THE STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON RULES

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Carolyn Koegler, Secretary

February 1, 2017

Eileen Fox
Clerk of Court
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Dear Clerk Fox:

Pursuant to Supreme Court Rule 51 (amended effective January 1, 2017), I hereby submit on behalf of the Supreme Court Advisory Committee on Rules ("Committee") the Committee's February 1, 2017 report, which contains the final draft of proposed rules and amendments recommended for adoption by the Committee between September 2016 and February 2017. The Committee held public meetings on September 9, 2016 and December 9, 2016. The Committee also held a public hearing on December 9, 2016.

The Committee voted to recommend adoption of the following proposed rules and amendments.

A. Supreme Court Rules. Attorney Discipline – Summary Suspension

2016-003. This proposed amendment would add a new subsection 9-B to Supreme Court Rule 37 to provide a summary suspension procedure for respondent attorneys who do not cooperate with the disciplinary authority.

At its meeting on September 9, 2016, the Committee considered a proposal, set forth in a March 16, 2016 email and attachment from attorney David Rothstein, Chair of the Professional Conduct Committee, to amend Supreme Court Rule 37. Concerns were expressed about the proposal. Following some discussion, the Committee voted to amend the proposal and to put the amended proposal out for public hearing. For more information about the discussion, *see* Advisory Committee on Rules September 9, 2016 meeting minutes, which can be found at http://www.courts.state.nh.us/committees/adviscommrules/minutes.htm.

Sara Greene, Disciplinary Counsel at the Attorney Discipline Office, Elizabeth Murphy, Assistant Disciplinary Counsel at the Attorney Discipline Office and attorney David Rothstein, Chair of the Professional Conduct Committee, testified in support of the proposal at the December 9, 2016 public hearing. No details about the discussions at the public hearing are included in the December 9, 2016 Committee minutes, but a CD recording of the hearing is available at the Supreme Court.

Committee members agreed that two minor amendments should be made to the proposal included in the public hearing notice. Upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposal, as set forth in Appendix A.

B. Supreme Court Rules. Attorney Discipline – Permissive Vertical Prosecution

2016-003. These proposed amendments to Supreme Court Rules 37 and 37A, which are not recommended by the Committee would: (1) remove the language prohibiting disciplinary counsel from participating in meetings of the complaint screening committee; (2) add language to allow disciplinary counsel to assist general counsel in performing his or her duties; and (3) add "catch-all" provisions to the preliminary provisions of Rules 37 and 37A to allow vertical prosecution in the discretion of general counsel in appropriate cases.

Attorney David Rothstein, Chair of the Professional Conduct Committee, submitted a proposal, set forth in a February 8, 2016 letter, to amend Supreme Court Rule 37 to allow for permissive vertical prosecution in attorney discipline cases. Committee members received and reviewed the proposal in anticipation of the March meeting, but did not vote at the meeting to put the proposal out for public comment. The Committee voted by email to include the proposal in the December public hearing notice and ratified that vote on December 9, 2016, prior to the public hearing.

The Committee received one comment by email from attorney Tracy Pearson, dated October 21, 2016 prior to the public hearing. Sara Greene, Disciplinary Counsel at the Attorney Discipline Office, Elizabeth Murphy, Assistant Disciplinary Counsel at the Attorney Discipline Office, and attorney David Rothstein, Chair of the Professional Conduct Committee, testified in support of the proposal at the public hearing. No details about the discussions at the public hearing are included in the December 9, 2016 Committee minutes, but a CD recording of the hearing is available at the Supreme Court.

There was extensive discussion about this proposal at the December meeting following the public hearing. Some Committee members spoke in favor of the proposal, noting that under the existing rule, general counsel can assist disciplinary counsel in her duties, but it does not work the other way around. This rule would correct that, to allow disciplinary counsel to assist general counsel, and avoid duplication of effort. According to the testimony provided at the public hearing, the Attorney Discipline Office intends to continue to function the way that it currently does in most cases, but that in some cases, disciplinary counsel would become involved sooner in order to save resources. It was noted that while the rule as currently written does provide an additional level of due process, this does not appear to be required by law.

Other committee members expressed concern about the proposal, noting that under the current system, a grievance is filed and general counsel plays a neutral role, then the grievance goes to the complaint screening committee. Only if it meets a certain threshold does it go to the prosecutor. If disciplinary counsel becomes involved in the process sooner, then the Attorney Discipline Office has a prosecuting mindset from the start. If the functions of the general counsel and disciplinary counsel merge, as they would if these proposed rule changes are made, then it is not clear why it is there are two separate positions.

Following some further discussion, the Committee voted 9 to 5 against recommending that the Court adopt this proposal. For more information about the discussion, *see* the Advisory Committee on Rules December 9, 2016 meeting minutes, which can be found at http://www.courts.state.nh.us/committees/adviscommrules/minutes.htm.

Following the vote, there was discussion about whether the entire system should be restructured to address the efficiency issue and discussion about whether it would be possible to amend the language of the proposal to limit

the ability of general counsel to assign the initial review of matters to disciplinary counsel. Several members of the Committee agreed to draft some language designed to do this and to submit it to the Committee for consideration at the meeting on March 11, 2017. The language of the proposed amendments which the Committee does not recommend for adoption at this time is set forth in Appendices B, C, D, E and F.

C. Superior Court Civil Rules

2016-007, 2014-010, 2016-002 and additional amendments. These proposed amendments would: (1) amend Superior Court (Civ.) Rule 9 to provide a non-exclusive list of affirmative defenses; (2) adopt Superior Court (Civ.) Rule 13A to address when, and under what circumstances, responses beyond the objection to a motion are permitted; (3) amend Superior Court (Civ.) Rule 28A to make clear that an order for an independent medical examination outside of the expert disclosure deadlines should be a rare occurrence and only granted for good cause shown; (4) amend Superior Court (Civ.) Rule 29 to create a process and provide the timing for filing motions for protective orders to protect the confidentiality of certain discovery; (5) amend Superior Court (Civ.) Rule 205 to require records of juror orientation to be retained for only six years.

At the June 3, 2016 meeting, the Committee considered a May 9, 2016 memorandum that had been submitted by Judge Delker on behalf of the Subcommittee on Amendment to the Civil Rules of Procedure. As Judge Delker's memorandum made clear, the subcommittee was formed to continue the work of a subcommittee that had been chaired by attorney Emily Rice. The subcommittee had been asked to address a number of concerns that had arisen about the new Superior Court Civil Rules adopted by the Court in 2013. Those issues are identified in a June 4, 2014 memorandum from Carolyn Koegler. *See* docket # 2014-006 through 2014-010 at http://www.courts.state.nh.us/committees/adviscommrules/dockets. Over time, the Committee referred additional issues to the subcommittee.

Judge Delker's May 9, 2016 memo identifies all of the issues the subcommittee addressed and the subcommittee's recommendations with respect to each. The Committee agreed with all but one of the recommendations made. Following some discussion, and upon motion made and seconded, the Committee voted to put the subcommittee's recommendations to amend rules out for public hearing.

The Committee received one written comment on the proposals to amend the Superior Court Civil Rules prior to the December 2016 meeting. By letter dated December 9, 2016, New Hampshire Legal Assistance (NHLA) expressed

concern about the proposed amendment to Superior Court Rule 29, relating to protective orders. Committee members agreed that the proposal should be amended to address the concern. For more information about this issue, *see* Advisory Committee on Rules December 9, 2016 meeting minutes, which can be found at http://www.courts.state.nh.us/committees/adviscommrules/minutes.htm

Following some discussion, the Committee voted to recommend that the Court adopt the proposed changes to the Superior Court Civil Rules as set forth in Appendices G, H, I, J, and K.

D. Superior Court Civil Rules. Administrative Orders

2016-012. As is reflected in a May 9, 2016 memorandum from Judge Delker, the Subcommittee on Amendment to the Civil Rules of Procedure had proposed adopting a rule referencing administrative orders that supplement or clarify the rules of civil procedure so that lawyers and self-represented litigants are made aware that they exist and know where to look for them. Concern was expressed about this proposal at the September 9, 2016 meeting and Committee members agreed that this item should be assigned a separate docket number and added to the December 9, 2016 agenda.

At the December meeting, Judge Delker stated that he believes a rule referencing administrative orders would be helpful. There was some discussion about the nature of administrative orders. Judge Delker stated that his review of the existing administrative orders made clear that there are not many that fall into the "rule" category, and that the orders relate to internal governance issues and are designed to ensure that the system runs smoothly. For more information about this issue, *see* Advisory Committee on Rules December 9, 2016 meeting minutes, which can be found at http://www.courts.state.nh.us/committees/adviscommrules/minutes.htm. Upon motion made and seconded, the Committee voted to recommend that the Court adopt a rule referencing administrative orders, without holding a public hearing on the matter, as set forth in Appendix L.

E. New Hampshire Rules of Evidence – Update

2015-022. New Hampshire Rules of Evidence. These proposed amendments update the New Hampshire Rules of Evidence. Many of the proposed changes are stylistic, and are designed to ensure, where appropriate, that the language of the New Hampshire rule is identical to the language of the

federal rule. However, some of the changes to the rules are substantive. A proposed "2016 Update Committee Note" following each rule indicates whether a substantive change has been made to the rule, and, if so, why.

At its meeting on December 4, 2015, the Committee considered an August 3, 2015 report that had been submitted to the Supreme Court proposing a number of changes to the New Hampshire Rules of Evidence. The report was submitted by a committee co-chaired by Professor John Garvey and Judge David Garfunkel ("NHRE Committee"). Advisory Committee on Rules members asked that the proposals to amend the rules be set forth in the context of the existing New Hampshire Rules of Evidence.

Carolyn Koegler submitted a March 8, 2016 memo with an attached draft public hearing notice for the Committee's consideration at its March 11, 2016 meeting. The draft public hearing notice set forth the existing New Hampshire Rules of Evidence and used **[bold and brackets]** to indicate where the NHRE Committee's August 3, 2016 report proposes that language be added and ~~strikethrough~~ to indicate where the NHRE Committee report proposes that language be deleted. The March 8, 2016 memorandum can be found under docket #2015-022 at http://www.courts.state.nh.us/committees/adviscommrules/dockets/2015/index.htm

Professor Garvey and Judge Garfunkel were present at the March 11, 2016 meeting to explain when the NHRE Committee was formed and why. Judge Garfunkel explained that the New Hampshire Rules of Evidence, which are modeled on the Federal Rules of Evidence, have not been updated since they were first adopted in 1985, but that the Federal Rules are updated every year. The Federal Rules of Evidence were revised in 2010 with the goal of using plain language to make the rules easier to understand. The Committee approached the Court several years ago to ask whether the Court would like the Committee to do the same with the New Hampshire Rules.

Judge Garfunkel explained that the changes proposed in the August 3, 2015 NHRE Report (and set forth in the March 8, 2016 draft public hearing notice) are supported by all of the NHRE Committee members. The members of the Committee included representatives from prosecution, defense and civil plaintiffs, as well as law students.

At the March 11 meeting, Advisory Committee on Rules members inquired whether any of the proposals would: (1) change existing law; (2) codify decisions of the Supreme Court; and/or (3) overrule a decision of the Supreme Court. Judge Garfunkel stated that he did not believe that there are any

proposed changes to the rules that would overrule decisions of the Supreme Court. However, there was discussion about particular proposals that would change existing law and discussion about particular proposals designed to codify decisions of the Supreme Court. There was also some discussion about amending some of the proposals to address concerns raised at the meeting. For more information about the discussion, *see* Advisory Committee on Rules March 11, 2016 meeting minutes, which can be found at http://www.courts.state.nh.us/committees/adviscommrules/minutes.htm.

The Committee voted to put the NHRE proposals out for public hearing in June, understanding that the Committee would likely approve by email some of the changes proposed during the March meeting. The proposals are set forth in the April 21, 2016 public hearing notice, which can be found at http://www.courts.state.nh.us/committees/adviscommrules/notices.htm.

The Committee received written comments on the proposals to amend the Rules of Evidence prior to the June meeting. One set of comments were submitted in an April 21, 2016 email from Deputy Public Defender David Rothstein and can be found under docket number 2015-022 at http://www.courts.state.nh.us/committees/adviscommrules/dockets/2015/index.htm. Another set of comments are included in a May 20, 2016 memo from Judge Delker, and can be found under docket number 2015-022 at http://www.courts.state.nh.us/committees/adviscommrules/dockets/2015/index.htm. Professor Garvey and Judge Garfunkel were present at the public hearing to speak in support of, and answer questions about, the NHRE Committee's proposal. Melissa E. Fales, Assistant County Attorney, Grafton also offered a brief comment on Rule 803(5) of the Rules of Evidence. There was extensive discussion at the June meeting about the comments submitted by Judge Delker and Attorney Rothstein. No details about the discussions at the public hearing are included in the June Committee minutes, but a CD recording of the hearing is available at the Supreme Court.

At the September 9, 2016 meeting the Committee considered an August 25, 2016 memo and attachment from Carolyn Koegler. Justice Lynn noted that some changes had been made to the proposal to amend the New Hampshire Rules of Evidence set forth in the public hearing notice based upon the discussion about the rules that occurred at the June 3, 2016 public hearing. He noted that there are footnotes throughout the draft highlighting where changes were made to the language of the proposal submitted by the NHRE Committee, and why.

The Committee addressed a number of concerns that arose when the language of the NHRE Update Committee proposal was compared with the

Federal Rules of Evidence. The most significant concern related to a 2014 change to Federal Rule of Evidence 801(d). Following some discussion about the issue, the Committee noted that the change is significant and may not be consistent with New Hampshire law. The Committee asked Carolyn Koegler to seek input on the issue from NHRE Update Committee members. For more information about the discussion, *see* Advisory Committee on Rules September 9, 2016 meeting minutes, which can be found at http://www.courts.state.nh.us/committees/adviscommrules/minutes.htm.

Following the September meeting, and at the Committee's instruction, Carolyn Koegler sought input from the NHRE Committee regarding Rule 801(d) and also made a number of other changes to the proposal to address concerns that had been raised by Committee members. She submitted an October 6, 2016 memorandum to the Committee stating that Justice Lynn had requested that Committee members review and vote by email on the proposed changes to the New Hampshire Rules of Evidence prior to the December 9 meeting. The October 6, 2016 memorandum can be found at http://www.courts.state.nh.us/committees/adviscommrules/dockets/2015/index.htm. After several questions and concerns arose about particular rules, the proposal was amended again and redistributed to the Committee on November 9, 2016. The Committee voted by email to recommend the proposed amendments, as set forth in the November 9, 2016 memorandum.

At the December 9, 2016 meeting, Justice Lynn reminded the Committee that it had voted electronically to recommend the amendments to the Rules of Evidence set forth in Carolyn Koegler's November 9, 2016 memo, and that the Committee would need to ratify the electronic vote. However, he noted that he had one outstanding concern about a proposed comment to Rule 104(b). For more information about the discussion, *see* Advisory Committee on Rules December 9, 2016 meeting minutes, which can be found at http://www.courts.state.nh.us/committees/adviscommrules/minutes.htm. Following some discussion, and upon motion made and seconded, the Committee voted to ratify the electronic vote, with the additional change to the comment to Rule 104(b) proposed by Justice Lynn, as set forth in Appendix M.

Sincerely,

Carolyn A. Koegler
Secretary, Advisory Committee on Rules

APPENDIX A

Amend Supreme Court Rule 37 by adopting subsection 9-B, as set follows:

(9-B) ***Summary Suspension Procedure.***

(a) In cases alleging serious misconduct, failure of an attorney under investigation to comply with a subpoena validly issued under Rule 37(8) or 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 the violation of this section, 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.

(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 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 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) If, within thirty (30) days of the suspension order, an attorney cures the failure to comply with the subpoena or other request for information, the attorney shall file with this court and with the attorney discipline office an affidavit of compliance stating the extent to which he or she has complied. The attorney discipline office may respond to the attorney's affidavit of compliance within 10 days. If the attorney discipline office disputes whether the attorney has complied, this court may take such action 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 B

Amend Supreme Court Rule 37(1) as follows (new material is in **[bold and brackets]**):

(1) ***Attorney Discipline in General***:

(a) *Components*: The attorney discipline system consists of the following component parts:

(1) professional conduct committee;
(2) hearings committee;
(3) complaint screening committee;
(4) attorney discipline office.

(b) *Jurisdiction*: Any attorney admitted to practice law in this State, and any attorney specially admitted by a court of this State for a particular proceeding, and any attorney not admitted in this State who practices law or renders or offers to render any legal services in this State, and any non-lawyer representative permitted to represent other persons before the courts of this State pursuant to RSA 311:1, is subject to the disciplinary jurisdiction of this court and the attorney discipline system.

Nothing herein contained shall be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt. Suspension or disbarment of an individual subject to the attorney discipline system shall not terminate jurisdiction of this court.

(c) *Grounds for Discipline*: The right to practice law in this State is predicated upon the assumption that the holder is fit to be entrusted with professional matters and to aid in the administration of justice as an attorney and as an officer of the court. The conduct of every recipient of that right shall be at all times in conformity with the standards imposed upon members of the bar as conditions for the right to practice law.

Acts or omissions by an attorney individually or in concert with any other person or persons which violate the standards of professional responsibility that have been and any that may be from time to time hereafter approved or adopted by this court, shall constitute misconduct and shall be grounds for discipline whether or not the act or omission occurred in the course of an attorney-client relationship.

(d) *Priority of Discipline Matters*: Matters relating to discipline of an attorney shall take precedence over all other civil cases in this court.

(e) *Professional Continuity Committee and New Hampshire Lawyers Assistance Program Exemption*: For the purposes of Rule 8.3 of the rules of professional conduct,

information received by members of the New Hampshire Bar Association during the course of their work on behalf of the professional continuity committee or the New Hampshire Lawyers Assistance Program which is indicative of a violation of the rules of professional conduct shall be deemed privileged to the same extent allowed by the attorney-client privilege.

[(f) Disciplinary matters may be handled by attorneys of the Attorney Discipline Office fulfilling functions of either general counsel or disciplinary counsel, as the general counsel may from time to time assign.]

APPENDIX C

Amend Supreme Court Rule 37(5)(c) as follows (deleted material is in ~~strikethrough~~ format):

(5) Complaint Screening Committee:

(a) The court shall appoint a committee to be known as the complaint screening committee which shall consist of nine members, one of whom shall be designated by the court as chair and one of whom shall be designated by the court as vice chair to act in the absence or disability of the chair. Five of the members shall be attorneys and four of them shall be non-attorneys. The complaint screening committee shall act only with the consensus of a majority of its members present and voting provided, however, that three attorney members and two non-attorney members shall constitute a quorum. The chair of the committee, or any member performing the duties of the chair, shall only vote on matters relating to specific complaints in the event of a tie among the members present and voting. Initial appointments shall be for staggered terms: three members for three years; three members for two years; and three members for one year. Thereafter, the regular term of each member shall be three years. A member selected to fill a vacancy shall hold office for the unexpired term of his or her predecessor. A member shall not serve more than three consecutive full terms but may be reappointed after a lapse of one year. No member of the complaint screening committee shall serve concurrently as a member of the professional conduct committee or the hearings committee.

