, including a designation by the disciplinary counsel and respondent as to which of those persons will be called as witnesses;

(v) Police reports and any investigation reports generated by any agency other than the attorney discipline office;

(vi) Names and address of each person expected to be called as an expert witness, the expert's qualifications, the subject matter on which the expert will testify, a copy of all written reports submitted by the expert or, if none, a statement of facts and opinions to which the expert will testify and a summary of the grounds for each opinion; and

(vii) If disciplinary counsel or the respondent are unable to agree on discovery issues, a request must be made for a pre-hearing conference.

(C) This rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or that party's attorney or agents in connection with a disciplinary proceeding. Nor does it require discovery of statements, signed or unsigned, made by respondent to respondent's attorney or that attorney's agents. This rule does not authorize discovery of any internal materials or documents prepared by the attorney discipline office.

(D) Depositions shall be permitted in any matter to preserve the testimony of a witness likely to be unavailable for hearing due to death, incapacity or if otherwise agreed to by the parties. If disciplinary counsel or the respondent deem it necessary to take any other depositions, a request must be made for a pre-hearing conference.

(E) Discovery shall be made available within thirty (30) days after receipt of a written request therefor. A party's obligation to provide discovery is a continuing one. If, subsequent to compliance with a request for discovery, a party discovers additional names or statements of witnesses or other information reasonably encompassed by the initial request for discovery, the original discovery response shall be promptly supplemented accordingly. In any case in which a pre-hearing conference has been held, the case management order shall set forth the time period within which all discovery shall be completed.

(F) Any discoverable information which is not timely furnished either by original or supplemental response to a discovery request may, on application of the aggrieved party, be excluded from evidence at hearing. The failure of the disciplinary counsel or respondent to disclose the name and provide the report or summary of any expert who will be called to testify in accordance with prior agreement of the parties or as provided in the case management order at least twenty (20) days prior to the hearing date shall result in the exclusion of the witness, except on good cause shown.

Proposed Amendment:

(F) Any discoverable information which is not timely furnished either by original or supplemental response to a discovery request may, on application of the aggrieved party, be excluded from evidence at hearing-. The Attorney Discipline Office may move for conditional default if a Respondent fails to timely furnish discovery or appear at a duly noticed deposition, by complying with the procedure for conditional default as set forth in the Rules for Superior Courts. The failure of the disciplinary counsel or respondent to disclose the name and provide the report or summary of any expert who will be called to testify in accordance with prior agreement of the parties or as provided in the case management order at least twenty (20) days prior to the hearing date shall result in the exclusion of the witness, except on good cause shown.

– RULE 37A(V)

NEW HAMPSHIRE SUI

ATTORNEY DISCIPLINE OFFICE

Brian R. Moushegian
General Counsel

Mark P. Cornell
Deputy General Counsel

Andrea Q. Labonte
Assistant General Counsel

Sara S. Greene
Disciplinary Counsel

Elizabeth M. Murphy
Assistant Disciplinary Counsel

To: NH Supreme Court Advisory Committee on Rules

From: Brian R. Moushegian, General Counsel
Sara S. Greene, Disciplinary Counsel
NH Supreme Court Attorney Discipline Office

Date: January 27, 2022

Re: NH Supreme Court Rules 37A(V) and 37(8)

Annulments: Rule 37A(V)

Background:

The Professional Conduct Committee ("PCC") recently considered a request to annul previous discipline by an attorney who had received a public censure in 2011 for violating Rule of Professional Conduct 1.3 (Diligence) by failing to cure a conditional default and thereby allowing a final default judgment to be entered. The PCC denied the request to annul, finding that Rule 37(V)'s plain language allows annulments only for admonitions (under previous rules) and reprimands. The PCC's Order dated November 19, 2020 is attached hereto as Exhibit 1. The Order states, in pertinent part, "[t]he Committee suggests that the ADO considers proposing a change to the language of Rule 37A(V), to broaden its discretion to consider annulment in a slightly larger range of circumstances."

The ADO's proposed revision would allow individuals to move to annul public censures in addition to reprimands, but would lengthen the time period an individual must wait to request annulment for public censures to 10 years.

Public censures are generally imposed for negligent conduct that has caused some form of harm (but not serious harm). They are not imposed for knowing or intentional misconduct, which would generally result in suspension or disbarment. That said, public censures are a more serious sanction than a reprimand. Requiring individuals to wait the additional time before seeking an annulment for a public censure gives the ADO and the PCC a window of time to ensure the individual has not engaged in any further misconduct during the 10 year period.

Current Rule:

(V) Annulment

(a) When Annulment May Be Requested.

A person who has been issued an admonition (under prior rules), or reprimand may at any time after five (5) years from the date of the admonition or reprimand apply to the professional conduct committee for an order to annul the admonition or reprimand. A person against whom a complaint has been filed which has resulted in a finding of no misconduct, may also apply to the professional conduct committee for an order to annul the record at any time after five (5) years from the date of the finding of no misconduct.

(b) Matters Which May Not Be Annulled.

Notwithstanding the foregoing, an order of annulment will not be granted except upon order of the supreme court if respondent's misconduct included conduct which constitutes an element of a felony or which included as a material element fraud, fraudulent misrepresentation, dishonesty, deceit, or breach of fiduciary duty.

(c) Consideration of Other Complaints.

When application has been made under subsection (a), the professional conduct committee may consider any other complaints filed against the respondent and any other relevant facts.

(d) Effect of Annulment.

Upon entry of the order, the respondent shall be treated in all respects as if any admonition or reprimand had not been rendered, except that, upon conviction of any other violation of the rules of professional conduct after the order of annulment has been entered, the previous admonition, or reprimand may be considered by the professional conduct committee or the supreme court in determining the discipline to be imposed.

(e) Sealing of Records of Annulment.

Upon issuance of an order of annulment, all records or other evidence of the existence of the complaint shall be sealed, except that the attorney discipline office may keep the docket or card index showing the names of each respondent and complainant, the final disposition, and the date that the records relating to the matter were sealed.

(f) Disclosure of Annulled Matter.

Upon issuance of an order of annulment, the component parts of the attorney discipline systems shall not thereafter disclose the record of the complaint which resulted in a finding of no misconduct, admonition, or reprimand, except as permitted by section (V)(d) of this rule, and the respondent shall be under no obligation thereafter to disclose the admonition or reprimand.

(g) Denial of Request for Annulment.

Upon denial of an order of annulment, the respondent may appeal to the supreme court within thirty (30) days of the date of receipt of the denial. The appeal shall not be a mandatory appeal. Upon such appeal, the burden shall be upon the respondent to show that the professional conduct committee's exercise of its discretion in denying the order of annulment is unsustainable.

Proposed Amendment:

The ADO proposes the following amendment to subsection (V)(a) of Rule 37A:

(V) Annulment

(a) When Annulment May Be Requested.

A person who has been issued an admonition (under prior rules), or reprimand may at any time after five (5) years from the date of the admonition or reprimand apply to the professional conduct committee for an order to annul the admonition or reprimand. A person against whom a complaint has been filed which has resulted in a finding of no misconduct, may also apply to the professional conduct committee for an order to annul the record at any time after five (5) years from the date of the finding of no misconduct. A person who has been issued a public censure may at any time after ten (10) years from the date of the public censure apply to the professional conduct committee for an order to annul the public censure.

