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October 19, 2023

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Via e-mail attachment to rulescomment@courts.state.nh.us

Ref: 2023-012 New Hampshire Rules of Criminal Procedure 1-19

Committee Members:

Thank you for considering my attached comments concerning the proposed changes to Rules 1 through 19 of the New Hampshire Rules of Criminal Procedure.

While my concerns address many parts of the proposed rules, I want to point out several proposed rules where the overall impact cannot be underestimated – Rules 4(a)(1), 4(a)(2), 12(a)(1) and 19(3). These proposed rules, as written, will, in my opinion, result in increased (and in some cases duplicative) litigation, will negatively impact court operation and docket management at both the Circuit Court and Superior Court levels and, in some instances, appear to run afoul of jurisdictional limits imposed by the New Hampshire Constitution and statutes. I urge increased scrutiny on these specific rule proposals as you conduct your review and analysis.

Please feel free to contact me with any questions.

10/19

Paul Halvorsen
Merrimack County Attorney

Attachment: Input on 2023-012 New Hampshire Rules of Criminal Procedure 1-19

Attachment 1
October 19, 2023 Letter from Merrimack County Attorney Halvorsen
Re: 2023-012 New Hampshire Rules of Criminal Procedure 1-19

Rule 4(a)(1) and Rule 4(a)(2)

General Recommendation: Change wording of proposed Rule 4(a)(1) to identify a "***best practice***" rather than mandate a complaint be filed "no later than fourteen (14) days prior to the date of arraignment" for a non-detained individual.

General Recommendation: Change the wording of the proposed Rule 4(a)(2) to identify a "***best practice***" rather than mandate a complaint be filed "no later than one (1) hour prior to the arraignment" for a detained individual.

Discussion: Two proposed sections of Rule 4 include wording that mandates action before a complaint is before the courts. Without a complaint before the courts the adversarial judicial proceeding has not begun. See RSA 592-A:7 I(a) (criminal proceedings "**shall** be begun by complaint" (emphasis in **bold** text added)). See also State v. Jeleniewski, 147 N.H. 462 at 668 (2002) [quoting State v. Chaisson, 123 N.H. 17, 29, (1983) "adversary judicial proceedings are commenced by the filing of a complaint in court, and not merely by the signing of the complaint" and "[u]ntil a complaint is filed in court, the State is not committed to prosecute, and the defendant is not obligated to defend himself." Once the complaint is filed, the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law"].

- Because jurisdiction over a charge does not vest with a court until a complaint is filed there is an argument that the language of the rules appear to be an untimely application of judicial mandates on an executive branch function. By suggesting "***best practice***" within the proposed Rule the courts can avoid this conundrum.

- The proposed Rule addressing detained defendants and requiring filing of a complaint "no later than one (1) hour prior to the arraignment" in Circuit Court (proposed Rule 4(a)(2)), will probably be unworkable in many courts in many situations.

    - The filing of complaints involves at least four agencies: 1) The arresting agency, 2) the holding location where an individual is detained, 3) the prosecutor and 4) the Court. Difficulties within each agency with meeting specific time limits can occur in many forms including but certainly not limited to (in no particular order):

- In the event courts must schedule early morning arraignments the ability of a police department to process a defendant and their complaint(s) could be extremely time limited. Smaller departments with few officers (i.e. a town with only three officers) would be particularly impacted. Add in an arrest that occurs after 2:00 a.m. or 3:00 a.m. and the impact is compounded. Add a 50-minute drive to the County holding facility or an individual who must be medically cleared at a hospital before transport to a holding facility and the issue is compounded even further.[1] Remember, too, that reports and affidavits must also be completed.

- The involved prosecutor is already subject to being in court on matters already scheduled. That frequently includes trials, motion hearings and other arraignments. When the prosecutor gets a complaint while in court that case package must be read and reviewed before filing. In my 17+ years of courtroom experience in the criminal courts, I can say that such circumstances happened almost daily and across several police agencies.