(b) The complaint screening committee shall have the power and duty:

(1) To consider and act on requests for reconsideration filed by grievants following a decision by general counsel not to docket a matter, to divert attorneys out of the system, or to dismiss a complaint after investigation.

(2) To consider and act on reports by staff members of the attorney discipline office with respect to docketed complaints.

(3) To remove complaints from the docket if it determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing.

(4) To dismiss complaints with a finding of no professional misconduct.

(5) To dismiss complaints for any other reason. If the committee determines that there is no reasonable likelihood that a complaint can be proven by clear and convincing evidence, the complaint should be dismissed.

(6) To divert attorneys out of the attorney discipline system when appropriate and subject to the attorney complying with the terms of diversion. All diversion would be public unless the complaint screening committee determined that a given matter should remain non-public based on one or more of the following issues: health, finances, family considerations or highly personal matters. If a respondent declines to accept diversion or violates the terms of a written diversion agreement, the complaint in such cases shall be acted upon as if diversion did not exist.

(7) To refer complaints to disciplinary counsel for the scheduling of a hearing only where there is a reasonable likelihood that professional misconduct could be proven by clear and convincing evidence.

(8) To consider and act upon requests for reconsideration of its own decisions, subject to the further right of disciplinary counsel or respondents to request that the professional conduct committee review a decision to refer a complaint to disciplinary counsel for the scheduling of a hearing.

(c) Meetings of the complaint screening committee shall be in the nature of deliberations and shall not be open to the public, respondents, respondents' counsel, ~~disciplinary counsel~~ or the complainant. Records and reports of recommendations made shall in all respects be treated as work product and shall not be made public or be discoverable. However, the decision of the committee shall be public.

APPENDIX D

Amend Supreme Court Rule 37(6)(b) as follows (new material is in **[bold and brackets]**):

(6) ***Attorney Discipline Office***:

(a) The professional conduct committee shall appoint:

(1) a disciplinary counsel and such deputy and assistants as may be deemed necessary whether full-time or part-time;

(2) a general counsel and such deputy and assistants as may be deemed necessary whether full-time or part-time; and

(3) other professional staff, including auditors, and clerical staff as may be necessary whether full-time or part-time.

(b) Disciplinary counsel shall perform prosecutorial functions and shall have the power and duty:

(1) To review complaints referred by the complaint screening committee for hearings.

(2) To contact witnesses, conduct discovery and prepare the complaints for hearings before a panel of the hearings committee.

(3) To try cases before panels of the hearings committee.

(4) To present memoranda to and appear before the professional conduct committee for oral argument.

(5) To represent the attorney discipline office and, in appropriate cases, the professional conduct committee in matters filed with the supreme court.

[(6) To assist general counsel in performing the duties of general counsel as needed.]

(c) General counsel shall perform a variety of legal services and functions and shall have the power and duty:

(1) To receive, evaluate, docket and investigate professional conduct complaints.

(2) To remove complaints from the docket if it determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing.

(3) To dismiss complaints with a finding of no professional misconduct.

(4) To dismiss complaints for other good cause. If the general counsel determines that there is no reasonable likelihood that a complaint can be proven by clear and convincing evidence, the complaint should be dismissed.

(5) To divert attorneys out of the attorney discipline system when appropriate and subject to the attorney complying with the terms of diversion. All diversion would be public unless the general counsel determined that a given matter should remain non-public based on one or more of the following issues: health, finances, family considerations or highly personal matters. If a respondent declines to accept diversion or violates the terms of a written diversion agreement, the complaint in such cases shall be acted upon as if diversion didnot exist.

(6) To present complaints to the complaint screening committee with recommendations for diversion, dismissal for any reason or referral to disciplinary counsel for a hearing.

(7) To assist disciplinary counsel in performing the duties of disciplinary counsel as needed.

(8) To perform legal services as required for the committees of the attorney discipline system.

(9) To oversee and/or perform administrative functions for the attorney discipline system including but not limited to maintaining permanent records of the operation of the system, preparation of the annual budget, and preparation of an annual report summarizing the activities of the attorney discipline system during the preceding year.

APPENDIX E

Amend Supreme Court Rule 37A(I) as follows (new material is in **[bold and brackets]**):

(I) ***General Provisions***

(a) *Jurisdiction*: The jurisdiction of the attorney discipline system shall be as set forth in Supreme Court Rule 37(1)(b).

(b) *Construction*: This rule is promulgated for the purpose of assisting the grievant, complainant, respondent, counsel and the committees of the attorney discipline system to develop the facts relating to, and to reach a just and proper determination of matters brought to the attention of the attorney discipline system.

(c) *Definitions*: Subject to additional definitions contained in subsequent provisions of this rule which are applicable to specific questions, or other provisions of this rule, the following words and phrases, when used in this rule, shall have, unless the context clearly indicates otherwise, the meaning given to them in this section:

Answer: The response filed by, or on behalf of, the respondent to a complaint or a notice of charges.

Attorney: Unless otherwise indicated, "Attorney," for purposes of this rule, means any attorney admitted to practice in this State, any attorney specially admitted to practice by a court of this State, any attorney not admitted or specially admitted in this State who provides or offers to provide legal services in this State or any non-lawyer representative permitted to represent other persons before the courts of this State pursuant to RSA 311:1.

Complaint: A grievance that, after initial review, has been determined by the attorney discipline office to be within the jurisdiction of the attorney discipline system and to meet the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B) of this rule, and that is docketed by the attorney discipline office, or a complaint that is drafted and docketed by the attorney discipline office after an inquiry by that office. If after docketing, the attorney discipline office general counsel or the complaint screening committee determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

Court: The New Hampshire Supreme Court.

Disbarment: The termination of a New Hampshire licensed attorney's right to practice law in this State and automatic expulsion from membership in the bar of this State. A disbarred attorney may only apply for readmission to the bar of this State upon petition to the court, after having complied with the terms and conditions set forth in the disbarment order promulgated by the court which shall include all requirements applicable to applications for admission to the bar, including passing the bar examination and a favorable report by the professional conduct committee and the character and fitness committee.

Disciplinary Counsel: The attorney responsible for the prosecution of disciplinary proceedings before any hearings committee panel, the professional conduct committee and the supreme court. Disciplinary counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, such part-time attorney or attorneys as may from time to time be deemed necessary, and such other attorneys of the attorney discipline office as may from time to time be designated to assist disciplinary counsel.

Disciplinary Rule: Any provision of the rules of the court governing the conduct of attorneys or any rule of professional conduct.

Discipline: Any disciplinary action authorized by Rule 37(3)(c), in those cases in which misconduct in violation of a disciplinary rule is found warranting disciplinary action.

Diversion: Either a condition attached to discipline imposed by the professional conduct committee; or a referral, voluntary in nature, when conduct does not violate the rules of professional conduct; or non-disciplinary treatment by the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee as an alternative to discipline for minor misconduct.

Formal Proceedings: Proceedings subject to section (III) of this rule.

General Counsel: The attorney responsible for (a) receiving, evaluating, docketing and investigating grievances filed with the attorney discipline office; (b) dismissing or diverting complaints on the grounds set forth in Rule 37(6)(c) or presenting complaints to the complaint screening committee with recommendations for diversion, dismissal for any reason or referral to disciplinary counsel for a hearing; (c) assisting disciplinary counsel in the performance of the duties of disciplinary counsel as needed; (d) performing general legal services as required for the committees of the attorney discipline system; and (e) overseeing and performing administrative functions for the attorney discipline system. General counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, and such part-time attorney or attorneys as may from

time to time be deemed necessary**[, and such other attorneys of the attorney discipline office as may from time to time be designated to assist general counsel]**.

Grievance: "Grievance" means a written submission filed with the attorney discipline office to call to its attention conduct that the grievant believes may constitute misconduct by an attorney. A grievance that is determined, after initial screening, not to be within the jurisdiction of the attorney discipline system and/or not to meet the requirements for docketing as a complaint shall not be docketed and shall continue to be referred to as a grievance. A grievance that is determined, after initial screening, to be within the jurisdiction of the attorney discipline system and to meet the requirements for docketing as a complaint shall be docketed as a complaint and shall be referred to thereafter as a complaint; provided, however, that if the attorney discipline office general counsel or complaint screening committee later determines that the docketed complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

Hearing Panel: A hearing panel comprised of members of the hearings committee.

Inquiry: A preliminary investigation of a matter begun by the attorney discipline office on its own initiative to determine whether a complaint should be docketed.

Investigation: Fact gathering by the attorney discipline office with respect to alleged misconduct.

Minor Misconduct: Conduct, which if proved, violates the rules of professional conduct but would not warrant discipline greater than a reprimand. Minor misconduct (1) does not involve the misappropriation of client funds or property; (2) does not, nor is likely to, result in actual loss to a client or other person of money, legal rights or valuable property rights; (3) is not committed within five (5) years of a diversion, reprimand, censure, suspension or disbarment of the attorney for prior misconduct of the same nature; (4) does not involve fraud, dishonesty, deceit or misrepresentation; (5) does not constitute the commission of a serious crime as defined in Rule 37(9)(b); and (6) is not part of a pattern of similar misconduct.

Notice of Charges: A formal pleading served under section (III)(b)(2) of this rule by disciplinary counsel.

Public Censure: The publication by the court or the professional conduct committee, in appropriate New Hampshire publications, including a newspaper of general statewide circulation, and one with general circulation in the area of respondent's primary

office, as well as the New Hampshire Bar News, of a summary of its findings and conclusions relating to the discipline of an attorney, as defined in this section.

Referral: A grievance received by the attorney discipline office from any New Hampshire state court judge or from any member of the bar of New Hampshire, in which the judge or attorney indicates that he or she does not wish to be treated as a grievant.

Reprimand: Discipline administered by the professional conduct committee after notice of charges and after a hearing before a hearings committee panel and the right to request oral argument to the professional conduct committee in those cases in which misconduct in violation of the rules of professional conduct is found. A reprimand is administered by letter issued by the chair of the professional conduct committee, subject to an attorney's right to appeal such discipline to the court.

Suspension: The suspension of an attorney's right to practice law in this State, for a period of time specified by the court or by the professional conduct committee. Suspension by the professional conduct committee may not exceed six (6) months. The suspended attorney shall have the right to resume the practice of law, after the expiration of the suspension period, upon compliance with the terms and conditions set forth in the suspension order promulgated by the court or the professional conduct committee and pursuant to the procedure set forth in section (II)(c)(2) regarding reinstatement.

(d) *Grounds for Discipline*: The various matters specified in Supreme Court Rule 37(1)(c), the disciplinary rules or decisional law shall be grounds for discipline.

(e) *Types of Discipline and Other Possible Action*

(1) Misconduct under Supreme Court Rule 37(1)(c), the disciplinary rules or decisional law shall be grounds for any of the following:

(A) Disbarment - by the court.

(B) Suspension for more than six months - by the court.

(C) Suspension for six months or less - by the professional conduct committee or the court.

(D) Public Censure - by the professional conduct committee or the court.

(E) Reprimand - by the professional conduct committee.

(F) Monetary Sanctions Pursuant to Rule 37(19) – by the professional conduct committee or the court.

(2) The attorney discipline office general counsel, the complaint screening committee or the professional conduct committee may divert a matter involving minor discipline, in lieu of discipline, subject to compliance with the terms of a written agreement. The professional conduct committee may require an attorney to participate in a diversion

program as a condition of discipline. Any component of the attorney discipline system may refer to a diversion program, on a voluntary basis, an attorney who engages in conduct that does not violate the rules of professional conduct but which should be addressed as a corrective matter.

(f) *Subsequent Consideration of Disciplinary Action*

The fact that an attorney has been the subject of disciplinary action by the professional conduct committee, may (together with the basis thereof) be considered in determining the extent of discipline to be imposed, in the event additional charges of misconduct are subsequently brought and proven by clear and convincing evidence against the attorney.

(g) *Diversion*

Diversion may be either mandatory, a voluntary referral or a discretionary referral for minor misconduct.

(1) Mandatory diversion involving required participation in a diversion program may occur in some cases as part of discipline imposed by the professional conduct committee.

(2) Voluntary referral to a diversion program may occur when the conduct of an attorney may come to the attention of any of the committees or personnel involved in the attorney discipline system but the conduct does not violate the rules of professional conduct. The referral would be voluntary and may occur in situations where there is reason to believe that the attorney's conduct may lead to violations of the rules of professional conduct if corrective action is not taken by the attorney.

(3) Discretionary diversion as an alternative to a formal sanction for minor misconduct may occur if:

(A) The misconduct appears to the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee to be the result of poor office management, chemical dependency, behavioral or health-related conditions, negligence or lack of training or education; and

(B) There appears to the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee to be a reasonable likelihood that the successful completion of a remedial program will prevent the recurrence of conduct by the attorney similar to that which gave rise to the diversion.

(C) If the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee offers a written diversion agreement to an attorney, the attorney shall have thirty (30) days to accept and execute the diversion agreement.

(D) An attorney may decline to accept and execute a diversion agreement in which case the pending complaint shall be processed by the attorney discipline system in the same manner as any other matter.

(4) Diversion agreements shall be in writing and shall require the attorney to participate, at his or her own expense, in a remedial program acceptable to the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee which will address the apparent cause of the misconduct. Remedial programs may include but are not limited to: law office assistance; chemical dependency treatment; counseling; voluntary limitation of areas of practice for the period of the diversion agreement; or a prescribed course of legal education including attendance at legal education seminars. A diversion agreement shall require the attorney to admit the facts of the complaint being diverted and to agree that, in the event the attorney fails to comply with the terms of the diversion agreement, the facts shall be deemed true in any subsequent disciplinary proceedings.

(5) The fact that a diversion has occurred shall be public in all matters. Written diversion agreements shall also be public unless the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee votes to make it non-public based on one or more of the following: health, personal finances, family considerations or other highly personal matters.

(6) If an attorney fails to comply with the terms of a written diversion agreement, the agreement shall be terminated and the complaint shall be processed by the attorney discipline system in the same manner as any other matter.

(7) If an attorney fulfills the terms of a written diversion agreement, the complaint shall be dismissed and written notice shall be sent to both the attorney and the complainant.

(8) The attorney discipline office shall a) prepare diversion agreements setting forth the terms determined by the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee; b) monitor the progress of the attorney participating in the diversion program to insure compliance; and c) notify the complaint screening committee or the professional conduct committee whenever there is a voluntary or involuntary termination of the written diversion agreement or upon successful completion of the diversion program.

(h) *Public Announcements*

The attorney discipline office may, from time to time, publicly announce the nature, frequency and substance of diversion (unless made non-public) and sanctions imposed by the attorney discipline system. Unless a grievance or complaint has already been made

available for public inspection in accordance with Supreme Court Rule 37, such announcements shall not disclose or indicate the identity of any respondent attorney without the prior approval of the supreme court and prior notice to the respondent (giving said attorney an opportunity to be heard thereon) or without a written waiver from the attorney.

(i) *Period of Limitation*

(1) Except as provided in subsection (3), no formal disciplinary proceedings shall be commenced unless a grievance is filed with the attorney discipline office in accordance with section (II)(a) or a complaint is generated and docketed by the attorney discipline office under section (II)(a)(5)(B) of this rule within two (2) years after the commission of the alleged misconduct; except when the acts or omissions that are the basis of the grievance were not discovered and could not reasonably have been discovered at the time of the acts or omissions, in which case, the grievance must be filed within two (2) years of the time the grievant discovers, or in the exercise of reasonable diligence should have discovered, the acts and omissions complained of.

(2) Misconduct will be deemed to have been committed when every element of the alleged misconduct has occurred, except, however, that where there is a continuing course of conduct, misconduct will be deemed to have been committed beginning at the termination of that course of conduct.

(3) If a grievance is filed after the period prescribed in subsection (1) has expired, the attorney discipline office may elect to commence formal proceedings in the following cases:

(A) if based on charges which include commission of a "serious crime," as defined in Supreme Court Rule 37(9)(b), or conduct which would be a material element of a "serious crime," or

(B) if based on charges which do not include conduct described in (A) but which include as a material element fraud or fraudulent misrepresentation, dishonesty, deceit, or breach of a fiduciary duty, but only if commenced within one (1) year after actual discovery of the misconduct by the aggrieved party.

(4) The period of limitation does not run:

(A) during any time the attorney is outside this jurisdiction with a purpose to avoid commencement of proceedings, or wherein the attorney refuses to cooperate with an investigation into alleged misconduct, or

(B) during any period in which the attorney has engaged in active concealment of the alleged misconduct, provided that the period begins to run when the concealment is discovered by the aggrieved party or the attorney discipline office.

(5) If, while proceedings of any kind are pending against the attorney in any court or tribunal and arising out of the same acts or transactions that provide the basis for the

allegations of misconduct, the limitations period prescribed in subsection (1) expires, a grievance or referral may nonetheless be filed with the attorney discipline office so long as it is filed within one year after final conclusion of those proceedings notwithstanding the expiration of the period of limitation.

(j) *Status of Complainants*. Complainants are not parties to informal or formal disciplinary proceedings. Complainants lack standing to file pleadings or object to motions or recommendations of disposition of disciplinary matters.

[(k) Disciplinary matters may be handled by attorneys of the Attorney Discipline Office fulfilling functions of either general counsel or disciplinary counsel, as the general counsel may from time to time assign.]

APPENDIX F

Amend Supreme Court Rule 37A(II)(a)(6) as follows (deleted material is in ~~strikethrough~~ format):

(II) ***Investigations and Informal Proceedings***

(a) *Preliminary Provisions*

(1) *Responsibility of Attorney Discipline Office*

The attorney discipline office, through general counsel, shall investigate all matters involving alleged misconduct of attorneys which fall within the jurisdiction of the attorney discipline system and which satisfy the requirements of this rule.

(2) *Initiation of Investigation Process*

(A) *Grievance*. Any person may file a grievance with the attorney discipline office to call to its attention the conduct of an attorney that he or she believes constitutes misconduct which should be investigated by the attorney discipline office. If necessary, the general counsel or his or her deputy or assistant will assist the grievant in reducing the grievance to writing.