This proposed amendment would not create any need to amend Rule 37.

APPENDIX B

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

DRAFT
Minutes of Friday, March 11, 2022 Meeting

NH Supreme Court
Supreme Court Courtroom
1 Charles Doe Drive
Concord, NH 03301

Justice Donovan, Committee Chair, called the meeting to order at 12:30 p.m. The following Committee members were present in person:

Abigail Albee, Esq., Hon. R. Laurence Cullen, Hon. N. William Delker, Justice Patrick E. Donovan, Hon. Michael H. Garner, Sean P. Gill, Esq., Sara Greene, Esq., Jeanne P. Herrick, Esq., Charles Keefe, Esq., Derek Lick, Esq., Susan A. Lowry, Esq., Terri Peterson, Ari Richter, and Charles Stewart.

1. Approval of March 11, 2022 Minutes

On motion from Attorney Gill and seconded by Judge Cullen, the minutes of March 11, 2022 were approved. Attorney Lick, Mr. Stewart, Attorney Albee, and Attorney Greene abstained.

2. Items Pending Before the Committee

(a) 2016-009 New Hampshire Rules of Professional Conduct 8.4 (g)

Attorney Brian Moushegian provided a brief update about a proposed amendment that would define the term "primary purpose" as it is currently included in Rule 8.4(g). He asked the Committee to table this item until the June meeting of the Advisory Committee on Rules to provide time for review by the NH Bar Association Board of Governors.

On motion by Mr. Stewart and seconded by Attorney Albee, the Committee unanimously voted to table the item until the June meeting.

(b) 2020-006 New Hampshire Rule of Criminal Procedure 12 – Discovery; State's Obligation to Provide Copies to Defendant's Criminal Record

At the December 10, 2021 meeting, the Committee voted to refer this issue back to the subcommittee to review the proposed amendment and

suggest revisions for consideration. Justice Donovan referenced the March 4, 2022 report of the subcommittee and asked the subcommittee to provide an update. The subcommittee reported opposing views on the proposed amendment and struggled with two primary issues. The first issue concerns the confidentiality of an individual's criminal record and the second concerns whether exclusion of the record should be the remedy if the State fails to produce the record prior to a bail hearing without showing good cause.

Judge Delker reported that Chief Justice Nadeau had issued an administrative order in the Superior Court regarding dissemination of a defendant's criminal record and it has worked well. Attorney Keefe reported that in his experience, pro se defendants in the Circuit Court do not normally receive a copy of their criminal records prior to arraignment. The subcommittee generally agreed that a proposed rule should incentivize sharing the criminal record but issues about disclosure, confidentiality, and due process remain.

The subcommittee proposed two rules that do and do not include "exclusion" as a remedy.

A motion to recommend to the Supreme Court Version A of the amendment failed. Discussion ensued.

On motion by Attorney Keefe and seconded by Attorney Lowry, the Committee approved by 11-2, the proposed rule amendment to replace "shall" with "may" and to strike "good cause". This amendment will be recommended to the Supreme Court for adoption.

(c) 2020-009 New Hampshire Rule of Criminal Procedure 12 – Discovery; Evidence of Other Crimes, Wrongs or Acts

Judge Delker addressed the subcommittee's memo dated March 8, 2022, that provides commentary for proposed rule changes to NH Rules of Criminal Procedure 12 and Rule of Evidence 404(b).

(d) 2021-005 Supreme Court Rule 40 – Procedural Rules of Committee on Judicial Conduct: Deferred Discipline

Attorney Herrick addressed the subcommittee's March 9, 2022, report about the placement of adding a deferred discipline option to the Procedural Rules of Committee on Judicial Conduct.

The proposed amendment to Supreme Court Rule 40(5)(c)(6) would allow the Judicial Conduct Committee to vote to hold any matter in abeyance at any stage of the proceedings for "good cause." The proposed

amendment adds language to include as "good cause" a deferral to provide the opportunity for the judge to submit to a confidential evaluation under the supervision of the New Hampshire Lawyers Assistance Program.

Judge Delker reported that the Judicial Conduct Committee had met earlier on March 11, 2022, and was satisfied with the proposed amendment. He also shared the revised amendment with Jill O'Neill, who was also satisfied.

On motion by Attorney Green and seconded by Attorney Keefe, the Committee unanimously agreed to recommend adoption of the amended rule to the Court.

(e) 2021-006 New Hampshire Supreme Court Report on the Recommendations of the Criminal Defense Task Force

Justice Donovan explained that the subcommittee agreed that the Access to Justice Commission is working on the proposals outlined in the Recommendations of the Criminal Defense Task Force, so no further action is required at this time.

3. New Submissions

(a) 2021-007 Super.Ct. R. 41; Dist. Div. R. 1.27; Prob. Div. R. 172; Fam. Div. R. 1.32 – December 17, 2021 Memo from David Peck

Justice Donovan referenced the December 17, 2021, memo from David Peck to the Committee regarding the issue of providing clarity about whether dismissals are with or without prejudice. After brief discussion, on motion by Judge Delker and seconded by Attorney Albee, the Committee unanimously voted to table the item.

(b) 2022-001 Supreme Court Rule 37A(V) – January 27, 2022 letter from the New Hampshire Attorney Discipline Office

Attorney Greene reviewed six proposed rule amendments as outlined in a January 27, 2022, memo to the Committee from the Attorney Discipline Office. After some discussion, on motion by Attorney Greene and seconded by Attorney Lick, the Committee unanimously agreed to prepare the proposed amendments for public comment.

(c) 2022-002 Supreme Court Rule 47 – February 24, 2022 letter from Judicial Council and Sandra Cabrera on behalf of the Bar Association Board of Governors

Justice Donovan discussed the February 24, 2022 joint letter from the Judicial Council and Sandra Cabrera, President-elect of the New Hampshire Bar Association, that proposed an increase in the indigent fee schedule set forth in Supreme Court Rule 47. Justice Donovan discussed the need for expedited consideration of this request. See Supreme Court Rule 51(f)(3). On motion by Attorney Greene and seconded by Attorney Albee, the Committee agreed that the proposal should be referred to the Supreme Court. Mr. Stewart abstained.

(d) 2022-003 Supreme Court Rules 27 and 42 – March 3, 2022 letters from Dianne Martin, Director, Administrative Office of the Courts

Justice Donovan provided a general overview of the proposed changes to Rules 27 and 42, which are needed to integrate the merger of the Attorney Discipline Office and the Office of Bar Admissions into the Judicial Branch. Upon review of the submission, Justice Donovan explained that exceptional circumstances justified expedited consideration of the proposed amendments and submitted them directly to the Court for review. Pursuant to Supreme Court Rule 51(c)(3).

4. Other Business

Justice Donovan reported that the Court had voted to adopt the amendments to N.H. Rule of Evidence 902 and to Circuit Court Rule 3.6 that the Rules Committee had recommended in its December 15, 2021 report.

Justice Donovan proposed a subcommittee be established to review changes to Rule 37(9) and 37(16) regarding immediate suspension of attorneys. Justice Donovan, Attorney Greene, Attorney Lowry, and Timothy Gudas, Supreme Court Clerk, will serve on the subcommittee.

