

2014-006 through
2014-2010

MEMORANDUM

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

From: Subcommittee on Amendment to Civil Rules of Procedure
N. William Delker, Chair

Date: May 9, 2016

Re: Recommendations regarding Amendments to N.H. Rules of Civil Procedure

OVERVIEW

At the March 11, 2016 meeting of the Supreme Court Advisory Committee on Rules, I was asked to chair a subcommittee to address proposed amendments to the N.H. Rules of Civil Procedure. This endeavor is not intended to be a complete re-writing of the rules but rather to address some specific errors or omissions when the rules were recently adopted. More specifically, this subcommittee was asked to address the following issues:

1. Advisory Committee Agenda Items 2014-006 to -010: The subcommittee was tasked with continuing the work of an original subcommittee that had been chaired by Emily Rice in 2013.
2. The subcommittee was also asked to review a request to consider adopting some or all of the business docket standing orders as part of the civil rules. A link to those orders can be found at:
<http://www.courts.state.nh.us/superior/orders/bcdd/Business-and-Commercial-Dispute-Docket-Standing-Orders.pdf>
3. The subcommittee was also tasked with identifying any other issues that may have arisen since the recent adoption of the civil rules. For example, Rule 10(a) addresses the need to raise mandatory counterclaims but the rules are silent about when, if ever, permissive counterclaims can be brought in the action.

On April 18, 2016, the following individuals convened to discuss these matters:

- Hon. N. William Delker, Chair of Subcommittee
- Hon. David Anderson, Rockingham Superior Court
- Karen Gorham, Superior Court Clerk Administrator
- Carolyn Koegler, Secretary of the Advisory Committee on Rules
- Kimberly Kirkland, Esq.
- Jeanne Herrick, Esq.
- David Slawsky, Esq.

RECOMMENDATIONS:

Agenda Item 2014-006 Summary Jury Trials:

Recommendation: No change should be made to existing rule.

Rationale: This agenda item proposed eliminating N.H. R. Civ. P. 31, which allows for summary jury trials. The subcommittee recommends that Rule 31 remain unchanged. Although summary jury trials are not common, some practitioners do use them and the subcommittee felt that there was no harm in leaving this tool to facilitate the resolution of civil cases.

Agenda Item 2014-007 Rule 9 Answers; Defenses; Forms of Denials

Recommendation: Amend Rule 9 to include a list of affirmative defenses that must be included in the answer. No additional amendments to Rule 9 are recommended.

Rationale: N.H. R. Civ. P. 9(d) states that failure to plead “affirmative defenses” will constitute a waiver of affirmative defenses. Except for statute of limitations the rule does not list what constitute affirmative defenses. The subcommittee felt that it was appropriate to amend Rule 9(d) to include a non-exclusive list of affirmative defenses to provide guidance for parties. Fed. R. Civ. P. 8(c) provides a model for this proposal. The subcommittee recommends N.H. R. Civ. P. 9(d) be amended as follows:¹

Failure to plead as affirmative defenses or file a Motion to Dismiss based on affirmative defenses within the time allowed in section (b) of this rule will constitute waiver of such defenses. **[Affirmative defenses include the following:**

- **accord and satisfaction;**
- **arbitration and award;**
- **assumption of risk;**
- **contributory negligence;**
- **duress;**
- **estoppel;**
- **failure of consideration;**
- **fraud;**
- **illegality;**
- **injury by fellow servant;**
- **laches;**
- **license;**
- **payment;**
- **release;**

¹ New material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format.

- **res judicata;**
- **statute of frauds;**
- **statute of limitations; and**
- **waiver.]**

Agenda Item 2014-007 also included a more broad-ranging proposal to completely amend and re-write Rule 9. The original proposal was put forth by Attorney Slawsky. Upon review of the final rule as it currently stands, Attorney Slawsky indicated that his concerns no longer exist and he withdrew his request to rewrite Rule 9.

Agenda Item 2014-007 also included a proposal to eliminate redundancies in Rule 9. These redundancies, identified in a June 4, 2014 memo to the Advisory Committee on Rules were eliminated in a court order dated July 24, 2014.

Agenda Item 2014-008 Civil Action Cover Sheet and Final Civil Action Disposition Sheet:

Recommendation: No change to current rules.

Rationale: The original subcommittee on the civil rules proposed requiring a civil action cover sheet at the beginning of litigation and civil action disposition sheet at the conclusion of the litigation. These proposals were not included in the final version of the rules. Because the original subcommittee had recommended these filings to enable data-gathering, the matter was referred back to the subcommittee for further discussion. The current subcommittee felt that enforcement of the requirement for civil action cover sheets and final disposition sheets would be difficult, it would add work to an already over-worked clerk's staff, and would only provide value if there was a use for the data. Currently there are no plans to use the data gathered by these documents so the cost is outweighed by the value of requiring these cover sheets.