- If, due to a scheduling conflict, a court needs to reschedule an arraignment on a detained individual to an earlier time than originally scheduled, the last minute change may, dare I say usually will, result in an inability to meet the "one (1) hour prior to arraignment" standard in proposed Rule 4(a)(2).

- In circumstances where a police department has multiple arrests, it is reasonable to assume that the practical ability to meet the proposed time expectation outlined in proposed Rule 4(a)(2) will be compromised. There are just so many hours in a day and just so many officers available in a shift. This is especially true in the smaller department throughout rural New Hampshire.

[1] For example: The Newbury Police Department, a department located in Merrimack County, typically has one officer available per shift and is serviced by the 5th Circuit Court in Newport, which is located in Sullivan County. Google Maps indicates a good weather drive time of just under an hour from the Newbury Police Department to the Merrimack County Jail which is located in Boscawen. Inclement weather and/or a required stop at Concord Hospital to medically clear a defendant would dramatically increase travel time and therefore dramatically reduce an arresting officer's time available for completing reports, affidavits and complaints.

Specific Suggestions:

- At Rule 4(a)(1) change the paragraph to read: "***If a defendant is not detained prior to arraignment, it shall be best practice to file any complaint with the court no later than fourteen (14) days prior to the date of arraignment. If a statute or an administrative order require specific scheduling timeframes for the arraignment, the Complaint shall be filed as soon as possible prior to the arraignment.***"

- At Rule 4(a)(2) change the paragraph to read: "***If a defendant is detained prior to arraignment, it shall be best practice to file any complaint with the court no later than one (1) hour prior to the scheduled arraignment. If a statute or an administrative order require specific scheduling timeframes for the arraignment.***"

- In the event the two above recommendations are ***not*** accepted it is recommended that both Rule 4(a)(1) and 4(a)(2) have a sentence added reading: "***The inability to meet the provisions of this rule shall not constitute a basis for dismissal of any filed complaint or discharge of any otherwise existing bail order.***"

Rule 4(g)(1)

General Recommendation: Merge two court forms into one.

General Recommendation: Add wording to the proposed rule change indicating that a defendant who waives an arraignment on a class A misdemeanor is deemed to have received notice of the State's intent to seek class A misdemeanor penalties when the State timely files timely notice with the Court.

General Recommendation: Allow notice of the State's intent to seek class A penalties to be accomplished concurrent with the court's notice of charges to a defendant in accordance with Rule 4(g)(2).

Discussion: The proposed Rules would require two court specified forms where one consolidated form would suffice. As forms are under the control of the courts, see RSA 490:26-d, the consolidation of two forms into one form can be accomplished unilaterally with no (or, at most, minimal) outside coordination.

- Proposed Rule 4(g)(1) mandates the use of form NHJB-2618-D [Notice of Intent to Seek Class A Misdemeanor Penalties]. This form is used in conjunction with and in addition to form NHJB-2962-D [State of New Hampshire Complaint].

- Use of two forms to accomplish notice is clearly duplicative. A criminal complaint already provides notice of the charge and level of offense. Incorporating, by consolidation, additional statutory notice materials into the basic complaint form would reduce paperwork. Additionally, such consolidation of forms would allow the courts to meet the requirements of Rule 4(g)(2) [court to notify a defendant of "charges" and "possible penalties"] in a more efficient manner. Indeed, it also seems counterintuitive that one agency (the court) would provide notice of charges and penalties, as in proposed Rule 4(g)(2), and another agency (the prosecutor) must serve an additional form to a defendant giving identical notice, as in proposed Rule 4(g)(1).

- The language in proposed Rule 4(g)(1) requiring the State to serve form NHJB-2618-D [Notice of Intent to Seek Class A Misdemeanor Penalties] to a defendant appears to unduly expand the public policy established by the legislature in RSA 625:9 IV(c)(2). This statute, 625:9 IV(c)(2), only requires that the "state files a notice of intent to seek class A misdemeanor penalties." It is well settled that the courts do not establish public policy. See Appeal of the State of New Hampshire (New Hampshire Public Employee Labor Relations Board), _____ N.H. _____ (2021-0248, opinion issued July 21, 2022) ["... **it is not the court's role to second-guess the legislature**. Matters of public policy are reserved for the legislature." (Emphasis in **bold** added)].