With no further business before the Committee, the meeting adjourned at 2:06 p.m.

Respectfully submitted,
Lisa Merrill, Recording Secretary

APPENDIX C
2021-008

THE STATE OF NEW HAMPSHIRE

SUPREME COURT OF NEW HAMPSHIRE

ORDER

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51, the Supreme Court of New Hampshire entered the following order:

Following a public hearing held on April 12, 2019 on the recommendation made by the Advisory Committee on Rules (the Committee) to amend New Hampshire Rule of Professional Conduct (Rule) 8.4, and following a comment period on the court's alternative proposal to amend Rules 8.4 and 4.4 set forth in its May 17, 2019 order, and after considering all comments submitted, the New Hampshire Supreme Court hereby amends the Rules by adopting Rule 8.4(g) and the comments thereto as specified in Appendix A attached to this order. The court makes no changes to Rule 4.4.

The Bar has shown a high level of interest in the proposed amendment to Rule 8.4 since March 2017, when the Committee first considered the question of whether to recommend that this court adopt the American Bar Association's Model Rule of Professional Conduct 8.4(g)(Model Rule 8.4(g)). Since then, members of the Bar have expressed disparate views about Model Rule 8.4(g) and other proposals that were submitted to the Committee and this court. Model Rule 8.4(g) is of relatively recent origin, and a majority of jurisdictions have not yet considered whether to adopt it. Of those jurisdictions that have considered adopting Model Rule 8.4(g), several have declined to do so. As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g). As of this writing, Model Rule 8.4(g) remains under consideration in a number of jurisdictions.

In light of the nascent and ongoing discussion regarding the model rule, the court declines to adopt the rule proposed by the Advisory Committee on Rules. The amendment to Rule 8.4 that the court adopts today is similar to that proposed by the Attorney Discipline Office in a March 25, 2019 letter submitted prior to the April 12 hearing on the Committee's proposal.

The court believes that a review of the operation of the rule that the court adopts today is appropriate once it has been in effect for a reasonable period of time. Accordingly, the court hereby directs the Committee to undertake such a review after the amended rule has been in effect for two years, and that the Committee provide the court with its recommendations, if any, upon completing that review. The court requests that the Committee work with the

New Hampshire Bar Association Ethics Committee, the Attorney Discipline Office, and any other entities or persons the Committee believes would assist in the review.

The amendments to the New Hampshire Rules of Professional Conduct made by this order shall take effect on August 1, 2019.

Date: July 15, 2019

ATTEST: Eileen Fox

Eileen Fox, Clerk
Supreme Court of New Hampshire

Amend New Hampshire Rule of Professional Conduct 8.4 (new material is in **[bold and in brackets]**) as follows:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official;

(e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law~~.~~**[; or**

(g) take any action, while acting as a lawyer in any context, if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, harass or burden another person, including conduct motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules of Professional Conduct, nor does it preclude a lawyer from engaging in conduct or speech or from maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

New Hampshire Supreme Court Comment

Subsection (g) is intended to govern the conduct of lawyers in any context in which they are acting as lawyers. The rule requires that the proscribed action be taken with the primary purpose of embarrassing,

harassing or burdening another person, which includes an action motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.]

2021-008

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee
Equal Justice Under Law

April 20, 2022

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

Re: Rule 84(g) of the Rules of Professional Conduct

Dear Justice Donovan:

As you know, the Attorney Discipline Office and the Ethics Committee of the New Hampshire Bar Association had reached an agreement regarding a proposed amendment to the Rules of Professional Conduct.

That agreement required approval from the Board of Governors of the Bar Association, and at its last meeting, the Board of Governors voted to approve the amendment. Because of their approval, this proposal can be submitted to the Advisory Committee with the agreement of the aforementioned parties.

The agreed-upon proposal would add a new definition to the Rules as follows:

> 1.0(o) "Primary" means the principal, dominant or leading basis for the conduct engaged in, which may be inferred from the circumstances, without regard to any potential or actual secondary purposes for or effects of such conduct. Primary does not mean the sole or only reason for the conduct.

The concern being addressed relates to defining "primary purpose" in Rule 8.4(g). Of course, if you have questions, please let us know.

Very truly yours,

Stephanie K Burnham

Stephanie Burnham, Chair
N.H. Bar Association Ethics Committee

cc: Brian Moushegian, Gen'l Counsel, Attorney Discipline Office
Lorrie Platt, Sec'y to the Advisory Committee
Richard Guerriero, President, N.H. Bar Ass'n

APPENDIX D
2020-006

MEMORANDUM

TO: N.H. Supreme Court Advisory Committee on Rules

FROM: Subcommittee on Amendment to Criminal Rules of Procedure 12(a)(1)

RE: Agenda Item 2020-006: New Hampshire Rule of Criminal Procedure 12 – Discovery; State's Obligation to Provide Copies of Defendant's Criminal Record

DATE: March 4, 2022

OVERVIEW

By letter dated June 30, 2020, Attorney David Rothstein of the New Hampshire Public Defender originally proposed an amendment to Rule 12(a) of the New Hampshire Rules of Criminal Procedure as follows:

Proposed Rule 12 (a) from Attorney Rothstein

(a) Discovery of Criminal Record Prior to Arraignment

In any criminal proceeding in which the State intends to rely upon a defendant's criminal record, the State shall provide to either defense counsel or to a pro se defendant copies of any and all such records in the State's possession prior to any such hearing such that defense counsel will be given the opportunity to review said records with the defendant, or a pro se defendant to do the same individually, prior to the hearing.

If the State fails to provide said copies as described herein, the State shall be prohibited from referencing any such records except for good cause shown. If the State does not intend to cite to a defendant's criminal record during the arraignment or bail hearing, New Hampshire Rule of Criminal Procedure 12(c)(1)(c) shall govern the timing of disclosure in superior court.

The State may provide the records by fax, secure e-mail, or similar means to assure the confidentiality of said records, or in any manner consistent with state and federal law.

Existing Rule 12 (a) would follow, re-lettered as (b), etc.[1]

In summarizing the background and reasoning for this proposed rule change, Attorney Rothstein stated that attorneys at the New Hampshire Public Defender are not uniformly provided a copy of the client's criminal record before the arraignment. Having surveyed the attorneys in his office, he noted that the general rule in all but one county (Rockingham), his attorneys did not routinely get a copy of their client's criminal record before an arraignment at which the State is requesting preventative detention or cash bail that the client will not be able to post, or is relying on the record to substantiate a restrictive bail condition. He stated that this renders their representation deficient.

The Committee received responses from various prosecutorial and law enforcement agencies in response to the July 14, 2021 order seeking public comment on the proposed rule change. The Committee issued a second order on October 4, 2021, seeking further public comment on the proposed rule change.