In accordance with a judge's obligation under canon 3 of the code of judicial conduct to report unprofessional conduct of any attorney of which the judge is aware, a judge of the supreme, superior, district or probate courts of New Hampshire, may refer any matter to the attorney discipline office which he or she believes may constitute misconduct by an attorney that should be investigated by the attorney discipline office. In accordance with an attorney's obligation under Rule 8.3 of the rules of professional conduct to report unprofessional conduct of an attorney of which he or she has knowledge, a member of the bar of New Hampshire, may refer any matter to the attorney discipline office which he or she believes may constitute misconduct by an attorney that should be investigated by the attorney discipline office. Except as otherwise provided, a referral from a court or attorney shall be treated as a grievance. Upon receipt of a referral, if the attorney discipline office shall determine that the referring judge or attorney does not wish to be treated as a grievant, and, if it is determined after initial screening that the grievance is within the jurisdiction of the attorney discipline office and meets the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B), the attorney discipline office shall process the grievance as an attorney discipline office generated complaint.

(B) *Attorney Discipline Office-Initiated Inquiry*. The attorney discipline office may, upon any reasonable factual basis, undertake and complete an inquiry, on its own initiative, of any other matter within its jurisdiction coming to its attention by any lawful means. Unless the attorney discipline office later dockets a complaint against an attorney in accordance with section (II)(a)(5)(B), all records of such an inquiry shall be confidential.

(C) *Filing*. A grievance shall be deemed filed when received by the attorney discipline office.

(3) *Procedure after Receipt of Grievance*

(A) *Initial Screening of Grievance*. General counsel shall review each grievance upon receipt to determine whether the grievance is within the jurisdiction of the attorney discipline system and whether the grievance meets the requirements for docketing as a complaint.

When necessary, general counsel may request additional information or documents from the grievant. Except for good cause shown, failure of a grievant to provide such additional information and/or documents within twenty (20) days may result in general counsel processing the grievance based on the then existing file, or dismissing the complaint without prejudice.

Upon receipt of the above information, general counsel may allow a respondent thirty (30) days to file a voluntary response if it is deemed necessary to assist in the evaluation process.

Extensions of time are not favored.

(B) *Requirements for Docketing Grievance as a Complaint*. A grievance shall be docketed as a complaint if it is within the jurisdiction of the attorney discipline system and it meets the following requirements:

(i) *Violation Alleged*. It contains: (a) a brief description of the legal matter that gave rise to the grievance; (b) a detailed factual description of the respondent's conduct; (c) the relevant documents that illustrate the conduct of the respondent, or, if the grievant is unable to provide such documents, an explanation as to why the grievant is unable to do so; and (d) whatever proof is to be provided, including the name and addresses of witnesses to establish a violation of a disciplinary rule.

(ii) *Standing*. With the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, it must be filed by a person who is directly affected by

the conduct complained of or who was present when the conduct complained of occurred, and contain a statement establishing these facts.

(iii) *Oath or Affirmation*. It is typed or in legible handwriting and, with the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, signed by the grievant under oath or affirmation, administered by a notary public or a justice of the peace. The following language, or language that is substantially equivalent, must appear above the grievant's signature: "I hereby swear or affirm under the pains and penalties of perjury that the information contained in this grievance is true to the best of my knowledge."

(iv) *Limitation Period*. It was filed with the attorney discipline office within the period of limitation set forth in section (I)(i).

(C) *Treatment of Grievance Not Within Jurisdiction of Attorney Discipline System or Failing to Meet Complaint Requirements*. A grievance that is not within the jurisdiction of the attorney discipline system or that does not meet the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B) shall not be docketed and shall be dismissed in accordance with section (II)(a)(4).

(4) *Disposition of Grievance after Initial Screening.*

(A) *Lack of Jurisdiction*. If the attorney discipline office determines that the person who is the subject of the grievance is not a person subject to the rules of professional conduct, general counsel shall return the grievance to the grievant with a cover letter explaining the reason for the return and advising the grievant that the attorney discipline office will take no action on the grievance. The person who is the subject of the grievance shall not be notified of it. No file on the grievance will be maintained. The attorney discipline office may bring the matter to the attention of the authorities of the appropriate jurisdiction, or to any other duly constituted body which may provide a forum for the consideration of the grievance and shall advise the grievant of such referral.

(B) *Failure to Meet Complaint Requirements*. If the attorney discipline office determines that a grievance fails to meet the requirements for docketing as a complaint, it shall so advise the grievant in writing. The attorney who is the subject of the grievance shall be provided with a copy of the grievance and the response by general counsel, and shall be given an opportunity to submit a reply to the grievance within thirty (30) days from the date of the notification or such further time as may be permitted by general counsel. The attorney's reply shall be filed in the record, which shall be available for public inspection in accordance with Rule 37(20).

(C) *Reconsideration of Attorney Discipline Office's Decision*. A grievant may file a written request for reconsideration of the attorney discipline office's decision that the grievance is not within the jurisdiction of the attorney discipline system or does not meet the requirements for docketing as a complaint, but said request must be filed within ten (10) days of the date of the written notification. A request for reconsideration of the attorney discipline office's decision shall automatically stay the period in which the attorney may file a reply as provided for by section (II)(a)(4)(B). Any such request for reconsideration that is timely filed shall be presented by general counsel to the complaint screening committee which shall affirm the decision of the attorney discipline office or direct that the grievance be docketed as a complaint and processed in accordance with the following paragraph. If the decision of the attorney discipline office is affirmed, the attorney who is the subject of the grievance shall be given the opportunity to submit a reply to the grievance within thirty (30) days from the date of the complaint screening committee's action on the request for reconsideration or such further time as may be ordered by that committee.

(5) *Docketing of Grievance as Complaint; Procedure Following Docketing of Complaint.*

(A) *Docketing of Grievance as Complaint*. If general counsel determines that a grievance is within the jurisdiction of the attorney discipline office and meets the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B), he or she shall docket it as a complaint.

(B) *Drafting and Docketing of Attorney Discipline Office-generated Complaint*. If, after undertaking and completing an inquiry on its own initiative, the attorney discipline office determines that there is a reasonable basis to docket a complaint against a respondent, a written complaint shall promptly be drafted and docketed.

(C) *Request for Answer to Complaint*. After a complaint is docketed, general counsel shall promptly forward to the respondent a copy of the complaint and a request for an answer thereto or to any portion thereof specified by the general counsel. Unless a shorter time is fixed by the general counsel and specified in such notice, the respondent shall have thirty (30) days from the date of such notice within which to file his or her answer with the attorney discipline office. The respondent shall serve a copy of his or her answer in accordance with section (VII) of this rule. If an answer is not received within the specified period, or any granted extension, absent good cause demonstrated by the respondent, general counsel may recommend to the complaint screening committee that the issue of failing to cooperate be referred to disciplinary counsel who shall prepare a notice of charges requiring the respondent to appear before a panel for the hearings committee and to show cause why he or she should not be determined to be in violation of Rules 8.1(b) and 8.4(a) of the rules of professional conduct for failing to respond to general counsel's request for an answer to the complaint.

(6) *Investigation*.

Either prior to or following receipt of the respondent's answer, general counsel and his or her deputies and assistants shall conduct such investigation as may be appropriate.

Upon completion of the investigation, general counsel may (1) dismiss or divert a complaint on the grounds set forth in Rule 37(6)(c); or (2) present the complaint to the complaint screening committee with recommendations for diversion as provided in section (I)(g), dismissal for any reason or referral to disciplinary counsel for a hearing.

At any time while general counsel is investigating a docketed complaint, the respondent may notify general counsel that the respondent waives the right to have the matter considered by the complaint screening committee and consents to the matter being referred to disciplinary counsel for a hearing. Agreement by the respondent to referral for a hearing shall not be considered an admission of misconduct or a waiver of any defenses to the complaint.

Meetings of the complaint screening committee shall be in the nature of deliberations and shall not be open to the public, respondents, respondents' counsel, ~~disciplinary counsel~~ or the complainant. Records and reports of recommendations made shall in all respects be treated as work product and shall not be made public or be discoverable. However, the decision of the complaint screening committee shall be public.

(7) *Action By the Attorney Discipline Office General Counsel or the Complaint Screening Committee.*

(A) *Diversion.* In any matter in which the attorney discipline office general counsel or the complaint screening committee determines that diversion is appropriate, it shall be structured consistent with the provisions of section (I)(g).

(B) *Dismissal For Any Reason*. In any matter in which the Attorney Discipline Office General Counsel or the complaint screening committee determines that a complaint should be dismissed, either on grounds of no professional misconduct or any other reason, general counsel or the committee shall dismiss the complaint and it shall notify the complainant and the respondent in writing and the attorney discipline office shall close its file on the matter.

(C) *Formal Proceedings*. If the respondent agrees with the recommendation of the Attorney Discipline Office General Counsel to refer a complaint to disciplinary counsel, or the complaint screening committee determines that formal proceedings should be held, the complaint shall be referred to disciplinary counsel for the issuance of notice of charges and the scheduling of a hearing on the merits before a panel of the hearings committee or,

alternatively, for waiver of formal proceedings by respondent and the filing of stipulations as to facts, rule violations and/or sanction.

APPENDIX G

Amend Superior Court (Civ.) Rule 9 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 9. Answers; Defenses; Forms of Denials

(a) An Answer or other responsive pleading shall be filed with the court within 30 days after the person filing said pleading has been served with the pleading to which the Answer or response is made. It shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder. The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs. An Answer, to the effect that an allegation is neither admitted nor denied, will be deemed an admission. All facts well alleged in the Complaint and not denied or explained in the Answer, will be held to be admitted.

In addition, within the same 30 days, the person filing an Answer or other responsive pleading shall also file an appearance in accordance with Rule 17. No attorney, non-attorney representative or self-represented party will be heard until his or her Appearance is so entered.

(b) Instead of an Answer, a person responding to a pleading to which a response is required may, within 30 days after the person has been served with the pleading to which the Answer or response is required file a Motion to Dismiss. If a Motion to Dismiss is submitted and denied, an Answer must be filed within 30 days after the date on the Notice of the Decision finally denying the motion; provided, however, that if a Motion to Dismiss which challenges the court's personal jurisdiction, the sufficiency of process and/or the sufficiency of service of process is filed, an Answer must be filed within the time specified in section (e) of this rule.

(c) To preserve the right to a jury trial, a defendant entitled to a trial by jury must indicate his or her request for a jury trial upon the first page of the Answer at the time of filing. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the defendant thereof.

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

(1) accord and satisfaction;
(2) arbitration and award;
(3) assumption of risk;
(4) contributory negligence;
(5) duress;
(6) estoppel;
(7) failure of consideration;
(8) fraud;
(9) illegality;
(10) injury by fellow servant;
(11) laches;
(12) license;
(13) payment;
(14) release;
(15) res judicata;
(16) statute of frauds;
(17) statute of limitations; and
(18) waiver.

(e) A party does not waive the right to file a Motion to Dismiss challenging the court's personal jurisdiction, sufficiency of process and/or sufficiency of service of process by filing an Answer or other pleadings or motions addressing other issues. However, a party who wishes to challenge the court's personal jurisdiction, sufficiency of process, and/or sufficiency of service of process must do so in a Motion to Dismiss filed within 30 days after he or she is served. If a party fails to do so within this time period, he or she will be deemed to have waived the challenge. If the trial court denies the Motion to Dismiss:

(1) The party will be deemed to have waived the challenge if the party does not seek review of the denial by the supreme court within 30 days of the clerk's final written notice of the trial court's decision. If the party does not seek review of the denial by the supreme court, the party must file an Answer within 30 days of the clerk's final written notice of the trial court's decision.

(2) If the party appeals the denial, and the supreme court declines the appeal, the party must file an Answer within 30 days after the date of the supreme court's final written notice declining the appeal. The supreme court's declining to accept the appeal does not preclude a party who has complied with this section from challenging the trial court's ruling on personal jurisdiction, sufficiency of process and/or sufficiency of service of process in an appeal from a final judgment of the trial court.

(3) If the supreme court accepts the appeal and rejects the party's challenge, the party must file an Answer within 30 days after the date of the supreme court's final decision rejecting the challenge.

Comment

Pleadings which notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses better define the issues of fact and law to be adjudicated. This definition should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should assist in setting practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case.

Answers are to comply with statutory requirements that pertain to brief statements of defense. *See* RSA 515:3, 524:2, 565:7, and 547-C:10.

This rule changes current practice in that it requires a defendant to file an Answer within 30 days after the defendant is served with the Complaint. The practice under prior law whereby, in actions at law, the defendant's entry of an appearance operated as a general denial of all allegations of the plaintiff's writ has been eliminated. Section (b) of the rule extends the time for filing an Answer if the defendant moves to dismiss the Complaint. If a motion to dismiss is filed, the Answer is not due until 30 days after the clerk's notice of the court's decision finally denying the motion. Except for challenges to personal jurisdiction, to the sufficiency of process or to the sufficiency of service of process, any defense that can be raised by motion also can alternatively be raised in an Answer.

Section (d) of the rule makes clear that affirmative defenses are deemed waived if they are not raised in an Answer or a motion to dismiss filed within 30 days after the defendant is served with the Complaint.

Section (e) requires that motions to dismiss based on a challenge to the court's personal jurisdiction, the sufficiency of process, or the sufficiency of service of process must be raised by motion to dismiss filed within 30 days after service of the Complaint. This subsection is intended to modify long standing New Hampshire practice concerning the manner in which a litigant who desires to challenge the court's personal jurisdiction or the adequacy of process or service of process must proceed. Under prior law, a litigant desiring to make such challenges was required to enter a special appearance and to file a motion to dismiss within 30 days after being served. If the litigant failed to follow this course, or if the litigant filed an Answer or pleading that raised any other issues, the litigant would be deemed to have submitted to the court's jurisdiction and thus waived his or her challenge to personal jurisdiction or the adequacy of process or service of process.

Under the new rule, a litigant desiring to challenge personal jurisdiction or the sufficiency of process or the service of process must still do so by filing a motion to dismiss within 30 days after being served. However the litigant is not required to enter a "special appearance," nor will the litigant be deemed to have waived such challenges and submitted to the court's jurisdiction by filing an Answer or other pleadings or motions that raise issues aside from personal jurisdiction, sufficiency of process or sufficiency of service of process. In accordance with *Mosier v. Kinley*, 142 N.H. 415, 423-24 (1997), the new rule preserves the requirement that a litigant whose motion to dismiss on these grounds is denied by the trial court must seek an immediate appeal of the trial court's ruling, or be deemed to have waived these challenges.

APPENDIX H

Adopt Superior Court (Civ.) Rule 13A as follows:

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 permission of the Court.

APPENDIX I

Amend Superior Court (Civ.) Rule 28A as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

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.]**

(b) *Medical Reports*. Copies of all medical reports relating to the litigation, in the possession of the parties, will be furnished to opposing counsel on receipt of the same.

(c) *Medical Records*. Any party shall have the right to procure from opposing counsel an authorization to examine and obtain copies of hospital records and X-rays involved in the litigation.

(d) *Special Damages*. Any party claiming damages shall furnish to opposing counsel, within 6 months after entry of the action, a list specifying in detail all special damages claimed; copies of bills incurred thereafter shall be furnished on receipt. Any party claiming loss of income shall furnish opposing counsel, within six months after the entry of the action, as soon as each is available, copies of the party's Federal Income Tax Returns for the year of the incident giving rise to the loss of income, and for two years before, and one year after, that year, or, in the alternative, written authorization to procure such copies from the Internal Revenue Service.

APPENDIX J

Amend Superior Court (Civ.) Rule 29 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 29. Discovery Motions

(a) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (a) that the discovery not be had; (b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (d) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (e) that discovery be conducted with no one present except persons designated by the court; (f) that a deposition after being sealed be opened only by order of the court; (g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

[(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.]

~~(b)~~ **[(c)]** If a motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

~~(c)~~ **[(d)]** *Conditional Default.* If the party upon whom interrogatories or requests for production have been served, shall fail to answer said interrogatories or requests for production within 30 days, or any enlarged period, unless written objection to the answering of said interrogatories or requests is filed within that period, said failure will result in a conditional default being entered by the clerk upon motion being filed indicating such failure to answer. The party failing to answer shall receive notice of the conditional default. The conditional default shall be vacated if the defaulted party answers the interrogatories or requests within 10 days of receiving notice thereof and moves to strike the conditional default. If the defaulted party fails to move to strike the conditional default within 10 days of receiving notice thereof, the adverse party may move to have a default judgment entered and damages assessed in connection therewith. If, upon review of an affidavit of damages, the court determines that it does

not provide a sufficient basis for determining damages, the court may, in its discretion, order a hearing thereon.

~~(d)~~ **[(e)]** *Motion to Compel.* Before any Motion to Compel discovery may be filed, counsel for the parties shall attempt in good faith to settle the dispute by agreement. If a Motion to Compel regarding requested discovery is filed, the moving party shall be deemed to have certified to the court that the moving party has made a good faith effort to obtain concurrence in the relief sought.

~~(e)~~ **[(f)]** Where a discovery dispute has been resolved by court order in favor of the party requesting discovery by court order, the requested discovery shall be provided within 10 days thereafter or within such time as the court may direct.

~~(f)~~ **[(g)]** Motions for protective order or to compel responses to discovery requests shall include a statement summarizing the nature of the action and shall include the text of the requests and responses at issue.

~~(g)~~ **[(h)]** If the court finds that a motion, which is made pursuant to this rule, was made frivolously or for the purpose of delay or was necessitated by action of the adverse party that was frivolous or taken for the purpose of delay, the court may order the offending party to pay the amount of reasonable expenses, including attorney's fees, incurred by the other party in making or resisting the motion.

APPENDIX K

Amend Superior Court (Civ.) Rule 205 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 205. Juror Orientation.

When a new panel of prospective jurors is first summoned for service, the panel shall be given preliminary instructions regarding the terms and conditions of jury service, the role of the jury in the justice system, and the legal principles applicable to the cases the jurors may hear. Such instructions may be given by a justice of the superior court, by utilization of a prerecorded audio or video presentation created for this purpose, or by a combination of use of a recording and instruction by a justice. Juror orientation sessions shall be open to the public. Except during periods when an audio or video recording is being played, all proceedings involving the judge giving preliminary instructions and taking and responding to juror questions shall be conducted on the record. The record of juror orientation sessions shall be preserved for a period of ~~ten (10)~~ **[six (6)]** years.

APPENDIX L

Adopt Superior Court (Civ.) Rule 314 as follows:

Rule 314. Administrative Orders.

The Chief Justice of the Superior Court has issued administrative orders. The administrative orders can be located on the New Hampshire Judicial Branch website.

APPENDIX M(1)

Set forth below in appendices M(2) through M(80) are the proposed changes to the New Hampshire Rules of Evidence the Advisory Committee on Rules recommends for adoption by the Court. As is noted in the proposed preamble, the New Hampshire Rule of Evidence Committee (NHRE Update Committee) proposed a number of changes to the rules in an August 3, 2015 report to the Supreme Court. The Court referred the report to the Advisory Committee on Rules. Over a period of almost one year, the Advisory Committee on Rules worked with the NHRE Update Committee to finalize the recommendations to be made to the Court, taking into consideration comments about the proposed rules made by Committee members and members of the public, the bench and the bar. The footnotes in some of the appendices highlight where issues arose regarding the language changes proposed by the NHRE Update Committee.