- Incorporation of the two forms would comply with RSA 625:9 IV(c)(2) [notice of intent required] and RSA 490:26-d [court forms are under the control of the courts].

Specific Suggestions:

- Merge form NHJB-2618-D [Notice of Intent to Seek Class A Misdemeanor Penalties, revised 01/01/2020] with and into form NHJB-2962-D [State of New Hampshire Complaint, revised 10/02/2023].

- Delete "***with proof that a copy was provided to the Defendant by the State***" from proposed Rule 4(g)(1).

- Add language to the end of Rule 4(g)(1) indicating: "***A defendant who waives arraignment on a class A misdemeanor under Rule 4(c) where the State has timely filed notice with the Court to seek class A penalties shall be deemed to have received such notice.***" The rationale for this language is that the State should not be penalized for failing to notify a defendant of the State's intent to seek class A misdemeanor penalties when a defendant nullifies the State's opportunity to provide such notice "before or at" a defendant's arraignment.

Rule 7

General Recommendation: Rewrite the definitions contained in proposed Rule 7(c) and 7(d).

Discussion: Rule 7 is entitled "Definitions." The language in proposed Rules 7(c) and 7(d) appear to not be definitions but rather descriptions of process.

Specific Suggestion:

- Reword proposed content to be a definition of the term and not a descriptive comment as to process. I will defer to the committee as to how to define "indictment" and "misdemeanor appealed to Superior Court."

Rule 12(a)(1)

General Recommendation: Reword proposed Rule 12(a)(1) to ensure that the constitutional and statutory jurisdictional limits imposed on the Circuit Courts is maintained and complied with.

Discussion: The New Hampshire Constitution, at Part 2 Article 72-a, establishes the Superior Court as a "trial court of general jurisdiction." Within that same Article is the ability for the legislature to establish "lower courts." NH Const Pt 2 Art 72-a. Our legislature established our Circuit Court system and associated jurisdictional limits by statute within RSA Chapter 490-F. There is also a relevant jurisdictional statute addressing the Superior Courts at RSA 592-B:1. These constitutional and statutory mandates limit the ability of the Circuit Court when the Circuit Court is presented with felonies and associated misdemeanor and violation offenses.

- RSA 490-F:3-a, effective January 1, 2024, grants limited jurisdiction on felonies to the Circuit Court. A Circuit Court may only "hold a preliminary examination to determine whether probable cause exists" for the felony.

- With the limited exception granted by the legislature in RSA 490-F:3-a on the issue of holding a "preliminary examination," RSA 592-B:1, effective January 1, 2024, divests the Circuit Courts of jurisdiction over felonies and related misdemeanor and violation offenses. RSA 592-B:1 (The superior court **shall** have jurisdiction over felony complaints **and misdemeanors and violation level charges that are directly related to those felonies**)(emphasis in **bold** added).

- The language in proposed Rule 12(a)(1) establishes, in the Circuit Court, a discovery process in cases alleging felonies (and misdemeanors and violation level charges that are directly related to those felonies). The process established by the proposed rule is subject to pleadings and litigation and exceeds the jurisdiction of the Circuit Court established by constitution and statute.

Specific Suggestion:

- Reword proposed Rule 12(a)(1) to read: ***"At a 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 not associated with a felony, the State shall furnish the defendant with the following***:"

Rule 18

General Recommendation: Add text to Rule 18(a) to establish a judicial district (circuit) rule parallel to the rule that applies to prosecution of a crime in the Superior Courts.

Discussion: The language of this rule should adopt the term "circuit" to parallel the current structure of the Circuit Courts. Additionally, the ability to prosecute offenses where part of an offense is committed in one circuit and part is committed in another circuit should be made clear in this rule.