The Committee held a public hearing on the proposed rule change at its December 10, 2021 meeting. During the Committee meeting that followed, Committee members expressed concern that the proposed amendment will deprive judges of information necessary to make informed bail decisions, even when such information is readily available. It was also noted that, in some counties, prosecutors may not have access to the information prior to arraignment, making it hard to comply with the proposed amendment. Judge Delker advised that, based upon his discussion with prosecutors and his fellow judges, this issue may affect counties differently, particularly at the circuit

[1] This proposed rule is very similar, if not identical, to the current New Hampshire Superior Court Administrative Rule regarding the State's obligation to produce a defendant's criminal record.

court level. He proposed an additional amendment allowing defendants to request additional bail hearings when the State has not complied with the rule, adding that such an amendment would incentivize compliance without compromising the defendant's due process rights. The Committee discussed whether Rule 12 already entitles defendants to request additional bail hearings, obviating the need for Judge Delker's proposal.

Upon motion made by Attorney Gill, and seconded by Judge Garner, the Committee unanimously voted to refer the issue back to the subcommittee, which would review the proposed amendment and suggest revisions for consideration at the next meeting.

THE SUBCOMMITTEE'S CURRENT POSITION AND PROPOSAL

The subcommittee recognizes to a large degree that the proposed rule, that would also be applicable in the district division, should in principle be consistent with the superior court administrative rule. Attorney Rothstein's proposal very much mirrors the current superior court administrative rule. However, in attempting to craft a rule that would also apply to the district division, several difficulties were encountered.

First, incarcerated defendants in the district division generally appear by video and are *pro se*. Various prosecutorial agencies and police departments, as well as the New Hampshire Attorney General's Office, have expressed that there exist legal prohibitions that do not allow for sending criminal records to a house of correction in a manner to be reviewed by an incarcerated *pro se* defendant appearing for a bail hearing in the district division by video. Various members of law enforcement who appeared at the last hearing also expressed logistical concerns about providing records to *pro se* defendants incarcerated and appearing before the circuit court for arraignment. As well,

law enforcement entities strongly objected to the exclusion of the record as a remedy for failing to provide it without showing good cause as to why the record was not produced.

The subcommittee has made extensive efforts to propose a rule, and it has worked through a variety of proposed rules. The subcommittee has struggled with two issues in working to propose a new rule in this regard. The first issue is regarding the confidential nature of criminal records, as well as the laws and regulations (both federal and state) that apply to the dissemination of those records. The second issue is whether exclusion of the record should be the remedy if the State fails to produce the record prior to a bail hearing without showing good cause for such failure.

The subcommittee has investigated language for a proposed rule that will allow for compliance with federal and state laws and regulations, and that is contained in the proposed rule(s) below. However, there is a debate in the subcommittee about whether exclusion of the record should be the remedy if the State fails to produce the record prior to a bail hearing without showing good cause for such failure. After much thoughtful discussion, the subcommittee cannot agree on this issue. Due to the substantial nature of the issue at hand, the subcommittee has agreed to submit this specific issue to the full Committee for review and determination.

With that in mind, below are two proposed rules that do and do not include "exclusion" as a remedy. The former (including exclusion as a remedy) would contain the bracketed text, and the latter (not including exclusion as a remedy) would not contain the bracketed text.

Sub-Committee's Proposed Rule

(a) Circuit Court – District Division

(1) Disclosure of Defendant's Criminal Record at Initial Appearance or Bail Hearing

If the State intends to rely on the Defendant's criminal record at an initial appearance or any bail hearing, the prosecutor shall provide a copy of Defendant's criminal record to Defendant or, if Defendant is represented, to counsel for the Defendant, in advance of the initial appearance or bail hearing. The prosecutor shall exercise due diligence in complying with this disclosure obligation.

If the State[, for good cause,] is unable to provide a copy of the criminal record before the initial appearance or bail hearing, the Defendant or his counsel may elect to:

(A) Continue the initial appearance or bail hearing to the next available date after disclosure of the criminal record; or

(B) Proceed with the initial appearance or bail hearing subject to Defendant's right to a further bail hearing, upon request, after disclosure of the criminal record.

[If the State fails to provide said criminal record as described herein without showing good cause therefor, the State shall be prohibited from referencing any such record at the initial appearance or bail hearing.]

For purposes of this Rule, a "criminal record" is a written report of Defendant's criminal history generated by a governmental authority obligated to retain and produce such records.

["Good cause" under this Rule may include the State's inability to transmit the criminal record without violating state or federal law.]

Except for initial appearances and bail hearings, discovery of a Defendant's criminal record shall be governed by subsection (3)(D) of this Rule.

The subcommittee proposes renumbering existing subsection (1) to become (2) and (2) to become (3), and addition a subsection (D) to renumbered (3), to provide that at least fourteen days before trial, the State shall provide Defendant with **"(D) A copy of the Defendant's criminal record."**

The subcommittee requests that the full Committee vote and determine which version of the proposed rules should move forward.

APPENDIX E

MEMORANDUM

To: N.H. Supreme Court Advisory Committee on Rules

From: Subcommittee on Amendments to Criminal Rules of Procedure
Rule 12(a)(4) and (b)(4)(A)
N. William Delker, Chair

Date: March 8, 2022

Re: Agenda Item 2020-009: Recommendations regarding Amendments to N.H. Rules of Criminal Procedure 12 and Rule of Evidence 404(b)

OVERVIEW

At its December 18, 2020 meeting, the Advisory Committee on Rules considered a proposal from Attorney David Rothstein to amend N.H. Rule of Criminal Procedure 12 to require the State to provide notice of its intent to offer evidence of other bad acts of a defendant under Rule of Evidence 404(b).

The Committee received no public comment at the June 4, 2021 meeting. Nonetheless, the Committee noted several shortcomings in the proposal and voted to send the proposed amendment to subcommittee chaired by Judge Delker with Judge Garner and Attorney Charles Keefe as subcommittee members.

The subcommittee invited the Attorney General's Office to designate a prosecutor to provide the State's input on proposed changes. Assistant Attorney General Meghan Hagaman joined the subcommittee.

The subcommittee drafted a new version of N.H. R. Crim. P. 12 with timelines for Circuit and Superior Court. This proposal was submitted to the Advisory Committee for its September 10, 2021 meeting. The Committee voted to send the new proposal out for public comment at its December meeting.

At its December 10, 2021 public meeting, the Committee received no public comment. Before the Advisory Committee voted on the proposed amendments, Subcommittee Chair Judge Delker suggested that the Subcommittee draft commentary for the rule so that there was "legislative history" to explain the rule for future reference. This memo is submitted to the Advisory Committee to serve that purpose. The language of the proposed rule is appended to the end of this memorandum.

OVERVIEW OF THE ISSUE

The subcommittee agreed with Attorney Rothstein's original concerns that the current rules do not provide effective notice or deadlines relating to the introduction of Rule 404(b) evidence at trial. For example, in Circuit Court Rule 12(a)(2)(C) merely requires the State to give the defense notice of its intent to introduce Rule 404(b) evidence and provide access to discovery to support the Rule 404(b) evidence. The Circuit Court rule only applies to the State even though Rule 404(b) evidence may be introduced by either party. Moreover, the current rule does not require the State to articulate what non-propensity inferences make the Rule 404(b) evidence admissible at trial.

In Superior Court, Rule 12(b)(1)(F) has the same flaws as the Circuit Court rule. In addition, the Superior Court rule requires the State to provide notice of its intent to rely on Rule 404(b) evidence 45 days after arraignment. The subcommittee felt this was too early because few prosecutors were analyzing their case in this way that soon in the litigation process.