To facilitate review of the proposed changes, the notes in this appendix M(1) indicate: (1) where substantive changes are being made to the New Hampshire rules; and/or (2) where the language of the New Hampshire Rule of Evidence (NHRE) departs from the language of the Federal Rule of Evidence (FRE).

Preamble

- Is new, and unique to NH Rules.

Rule 100

- No change.
- No federal counterpart.

Rule 101

- Language identical to FRE except Federal Rule of Evidence 101(b) does not include a subsection (7), which defines what "Supreme Court" means when it is used in the rules.

Rule 102

- Language identical to FRE except that NH Rule retains sentence stating that while federal court decisions might be helpful in analyzing problems and issues that arise under the rules, the Supreme Court is the final interpreter of the rules.

Rule 103

- Language identical to FRE except that the language of NHRE 103(a)(2) differs from FRE 103(a)(2) – preservation of issues for appeal.
- The language of NHRE 103(b) is new and is identical to FRE 103(b).

Rule 104

- Language identical to FRE except NHRE 104(b) replaces the last sentence of FRE 104(b) with two sentences.

Rule 105

- Language identical to FRE.
- No substantive change.

Rule 106

- Language identical to FRE except that the FRE does not include a subsection (b), but the NHRE does – it codifies case law as set forth in *State v. Lopez*, 156 N.H. 416 (2007).

Rule 201

- No changes to the rule, but comment added to explain why New Hampshire has not adopted the federal rule.

Rule 301

- Language identical to FRE except FRE applies only to civil proceedings. NHRE 301 applies to both civil and criminal proceedings.
- No substantive change.

Rule 401

- Language identical to FRE.
- No substantive change.

Rule 402

- Language substantially the same as FRE (some minor differences)
- No substantive change.

Rule 403

- Language identical to FRE.
- No substantive change.

Rule 404

- No changes to rule, but comment added to explain why New Hampshire has not adopted the substantive changes made to the federal rule since 1985.
- No substantive change.

Rule 405

- Language identical to FRE.
- No substantive change.

Rule 406

- Language identical to FRE.
- No substantive change

Rule 407

- Language identical to FRE.
- Substantive changes made.

Rule 408

- No changes to rule, but comment added to explain why New Hampshire has not adopted the federal rule.

Rule 409

- Language identical to FRE.
- A substantive change was made to the rule – a sentence was deleted.

Rule 410

- Language identical to FRE except the language "attorney for the prosecuting authority" in Rule 410(a)(4) of the federal rule is replaced with "representative of the State" in the New Hampshire Rule. Otherwise, no substantive change.

Rule 411

- Language identical to FRE.
- A substantive change was made to the rule – a phrase was deleted.

Rule 412

- No changes to rule, but comment added to explain why New Hampshire has not adopted the federal rule.

Rules 413, 414, 415

- The Committee recommends against the adoption of these rules.

Rules 501-512 (privileges)

- No change.
- But a comment has been added after each of these rules making clear that no change was made in 2016 and that these rules were not modeled on the FRE, but on the Uniform Rules of Evidence and NH statutes on privilege.

Rule 601

- Language of (a) is identical to language of first sentence of FRE 601.
- NHRE 601 includes a subsection (b) that is not included in the FRE.

Rule 602

- Language identical to FRE.
- No substantive change.

Rule 603

- Language identical to FRE.
- No substantive change.

Rule 604

- Language identical to FRE.
- No substantive change.

Rule 605

- New rule.
- Language identical to FRE

Rule 606

- Language very different from FRE.
- The Committee engaged in extensive discussion about this rule ("Juror's Competency as a Witness"). *See* footnote 24.

Rule 607

- Language identical to FRE.
- No substantive change.

Rule 608

- Language identical to FRE.
- Substantive change was made to FRE 608(b) in 2003, relating to use of extrinsic evidence to attack or support a witness' character for truthfulness.

Rule 609

- Language identical to FRE except the NH Rule includes the phrase "of the appeal" in the second sentence of (c).
- Substantive changes were made to FRE in 1990 and 2006.

Rule 610

- Language identical to FRE.
- No substantive change.

Rule 611

- Language of (a) and (c) identical to FRE.
- Language of (b) unchanged. NH rule allows for more latitude on cross examination than FRE.

Rule 612

- Language identical to FRE.
- No substantive changes.

Rule 613

- Language of (a) and (b) identical to FRE. FRE does not have a subsection (c).
- 2016 amendments add (c), codifying NH common law rule.

Rule 614

- Language identical to FRE.
- Substantive change made to NH Rule to comport with FRE.

Rule 615

- Language of (a) is identical to FRE.
- Substantive change made to NH Rule to define scope of sequestration – the NH rule includes a subsection (b). The federal rule does not.

Rule 701

- Language identical to FRE.
- A substantive change was made with the addition of subsection (c).

Rule 702

- Language identical to FRE.
- Substantive change made – with additions of subsections (b), (c) and (d).

Rule 703

- Language identical to FRE.
- Substantive changes made.

Rule 704

- Language identical to FRE 704(a).
- FRE 704 includes a subsection (b). The New Hampshire rule does not.

Rule 705

- Language identical to FRE.
- Substantive changes made.

Rule 706

- This federal rule was not adopted.

Rule 801

- Language identical to Rule 801 except that the change to FRE 801 that was made in 2014 was not made to NHRE 801. Justice Lynn recommends that the proposed change to adopt the FRE 2014 amendment be assigned a docket number and be added to Advisory Committee on Rules agenda.
- A substantive change was made to the rule with the addition of the last sentence of 801(d)(2).

Rule 802

- Language identical to FRE 802.
- No substantive change.

Rule 803

- Language identical to FRE 803 except:
  - The NH Rule adds the language, regarding circumstances and trustworthiness at 803(4) and 803(10).
  - The NH Rule adds the language "or played before a jury" to 803(5).
  - The NH Rule adds the language, 'unless the Court finds that the probative value of the statement as an exhibit outweighs the prejudicial effect of its admission" at 803(18).
- A substantive change was made to the rule with the addition of (22), relating to judgment of a previous conviction.

Rule 804

- Language identical to FRE.
- A substantive change was made to FRE 804(b)(3) in 2010 to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases.
- A substantive change was made to FRE 804(b)(6) in 1997. Attorney Rothstein has expressed concern that these codify the doctrine of forfeiture by wrongdoing.

Rule 805

- Language identical to FRE.
- No substantive change.

Rule 806
- Language identical to FRE.
- No substantive change.

Rule 807
- A new rule, language identical to FRE.
- Not a substantive change – this includes the substance of former NHRE 803(24) and 804(b)(6).

Rule 901
- Language identical to FRE.
- No substantive change.

Rule 902
- Language identical to FRE.
- Substantive change made – addition of (11) and (12)

Rule 903
- Language identical to FRE.
- No substantive change.

Rule 1001
- Language identical to FRE.
- No substantive change.

Rule 1002
- Language identical to FRE
- No substantive change.

Rule 1003
- Language identical to FRE.
- No substantive change.

Rule 1004
- Language identical to FRE.
- No substantive change.

Rule 1005
- Language identical to FRE.
- No substantive change.

Rule 1006

- Language identical to FRE.
- No substantive change.

Rule 1007

- Language identical to FRE.
- No substantive change.

Rule 1008

- Language identical to FRE.
- No substantive change.

Rule 1101

- This is a New Hampshire specific rule.
- No change made as a result of FRE restyling, but a technical change made to the New Hampshire Rule.

Rule 1102

- Language similar, but not identical, to FRE.
- A substantive change has been made, and a comment added, to make clear that the Supreme Court's rulemaking power is not exclusive.

Rule 1103

- This is a New Hampshire specific rule.
- No change to New Hampshire Rule.

APPENDIX M(2)

The NHRE Update Committee recommends the adoption of the following Preamble to the New Hampshire Rules of Evidence:

PREAMBLE[1]

Pursuant to the authority conferred by Part II, Article 73-a of the New Hampshire Constitution, the Supreme Court of New Hampshire amends the Rules of Evidence as provided below. The rules were first adopted by the New Hampshire Supreme Court on January 18, 1985, effective July 1, 1985 and were modeled on the Federal Rules of Evidence. Because the Federal Rules of Evidence have been amended several times since 1985, the New Hampshire Supreme Court asked a Committee chaired by the Honorable David A. Garfunkel and Professor John B. Garvey to undertake a review of the New Hampshire Rules of Evidence to determine whether any changes should be made.

In an August 3, 2015 report to the Court, the New Hampshire Rules of Evidence Update Committee ("NHRE Update Committee") made a number of recommendations to amend the rules after considering whether changes that have been made to the Federal Rules of Evidence since 1985 should also be made to the New Hampshire Rules of Evidence. The Court referred the report to the New Hampshire Supreme Court Advisory Committee on Rules in early 2016. The Advisory Committee on Rules held a public hearing on the rules on June 3, 2016 and made a number of changes to the rules based on the comments it received at the public hearing.

Many of the changes recommended by the NHRE Update Committee and the Advisory Committee on Rules and which the Court has adopted are stylistic and designed to ensure, where appropriate, that the language of the New Hampshire Rule is identical to the language of the federal rule. The NHRE Update Committee and the Advisory Committee on Rules did recommend some substantive changes to the rules. A "2016 NHRE Update Committee Note" following the relevant rule indicates whether a substantive change has been made to the rule, and, if so, why. The "Reporter's Notes" that were included when the New Hampshire Rules of Evidence were adopted in 1985 have not been updated.

Where the rule amendments are stylistic only, they are not intended to change existing case law that has developed under the rule. In interpreting the rules, New Hampshire case law has primacy over federal case law.

[1] At its meeting on June 3, the Committee suggested that it agreed with David Rothstein's recommendation that a preamble be included.

APPENDIX M(3)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 100 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 100. Adoption and Effective Date; Effect Upon Common Law

Pursuant to Part II, Article 73-A of the New Hampshire Constitution the Supreme Court unanimously adopts these rules of evidence. These rules shall govern all cases the trial of which commences on or after July 1, 1985, and shall be effective to the extent they are not inconsistent with statutory law in effect on that date, provided, that upon any later legislative repeal of such inconsistent statutes the appropriate rules shall then become effective. To the extent these rules alter or conflict with the common law, the rules shall govern.

[2016 NHRE Update Committee Note[2]

No change was made to New Hampshire Rule of Evidence 100 because the rule is a New Hampshire specific rule on adoption of the New Hampshire rules and is still germane.]

[2] NHRE Aug. 3, 2015 Report.

APPENDIX M(4)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 101 and add a 2016 Update Committee note to be placed after the original Reporter's Note as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 101. Scope[; Definitions]

[(a)] [Scope.] These rules **[apply to]** ~~govern~~ proceedings in the ~~courts of the~~ State of New Hampshire **[courts. The specific courts and proceedings to which the rules apply, along with]** ~~, to the extent and with the~~ exceptions **[are set out in]** ~~stated in~~ Rule 1101.

[(b) Definitions. In these rules:
(1) "civil case" means a civil action or proceeding;
(2) "criminal case" includes a criminal proceeding;
(3) "public office" includes a public agency;
(4) "record" includes a memorandum, report or data compilation;
(5) a "rule prescribed by the Supreme Court" means a rule adopted by the New Hampshire Supreme Court under constitutional authority;
(6) a reference to any kind of written material or any other medium includes electronically stored information;
(7) "Supreme Court" means the New Hampshire Supreme Court.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to (a) and added a section (b) to the rule to mirror Federal Rule of Evidence 101. Federal Rule of Evidence 101(b) does not include a subsection (7).]

APPENDIX M(5)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 102 and add a 2016 Update Committee to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 102. Purpose and Construction.

~~These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.~~ **[These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.]** While decisions of federal courts involving the Federal Rules of Evidence may be helpful in analyzing problems and issues that arise under these rules, the Supreme Court shall be the final interpreter of these rules.

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(6)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 103 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format): [3]

Rule 103. Rulings On Evidence

~~(a) *Specific objection.* A general objection shall not be sufficient to raise or preserve an issue for appeal.~~

~~(b) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and~~

~~(1)*Objection.* In case the ruling is one admitting evidence, a contemporaneous objection appears of record, stating explicitly the specific ground of objection; all other grounds for objection shall be deemed waived; or~~

~~(2)*Offer of proof.* In case the ruling is one excluding evidence, the record indicates that the substance of the evidence was contemporaneously made known to the court by offer of proof.~~

[3] The NHRE Update Committee noted in its August 3, 2015 report, regarding this rule, that, "NHRE in its present form adopted the FRE while retaining a few provisions from prior New Hampshire common law. With the passage of time, the committee believes that restyled FRE 103 accurately describes current New Hampshire practice and can be adopted." Thus, it appears that a substantive change is being proposed here. Justice Lynn, Chair of the Advisory Committee on Rules, stated that he believes additional language changes must be made, recognizing that this is a departure from the FRE language. In response to Justice Lynn's proposal, the NHRE Committee stated, "The committee recommended amending the NH rule to conform to the restyled FRE. The Court has expressed a preference for retaining the NHRE in its present form, citing *State v. Noucas*. While the committee believes that the restyled FRE preserves the essence of the existing NHRE, it understands the Court's concern that the additional language found in the FRE, which preserves for appellate review those rulings that were apparent from the context even if the specific grounds for the objection are not contained in the record, is a departure from NH law. Because of the historical requirement in New Hampshire, as expressed in *State v. Noucas*, that preservation of issues for appellate review requires trial counsel to articulate specific grounds for a trial objection, the committee agrees with the language proposed by the Court. The Advisory Committee on Rules agreed at the June 2016 meeting that the additional change to the language suggested by Justice Lynn should be made, and the Committee added the language contained in the second paragraph of the 2016 Update Committee note.

[(a) *Preserving a Claim of Error.* A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party, and:

(1) if the ruling admits evidence, a party, on the record:
(A) timely objects or moves to strike; and
(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of the substance of the evidence and the basis for its admissibility by offer of proof, unless these matters were apparent from the context.

(b) *Not Needing to Renew an Objection or Offer of Proof.* Once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal.]

~~(c) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.~~

[(c) *Court's Statement About the Ruling; Directing an Offer of Proof.* The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.]

~~(d) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.~~

[(d) *Preventing the Jury from Hearing Inadmissible Evidence.* To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.]

~~(e) *Exceptions unnecessary.* Taking of exceptions is no longer necessary in matters of evidence.~~

~~(f) *Plain error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.~~

[(e) *Taking Notice of Plain Error.* A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.]

[<u>2016 NHRE Update Committee Note</u>

The 2016 amendment made stylistic and substantive changes to the rule.

The language of New Hampshire Rule of Evidence 103(a)(2), as amended in 2016, differs from the language of Federal Rule of Evidence 103(a)(2). The language of the federal rule preserves for appellate review those rulings that were apparent from the context even if the specific grounds for the objection are not contained in the record. This is a departure from New Hampshire law. In New Hampshire, as is expressed in *State v. Noucas*, 165 N.H. 146, 152 (2013), preservation of issues for appellate review requires trial counsel to articulate specific grounds for a trial objection.

The language of New Hampshire Rule of Evidence 103(b) is new and mirrors the language of Federal Rule of Evidence 103(b). Although the New Hampshire Rule of Evidence Committee and the Advisory Committee on Rules recognize that the language is new, they do not believe that this will constitute a substantive change in practice. Under the prior rule, when evidentiary issues are worked out in motions in limine, or when a line of questioning is objected to, judges will give continuing objections, without the need to renew each time, because repeated objections are invasive and disruptive.[4]

For additional guidance regarding the substantive changes to the rule see the notes following Federal Rules of Evidence 103 (Notes of Advisory Committee on 2000 amendments).

[4] The language of this paragraph of the comment comes from NHRE Committee comments Professor Garvey relayed via email to Carolyn Koegler on 3/1/16.

APPENDIX M(7)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 104 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 104. Preliminary Questions

~~(a) *Questions of admissibility generally*. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.~~

[(a) *In General*.

The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.]

~~(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.~~

[(b) *Relevance That Depends on a Fact*. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. If such proof is presented, and the court finds that the evidence is otherwise admissible, the court shall admit the evidence. The court may admit the proposed evidence on the condition that the proof be introduced later.][5]

~~(c) *Hearing of jury*. Hearings on the admissibility of confession shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.~~

[5] This language differs from the language in the federal rule. The New Hampshire Rule replaces with these two sentences the last sentence of FRE 104(b) which reads, "The court may admit the proposed evidence on the condition that the proof be introduced later."

[(c) *Conducting a Hearing So That the Jury Cannot Hear It.* The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.]

~~(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, subject himself or herself to cross-examination as to other issues in the case.~~

[(d) *Cross-Examining a Defendant in a Criminal Case.* By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.]

~~(e) *Weight and credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.~~

[(e) *Evidence Relevant to Weight and Credibility.* This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.]

[2016 NHRE Update Committee Note

The 2016 amendments made stylistic and substantive changes to the rule.

The language of the amended rule mirrors Federal Rule of Evidence 104, except that the last two sentences of New Hampshire Rule of Evidence 104(b) are not included in the Federal Rule. The Committee believes that the addition of the last two sentences codifies existing New Hampshire law and makes it clear that a judge cannot decline to admit evidence which is otherwise admissible if the conditional evidence is presented.][6]

[6] This note is based upon the reasons articulated at the March 11, 2016 meeting and June 3, 2016 hearing.

APPENDIX M(8)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 105 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):.

Rule 105. ~~Limited Admissibility~~ [Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes]

~~When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted,~~ **[If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose —]** the court, ~~upon~~ **[on timely]** request, ~~shall~~ **[must]** restrict the evidence to its proper scope and instruct the jury accordingly.

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(9)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 106 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 106. Remainder of or Related Writings or Recorded Statements

[(a)] ~~When~~ **[If a party introduces all or part of]** a writing or recorded statement ~~or part thereof is introduced by a party~~, an adverse party may require ~~at that time~~ the introduction**[, at the time,]** of any other part**[—]** or any other writing or recorded statement**[— that]** ~~ought~~ in fairness **[ought]** to be considered **[at the same time.]** ~~contemporaneously with it~~.

[(b) A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced so far as it relates:

(1) to the same subject matter; and

(2) tends to explain or shed light on the meaning of the part already received.] [7]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

The 2016 amendment designated the first paragraph (a) and added subdivision (b). The changes to (a) are stylistic and mirror the federal rule. The addition of (b), not included in Federal Rule of Evidence 106, codifies New Hampshire case law as set forth in *State v. Lopez*, 156 N.H. 416, 421 (2007).]

[7] The language of (a) is identical to the language of FRE 106. The language in (b) is unique to the New Hampshire rule and is the language set forth in Judge Delker's May 20, 2016 memorandum to the Committee. The Committee agreed at the June 3 public hearing that this change would be appropriate because this is an area in which New Hampshire has established evidentiary case law that departs from the federal practice.