Specific Suggestion:

- Change and add text as follows.
  - Change the following text in Rule 18(a): Change "***judicial district***" to "***judicial circuit***."
  - Add the following text to Rule 18(a): "***If part of an offense is committed in one judicial circuit, and part in another, the offense may be prosecuted in either judicial circuit***."

Rule 19(3)

General Recommendation: Establish a remand process from Superior Court to Circuit Court (District Division) for misdemeanor and violation charges that were associated with a felony when the State is unable to proceed on the felony(ies) involved in the bind over.

Discussion: The appropriateness of this suggestion can be illustrated by an example. A civilian witness calls 911 to report a vehicle is being operated in an erratic manner. That vehicle is stopped minutes later for a yellow line violation level offense. The motor vehicle stop results in a DWI arrest which ultimately results in a blood draw. Additionally, a felony drug charge results from the event. All charges are bound over to the Superior Court under proposed Rule 6 and RSA 592-A:4-a.[2] Later litigation in the Superior Court results in a motion to suppress the felony level drugs being granted and therefore the State is unable to proceed on the sole felony. The misdemeanor and violation level offenses are unaffected by the suppression litigation. RSA 592-A:1 does not allow the Superior Court to dismiss the remaining misdemeanor and violation charges[3] and proposed Rule 19 prohibits a transfer of the remaining DWI and yellow line offenses to the Circuit Court.[4] In the end you have, in Superior Court, a several hour trial on a one class B misdemeanor DWI and one violation yellow line offense where the State's case-in-chief involves at least one civilian witness, the arresting officer, a phlebotomist, the evidence technician and laboratory analyst. This scenario is not unreasonable and is repeatable in several permutations across charges available in the criminal and motor vehicle codes. It is an unreasonable end result to expend limited Superior Court assets of time and resources on issues better resolved in a Circuit Court. Additionally, in my example, other than conducting a trial in the Superior Court it appears that the only remaining option, based on statutes and proposed Rules, is for the State to enter a *nolle prosequi* on the charges remaining in the Superior Court and then recharge the defendant in Circuit Court on the lower level offenses. This will ultimately involve the warrant process followed by another arrest and then an arraignment of the same defendant in Circuit Court. Frankly, that process drags out the issue even longer and is certainly not appropriate from the viewpoint of a defendant who begins the adversarial process anew. The lack of a remand process in these types of events would, in addition to a great inconvenience for a defendant, unnecessarily use scarce District Division court time for re-arraignment, limited police resources for an arrest warrant and post-arrest processing, and bail commissioner time to re-bail the again arrested defendant.

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[2] The proposed Rule 6 requires the Circuit Court to bind over "any directly related misdemeanors and violations to the Superior Court" with the bound over felony charge(s). This portion of the Rule duplicates RSA 592-A:4-a.

[3] RSA 592-A:1 prohibits a Superior Court from dismissing charges which began in Circuit Court.

[4] Proposed Rule 19(3) prohibits any transfer of cases from the Superior Courts to the Circuit Courts unless otherwise allowed by a statute or rule. The writer of this letter is not aware of any statute prohibiting a transfer of misdemeanors or violations back to the Circuit Court where the issue originated.

Specific Suggestion:

- Add language to Rule 19 by adding a paragraph 4 saying: "***When a felony having any directly related misdemeanors and/or violations is bound over to Superior Court and the State is unable to proceed on all bound over felonies in that case the Superior Court shall remand the misdemeanors and/or violations along with a transfer of bail conditions to the originating Circuit Court.***"

Miscellaneous:

- Several attorneys I spoke with have concerns with the some construction decisions within the proposed rules. They included syntax, capitalization and internal consistency in identifying subparagraphs [some rules use one style of subparagraph identification and other rules use another style – i.e. use of (a), (b) etc vs. use of (1), (2) etc].

- Several attorneys I spoke with have mentioned that they identified conflict or misalignment with other govern directives (i.e. other statutes). Some issues that were mentioned I, too, identified and included in this letter. I will defer to submissions from others as well as the Committee's review concerning issues I may have overlooked.