The subcommittee disagreed with Attorney Rothstein's proposal in three main respects. First, his proposal did not set sufficiently clear deadlines to be enforceable. Second, the subcommittee felt that the procedure for Rule 404(b) evidence was different in Circuit and Superior Court so that separate rules were needed for each venue. Third, the deadlines for use of Rule 404(b) evidence should apply to both the prosecution and defense since Rule 404(b) applies to both sides of a criminal case.

AMENDMENT TO RULE 12(a)(4): CIRCUIT COURT PRACTICE

The subcommittee agreed that a different rule was required for Circuit Court because trial litigation in Circuit Court is much less structured than in Superior Court. In addition, unlike jury trials in Superior Court, a Circuit Court judge decides both the pretrial motions and hears the trial evidence. As a result, the subcommittee felt that the current deadline of 14 days before trial for notice of intent to introduce Rule 404(b) evidence remains appropriate. The proposed amendment makes the following changes to existing Circuit Court practice:

1. The notice obligations apply to both parties;
2. The deadline may be waived for good cause shown;
3. The notice must be in writing; and
4. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose

The proponent of the Rule 404(b) evidence must provide the opposing party with discovery of the Rule 404(b) evidence at or before the notice of intent to introduce that evidence.

AMENDMENT TO RULE 12(b)(4)(A): SUPERIOR COURT PRACTICE

The proposed Superior Court Rule completely revamps the approach to Rule 404(b) evidence. The proposed amendment sets deadlines in relation to jury selection when the parties can reasonably be expected to begin trial preparation. The proposed rule is structured to provide sufficient notice so that the issues are resolved before the final pretrial conference.

Proposed Rule 12(b)(4)(A)(i) begins by requiring the proponent of Rule 404(b) evidence to give notice to the other side of its intent to use other bad act evidence together with the discovery of that Rule 404(b) evidence. As with the Circuit Court, the obligation applies to both the prosecution and defense. The notice must be in writing and articulate the legal reasoning for the introduction of such evidence. Under current practice some prosecutors provide a generic letter stating that the State may introduce Rule 404(b) evidence contained in discovery without identifying with particularity the evidence or the specific, non-propensity reason the Rule 404(b) evidence is admissible. It is the intent of the subcommittee that such a generic letter would not satisfy the notice requirements of the proposed rule.

The subcommittee set this written notice 60 days before jury selection to give the parties time to confer about the proposed evidence. Notice in advance in this form may avoid unnecessary motion practice if the parties can reach agreement on the issue.

Proposed Rule 12(b)(4)(A)(ii) requires the proponent to file a motion 45 days before jury selection. Requiring the proponent to file a formal motion, which articulates the legal basis for the introduction of Rule 404(b) evidence, will ensure that the matter can be addressed by the Court in a timely manner before trial.

Proposed Rule 12(b)(4)(A)(iii) is intended to address the situation where one party believes that certain evidence should be excluded under Rule 404(b), but no notice or motion has been filed by the other side under subparagraphs (i) or (ii). It is not uncommon for a proponent of evidence to conclude that the evidence is not evidence of <u>other</u> bad actions, but rather is intrinsic to the charged crime(s). In this situation, the proponent reasonably could take the position that notice and a motion are not required under subparagraphs (i) or (ii) because the challenged evidence is admissible under a theory other than Rule 404(b). If the opposing party disagrees and believes that challenged evidence falls under Rule 404(b), the party seeking to exclude the evidence must file a motion 30 days before jury selection to resolve the issue. The motion to exclude cannot generically seek to exclude "all Rule 404(b) evidence." Rather, the motion to exclude must specifically identify the evidence the party believes should be excluded as Rule 404(b) evidence.

The trial court can then determine if the challenged evidence is, in fact, intrinsic to the charges. If the trial court concludes that the evidence is actually Rule 404(b) evidence the court may exclude the evidence on the ground that the proponent did not comply with the notice and motion requirements of (i) and (ii). In deciding whether to

exclude Rule 404(b) evidence based on the proponent's failure to comply with the notice and motion requirements, the court may consider the strength of the argument that the evidence is intrinsic, whether the proponent of the evidence sought to shift the burden of filing a motion to exclude evidence to the opponent, and any other relevant factor.

The subcommittee is mindful that Rule 12(b)(4)(A) sets out a fairly complicated procedural framework for resolution of Rule 404(b) evidence. Nonetheless, the subcommittee felt that establishing a clear timetable for resolution of Rule 404(b) issues was important because the legal analysis is often complicated, the issue may require an evidentiary "clear proof" pretrial hearing, and, under existing practice, late or ambiguous disclosures often result in continuances or other trial disruptions.

PROPOSED AMENDMENTS TO N.H. RULE OF CRIMINAL PROCEDURE 12
N.H. SUPREME COURT ADVISORY COMMITTEE ON RULES
NOTICE OF DECEMBER 10, 2021 PUBLIC HEARING (APPENDIX C)

Amend New Hampshire Rule of Criminal Procedure 12 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 12. Discovery

(a) *Circuit Court-District Division*

(1) At the defendant's first appearance before the court, the court shall inform the defendant of his or her ability to obtain discovery from the State. Upon request, in misdemeanor and violation-level cases, the prosecuting attorney shall furnish the defendant with the following:

(A) A copy of records of statements or confessions, signed or unsigned, by the defendant, to any law enforcement officer or agent;

(B) A list of any tangible objects, papers, documents or books obtained from or belonging to the defendant; and

(C) A statement as to whether or not the foregoing evidence, or any part thereof, will be offered at the trial.

(2) Not less than fourteen days prior to trial, the State shall provide the defendant with:

(A) a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, it anticipates introducing at trial; **[and]**

(B) 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)**[.]**~~; and~~

~~(C) notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, 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.~~

(3) Not less than seven days prior to trial, the defendant shall provide the State with a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, the defendant anticipates introducing at trial.

(4) **[Except for good cause shown, not less than fourteen days prior to trial, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to**

Rule of Evidence 404(b), must provide the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose. The party shall also provide access to all statements, reports or other materials that the proponent of Rule 404(b) evidence will rely on to prove the commission of such other crimes, wrongs or acts.]

[(5)] Sanctions for Failure to Comply. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including but not limited to:

(A) ordering the party to provide the discovery not previously provided;

(B) granting a continuance of the trial or hearing;

(C) prohibiting the party from introducing the evidence not disclosed;

(D) assessing the costs and attorneys fees against the party or counsel who has violated the terms of this rule.

(b) *Superior Court.* The following discovery and scheduling provisions shall apply to all criminal cases in the superior court unless otherwise ordered by the presiding justice.

(1) *Pretrial Disclosure by the State.* If a case is initiated in superior court, the State shall provide the materials specified in RSA 592-B:6. In addition, within forty-five calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with the materials specified below. If a case is originated in circuit court-district division, within ten calendar days after the entry of a not-guilty plea by the defendant, the State shall provide the defendant with the materials specified below.