APPENDIX M(10)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 201, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 201 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 201. Judicial Notice

(a) *Kinds of facts*. A court may take judicial notice of a fact. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(b) *Kinds of law*. A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) regulations of governmental agencies, and (4) ordinances of municipalities and other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.

(c) *When discretionary*. A court may take judicial notice, whether requested or not.

(d) *When mandatory*. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard*. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice*. Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury*. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

[2016 NHRE Update Committee Note[8]

This rule was not amended in 2016 to mirror the federal rule.

Subsections (a) and (b) of the New Hampshire Rule are structured differently from the Federal Rule. The Federal Advisory Committee placed notice of the law in the rules of procedure due to their "assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather the rules of procedure." *See* Note on Judicial Notice of Law following Federal Rule of Evidence 201. The structure of New Hampshire Rule of Evidence 201 honors the contrary thesis. When a rule of law is a factor in issue in the litigation, it should be fed into the judicial process in the same manner – and subject to the same safeguards – as are facts generally. In practice, the federal courts also rely on judicial notice to feed law into the judicial process, but without the benefit of the rule. New Hampshire Rule 201 legitimizes this practice.

[8] This comment was taken from the NHRE Update Committee's Aug. 3, 2015 Report.

APPENDIX M(11)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 301 and add a 2016 Update Committee to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 301. Presumptions

~~In all actions and proceedings, unless otherwise provided for by constitution, statute, case law, or these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.~~

[In all actions and proceedings, unless the constitution, a statute, case law, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.][9]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.

The New Hampshire rule continues to depart from the federal rule. Federal Rule of Evidence 301 applies only to civil proceedings. New Hampshire Rule of Evidence 301 in both its prior and current form applies to both civil and criminal proceedings.][10]

[9] This language differs from the language of the federal rule.

[10] The Aug 3, 2015 NHRE Report had recommended the adoption of the federal rule, but Justice Lynn believed that the rule should remain the same and should continue to apply to criminal proceedings. Judge Delker and attorney Rothstein agreed. The Committee discussed this issue at the June 3 public hearing and agreed with Justice Lynn and Judge Delker that this rule should continue to apply to both criminal and civil proceedings.

APPENDIX M(12)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 401 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 401. ~~Definition of "Relevant Evidence"~~

~~"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.~~

[Rule 401. Test for Relevant Evidence

Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(13)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 402 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

~~**Rule 402. Generally Admissible; Irrelevant Evidence Inadmissible**~~

~~All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules prescribed by the New Hampshire Supreme Court. Evidence which is not relevant is not admissible.~~

[Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:
- **the United States or New Hampshire Constitution;**
- **a statute;**
- **these rules; or**
- **other rules prescribed by the Supreme Court.**

Irrelevant evidence is not admissible.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(14)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 403 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

~~Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time~~

~~Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.~~

[Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(15)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 404, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 404 Reporter's Note, as follows (new material is in **[bold and in brackets]**):[11]

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) *Character Evidence Generally*. - Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused*. - Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim*. - Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness*. - Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *Other Crimes, Wrongs, or Acts*. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in

[11] NHRE Update Committee states in its August 3, 2015 report: "The current New Hampshire Rule is the same effective language as the original Federal Rule. [FRE 404 has been amended four times since New Hampshire adopted the rule. The first amendment (1987) was only technical but the last three amendments were substantive. The 1991 amendment added a pretrial notice requirement to 404 (b). The 2000 amendment provides that when the accused attacks the character of an alleged victim the door is open to an attack on the same character trait of the accused. The 2006 amendment was added to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait.] New Hampshire has a body of case law that has clarified and limited this rule as applied in New Hampshire. After considerable discussion, the committee decided to recommend that the rule be left as is because of the substantial case law. (If the Court desires a restyled rule that incorporates the case law the committee would be happy to propose one.)" Justice Lynn, Chair of the Advisory Committee on Rules, does not believe a change needs to be made. The rationale provided in the NHRE Update Committee Report has been incorporated into an NHRE Update Committee comment to explain why the New Hampshire rule has not been amended.

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[2016 NHRE Update Committee Note[12]

No change was made to New Hampshire Rule of Evidence 404 to mirror the federal rule. The current New Hampshire rule mirrors the language of Federal Rule 404 as it existed in 1985. Federal Rule of Evidence 404 has been amended four times since New Hampshire adopted the rule. The 1987 amendment to Federal Rule of Evidence 404 was technical, but the three subsequent amendments were substantive. The 1991 amendment added a pretrial notice requirement to 404 (b). The 2000 amendment provides that when the accused attacks the character of an alleged victim the door is open to an attack on the same character trait of the accused. The 2006 amendment was added to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. Because New Hampshire has a body of case law that has clarified and limited this rule as applied in New Hampshire, the changes made to Federal Rule 404 have not been made to New Hampshire Rule of Evidence 404.]

[12] This comment is derived from the August 3, 2015 NHRE Update Committee Report, page 4.

APPENDIX M(16)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 405 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 405. Methods of Proving Character

~~(a) *Reputation or Opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.~~

[(a) *By Reputation or Opinion.* When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.]

~~(b) *Specific Instances of Conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.~~

[(b) *By Specific Instances of Conduct.* When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(17)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 406 and add a 2016 Update Committee to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 406. Habit; Routine Practice

~~Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.~~

[Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(18)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 407 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 407. Subsequent Remedial Measures

~~When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.~~

[When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- **negligence;**
- **culpable conduct;**
- **a defect in a product or its design; or**
- **a need for a warning or instruction.**

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

The 2016 amendment provides that the evidence of subsequent remedial measures may not be used to prove, "a defect in a product or its design," or that a warning or instruction should have accompanied a product. The language of the amended rule mirrors Federal Rule of Evidence 407. For additional guidance regarding the substantive changes to the rule see the notes following Federal Rules of Evidence 407 (Notes of Advisory Committee on 1997 amendments).

APPENDIX M(19)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 408, but that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 408 Reporter's Note, as follows (new material is in **[bold and in brackets]**):[13]

Rule 408. Compromise and Offers To Compromise

In a tort case, evidence of (1) a settlement with or the giving of a release or covenant not to sue to or, (2) furnishing or offering or promising to furnish or accepting or offering or promising to accept, a valuable consideration in compromising a disputed claim with one or more persons liable in tort for the same injury to person or property or for the same wrongful death shall not be introduced in evidence in a subsequent trial of an action against any other tortfeasor to recover damages for the injury or wrongful death. Upon the return of a verdict, the court shall inquire of the attorneys for the parties the amount of the consideration paid for any settlement, release or covenant not to sue, and shall reduce the verdict by that amount.

In any other case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Evidence of conduct or statements made in compromise negotiations is likewise not admissible. However, this rule does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations.

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[13] NHRE Committee's states in its August 3, 2015 report: "This rule involved considerable committee discussion. If the Court would like further information regarding the committee's thought process it is available. Ultimately, the committee decided that FRE 408 is inconsistent with Superior Court Rule 32(d), would change substantive NH law, and would limit the openness of settlement discussions in some civil settings because the federal rule allows for the subsequent use of some civil settlement discussions in criminal cases. For example, if NH adopted FRE 408, a statement in an SEC civil securities fraud settlement negotiation would be admissible in a later prosecution for mail fraud. Statements in any mediation or settlement negotiation in a municipal or state regulatory proceeding would be admissible in a later criminal case. Categorical rules of exclusion operate like privileges to the extent that they exclude relevant, probative and usually truthful and reliable evidence. The reason for this interference with the truth-finding process is that there are other interests at stake—such as, in this instance, the interest in giving parties breathing room to have the frank discussions that are often necessary to compromise and settle cases."

This rule does not require exclusion when the evidence is offered for a purpose other than the proof of liability for or invalidity of the claim or its amount, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[2016 NHRE Update Committee Note[14]

No change was made to New Hampshire Rule of Evidence 408.

Federal Rule 408 is inconsistent with New Hampshire Superior Court Rule 32(d), would change substantive NH law, and would limit the openness of settlement discussions in some civil settings because the federal rule allows for the subsequent use of some civil settlement discussions in criminal cases. If New Hampshire were to adopt Federal Rule 408, a statement in a Securities and Exchange Commission civil securities fraud settlement negotiation would be admissible in a later prosecution for mail fraud. Statements in any mediation or settlement negotiation in a municipal or state regulatory proceeding would be admissible in a later criminal case. Categorical rules of exclusion operate like privileges to the extent that they exclude relevant, probative and usually truthful and reliable evidence. The reason for this interference with the truth-finding process is that there are other interests at stake—such as, in this instance, the interest in giving parties breathing room to have the frank discussions that are often necessary to compromise and settle cases.]

[14] NHRE Aug. 3, 2015 Report.

APPENDIX M(20)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 409 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 409. ~~Payment of~~ [Offers to Pay] Medical and Similar Expenses

Evidence of furnishing**[,]** ~~or offering or~~ promising to pay**[,]** ~~damage including but not limited to~~ **[or offering to pay]** medical, hospital, or similar expenses ~~occasioned by~~ **[resulting from]** an injury is not admissible to prove liability for the injury. ~~Any such payments shall, however, constitute a credit against and be deducted from any final settlement made or judgment rendered with respect to such injury which does not expressly provide to the contrary.~~

2016 NHRE Update Committee Note

The 2016 amendments made stylistic and substantive changes to the rule.

The 2016 amendments deleted the last sentence of the rule. The sentence read, "Any such payments shall, however, constitute a credit against and be deducted from any final settlement made or judgment rendered with respect to such injury which does not expressly provide to the contrary." The sentence was not included in the original federal rule, but was included in the New Hampshire Rule adopted in 1985. It was deleted in 2016 because it deals with substantive law, not evidence.[15]

[15] The NHRE August 3, 2015 Update Committee Report recommended that the Court adopt FRE 409. The adoption of FRE 409 would make a substantive change because the last sentence would be deleted. Justice Lynn believes, and the NHRE Committee and Advisory Committee on Rules agree, that this sentence should be deleted because it deals with substantive law, not evidence.

APPENDIX M(21)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 410 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 410. ~~Inadmissibility of~~ Pleas, Plea Discussions, and Related Statements

~~Except as otherwise provided in this Rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:~~

[(a) *Prohibited Uses*. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:]

~~(1) A plea of guilty which was later withdrawn;~~

[(1) a guilty plea that was later withdrawn;]

~~(2) A plea of nolo contendere;~~

[(2) a nolo contendere plea;]

~~(3) Any statement made in the course of any state court proceeding, or comparable procedure under Rule 11 of the Federal Rules of Criminal Procedure, regarding any of the foregoing pleas; or~~

[(3) a statement made during a proceeding on either of those pleas in any state court proceeding or under Federal Rule of Criminal Procedure 11; or]

~~(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.~~

[(4) a statement made during plea discussions with the representative of the State[16] if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.]

~~However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought to, in fairness, be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.~~

[(b) *Exceptions*. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

[16] The language "representative of the State" is used in the New Hampshire Rule, instead of the language, "prosecuting authority," as is used in FRE 410(a) to address a concern raised at the June 3, 2016 Advisory Committee on Rules meeting that this should not be limited to "an attorney for the prosecuting authority."

APPENDIX M(22)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 411 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 411. Liability Insurance

~~Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully or to prove the extent of damages therefor. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness, but only when the proof thereof cannot be reasonably obtained by other means and the trial court determines that its probative value substantially outweighs the danger of unfair prejudice.~~

[Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

The 2016 amendments deleted the phrase, "but only when the proof thereof cannot be reasonably obtained by other means and the trial court determines that its probative value substantially outweighs the danger of unfair prejudice." This phrase was not included in the original Federal Rules of Evidence, but the phrase was included in the New Hampshire Rules of Evidence adopted in 1985 because at that time the mention of insurance was taboo. Today, there is a jury instruction regarding insurance, and the Committee believes that the mention of insurance is not as big a concern as it used to be.[17]

[17] This comment is derived from a 3/1/16 email from Professor Garvey to Carolyn Koegler.

APPENDIX M(23)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 412, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 412 Reporter's Note, as follows (new material is in **[bold and in brackets]**):[18]

Rule 412. Evidence of Prior Sexual Activity

(a) Except as constitutionally required, and then only in the manner provided in (b), below, evidence of prior consensual sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in any prosecution or in any pretrial discovery proceeding undertaken in anticipation of a prosecution under the laws of this state.

(b) Upon motion by the defense filed in accordance with the then applicable Rules of Court, the defense shall be given an opportunity to demonstrate, during a hearing in chambers, in the manner provided for in Rule 104:

(1) *Evidence Sought During Pretrial Discovery Stage*: that there is a reasonable possibility that the information sought in a pretrial discovery proceeding which would otherwise be excluded under subsection (a), above, will produce the type of evidence that due process will require to be admitted at trial;

(2) *Use of Evidence At Trial:* that due process requires the admission of the evidence proffered by the defense which would be otherwise excluded under subsection (a), above, and the probative value in the context of the case in issue outweighs its prejudicial effect on the victim.

[18] NHRE Update Committee's August 3, 2015 report states: "Rationale: The New Hampshire Rule is specific to New Hampshire and was originally drafted to comply with RSA 632-A:6 as interpreted by case law. The federal rule is not recommended by the committee for the reasons stated in the original Reporter's Notes." This language is now included in the 2016 Update Committee Note.

[2016 NHRE Update Committee Note

No change has been made to New Hampshire Rule of Evidence 412 because the New Hampshire Rule is specific to New Hampshire and was originally drafted to comply with RSA 632-A:6 as interpreted by case law. The federal rule was not recommended by the Update Committee for the reasons stated in the original Reporter's Notes.]

APPENDIX M(24)

The NHRE Update Committee and the Advisory Committee on Rules recommend against the adoption of Federal Rule of Evidence 413. Federal Rule of Evidence 413 reads as follows:[19]

RULE 413. Similar Crimes in Sexual-Assault Cases

(a) *Permitted Uses.* In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Defendant.* If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.

(d) *Definition of "Sexual Assault."* In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).

[19] The NHRE Update Committee's August 3, 2015 report states, "Rationale: This rule allows for the admission of evidence of similar offenses in criminal sexual assault cases 'on any matter to which it is relevant.' This would be a substantial change in New Hampshire law that the committee does not recommend. 'Congress enacted Rules 413, 414 and 415 as part of the Violent Crime Control and Law Enforcement Act of 1994. The Act invited the Judicial Conference of the United States to submit alternative recommendations within 150 days. After reviewing extensive public comment, the Judicial Conference opposed the new rules and recommended that Congress either abandon or redraft them. Congress took no further action, and the rules took effect on July 9, 1995.' Fisher, Evidence, 3rd ed., 2013-2014 Statutory and Case Supplement, pp. 94-95 (2013)."

APPENDIX M(25)

The NHRE Update Committee and the Advisory Committee on Rules recommend against the adoption of Federal Rule of Evidence 414.[20] Federal Rule of Evidence 414 reads as follows:

RULE 414. Similar Crimes in Child-Molestation Cases

(a) *Permitted Uses*. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Defendant.* If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.

(d) *Definition of "Child" and "Child Molestation."* In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body — or an object — and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

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[20] The NHRE Update Committee's August 3, 2015 report states, "Rationale: This rule allows for the admission of evidence in criminal child molestation cases of prior acts of molestation 'on any matter to which it is relevant.' This would be a substantial change in New Hampshire law that the committee does not recommend. 'Congress enacted Rules 413, 414 and 415 as part of the Violent Crime Control and Law Enforcement Act of 1994. The Act invited the Judicial Conference of the United States to submit alternative recommendations within 150 days. After reviewing extensive public comment, the Judicial Conference opposed the new rules and recommended that Congress either abandon or redraft them. Congress took no further action, and the rules took effect on July 9, 1995.' Fisher, Evidence, 3rd ed., 2013-2014 Statutory and Case Supplement, pp. 94-95 (2013)."

APPENDIX M(26)

The NHRE Committee and the Advisory Committee on Rules recommend against the adoption of Federal Rule of Evidence 415.[21] Federal Rule of Evidence 415 reads as follows:

RULE 415. Similar Acts in Civil Cases involving Sexual Assault or Child Molestation.

(a) *Permitted Uses*. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) *Disclosure to the Opponent*. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.

[21] The NHRE Update Committee's August 3, 2015 report states, "Rationale: This rule allows for the admission of evidence in criminal child molestation cases of prior acts of molestation 'on any matter to which it is relevant.' This would be a substantial change in New Hampshire law that the committee does not recommend. 'Congress enacted Rules 413, 414 and 415 as part of the Violent Crime Control and Law Enforcement Act of 1994. The Act invited the Judicial Conference of the United States to submit alternative recommendations within 150 days. After reviewing extensive public comment, the Judicial Conference opposed the new rules and recommended that Congress either abandon or redraft them. Congress took no further action, and the rules took effect on July 9, 1995.' Fisher, Evidence, 3rd ed., 2013-2014 Statutory and Case Supplement, pp. 94-95 (2013)."

APPENDIX M(27)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 501, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 501 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 501. Privileges Recognized Only as Provided

(a) Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing, or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(b) Nothing herein shall be construed to confer a privilege otherwise limited by statute.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.

APPENDIX M(28)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 502, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 502 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 502. Lawyer-Client Privilege

(a) *Definitions*. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "representative of a client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) *General Rule of Privilege*. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or his or her representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) *Exceptions*. There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud*. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit in the future what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client*. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of Duty by a Lawyer or Client*. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer*. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) *Joint Clients*. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(29)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 503, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 503 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 503. Patient's Privilege

(a) The confidential relations and communications between a physician or surgeon licensed under provisions of RSA Chapter 329 and his or her patient are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications. Confidential relations and communications between a patient and any person working under the supervision of a physician or surgeon that are customary and necessary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising physician or surgeon.

(b) The confidential relations and communications between a psychologist or pastoral counselor certified under provisions of RSA 330-A and his and her client are placed on the same basis as those provided by law between attorney and client, and except as authorized by the patient or otherwise provided by law, no psychologist or pastoral counselor shall be required to disclose such privileged communications. Confidential relations and communications between a client and any person working under the supervision of a psychologist or pastoral counselor that are necessary and customary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising psychologist or pastoral counselor.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(30)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 504, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 504 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 504. Husband and Wife Privilege

Husband and wife are competent witnesses for or against each other in all cases, civil and criminal, except that unless otherwise specifically provided, neither shall be allowed to testify against the other as to any statement, conversation, letter or other communication made to the other or to another person, nor shall either be allowed in any case to testify as to any matter which in the opinion of the Court would lead to a violation of marital confidence.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(31)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 505, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 505 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 505. Religious Privilege

A priest, rabbi or ordained or licensed minister of any church or a duly accredited Christian Science practitioner shall not be required to disclose a confession or confidence made to him or her in his or her professional character as spiritual advisor unless the person confessing or confiding waives the privilege.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(32)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 506, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 506 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 506. Reserved.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(33)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 507, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 507 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 507. Trade Secrets

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(34)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 508, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 508 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 508. Reserved

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(35)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 509, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 509 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 509. Identity of Informer

(a) *Rule of Privilege.* The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) *Who May Claim.* The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) *Exceptions.*

(1) *Voluntary Disclosure; Informer a Witness.* No privilege exists under this rule (A) if the identity of the informer or the informer's interest in the subject matter of his or her communication has been disclosed by a holder of the privilege or by the informer's own deliberate action to those who would have cause to resent the communication, or (B) if the informer testifies as a witness for the government.