Agenda Item 2014-009 Relation Back

Recommendation: Currently, N.H. R. Civ. P. 12(a) only provides general guidelines for amendments to pleadings. The subcommittee was in general consensus that a rule addressing amendment to the complaint and the effect of the amendment in terms of relation back to the original filing was a good idea. This issue, however, is complicated and has significant substantive ramifications in terms of the statute of limitations and progress of the case in general. The subcommittee recommended further study of this issue. Judge Delker volunteered to enlist law clerk assistance to research the issue and N.H. law and to generate a proposal. This issue should remain as a separate pending agenda item.

Agenda Item 2014-010 Conflict Between Rule 205 and Administrative Order Regarding Retention of Records

Recommendation: The subcommittee recommends that the last sentence of N.H. R. Civ. P. 205 be amended to require records of juror orientation be retained for only six years instead of the current 10 years required by Rule 205.

Rationale: N.H. Supreme Court Administrative Order 2009-03 provides: "all stenographic notes and all recordings of Superior Court proceedings must be kept six years unless a transcript has been prepared." Rule 205 provides, in relevant part, "The record of juror orientation sessions shall be preserved for a period of 10 years." This means that recordings of juror orientation must be preserved even if the recording of the trials on which those jurors served were destroyed. The subcommittee could see no logical reason for this inconsistency and recommends that the Rule be amended to be consistent with the Supreme Court Administrative Order.

Non-Docketed Item 1: Adoption of Business Docket Standing Orders:

Proposal: Attorney Maureen Raiche Manning proposed that the Advisory Committee consider incorporating into the permanent rules of civil procedure the standing orders of the Superior Court Business Docket promulgated by Judge McNamara.

Recommendations: The following analysis groups the rules into those proposals the subcommittee does not recommend and those it does recommend and includes a brief description of the current standing order, and if the subcommittee recommends adoption of the order, proposed rule language.

Recommended:

- Standing Order 3: This order sets forth a right to file a reply to an objection, the timing of that reply, and a presumption that surreplies will not be allowed without special permission from the court. Current civil rules do not address when, and under what circumstances, responses beyond the objection to a motion are allowed. The subcommittee felt that regulation of this practice would be beneficial. To that end, the subcommittee recommends adoption of N.H. R. Civ. P. 13A:

[Rule 13A. Reply and Surreply. Any party may file a reply within ten (10) days of the filing of an objection to a motion. A party who intends to file a reply to an objection shall advise the clerk within three (3) days of the Court's receipt of the objection. Surreplies may only be filed with the permission of the Court.]

- Standing Order 5: This order creates a process and timing for filing protective orders to protect the confidentiality of certain discovery. The subcommittee recommends that Rule 29(b) be amended to adopt Standing Order 5 with modifications and that the remaining provisions of Rule 29 be re-lettered accordingly.

[Rule 29(b): Motions for a protective order relating to trade secrets, confidential research, development, or commercial information, or other private or confidential information sought through discovery shall be filed within 30 days of the discovery request or automatic disclosure required by Rule 22. All protective orders, whether assented to or not, must be approved by the court.]

Not recommended:

- Standing Order 1: This order is not applicable to N.H. R. Civ. P. It simply states that the standing orders apply to all business docket cases except as otherwise order.
- Standing Order 2 Initial Status Conference: This order requires initial appearance in all cases. The subcommittee agreed that because civil cases range in complexity an initial status conference is not needed in every case. The subcommittee felt that the current structuring order could be amended without court rule to allow the parties to request a preliminary status conference early in the case if there were important structuring issues that needed to be addressed.
- Standing Order 4 Copies of Memoranda: This order requires a party to file 2 hard copies of memoranda with the court and law clerk. The subcommittee agreed that this is unnecessary as a matter of general practice.
- Standing Order 6 Privilege Logs: This standing order is adequately addressed by Rule 21(c).
- Standing Order 7 Time of Depositions: This standing order is adequately addressed by Rule 26(a).
- Standing Order 8 Deposition of Corporation or other entity: This order has already been adopted as Rule 26(m).
- Standing Order 9 Electronic Discovery: This order is adequately covered by Rule 25.
- Standing Order 10 Status Conferences: This standing order allows informal status conferences at the request of either party. This should be left to the discretion of individual judges.
- Standing Order 11 Real Time Transcripts: In the rare case involving a request for real-time transcripts the matter can be adequately addressed by motion of either party without a special rule.