(A) A copy of all statements, written or oral, signed or unsigned, made by the defendant to any law enforcement officer or the officer's agent which are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(B) Copies of all police reports; statements of witnesses; and to the extent the State is in possession of such materials, results or reports of physical or mental examinations, scientific tests or experiments, or any other reports or statements of experts, as well as a summary of each expert's qualifications, with the exception of drug testing results from the New Hampshire State Forensic Laboratory, which shall be provided within ten court days from the date of indictment, or such other date as may be authorized in the dispositional conference order.

(C) The defendant's prior criminal record.

(D) Copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places that are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(E) 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).

~~(F) Notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, 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.~~

(2) *Pretrial Disclosure by the Defendant*

Not less than sixty calendar days prior to jury selection if the case originated in Superior Court or not less than thirty calendar days prior to jury selection if the case originated in Circuit Court-District Division or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the defendant shall provide the State with copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the defendant as evidence at the trial or hearing.

(3) *Dispositional Conferences.* The purpose of the dispositional conference is to facilitate meaningful discussion and early resolution of cases.

(A) Unless the State does not intend to make a plea offer, in which case it shall so advise the defendant within the time limits specified herein, the State shall provide a written offer for a negotiated plea, in compliance with the Victim's Rights statute, RSA 21-M:8-k, to the defense, no less than fourteen (14) days prior to the dispositional conference. The defense shall respond to the State's offer no later than ten (10) days after receipt.

(B) The judge shall have broad discretion in the conduct of the dispositional conference.

(C) The State, defendant, and defendant's counsel, if any, shall appear at the dispositional conference. The State and the defendant shall be represented at the dispositional conference by an attorney who has full knowledge of the facts and the ability to negotiate a resolution of the case. Counsel shall be prepared to discuss the impact of known charges being brought against the defendant in other jurisdictions, if any.

(D) If a plea agreement is not reached at the dispositional conference, the matter shall be set for trial. The court may also schedule hearings on any motions

discussed during the dispositional conference. Counsel shall be prepared to discuss their availability for trial or hearing as scheduled by the court.

(E) Evidence of conduct or statements made during the dispositional conference about the facts and/or merits of the case is not admissible as evidence at a hearing or trial.

(F) If the case may involve expert testimony from either party, both sides shall be prepared to address disclosure deadlines for: all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by the expert witness; a summary of each such expert's qualifications; rebuttal expert reports and qualifications; and expert depositions. Except for good cause shown, the failure of either party to set expert witness disclosure deadlines at the dispositional conference may be grounds to exclude the expert from testifying at trial.

(4) *Exchange of Information Concerning Trial Witnesses*

(A) **[Except for good cause shown,**

(i) not less than 60 days prior to jury selection, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must provide the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose. The party shall also provide access to all statements, reports or other materials that the proponent of Rule 404(b) evidence will rely on to prove the commission of such other crimes, wrongs or acts.

(ii) not less than 45 days prior to jury selection, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must file a motion to admit such evidence. The motion must identify the evidence and articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose.

(iii) not less than 30 days prior to jury selection, a party shall file a motion to exclude evidence it believes constitutes Rule 404(b) evidence if no motion to admit the evidence has been filed by the opposing party. A motion to exclude filed pursuant to this provision must identify with specificity the evidence the party seeks to be excluded under Rule 404(b).]

[(B)] Not less than twenty calendar days prior to the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the State shall provide the defendant with a list of the names of the witnesses it anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to

paragraph (b)(1) of this rule, the State shall provide the defendant with all statements of witnesses the State anticipates calling at the trial or hearing. At this same time, the State also shall furnish the defendant with the results of New Hampshire criminal record checks for all of the State's trial or hearing witnesses other than those witnesses who are experts or law enforcement officers.

~~(B)~~ **[(C)]** Not later than ten calendar days before the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than two calendar days prior to such hearing, the defendant shall provide the State with a list of the names of the witnesses the defendant anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the defendant shall provide the State with all statements of witnesses the defendant anticipates calling at the trial or hearing. Notwithstanding the preceding sentence, this rule does not require the defendant to provide the State with copies of or access to statements of the defendant.

~~(C)~~ **[(D)]** For purposes of this rule, a "statement" of a witness means:

(i) a written statement signed or otherwise adopted or approved by the witness;

(ii) a stenographic, mechanical, electrical or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement; and

(iii) the substance of an oral statement made by the witness and memorialized or summarized within any notes, reports, or other writings or recordings, except that, in the case of notes personally prepared by the attorney representing the State or the defendant at trial, such notes do not constitute a "statement" unless they have been adopted or approved by the witness or by a third person who was present when the oral statement memorialized or summarized within the notes was made.

(5) *Protection of Information not Subject to Disclosure.* To the extent either party contends that a particular statement of a witness otherwise subject to discovery under this rule contains information concerning the mental impressions, theories, legal conclusions or trial or hearing strategy of counsel, or contains information that is not pertinent to the anticipated testimony of the witness on direct or cross examination, that party shall, at or before the time disclosure hereunder is required, submit to the opposing party a proposed redacted copy of the statement deleting the information which the party contends should not be disclosed, together with (A) notification that the statement or report in question has been redacted and (B) (without disclosing the contents of the redacted portions) a general statement of the basis for the redactions. If the opposing party is not satisfied with the redacted version of the statement so provided, the party claiming the right to prevent disclosure of the redacted material shall submit to the court for in camera review a complete copy of the statement at issue as

well as the proposed redacted version, along with a memorandum of law detailing the grounds for nondisclosure.

(6) *Motions Seeking Additional Discovery.* Subject to the provisions of paragraph (b)(8), the discovery mandated by paragraphs (b)(1), (b)(2), and (b)(4) of this rule shall be provided as a matter of course and without the need for making formal request or filing a motion for the same. No motion seeking discovery of any of the materials required to be disclosed by paragraphs (b)(1), (b)(2) or (b)(4) of this rule shall be accepted for filing by the clerk of court unless said motion contains a specific recitation of: (A) the particular discovery materials sought by the motion; (B) the efforts which the movant has made to obtain said materials from the opposing party without the need for filing a motion; and (C) the reasons, if any, given by the opposing party for refusing to provide such materials. Nonetheless, this rule does not preclude any party from filing motions to obtain additional discovery. Except with respect to witnesses or information first disclosed pursuant to paragraph (b)(4), all motions seeking additional discovery, including motions for a bill of particulars and for depositions, shall be filed within sixty calendar days if the case originated in Superior Court, or within forty-five calendar days if the case originated in Circuit Court – District Division after the defendant enters a plea of not guilty. Motions for additional discovery or depositions with respect to trial witnesses first disclosed pursuant to paragraph (b)(4) shall be filed no later than seven calendar days after such disclosure occurs.

(7) *Continuing Duty to Disclose.* The parties are under a continuing obligation to supplement their discovery responses on a timely basis as additional materials covered by this rule are generated or as a party learns that discovery previously provided is incomplete, inaccurate, or misleading.

(8) *Protective and Modifying Orders.* Upon a sufficient showing of good cause, the court may at any time order that discovery required hereunder be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing of good cause, in whole or in part, in the form of an ex parte written submission to be reviewed by the court in camera. If the court enters an order granting relief following such an ex parte showing, the written submission made by the party shall be sealed and preserved in the records of the court to be made available to the Supreme Court in the event of an appeal.