(2) *Testimony on Relevant Issue.* If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case relating to the defendant's guilt or innocence or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply; granting the defendant additional time or a continuance; relieving the defendant from making disclosures otherwise required of the defendant; prohibiting the prosecuting attorney from introducing specified evidence; and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the

contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(36)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 510, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 510 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 510. Waiver of Privilege by Voluntary Disclosure

A person claiming privilege against disclosure wives the privilege if the person or the person's predecessor, while holder of the privilege, knowingly and voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This Rule does not apply if the disclosure itself is privileged.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(37)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 511, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 511 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

A claim of privilege is not defeated by a disclosure that was completed erroneously or by a disclosure that was made inadvertently during the course of discovery.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(38)

The NHRE Update Committee and the Advisory Committee on Rules recommend that no changes be made to New Hampshire Rule of Evidence 512, but recommend that the Court add a 2016 Update Committee note to be placed after the New Hampshire Rule of Evidence 512 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 512. Comment Upon or Inference From Claim of Privilege: Instruction

(a) *Comment or Inference Not Permitted.* The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) *Claiming Privilege Without Knowledge of Jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) *Jury Instruction.* Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(d) *Application -- Self-Incrimination.* Subsections (a) to (c) do not apply in a non-criminal case with respect to the privilege against self-incrimination.

[2016 NHRE Update Committee Note

None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.]

APPENDIX M(39)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 601 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 601. ~~General Rule of~~ Competency [to Testify in General]

(a) *General rule of competency.* Every person is competent to be a witness ~~except as otherwise provided by statute or in these rules.~~ **[unless these rules or an applicable statute provide otherwise.]**

(b) *Incompetence of a witness*. A person is not competent to testify as a witness if the court finds that the witness lacks sufficient capacity to observe, remember and narrate as well as understand the duty to tell the truth.

[2016 NHRE Update Committee Note

The 2016 amendments made stylistic changes to the rule.

The 2016 amendments retain subsection (b), which is not included in Federal Rule of Evidence 601. Subsection (b) had been added to the New Hampshire Rule in 1985 to help clarify existing New Hampshire law. The Committee saw no reason to delete this provision.][22]

[22] This comment derives from the August 3, 2015 NH Rule of Evidence Update Committee Report.

APPENDIX M(40)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 602 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 602. ~~Lack of~~ [Need for] Personal Knowledge

A witness may ~~not~~ testify to a matter **[only if]** ~~unless~~ evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may~~, but need not,~~ consist of the **[witness's own testimony.]** ~~testimony of the witness.~~ This rule **[does not apply to a witness's expert testimony under Rule 703.]** ~~is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.~~

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(41)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 603 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 603. Oath or Affirmation [to Testify Truthfully]

~~Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience and impress his or her mind with the duty to do so.~~

[Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(42)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 604 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 604. Interpreters

~~An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.~~

[An interpreter must be qualified and must give an oath or affirmation to make a true translation.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(43)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court adopt New Hampshire Rule of Evidence 605 and add a 2016 Update Committee note, as follows:

[Rule 605. Judge's Competency as a Witness.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.]

2016 NHRE Update Committee Note

The Committee recommended adoption of this rule, because it believes that it states the obvious, and there does not seem to be any reason to continue to exclude it.][23]

[23] This language comes from NHRE Committee comments Professor Garvey relayed via email on 3/1/16.

APPENDIX M(44)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 606 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

~~**Rule 606. Competency of Juror as Witness**~~

~~A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.~~

Rule 606. Juror's Competency as a Witness

[No juror may testify as a witness before other jurors in the same jury venire.]

2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

New Hampshire Rule of Evidence 606 differs from Federal Rule of Evidence 606. Federal Rule of Evidence 606 includes a subsection (a) and a subsection (b). The language of subsection (a) of the federal rule is similar, but not identical, to the language set forth in New Hampshire Rule of Evidence 606. The language of New Hampshire Rule of Evidence 606 recognizes the unique nature of New Hampshire jury practice.[24]

[24] This issue was discussed at length at the June 3, 2016 public hearing. The view was expressed that one way to address a concern about a juror being called as a witness in a case in which the jurors were in the same jury venire as the witness would be to add something to the jury questionnaire. It was suggested that a question be added to the jury questionnaire that asks whether the potential juror anticipates being a witness in any cases that are being tried during the time period that he or she is called as a juror. Some Committee members stated that they had some concerns about the new automated juror questionnaire. One noted that a question on the questionnaire is whether the juror or a close family member or close friend has ever been involved in a legal proceeding. There used to be space on the form to allow the person to write in what the involvement was. Now, all a person answering the question is able to do is to answer "yes," or "no." The suggestion was also made that this question could be added to the questions the judge asks because the questionnaires are often poorly answered. Following extensive discussion the Committee recommended: (1) that a question be added to the jury questionnaire that asks, "Do you anticipate being called as a witness in any case before this court during the period for which this jury venire is to serve." If the person answers yes,

New Hampshire Rule of Evidence 606 does not include the language of Federal Rule of Evidence 606(b) because the language of the Federal Rule appears to be more restrictive than New Hampshire law. The Committee saw no reason to restrict the judge's discretion.][25]

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then the person is bumped over to the next jury pool; and (2) that the same question also be asked by the judge.

By email dated 10/6/16, Judge Delker reported:

NHRE 606(b). . . addresses the disqualification of a juror in the venire who might be a witness during a case heard during that session. I have addressed the issue of changing the electronic questionnaire with Chief Judge Nadeau and Superior Court Administrative Clerk Karen Gorham. Apparently, it is time-consuming and costly to change the electronic questionnaire. They recommended that superior court judges simply add a mandatory question to the general voir dire questions the judge poses to the entire panel of jurors to determine if jurors are qualified. The question could be: "Do you anticipate being called to testify as a witness in any case currently pending in this courthouse during the XX weeks of your jury service?"

I think this solution is actually more effective than amending the questionnaire because the questionnaire is completed many weeks before the actual jury service so it is possible that a juror is not even subpoenaed as a witness when they complete the questionnaire. The superior court can do some training to make sure judges incorporate this question into the standard list of general voir dire questions.

[25] This paragraph is derived from the August 3, 2015 NHRE Update Committee Report.

APPENDIX M(45)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 607 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

~~**Rule 607. Who May Impeach**~~

~~The credibility of a witness may be attacked by any party, including the party calling the witness.~~

[Rule 607. Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(46)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 608 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 608. ~~Evidence of Character and Conduct of Witness~~
[A Witness's Character for Truthfulness or Untruthfulness.]

~~(a) *Opinion and reputation of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.~~

[(a) *Reputation or Opinion Evidence.* A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.]

~~(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.~~

[(b) *Specific Instances of Conduct.* Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

In recommending these amendments, the Committee adopts the comments in the Advisory Committee Notes for Federal Rule 608, including 2003, including the following:

> **The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. . . . On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." . . . . The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity.**
>
> **By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403.][26]**

[26] A substantive amendment was made to subsection (b) of the Federal Rule in 2003. The NHRE Update Committee recommended that the Committee adopt FRE 608, but made no comment about the substantive change. Justice Lynn agrees that the substantive change/"clarification" should be made, but also believes that it is significant enough to warrant something more in the comment than a reference to the notes following the federal rule. For this reason, the text of the relevant Federal Rule comment is reprinted here.

APPENDIX M(47)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 609 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 609. Impeachment by Evidence of [A Criminal] Conviction ~~of Crime~~

(a) ~~*General rule.* For the purpose of attacking the character for truthfulness of a witness~~,

[*In General.* The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

~~(1) evidence that a witness other than an accused been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and~~

[(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

~~(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.~~

[(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.]

(b) ~~*Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date,~~

~~unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.~~

[(b) *Limit on Using the Evidence After 10 Years*. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.]

(c) *Effect of* ***[a]*** ~~*p*~~***[P]****ardon,* ~~*a*~~***[A]****nnulment, or* ~~*c*~~***[C]****ertificate of* ~~*r*~~***[R]****ehabilitation.* Evidence of a conviction is not admissible ~~under this rule~~ if**[:]**

(1) the conviction has been the subject of a pardon, annulment, certificate o**[f]**~~r~~ rehabilitation, or other equivalent procedure based on a finding **[that the person has been rehabilitated,]** ~~of the rehabilitation of the person convicted,~~ and ~~that~~ **[the]** person has not been convicted of a **[later]** ~~subsequent~~ crime ~~which was~~ punishable by death or **[by]** imprisonment **[for more than]** ~~in excess of~~ one year, or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

~~(d) *Juvenile adjudications*. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.~~

[(d) *Juvenile Adjudications*. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.]

(e) *Pendency of* ***[an]*** ~~*a*~~***[A]****ppeal.* ~~The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.~~

[A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency of the appeal is also admissible.][27]

[2016 NHRE Update Committee Note

The 2016 amendment made substantive and stylistic changes to the rule. The language of the New Hampshire Rule mirrors Federal Rule of Evidence 609, except that the New Hampshire rule includes the phrase "of the appeal" in the second sentence of subdivision (e).

The phrase "for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year," used in 609(a)(1), means for a crime that was punishable by death or by imprisonment for more than one year under the law under which the witness was convicted.]

For additional guidance regarding the substantive changes to the rule see the notes following Federal Rules of Evidence 609 (Notes of Advisory Committee on 1990 and 2006 amendments).]

[27] Justice Lynn, Chair of the Advisory Committee on Rules, suggests adding the phrase, "of the appeal." This is not in the FRE. The NHRE Committee inquires whether Justice Lynn suggests the addition of this language for clarification, or is there an intended difference. In general, the NHRE Committee approach was that it would not edit unless it was substantive, but defers to the Court on this.

APPENDIX M(48)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 610 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 610. Religious Beliefs or Opinions

~~Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.~~

[Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(49)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 611 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):[28]

Rule 611. Mode and Order of [Examining Witnesses and Presenting Evidence] ~~Interrogation and Presentation~~

(a) *Control by **[the]** ~~e~**[C]**ourt**[; Purposes]***. - The court ~~shall~~ **[should]** exercise reasonable control over the mode and order of ~~interrogating~~ **[examining]** witnesses and presenting evidence so as to**[:]**

(1) make **[those procedures effective for determining the truth;]** ~~the interrogation and presentation effective for the ascertainment of the truth,~~

(2) avoid **[wasting]** ~~needless consumption of~~ time~~,~~**[;]** and

(3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of ~~e~**[C]**ross-~~e~**[E]**xamination*. - A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

(c) *Leading ~~q~**[Q]**uestions*. - Leading questions should not be used on ~~the~~ direct examination ~~of a witness~~ except as ~~may be~~ necessary to develop ~~his~~ **[the witness's]** testimony. Ordinarily**[, the court should allow** leading questions**[:**

(1)] ~~should be permitted~~ on cross-examination~~.~~**[; and**

(2)] When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party**[.]**~~, interrogation may be by leading questions.~~

[28] The NHRE Update Committee's August 3, 2015 report states that the Committee does not recommend any changes to this rule. The NHRE Committee now believes that the stylistic changes to the (a) and (c), as indicated, should be made. Regarding a potential substantive change, the NHRE Update Committee states in its August 3, 2015 report, "Rationale: As stated in the original Reporter's Notes, NHRE 611 offers a flexible approach to examination, consistent with New Hampshire law. NHRE 611(b) generally allows for more latitude on the scope of cross-examination than does FRE 611(b). The committee saw no reason to change this practice."

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to subsections (a) and (c) of the rule. Subsections (a) and (c) mirror Federal Rule of Evidence 611(a) and (c). No change was made to subsection (b). New Hampshire Rule of Evidence 611(b) generally allows for more latitude on the scope of cross-examination than does FRE 611(b). The committee saw no reason to change this practice.]

APPENDIX M(50)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 612 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

~~**Rule 612. Writing or Object Used To Refresh Memory**~~

~~(a) *While testifying.* If, while testifying, a witness uses a writing or object to refresh his or her memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.~~

~~(b) *Before testifying.* If, before testifying, a witness uses a writing or object to refresh his or her memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.~~

~~(c) *Terms and conditions of production and use.* A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the Supreme Court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.~~

Rule 612. Writing Used to Refresh a Witness's Memory

(a) *Scope*. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) ***Adverse Party's Options; Deleting Unrelated Matter.*** **An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.**

(c) ***Failure to Produce or Deliver the Writing.*** **If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.]**

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(51)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 613 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 613. [Witness's] Prior Statements ~~of Witnesses~~

(a) ~~*Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.~~

[(a) *Showing or Disclosing the Statement During Examination.* When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.]

~~(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).~~

[(b) *Extrinsic Evidence of a Prior Inconsistent Statement.* Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

(c) *Extrinsic Evidence of a Prior Consistent Statement for Rehabilitation.* Except as provided in Rule 801(d)(1)(B) or (C), evidence of a prior consistent statement may be admitted only for rehabilitation:

(1) after the witness's credibility has been attacked through the use of a prior inconsistent statement; and

(2) where the probative value of the prior consistent statement outweighs its prejudicial effect.

If a prior consistent statement is admitted for rehabilitation the court shall give a limiting instruction that the statement is not substantive evidence.

2016 NHRE Update Committee Note

The 2016 amendments made stylistic and substantive changes.

The 2016 amendments made stylistic changes to subsections (a) and (b). Subsections (a) and (b) mirror Federal Rule of Evidence 613 (a) and (b). The 2016 amendments also added subsection (c), codifying the New Hampshire common law rule regarding the use of prior consistent statements for the purpose of rehabilitation.[29]

When a witness has been impeached by the use of prior inconsistent statements, New Hampshire common law "allows the admission of prior consistent statements for the purpose of rehabilitation . . . . The prior consistent statements, however, may not be used substantively, and a defendant is entitled to a limiting instruction to prevent unfair prejudice. Even when a witness's credibility has been attacked through the use of prior inconsistent statements, however, the common law rule allowing admission of rehabilitative testimony should be used with caution." *State v. White*, 159 N.H. 76, 79 (2009) (internal citations and quotation omitted).][30]

[29] This paragraph was added as a result of committee discussion at the June 3, 2016 meeting.
[30] This paragraph was added by the NHRE Update Committee following the March 11, 2016 Advisory Committee on Rules meeting, at the request of the Advisory Committee on Rules.

APPENDIX M(52)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 614 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):[31]

Rule 614. ~~Interrogation of Witnesses by Court~~
[Court's Calling or Examining a Witness]

~~(a) *Interrogation by the Court.* The court may not ordinarily interrogate a witness and may do so only as long as it maintains impartiality.~~

[(a) *Calling.* The court may call a witness on its own or at a party's request. Each party is entitled to crossexamine the witness.

(b) *Examining.* The court may examine a witness regardless of who calls the witness.]

~~(b)~~ **[(c)]** *Objections.* ~~Objections to the interrogation by the court may be made~~ **[A party may object to the court's calling or examining a witness either]** at **[that]** ~~the~~ time or at the next ~~available~~ opportunity when the jury is not present.

2016 NHRE Update Committee Note

The 2016 amendments made stylistic and substantive changes. The language of New Hampshire Rule of Evidence 614 is now identical to Federal Rule of Evidence 614. Former New Hampshire Rule of Evidence stated that a judge may not ordinarily interrogate a witness. The Committee recommended adoption of the Federal Rule because, as a practical matter, courts do interrogate witnesses.

[31] In its August 3, 2015 Report, the NHRE Update Committee recommended that no changes be made to New Hampshire Rule of Evidence 614. However, Justice Lynn believes that the Committee should recommend that the Court adopt the Federal Rule because, as a practical matter, courts do interrogate witnesses.

APPENDIX M(53)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 615 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 615. Exclu[ding]~~sion of~~ Witnesses

~~At the request of a party the court shall in criminal cases and may in civil cases order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or a victim of the crime, or (2) an officer or employee of a party in a civil case which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.~~

[(a) At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(3) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(4) a person authorized by statute to be present.]

(b) A sequestration order issued under subsection (a) of this rule prohibits a sequestered witness:

(1) from being present in the courtroom until after the witness has testified and is not subject to recall by any party; and

(2) from discussing the testimony he or she has given in the proceeding with any other witness who is subject to sequestration and who has not yet testified.

A sequestration order shall not be construed to impose additional restrictions unless the order clearly describes such restrictions.

2016 Update Committee Note

The 2016 amendments made stylistic and substantive changes to the rule.

The 2016 amendment designated the first paragraph (a) and added subdivision (b). The changes to (a) are stylistic and mirror the federal rule. The addition of (b), not included in Federal Rule of Evidence 615, defines the scope of sequestration, makes clear that a standard sequestration order imposes no other restrictions unless they are clearly described, and is consistent with current New Hampshire practice.[32]

For additional guidance regarding the substantive changes to the rule see the notes following Federal Rules of Evidence 615 (Notes of Advisory Committee on 1998 amendment).]

[32] The NHRE Update Committee's August 3, 2015 report does not recommend any changes to this rule, *see* August 3 report at page 7, stating "FRE 615 provides that witnesses *must* be excluded at the request of either party. NHRE requires exclusion in a criminal case but gives the judge discretion in a civil matter. The committee saw no reason to change the New Hampshire rule." However, Justice Lynn believes that the NH rule should be changed to read as the federal rule does, as indicated in (a), and also believes that the rule should be further amended, as indicated in (b). The language set forth in section (a) is FRE language. The language set forth in section (b) is not. This rule was discussed at the June 3, 2016 public hearing. The language of the comment was generally agreed upon at the public hearing and derives from a comment about Justice Lynn's proposal set forth in an April 21 email from attorney David Rothstein.

APPENDIX M(54)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 701 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 701. Opinion Testimony by Lay Witnesses

If ~~the~~ **[a]** witness is not testifying as an expert, ~~the witness'~~ testimony in the form of **[an]** opinion~~s or inferences~~ is limited to **[one that is:]** ~~those opinions or inferences which are~~

(a) rationally based on the **[witness's]** perception**[;]** ~~of the witness, and~~

(b) helpful to ~~a~~ clear**[ly]** understanding ~~of~~ the **[witness's]** testimony or ~~the~~ **[to]** determin~~ation~~**[ing]** ~~of~~ a fact in issue~~.~~**[; and**

(c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule and added subsection (c).]

For additional guidance regarding the substantive changes to the rule see the notes following Federal Rules of Evidence 701 (Notes of Advisory Committee on 2000 amendment).]