Non-Docketed Item 2: Extending the time to file an answer for more than 30 days

Proposal: Attorney Derek Lick proposed amending the time to file an answer or other responsive pleading to provide more than 30 days. He felt that for insurance defense cases 30 days was not adequate to file an answer or other responsive pleading.

Recommendation: The subcommittee felt that no change to the existing rule was needed. The subcommittee felt that extending the time to answer would only delay resolution of cases. In New Hampshire practice attorneys regularly assent to requests for more time to respond to the complaint. If the plaintiff objects, the defendant can always file a motion for an extension of time, which Courts routinely grant so long as the delay does not prejudice the plaintiff.

Non-Docketed Item 3: Permissive Counterclaims

Proposal: Currently Rule 10 only addresses mandatory counterclaims which must be asserted by a party. Judge Delker proposed amending Rule 10 to address when it is appropriate for a party to file permissive counterclaims.

Recommendation: This proposal requires additional research of New Hampshire law on the parameters for filing permissive counterclaims. Judge Delker volunteered to recruit law clerk assistance to research this issue and craft a proposal for the Advisory Committee. The subcommittee recommends this issue be docketed as a separate agenda item to be addressed at a later time.

Non-Docketed Item 4: Appearances

Proposal: Judge Anderson raised the question of whether the rules regarding when a party must file an appearance should be amended. In other words, he felt that the filing of a complaint, answer, or other responsive pleading should be adequate to constitute an appearance of an attorney. Currently N.H. Superior Court Administrative Order 2013-007 provides that a complaint signed by an attorney which includes all of the information required by Rule 4(a) will serve as an appearance.

Recommendation: The subcommittee was in general agreement that the rule regarding appearance should be revisited. The rule would have to address appearances filed by an attorney, a non-attorney representative, a *pro se* litigant, and limited representative appearances. Judge Anderson volunteered to draft a rule for the subcommittee's consideration. The subcommittee recommends that this item be assigned its own docket number for separate consideration at a later time.

Non-Docketed Item 5: Administrative Orders

Proposal: Add a rule to reference administrative orders and where to find them.

Recommendation: Based on the subcommittee's discussion on Non-Docketed Item 4 relating to Appearances, the subcommittee discussed how there are administrative orders that supplement or clarify the rules of procedure. These administrative orders are located on the website but lawyers forget about them and *pro se* litigants would not even have a way to know to look for them. The subcommittee recommends adding a Rule 314 to address the existence of administrative orders.

[Rule 314: The Chief Justice of the Superior Court has issued administrative orders which supplement and/or clarify the rules of civil procedure. The administrative orders can be located on the New Hampshire Judicial Branch website.]

Non-Docketed Item 6: Independent Medical Examination Pursuant to Rule 28A

Proposal: Currently Rule 28A(a) authorizes a defendant to obtain an independent medical examination ("IME") in personal injury cases "prior to, or during, trial." This rule appears to conflict with the disclosure obligations set in RSA 516:29-b, Rule 27, and the structuring order. Several members of the subcommittee felt because Rule 28A(a) gives the defendant a right to the IME, the rule can create injustice in personal injury cases. The superior court was exploring an amendment to the structuring conference form to address the potential unfairness. The proposal is to bring Rule 28A(a) in line with ordinary expert disclosure deadlines.

Recommendation: The subcommittee recommends amending Rule 28A(a) and not simply changing the structuring conference form. The subcommittee recognized that an IME may be appropriate outside of the expert disclosure deadlines, including during trial, if the defendant learns information that may undermine the plaintiff's claim for personal injury. For example, the defendant may make observations or otherwise learn of information during the course of trial that undermines the plaintiff's claim of personal injury. Likewise, the plaintiff may testify during the trial in a manner that may necessitate an IME. Because of the potential for prejudice and disruption of the trial process, an order for an IME outside of the expert disclosure deadlines should be a rare occurrence and only granted for good cause shown. The subcommittee recommends the following amendment:

Rule 28A. Medical Injuries and Special Damages.

(a) *Medical Examinations.* In actions to recover damages for personal injuries the defendant shall have the right to a medical examination of the plaintiff prior to, ~~or during,~~ trial. **[The defendant shall seek and obtain the medical examination of the plaintiff within the expert disclosure deadlines set forth by statute, rule, or in the structuring order issued by the court. The court may order a medical examination of the plaintiff to take place outside of the expert disclosure deadlines, including during trial, only for good cause shown.]**