(9) *Sanctions for Failure to Comply.* If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including, but not limited to: (A) ordering the party to provide the discovery not previously provided; (B) granting a continuance of the trial or hearing; (C) prohibiting the party from introducing the evidence not disclosed; and (D) assessing costs and attorney's fees against the party or counsel who has violated the terms of this rule.

APPENDIX F 2022-004

TO: Advisory Committee on Rules
FROM: Subcommittee established to review Supreme Court Rule 37(9) and 37(16)

Date: May 16, 2022

At our March 11, 2022 meeting, Justice Donovan proposed that a subcommittee be established to consider possible changes to Supreme Court Rule 37(9) and 37(16) to address the procedures that apply to the immediate suspension of attorneys. The subcommittee consists of Justice Donovan, Attorney Sara Greene, Attorney Susan Lowry, and Timothy Gudas, Supreme Court Clerk. Attorney Russ Hilliard also participated in discussions.

The subcommittee determined that Rule 37 required an amendment to address ADO cases that involve attorneys who have engaged in serious misconduct that poses an immediate and substantial threat of serious harm, but who have responded to ADO requests for information or have not been convicted of a serious crime. At present, Rule 37(9-A) suggests that an "interim suspension" can be sought by the ADO in these circumstances. That procedure, however, provides that the attorney will be afforded 50 days to respond to the petition and prepare for a hearing before a referee or panel and another 10 days before a decision may be issued. The ADO believes that, in certain cases involving, for example client fund misappropriation, an immediate, summary suspension of the attorney is necessary to protect either the public or the integrity of the legal profession. The current language of Rule 37(9-A) and (9-B) has led some practitioners to suggest that an immediate summary suspension is available only when the attorney refuses or fails to respond to a subpoena issued by the ADO. A recent ADO case fell within this area which resulted in the litigation of the proper procedural vehicle under which the ADO could petition for an immediate or summary suspension. As a result, the subcommittee recommends that the rules be amended as follows.

Rule 37(9-A) *Proceedings ~~Where~~ When an Attorney is Alleged to have Engaged in Conduct that Poses a Substantial Threat of Serious Harm.*

(a) The attorney discipline office may file a petition for interim suspension or other relief in this court alleging that an attorney has engaged in conduct that poses a substantial threat of serious harm to the public. **[If the attorney discipline office's petition alleges that an attorney's serious misconduct poses an immediate and substantial threat of serious harm to the public or the integrity of the legal profession, the provisions of (9-B), *Summary Suspension Procedure*, shall apply.]**

(b) The term "substantial threat of serious harm" encompasses any non-serious crime, conduct, or course of conduct that substantially impairs the attorney's ability to continue to practice in conformity with the Rules of Professional Conduct and Rule 50, or creates a substantial risk of harm to the public if the attorney is not suspended on an interim basis.

(c) The petition must state with particularity the conduct alleged as well as **the bases upon which** ~~why~~ the interim suspension is necessary to prevent a threat of serious harm to the public. The attorney discipline office shall serve the petition on the attorney by first-class mail, and service shall be deemed complete upon mailing. Service upon the respondent attorney at the latest address provided to the New Hampshire Bar Association shall be deemed to be sufficient. The attorney shall have twenty (20) days from the date of mailing to respond. If the attorney contests the interim suspension, the court will convene a hearing before a judicial referee or a hearing panel of the professional conduct committee. If the attorney consents to the interim suspension, the court may issue an order of interim suspension which will be effective immediately. If the attorney fails to respond to the petition, the allegations of the petition shall be deemed to be admitted, and no hearing shall be required.

(d) The hearing on the petition shall be recorded. The parties shall have thirty (30) days to prepare for the hearing, but no continuance of the hearing shall be granted absent extraordinary circumstances. The attorney discipline office shall have the burden to prove the need for interim suspension by clear and convincing evidence. The referee or panel may consider whether measures short of interim suspension adequately safeguard the public against the threat of substantial harm.

(e) After the hearing, the referee or panel shall issue a recommendation with regard to the need for interim suspension within ten (10) days, and shall forward that recommendation, with the record of the hearing, to the court. The court shall review the recommendation and the record. It may enter an order of interim suspension, dismiss the petition for interim suspension, issue an order directing the attorney to abide by specific conditions in lieu of interim suspension, or remand the matter for

further proceedings. Any order issued by the court shall be effective immediately, and shall remain in effect unless it is modified by the court, or it is superseded by an order stemming from disciplinary proceedings arising out of the same or related conduct.

Rule 37(9-B) Summary Suspension Procedure.

(a) [**[The foregoing Summary Suspension Procedure shall apply to cases in which the attorney discipline office alleges that a lawyer has:**

(1) engaged in serious misconduct **which poses an immediate and substantial threat of serious harm to the public or the integrity of the legal profession, or;**

(2) failed] ~~failure of an attorney under investigation~~ to comply with a subpoena validly issued under Rule 37(8), or **[failed]** ~~failure of an attorney under investigation~~ to respond to requests for information ~~by attorneys~~ from the attorney discipline office made in the course of investigating a docketed matter. ~~may be grounds for summary suspension as set forth herein.~~

(b) "Serious misconduct," for purposes of this Rule, is any misconduct involving (1) mishandling or misappropriation of client or third party property or funds or (2) any other misconduct which by itself could result in a suspension or disbarment.

(c) The attorney discipline office may file a petition for summary suspension with this court, with copies to the subject attorney, which sets forth **[with specificity]** the violation of this section**[. The petition must state with particularity the conduct alleged as well as the bases upon which the summary suspension is necessary to prevent an immediate and substantial threat of serious harm to the public or the integrity of the legal profession. When the petition for summary suspension is based upon a lawyer's failure to respond pursuant to Rule 37 (9-B)(a)(2), the petition shall be]** supported by an affidavit of the attorney discipline office affirming the facts set forth in subsection (d). Upon such filing, this court may enter an order of summary suspension and may order such emergency relief as this court deems necessary to protect the public **[or the integrity of the legal profession.]**

(d) The affidavit in support of the petition for summary suspension shall affirm:

(1) that the lawyer was served with the subpoena or was mailed the request(s) for information at the latest address provided to the New Hampshire Bar Association;

(2) that the lawyer was afforded a reasonable period of time to **[comply]** ~~for compliance~~ with the request for information or the subpoena, and has failed to comply, to answer, or to appear; and

(3) that the subpoena or request for information was accompanied by a statement advising the attorney that failure to comply with the subpoena or request for information may result in summary suspension without further hearing.

(4) Notice of intent to seek summary suspension was both sent by certified mail and was provided in hand to the attorney or attempted in hand without success, despite reasonable efforts.

(e) Any suspension under the provisions of **[this Rule]** ~~subsection (c) above~~ shall be immediately effective upon entry of the suspension order and shall be subject to the provisions of Rule 37(16)(g).

(f) An attorney suspended under the provisions of subsection (c) above may request a hearing by the deadline set forth in the order of suspension. The hearing shall be conducted by a judicial referee or a hearing panel, and shall occur within ten (10) days of the effective date of the suspension. The judicial referee or hearing panel shall issue a report within ten (10) days of the hearing recommending whether the suspension should be lifted.