APPENDIX M(55)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court amend New Hampshire Rule of Evidence 702 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 702. Testimony by Experts [Witnesses]

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a~~**[A]** witness **[who is]** qualified as an expert by knowledge, skill, experience, training, or education, may testify ~~thereto~~ in the form of an opinion or otherwise~~.~~**[if:**

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule and added subsections (b), (c) and (d).

For additional guidance regarding the substantive changes to the rule see the notes following Federal Rules of Evidence 702 (Notes of Advisory Committee on 2000 amendment).]

APPENDIX M(56)

Delete and replace New Hampshire Rule of Evidence 703 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format).[33]

Rule 703. Bases of [An Expert's] Opinion Testimony ~~by Experts~~

~~The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence~~.

[An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

2016 Update Committee Note[34]

The 2016 amendment made stylistic and substantive changes to the rule.

In recommending this rule, the Committee adopts the comments in the Advisory Committee Notes for Federal Rule 703, including 2000 and 2011, including the following:

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for

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[33] The NHRE Update Committee's August 3, 2015 report states, "Adoption of restyled FRE." However, the addition of the sentence, "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect" constitutes a substantive change. The NHRE Update Committee notes that this is not a substantive change to the federal rule, but it is a change to the New Hampshire rule. The federal rule was amended, but the New Hampshire rule was not. The NHRE Evidence Update Committee recommends that the change be made now.

[34] The last three paragraphs of the comment were added by the NHRE Update Committee following the March 11, 2016 Advisory Committee on Rules Meeting, at the request of the Advisory Committee on Rules.

any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.[35]

[35] These paragraphs were provided by Professor John Garvey after the Committee requested that he provide a comment to be included. Because this goes beyond what the other Committee notes do – *i.e.,* they do more than just refer the reader to the comment, Justice Lynn had recommended striking these paragraphs and instead including the language used in the other Update Committee Notes; that is, "for additional guidance regarding changes to the rule see the notes following Federal Rules of Evidence 703 (Notes of Advisory Committee on 2000 amendment)." Judge Delker expressed concern about this, stating, "I remain concerned that the change to Rule 703 regarding the admissibility of the factual basis for an expert opinion could be interpreted as allowing substantive evidence even though that is not the intent. I know that incorporating part of the federal comments to Rule 703 in the commentary to NHRE 703 is inconsistent with the approach we have taken with other rules. I think an exception may be warranted on this rule for two reasons: (1) lawyers struggle to understand the distinction between when hearsay is admitted for substantive purposes or some other purpose and the new language in Rule 703 will only add to that confusion without explanation in the commentary; and (2) courts may interpret amended Rule 703 as allowing the expert to introduce the facts underlying his or her opinion as substantive evidence. This is so because Rule 802 says that hearsay may be admitted if some rule outside the 800 series permits the introduction of hearsay." Committee members agreed with Judge Delker.

APPENDIX M(57)

Amend New Hampshire Rule of Evidence 704 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):[36]

Rule 704. Opinion on [an] Ultimate Issue

~~Testimony in the form of a~~**[A]**n opinion ~~or inference otherwise admissible~~ is not objectionable ~~solely~~ **[just]** because it embraces an ultimate issue**[.]** ~~to be decided by the trier of fact.~~

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.

Federal Rule of Evidence 704 includes a subsection (b), which provides an exception to the general rule stated in FRE 704(a). Subsection (b) of the federal rule reads,

Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. These matters are for the trier of fact alone.

This amendment was made to the federal rule in 1984, after John Hinkley Jr. was found not guilty by reason of insanity in the assassination attempt on President Reagan. There is no reason to create the exception in New Hampshire.

[36] The NHRE Update Committee's August 3, 2015 report notes that Federal Rule of Evidence 704 contains a section (b), but the Committee does not recommend it for adoption. The August 3, 2015 report states, "Rationale. FRE 704(b) was added in 1984, after John Hinkley Jr. was found not guilty by reason of insanity in the assassination attempt on President Reagan. The rule provides an exception to the general rule stated in FRE 704(a). The Committee saw no reason to recommend creating the exception in New Hampshire."

APPENDIX M(58)

Amend New Hampshire Rule of Evidence 705 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 705. Disclo~~sure~~[ing] ~~of~~ [the] Facts or Data Underlying [an] Expert[']s] Opinion

~~The expert may testify in terms of opinion or inference and give reason therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination~~.

[Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

For additional guidance regarding changes to the rule see the notes following Federal Rules of Evidence 705 (Notes of Advisory Committee on 1993 amendment).]

APPENDIX M(59)

Add a 2016 Update Committee note to be placed after reserved New Hampshire Rule 706, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):[37]

Rule 706. Reserved.

[2016 NHRE Update Committee Note

As stated in the original Reporter's Notes, New Hampshire has a variety of statutes that deal with the appointment of experts. The committee saw no reason to change the New Hampshire rule.]

[37] The NHRE Update Committee's August 3, 2015 report states, "Rationale: This rule is reserved under the current NHRE. As stated in the original Reporter's Notes, New Hampshire has a variety of statutes that deal with the appointment of experts. The committee saw no reason to change the New Hampshire rule."

APPENDIX M(60)

Amend New Hampshire Rule of Evidence 801 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):[38]

Rule 801. Definitions [That Apply to this Article; Exclusions from Hearsay]

~~The following definitions apply under this article:~~

(a) *Statement.* ~~A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.~~ **["Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.]**

(b) *Declarant.* ~~A~~ "~~d~~**[D]**eclarant" ~~is a~~ **[means the]** person who **[made the]** ~~makes a~~ statement.

(c) *Hearsay.* ~~"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted~~. **["Hearsay" means a statement that:**

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.]

(d) *Statements ~~which~~ [That] ~~a~~[A]re ~~n~~[N]ot ~~h~~[H]earsay.* A statement **[that meets the following conditions]** is not hearsay**[:]** ~~if –~~

(1) ~~*Prior statement by witness.*~~ **[*A Declarant-Witness's Prior Statement.*][39]** The declarant testifies ~~at the trial or hearing~~ and is subject to cross-examination **[about a prior]** ~~concerning the~~ statement, and the statement**[:]** ~~is~~

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[38] The NHRE Update Committee's August 3, 2015 states, "Adoption of Restyled FRE." However, there is a substantive change being proposed, as noted. The Committee notes that this amendment was made to the federal rule after New Hampshire adopted the rules in 1985, but the New Hampshire rules was never updated. The Committee believes that this change should be made now.

[39] The changes to (1) are the changes recommended in the NHRE Update Committee's August 3, 2015 Report. However, the language changes do not accurately reflect the language of FRE 801, as set forth in the U.S. Code. The following additional changes were made to FRE 801 in 2014 (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~):

(d) *Statements That Are Not Hearsay*. A Statement that meets the following conditions is not hearsay:

(A) **[is]** inconsistent with the declarant's testimony, and was given under ~~oath subject to the~~ penalty o~~r~~**[f]** perjury at a trial, hearing, or other proceeding, or in a deposition~~,or~~**[;]**

(B) **[is]** consistent with the declarant's testimony and is offered to rebut an express or implied charge ~~against~~ **[that]** the declarant ~~of recent fabrication or~~ **[recently fabricated it or acted from a recent]** improper influence or motive **[in so testifying;]**~~,~~ or

(C) ~~one of identification of a person made after perceiving him or her; or~~ **[identifies a person as someone the declarant perceived earlier.]**

(2) ~~*Admission by party-opponent.*~~ **[*An Opposing Party's Statement.]*** The statement is offered against a**[n opposing]** party and**[:]** ~~is~~

(A) **[Was made by]** the party~~'s own statement,~~ in ~~either~~ an individual or ~~a~~ representative capacity**[;]** ~~or~~

(B) **[is one]** ~~a statement of which~~ the party ~~has~~ manifested **[that it adopted or believed to be true;]** ~~adoption or belief in its truth, or~~

(C) **[was made]** ~~a statement~~ by a person **[whom]** ~~authorized by~~ the party **[authorized]** to make a statement **[on]** ~~concerning~~ the subject**[;]**~~, or~~

(D) **[was made]** ~~a statement~~ by the party's agent or **[employee on]** ~~servant concerning~~ a matter within the scope of **[that relationship, and while it existed;]** ~~the party's agency or employment, made during the existence of the relationship~~, or

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(1) *A Declarant-Witness's Prior Statement*. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
(B) is consistent with the declarant's testimony and is offered**[:]** ~~to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or~~
[(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or]
(C) identifies a person as someone the declarant perceived earlier.

This amendment, which adds the language of 801(d)(1)(B)(ii) was probably not included in the August 3, 2015 Report to the Court because it is a fairly recent change. The Committee reviewed the 2014 Federal Advisory Committee's Note on Rule 801 during the September 9 meeting. The Committee believes that the addition of the language at (ii) is significant, and therefore asked that I contact Judge Garfunkel and Professor Garvey to request that they ask all members of the NHRE Update Committee to consider whether this change should be made to the New Hampshire Rule. I have done so, and I received the following response:
The committee is quite evenly divided on the merits of making the change. Since it would appear to impact the common law as expressed in *State v. White*, we think the decision should be made by the Supreme Court, (with appropriate input through the Rules Committee process), and we do not have a consensus recommendation.
In light of this response, Justice Lynn recommends that the 2014 change not be made now, but that the issue of whether Rule 801(d)(1)(B)(ii) should be adopted should be assigned a docket number and added to the Committee's December 9, 2016 meeting agenda as a new proposal.

(E) **[was made by the party's]** ~~a statement by a~~ coconspirator ~~of a party~~ during ~~the course~~ and in furtherance of the conspiracy.

[The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes, and one substantive change to the rule.

The 2016 amendment added the last sentence of (d)(2). The Committee notes that this amendment was made to Federal Rule of Evidence 801 after New Hampshire adopted the federal rules in 1985, but the New Hampshire rule was never updated. For additional guidance regarding changes to the rule see the notes following Federal Rules of Evidence 801 (Notes of Advisory Committee on 1997 amendment).]

APPENDIX M(61)

Delete and replace New Hampshire Rule of Evidence 802 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

~~**Rule 802. Hearsay**~~

~~Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority.~~

[Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:
- **a statute;**
- **these rules; or**
- **other rules prescribed by the Supreme Court.]**

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(62)

Amend New Hampshire Rule of Evidence 803 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 803. ~~Hearsay Exceptions; Availability of Declarant Immaterial~~
[Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness.]

~~The statements, records and documents specified in 803(1) through 803(24) are not excluded by the hearsay rule, even though the declarant is available as a witness.~~

[The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:]

(1) *Present Sense Impression*

A statement describing or explaining an event or condition**[,]** made while **[or immediately after]** the declarant ~~was~~ perceive**[ed]**~~ing~~ **[it].** ~~the event or condition, or immediately thereafter~~.

(2) *Excited Utterance*

A statement relating to a startling event or condition**[,]** made while the declarant was under the stress of excitement **[that it]** caused**[.]** ~~by the event or condition~~.

(3) *Then**[-]**Existing Mental, Emotional, or Physical Condition*

A statement of the declarant's then**[-]**existing state of mind **[(such as motive, intent or plan)]**, or emotion**[al]**, sens**[ory]**~~ation~~, or physical condition (such as ~~intent, plan, motive, design,~~ mental feeling, pain, ~~and~~ **[or]** bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the **[validity or terms of the]** ~~execution, revocation, identification, or terms of~~ declarant's will.

~~(4) *Statements for Purposes of Medical Diagnosis or Treatment*~~

~~Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the~~

~~statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness.~~

[(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment;

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and

(C) the court affirmatively finds were made under circumstances indicating their trustworthiness.][40]

~~(5) *Recorded Recollection*~~

~~A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his or her memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence and may be received as an exhibit unless the court, in its discretion, finds that such admission is unduly cumulative or prejudicial.~~

[(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence or played before a jury but may be received as an exhibit only if offered by an adverse party.][41]

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[40] This is not included in FRE 803.

[41] At the conclusion of the June 3 public hearing, Judge Delker asked me to make a note of the testimony offered by a circuit court prosecutor. She was present to testify regarding the proposal to amend Rule of Criminal Procedure 12(a) but offered the following regarding Rule 803(5) of the rules of evidence, after noting that her office uses 803(5) frequently in child sexual assault prosecutions.

> There are two supreme court cases, *State v. Locke*,139 N.H. 741 (1995) and *State v. Reid*, 161 N.H. 569 (2011) that have interpreted the rule to allow prior statement of a child witness to be admitted. Often kids 4-5-6 years old don't have the capacity to remember a child advocacy center interview that they have done, sometimes, up to a year before the trial. So we have used that provision in the past to admit the interview. The child obviously still has to be found a competent witness and subject to cross-examination, but because they are unable to remember the event their actual interview would come in. So, I would understand the Committee's revision regarding whether it comes in as an exhibit or simply as evidence in the case and I know you have already had a discussion on that. My concern is with the language that says that the statement is to be read into evidence, because in that case it is often video testimony. I would leave it up to the committee whether it is appropriate to change that, I

~~(6) *Records of Regularly Conducted Activity*~~

~~A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph, includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit~~.

[(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.]

~~(7) *Absence of Entry in Records Kept in Accordance With the Provisions of Rule 803(6)*~~

~~Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Rule 803(6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of the kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information of other circumstances indicate lack of trustworthiness.~~

[(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

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might propose something like, “published as evidence,” or something to that effect, so as not to leave out a video or audio recording.

The committee proposes adding the language, “or played before a jury” to address this concern.

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.]

~~(8) *Public Records and Reports*~~

~~Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.~~

[(8) *Public Records*. A record or statement of a public office if:
(A) it sets out:
(i) the office's activities;
(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.]

~~(9) *Records of Vital Statistics*~~

~~Records of data compilations in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law.~~

[(9) *Public Records of Vital Statistics*. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.]

~~(10) *Absence of Public Record or Entry*~~

~~To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.~~

[(10) *Absence of a Public Record.* Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.]

This exception shall apply only if neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.[42]

~~(11) *Records of Religious Organizations*~~

~~Statements of births, marriages, divorces, deaths, legitimacy, and ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.~~

[(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.]

~~(12) *Marriage, Baptismal, and Similar Certificates*~~

~~Statements of fact, contained in a certificate that the maker performed a marriage or ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.~~

[(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.]

~~(13) *Family Records*~~

[42] This is not included in FRE 803(10).

~~Statements of fact containing personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tomb stones, or the like.~~

[(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.]

~~(14) *Records of Documents Affecting an Interest in Property*~~

~~The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.~~

[(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.]

(15) *Statements in Documents **[That]** Affect~~ing~~ an Interest in Property***[.]*** A statement contained in a document **[that]** purport**[s]**~~ing~~ to establish or affect an interest in property if the matter stated was relevant to the **[document's]** purpose **[-]** ~~of the document,~~ unless **[later]** ~~the~~ dealings with the property **[are]** ~~since the document was made have been~~ inconsistent with the truth of the statement, or the purport of the document.

(16) *Statements in Ancient **Documents*****[. A]** ~~S~~**[s]**tatement~~s~~ in a document **[that is at least 20]** ~~in existence twenty (20)~~ years **[old and whose]** ~~or more, the~~ authenticity ~~of which~~ is established.

(17) *Market Reports~~,~~ **[and Similar]** Commercial Publications***[.]*** Market quotations, ~~tabulations,~~ lists, directories, or other ~~published~~ compilations, **[that are]** generally ~~used and~~ relied **[on]** ~~upon~~ by the public or by persons in particular occupations.

~~(18) *Learned Treatise*~~

~~To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or~~

~~art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits unless the Court finds that the probative value of the statements outweigh their prejudicial effect.~~

[(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit unless the Court finds that the probative value of the statement as an exhibit outweighs the prejudicial effect of its admission.][43]

(19) *Reputation Concerning Personal or Family History***[. A]** ~~R~~**[r]**eputation among ~~members of~~ a person's family by blood, adoption, or ~~a~~ marriage~~,~~ **[-]** or among **[a person's]** ~~his or her~~ associates~~,~~ or in the community **[-]**concerning ~~a~~ **[the]** person's birth, adoption, **[legitimacy, ancestry,]** marriage, divorce, death, ~~legitimacy,~~ relationship by blood, adoption, **[or]** marriage~~, ancestry~~ or ~~other~~ similar fact**[s]** of ~~his or her~~ personal or family history.

(20) *Reputation Concerning Boundaries or General History**[.* **A** ~~R~~**[r]**eputation in a community~~,~~ **[-]** arising before the controversy, **[concerning]** ~~as to~~ boundaries of ~~or customs affecting~~ land~~s~~ in the community **[or customs that affect the land, or concerning general historical events important to that** ~~, and reputation as to events of general history important to the~~ community**[,]** ~~or~~ state, or nation**[.]** ~~in which located.~~

(21) *Reputation ~~as to~~ [Concerning] Character***[. A]** ~~R~~**[r]**eputation **[among a]** ~~of a~~ person's ~~character among~~ associates or in the community **[concerning the person's character]**.

(22) ~~Reserved~~[44] **[*Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:**

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[43] This language is not in FRE 803.

[44] The NHRE Update Committee recommends restyling Rule 803, largely in accordance with FRE restyled. However, FRE has a section (22), but the NHRE does not. This is a substantive change not noted in the August 3, 2015 report. Justice Lynn, Chair of the Advisory Committee on Rules, tends to think that section (22) is necessary. In an email, the NHRE Committee stated, "The committee had a lively discussion about proposed Rule 803(22). Judges Schulman and Garfunkel expressed concerns about this rule as it may apply to a non-party witness in a civil case. They stated:

"The rule allows judgment of a previous conviction to be entered substantively. It further states that the "evidence is admitted to prove any fact essential to the judgment." While we have no concerns when such

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

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evidence is admitted against [the confessing] party in a subsequent trial, we are troubled about admitting such evidence to prove facts based upon a non-party's guilty plea. In such a case, the fact of a non-party's guilty plea could be admitted to prove a fact or element at issue in the case. The non-party would not be called as a witness and would therefore not be subject to cross examination. And, the …plea would be admitted to prove any fact that was 'essential to the judgment' in the non-party's case, which may also be an essential fact in the case at issue…Thus, an element of the plaintiff's case, or the defendant's affirmative defense, could be proved by a judgment against a non-party, without that person ever having testified…Imagine the following:

1. A school is sued because a teacher sexually assaults a student.
2. The teacher pleads guilty to a criminal offense. The school, of course, had no ability to control whether the teacher pled guilty or not.
3. Why should the judgment against the teacher be admitted against the school in civil litigation, if the school was not in privity with the teacher at the time of the teacher's guilty plea?

Same issue in a civil case resulting from a motor vehicle accident when the driver pleads to Reckless Operation (down from a DUI) and the employer is the civil defendant.

What if the conviction related to a witness or a third party and the party [against whom the conviction is offered] was not the defendant in the criminal case?