(g) **[In the interest of justice, the court may, upon the filing of a petition for reinstatement, terminate such suspension at any time after affording the attorney discipline office an opportunity to be heard.]** ~~If an attorney cures the failure to comply with the subpoena or other request for information, the attorney may file a petition for reinstatement with this court~~. The petition **[for reinstatement]** shall be accompanied by an affidavit of compliance stating the extent to which **[the lawyer]** ~~he or she~~ has **[cured or abated the immediate threat of serious harm to the public or the integrity of the legal profession, or has otherwise]** complied with the subpoena or request for information. A copy of the petition and affidavit shall be sent to the attorney discipline office, which may file a response to the petition and affidavit within 10 days. The court may take such action on the petition as it deems appropriate.

(h) If not reinstated pursuant to Rule 37(9-B)(f) or (g), the attorney shall become subject to the provisions of Rule 37(17).

(i) A lawyer suspended in another jurisdiction pursuant to a procedure similar to that set forth herein may be suspended in this jurisdiction on a reciprocal basis as provided in Rule 37(12)

APPENDIX G

2022-005

From: Paula Werme <pwerme@comcast.net>
Date: May 18, 2022 at 7:23:04 PM EDT
To: "Justice Patrick E. Donovan" <PDonovan@courts.state.nh.us>, Abigail Albee <aalbee@courts.state.nh.us>, "Hon. William Delker" <WDelker@courts.state.nh.us>, "Hon. Michael H. Garner" <MGarner@courts.state.nh.us>, sean.gill@doj.nh.gov
Subject: I got tired of copying email addresses - TO: ADVISORY COMMITTEE ON RULES

Send it to the rest of the members. . . .

I just got an email from one pro se litigant to another about 10 day deadlines and postal delays in the FD. Ten days is no longer enough with postal delays.

"Quite frankly, I think it's absolutely shameful that, in 2022, the New Hampshire Judicial Branch still doesn't support e-file for family law cases in the trial courts!

Worse, Clerk [redacted] has been instructed by [redacted] "to not respond to emails sent to her by any citizen or lawyers," so we're all (regular citizens and professional lawyers) really all at the mercy of the U.S. Postal Service to learn what's going on in our cases. . . . . Often, by the time anyone first learns, via snail mail, what the trial court has done in a Family Division case, there's often no time to respond appropriately, and sometimes not even enough time just to comply. It's especially an issue for *pro se* litigants such as myself, who often need more time than professional attorneys.

It is a huge problem - especially for pro-se litigants, whose legal research skills might not be the best.

I would appreciate it you folks would consider changing the rule - at least until e-filing in the FD becomes a reality for pro se litigants.

APPENDIX H

2022-006

The Ethics Committee proposes to add language to N.H. RPC 3.8. The current N.H. RPC 3.8 reads:

Rule 3.8. Special Responsibilities of a Prosecutor
The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

The Ethics Committee proposes to add the following language to N.H. RPC 3.8:

(b) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or prosecutorial authority in the jurisdiction where the conviction occurred, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly request that the Court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(c) When a prosecutor knows of clear and convincing evidence establishing that a defendant convicted in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

(d) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (b) or (c), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

The purpose of the rule change is explained in the Ethics Committee comment:

"Paragraphs (b) and (c) are not intended to suggest any existing deficiency in how New Hampshire prosecutors conduct themselves. These paragraphs instead are intended to proactively provide guidance to prosecutors regarding their obligations regarding post-conviction evidence. Paragraph (d) is intended to provide safe harbor to prosecutors who make judgments regarding evidence in good faith, and that even when wrong, should not be subject to discipline."

Paragraphs (b) and (c) are largely drawn from the ABA Model Rule[1] with a few minor modifications. In paragraph (b) we replaced "reasonable likelihood" with "reasonable probability." The purpose for this change was to track the language used by Courts when evaluating Brady violations. Paragraph (d) is a safe harbor to shield prosecutors who make an independent judgment in good faith which ultimately turns out to be wrong from prosecution under the rule.

[1] The analogous paragraphs are paragraph (g) and (h) from the ABA Model Rule.

Due to the introductory phrase, the Ethics Committee recommends that the rule be reformatted so that it reads naturally. The ABA did not reformat its rule when it adopted the paragraphs analogous to the proposed paragraphs (b) and (c). The reformatted rule would read:

(a) The prosecutor in a criminal case shall:

(1) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(2) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(3) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(4) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(5) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information;

(6) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(b) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or prosecutorial authority in the jurisdiction where the conviction occurred, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly request that the Court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(c) When a prosecutor knows of clear and convincing evidence establishing that a defendant convicted in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

(d) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (c) or (d), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Should the rule be adopted as proposed, the Ethics Committee has drafted the following comment:

Paragraphs (b) and (c) are not intended to suggest any existing deficiency in how New Hampshire prosecutors conduct themselves. These paragraphs instead are intended to proactively provide guidance to prosecutors regarding their obligations regarding post-conviction evidence. Paragraph (d) is intended to provide safe harbor to prosecutors who make judgments regarding evidence in good faith, and that even when wrong, should not be subject to discipline. It is recommended that a prosecutor who chooses not to disclose post-conviction evidence pursuant to Paragraphs (b) or (c) record the reasons in writing.

Paragraph (b)'s "reasonable probability" standard should be interpreted consistently with how courts have applied that standard in the context of the prosecution's failure to disclose exculpatory evidence to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g.*, *United States v. Peake*, 874 F.3d 65, 69 (1st Cir. 2017) (explaining that to get a new trial in this context, "the defendant need demonstrate only a reasonable probability that, had the evidence been disclosed to the defense in a timely manner, the result of the proceeding would have been different"); *see also State v. Shepherd*, 159 N.H. 163, 170-71 (2009) (applying the reasonably probability standard to new trial motion under state law where prosecution did not knowingly withhold *Brady* material). In that context, the United States Supreme Court has equated the reasonable probability standard with "something sufficient to 'undermine confidence in the outcome of the trial.'" *United States v. Mathur*, 624 F.3d 498, 504 (1st Cir. 2010) (quoting *Kyles v. Whitney*, 514 U.S. 419, 434 (1995)). Similarly, Paragraph (h)'s "clear and convincing evidence" standard should be interpreted consistently with how that phrase has been used in existing caselaw.

The Committee also notes that by its plain terms, Paragraph (g) may require a prosecutor to take action with respect to a conviction obtained in a jurisdiction in which the prosecutor is not admitted to the practice of law and/or has little or no knowledge regarding how the criminal justice system functions. While prosecutors should undertake reasonable efforts to fulfill their obligations under Paragraph (b), a prosecutor's inability, despite such reasonable efforts, to identify an appropriate court or authority to which to disclose post-conviction evidence should not subject the prosecutor to discipline under this Rule. Nor is there any expectation that prosecutors seek admission *pro hac vice* in another jurisdiction to fulfill their obligations.

Under paragraph (c), if the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel

for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted. In situations where these steps are unlikely to redress the wrongful conviction, the prosecutor may need to take more direct steps such as seeking a Writ of Coram Nobis or a Writ of Habeas Corpus depending upon the specifics of the circumstances.