Why should a civil litigant who was not party to a criminal case be bound by whatever stipulation of fact the criminal defendant and government entered into?"

Judge Laplante was asked by Judges Garfunkel and Schulman for his thoughts and he responded:

"The issues raised by Judge Schulman do not bother me. I think it comes down to his last point/question – – 'why should a civil litigant be bound by a fact stipulated/agreed-to by a nonparty with whom the civil litigation and was not in privity?'.

But that is the point – – 803(22) does not bind anybody to anything. It simply allows for the admissibility of evidence. It is not a stipulation, or an instance of judicial notice, or even a presumption. It simply allows the evidence to be admitted, and all of the (admittedly thought-provoking) scenarios raised by Judge Schulman can be adequately addressed through cross-examination, contradictory or explanatory evidence, or argument. …803(22) is fine by me…"

Attorney Johnson suggested that we not adopt 803(22). The other committee members did not voice an objection to the proposed rule.

In his memo dated May 20, 2016, Judge Delker stated that he agrees with Judge LaPlante. The Committee did not discuss this provision at its meeting on June 3, but it did vote to approve its adoption.

The pendency of an appeal may be shown but does not affect admissibility.]

~~(23) *Judgment as to Personal, Family or General History, or Boundaries*~~

~~Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.~~

[(23) *Judgments Involving Personal, Family, or General History, or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.]

(24) *Other Exceptions* **[(Transferred to Rule 807)]**

~~A statement not specifically covered by any of the foregoing exceptions, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that: (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.~~

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

New Hampshire Rule of Evidence 803(4), as amended, continues to include a requirement that the court find that statements made for medical diagnosis or treatment were made under circumstances indicating their trustworthiness. This requirement is not included in Federal Rule of Evidence 803(4). To eliminate this requirement would make this rule inconsistent with the other exceptions to the hearsay rule.][45]

The 2016 amendment of New Hampshire Rule of Evidence 803(5) includes a substantive change relating to the admissibility of the recorded recollection as an exhibit. The language of the previous New Hampshire rule stated that past recollection recorded, "may be received as an exhibit unless the court, in its

[45] Professor Garvey noted that he would like to see included here language that the decision to include this language should not signal an intention to change the substance from federal practice. Justice Lynn does not believe that such language should be added because having a third prong of this rule will necessarily change the practice, insofar as the judge will be required to make this third finding.

discretion, finds that such admission is unduly cumulative or prejudicial." Because past recollection recorded is the statement of a witness who can no longer remember and is therefore subject to only limited cross-examination, the document should not be allowed as an exhibit unless offered by an adverse party, as is provided in the federal rule.

Unlike the federal rule, New Hampshire Rule 803(5) includes the language, "or played before a jury," to make clear that a recorded recollection may include an audio or video recording.

New Hampshire Rule of Evidence 803(10), as amended, adds language to make clear that the lack of a public record exception to the hearsay rule shall apply only if neither the possible source of the information nor other circumstances indicate a lack of trustworthiness. This language was not included in either the New Hampshire Rule adopted in 1985 or the federal rule. Not including this language would make this rule inconsistent with New Hampshire Rule of Evidence 803(7), regarding ordinary business records, and 803(8)(B), regarding public records.

New Hampshire Rule of Evidence 803(18) continues to include the statement, "If admitted, the statement may be read into evidence but may not be received as an exhibit unless the Court finds that the probative value of the statement as an exhibit outweighs the prejudicial effect of its admission." The prior New Hampshire rule allowed the judge discretion with respect to whether learned treatises can be admitted as exhibits after being read to the jury. The federal rule does not allow treatises to be admitted as exhibits under any circumstance. Because these treatises can sometimes be lengthy and difficult to understand when only received orally, this aspect of the New Hampshire rule has been retained.

New Hampshire Rule of Evidence 803(22) is new.

New Hampshire Rule of Evidence 803(24) has been transferred to New Hampshire Rule of Evidence 807.

For additional guidance regarding changes to the rule see the notes following Federal Rules of Evidence 803 (Notes of Advisory Committee on 1997 and 2000 amendments).]

APPENDIX M(63)

Amend New Hampshire Rule of Evidence 804 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 804. [Exceptions to the Rule Against] Hearsay ~~Exceptions;~~ [- When the] Declarant [Is] Unavailable [as a Witness]

~~(a) *Definition of unavailability*. "Unavailability as a witness" includes situations in which the declarant~~

[(a) *Criteria for Being Unavailable.* A declarant is considered to be unavailable as a witness if the declarant:]

~~(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement; or~~

[(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;]

~~(2) persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so; or~~

[(2) refuses to testify about the subject matter despite a court order to do so;]

~~(3) testifies to a lack of memory of the subject matter of his or her statement; or~~

[(3) testifies to not remembering the subject matter;]

~~(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or~~

[(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or]

~~(5) is absent from the hearing and the proponent of the witness' statement has been unable to procure the witness' attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the witness' attendance or testimony) by process or other reasonable means.~~

[(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).]

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.][46]

(b) **[*The*]** ~~*Hearsay e*~~*[**E**]xceptions*. The following are not excluded by the **[rule against]** hearsay ~~rule~~ if the declarant is unavailable as a witness:

~~(1) *Former testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination~~.

[(1) *Former Testimony*. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had— an opportunity and similar motive to develop it by direct, cross-, or redirect examination.]

~~(2) *Statement under belief of impending death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.~~

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[46] Attorney Rothstein has raised a concern that the revision to 804(a)(5) and (b)(6) effectively codify the rule of "forfeiture by wrongdoing" in New Hampshire. He states that this is a common law rule which permits the introduction of a statement by a witness who was "kept away" by the defendant. See *Giles v. California*, 554 U.S. 355, 359 (2008). The rule has not been formally adopted by the New Hampshire Supreme Court. Attorney Rothstein asserts that the preferred method for determining whether a common law doctrine is consistent with New Hampshire practice is to allow the issue to be raised, litigated, and decided by the Court. The Public Defender submits that the "forfeiture by wrongdoing" doctrine should be addressed in a case before the Court, rather than in a rule. At the Advisory Committee on Rules meeting Judge Garfunkel suggested that this is an issue that Justice Lynn might want to raise with the Court because the rule does adopt a new legal principle. Justice Lynn believes that the language should be left as is. He will raise this issue with the Court when the proposal is submitted to the Court.

[(2) *Statement Under the Belief of Imminent Death*. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.]

~~(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in this position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.~~

[(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.]

(4) *Statement of ~~p~~**[P]ersonal** or ~~f~~**[F]amily** ~~h~~**[H]istory***. ~~(A)~~ A statement **[about:]** ~~concerning~~

[(A) the declarant's own birth, adoption, **[legitimacy, ancestry,]** marriage, divorce, ~~legitimacy,~~ relationship by blood, adoption, or marriage, ~~ancestry,~~ or ~~other~~ similar fact**[s]** of personal or family history, even though **[the]** declarant had no **[way]** ~~means~~ of acquiring personal knowledge **[about that fact]** ~~of the matter stated~~; or

(B) **[another person concerning any of these facts, as well as death,]** ~~a statement concerning the foregoing matters, and death also, of another person,~~ if the declarant was related to the **[person]** ~~other~~ by blood, adoption, or marriage or was so intimately associated with the **[person's]** ~~other's~~ family **[that the declarant's information is likely to be]** ~~as to be likely to have~~ accurate**[.]** ~~information concerning the matter declared.~~

~~(5) *Statement of a deceased person.* In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided the Trial Judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge~~.

~~(6)~~ **[(5)]** *Other exceptions*. **[(Transferred to Rule 807)]** ~~A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees~~

~~of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

[(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.][47]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

For additional guidance regarding the substantive changes to the rule see the notes following Federal Rules of Evidence 804 (Notes of Advisory Committee on 1997 and 2000 amendments).

~~The amendments to the Federal Rule that were made in 2010 and which are reflected in the 2016 amendments to the New Hampshire Rule strike a good balance and improve the rule. In recommending the amendments, the Committee adopts the comments set forth in the 2010 Advisory Committee Notes for Federal Rule 804 which read as follows:~~[48]

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[47] Attorney Rothstein has raised a concern that the revision to 804(a)(5) and (b)(6) effectively codify the rule of "forfeiture by wrongdoing" in New Hampshire. He states that this is a common law rule which permits the introduction of a statement by a witness who was "kept away" by the defendant. See *Giles v. California*, 554 U.S. 355, 359 (2008). The rule has not been formally adopted by the New Hampshire Supreme Court. Attorney Rothstein asserts that the preferred method for determining whether a common law doctrine is consistent with New Hampshire practice is to allow the issue to be raised, litigated, and decided by the Court. The Public Defender submits that the "forfeiture by wrongdoing" doctrine should be addressed in a case before the Court, rather than in a rule. At the Advisory Committee on Rules meeting Judge Garfunkel suggested that this is an issue that Justice Lynn might want to raise with the Court because the rule does adopt a new legal principle. Justice Lynn believes that the language should be left as is. He will raise this issue with the Court when the proposal is submitted to the Court.

[48] Justice Lynn recommends that this language be deleted. It was recommended at some point by the NHRE Committee in response to an inquiry about the substantive change being made at (b)(3), but Justice Lynn believes it is better to simply point the reader to the federal rule comments, both for the sake of consistency and because this comment as written points the reader to only the (b)(3) change. There was another substantive amendment made to b(5) and (6) in 1997.

Subdivision (b)(3). **Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g.*, *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.**

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses."

APPENDIX M(64)

Amend New Hampshire Rule of Evidence 805 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 805. Hearsay Within Hearsay

Hearsay ~~included~~ within hearsay is not excluded **[by]** ~~under~~ the **[rule against hearsay]** ~~Hearsay Rule~~ if each part of the combined statements conforms with an exception to the **[rule.]** ~~hearsay rule provided in these Rules.~~

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(65)

Amend New Hampshire Rule of Evidence 806 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 806. Attacking and Supporting [The Declarant's] Credibility ~~of Declarant~~[49]

When a hearsay statement~~,~~ **[-]** or a statement **[described]** ~~defined~~ in Rule 801(d)(2)(C), (D), or (E)~~,~~ **[-]** has been admitted in evidence, the **[declarant's]** credibility ~~of the declarant~~ may be attacked, and **[then]** ~~if attacked may be~~ supported, by any evidence **[that]** ~~which~~ would be admissible for those purposes if **[the]** declarant had testified as a witness. **[The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.]** ~~Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.~~ If the party against whom **[the]** ~~a hearsay~~ statement **[was]** ~~has been~~ admitted calls the declarant as a witness, the party **[may]** ~~is entitled to~~ examine the declarant on the statement as if **[on]** ~~under~~ cross-examination.

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

[49] In a letter to me sent by email dated April 21, Attorney Rothstein has raised a concern that the revision to "Rule 804(a)(5) and Rule 806" effectively codify the rule of "forfeiture by wrongdoing" in New Hampshire. I believe that this is a typo in the letter, and that Attorney Rothstein intended to say "and Rule 804(b)(6)."

APPENDIX M(66)

Adopt New Hampshire Rule of Evidence 807 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 807. Residual Exception

(a) *In General.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

[2016 NHRE Update Committee Note

This new rule includes the substance of former New Hampshire Rules of Evidence 803(24) and 804(b)(6).]

APPENDIX M(67)

Amend New Hampshire Rule of Evidence 901 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 901. ~~Requirement of Authentication or Identification~~ [Authenticating or Identifying Evidence]

~~(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.~~

[(a) *In General.* To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

~~(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:~~

[(b) *Examples.* The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) *Testimony of* ***[a]*** ~~*w*~~***[W]****itness with* ~~*k*~~***[K]****nowledge.* - Testimony that a**[n item]** ~~matter~~ is what it is claimed to be.

(2) *Nonexpert* ~~*o*~~***[O]****pinion* ***[About]*** ~~*on*~~ ~~*h*~~***[H]****andwriting.* – **[A]** ~~N~~**[n]**onexpert**['s]** opinion ~~as to the genuineness of~~ **[that]** handwriting **[is genuine]**, based **[on a]** ~~upon~~ familiarity **[with it that was]** not acquired for ~~purposes of~~ the **[current]** litigation.

~~(3) *Comparison by trier or expert witness.* - Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.~~

[(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.]

(4) *Distinctive* ~~*c*~~***[C]****haracteristics and the* ~~*l*~~***[L]****ike.* – **[The]** ~~A~~**[a]**ppearance, contents, substance, internal patterns, or other distinctive characteristics **[of the item]**, taken **[together]** ~~in conjunction~~ with **[all the]** circumstances.

(5) **[Opinion About a]** *Voice ~~identification~~*. **[An opinion identifying a person's voice -]** ~~Identification of a voice,~~ whether heard firsthand or through mechanical or electronic transmission or recording~~,~~**[-]** ~~by opinion~~ based **[on]** ~~upon~~ hearing the voice at any time under circumstances **[that]** connect~~ing~~ it with the alleged speaker.

(6) **[*Evidence About A*]** *Telephone ~~c~~[C]onversation~~s~~*. – **[For a]** ~~T~~**[t]**elephone conversation~~s~~, ~~by~~ evidence that a call was made to the number assigned at the time **[to:]** ~~by the telephone company to a particular person or business, if~~

(A) **[a particular person, if]** ~~in the case of a person,~~ circumstances, including self-identification, show **[that]** the person answering **[was]** ~~to be~~ the one called~~,~~**[;]** or

(B) **[a particular business, if]** ~~in the case of a business,~~ the call was made to a ~~place of~~ business and the **[call]** ~~conversation~~ related to business reasonably transacted over the telephone.

(7) **[*Evidence About*]** *Public ~~r~~[R]ecords ~~or reports~~*. - Evidence that**[:**

(A)] a **[document was]** ~~writing authorized by law to be~~ recorded or filed ~~and in fact recorded or filed~~ in a public office **[as authorized by law;]**~~,~~ or

(B) a purported public record **[or]** ~~, report,~~ statement~~, or data compilation, in any form,~~ is from the ~~public~~ office where items of this **[kind]** ~~nature~~ are kept.

~~(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.~~

[(8) *Evidence About Ancient Documents or Data Compilations*. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.]

(9) **[*Evidence About a* *Process or ~~s~~[S]ystem*. - Evidence describing a process or system ~~used to produce a result~~ and showing that **[it]** ~~the process or system~~ produces an accurate result.

(10) *Methods ~~p~~[P]rovided by **[a]** ~~s~~[S]tatute or ~~r~~[R]ule*. - Any method of authentication or identification **[allowed by a]** ~~provided by~~ statute or by other rules prescribed by the ~~New Hampshire~~ Supreme Court.

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(68)

Amend New Hampshire Rule of Evidence 902 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 902. [Evidence That Is] Self-Authentica~~tion~~[ing]

~~Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:~~

[The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:]

~~(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution~~.

[(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.]

~~(2) *Domestic public documents not under seal.* - A document purporting to bear the signature in an official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.~~

[(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.]

(3) *Foreign ~~p~~**[P]**ublic ~~d~~**[D]**ocuments*. - A document **[that purports]** ~~purporting~~ to be **[signed]** ~~executed~~ or attested **[by a person who is authorized by a foreign country's law to do so.]** ~~in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and~~ **[The document must be]** accompanied by a final certification **[that certifies]** ~~as to~~ the genuineness of the signature and official position **[of the signer or attester -]**~~(A) of the executing or attesting person, or (B)~~ **[or]** of any foreign official whose certificate of genuineness ~~of signature and official position~~ relates to the **[signature]** ~~execution~~ or attestation or is in a chain of certificates of genuineness ~~of signature and official position~~ relating to the **[signature]** ~~execution~~ or attestation. **[The certification]** ~~A final certification~~ may be made by a secretary of **[a United States]** embassy or legation**[; by a]**~~,~~ consul general, ~~consul,~~ vice consul, or consular agent of the United States**[;]**~~,~~ or **[by]** a diplomatic or consular official of the foreign country assigned or accredited to the United States. **[If all parties have been given a]** ~~If~~ reasonable opportunity ~~has been given to all parties~~ to investigate the **[document's]** authenticity and accuracy ~~of official documents~~, the court may, for good cause**[, either:]** ~~shown,~~

[(A)]order that **[it]** ~~they~~ be treated as presumptively authentic without final certification**[;]** or

[(B) allow it] ~~permit them~~ to be evidenced by an attested summary with or without final certification.

~~(4) *Certified copies of public records*. - A copy of an official record or report or entry therein, or of a document recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or rule prescribed by the Supreme Court.~~

[(4) *Certified Copies of Public Records*. A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed by the Supreme Court.]

(5) *Official ~~p~~**[P]**ublications*. ~~—~~**[A]** ~~B~~[b]ook~~s~~, pamphlet~~s~~, or other publication~~s~~ purporting to be issued by **[a]** public authority.

(6) *Newspapers and ~~p~~**[P]**eriodicals*. - Printed material~~s~~ purporting to be **[a]** newspaper~~s~~ or periodical~~s~~.

(7) *Trade ~~i~~[I]nscriptions and the ~~l~~[L]ike.*~~—~~ **[An]** ~~I~~**[i]**nscription~~s~~, sign~~s~~, tag~~s~~, or label~~s~~ purporting to have been affixed in the course of business and indicating **[origin,]** ownership, **[or]** control~~, or origin~~.

(8) *Acknowledged ~~d~~[D]ocuments.*~~—~~ **[A]** ~~D~~**[d]**ocument~~s~~ accompanied by a certificate of acknowledgment **[that is lawfully]** executed ~~in the manner provided by law~~ by a notary public or **[an]**other officer **[who is]** authorized ~~by law~~ to take acknowledgments.

(9) *Commercial ~~p~~[P]aper and ~~r~~[R]elated ~~d~~[D]ocuments.*~~—~~ Commercial paper, **[a]** signature~~s~~ **[on it]** ~~thereon~~, and **[related]** documents**[,]** ~~relating thereto~~ to the extent **[allowed]** ~~provided~~ by general commercial law.

(10*) Presumptions ~~u~~[U]nder [a] ~~s~~[S]tate [or Federal] ~~s~~[S]tatute.*[50] ~~– Any~~ **[A]** signature, document, or **[anything else that state or federal law declares]** ~~other matter declared by state law~~ to be presumptively or prima facie genuine or authentic.

~~(11) *Certified domestic records of regularly conducted activity.* – The original or a duplicate of a domestic record of regularly conducted activity, which would be admissible under Rule 803(6), and which the custodian thereof or another qualified person certifies under oath –~~

~~(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;~~

~~(B) was kept in the course of the regularly conducted activity; and~~

~~(C) was made by the regularly conducted activity as a regular practice.~~

~~– A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.~~

[(11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to

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[50] In an early version of this proposal, this had been amended to read, "*Presumptions ~~u~~[U]nder [a] ~~s~~[S]tate ~~s~~[S]tatute.*[50] ~~– Any~~ **[A]** signature, document, or **[anything else that State law declares]** ~~other matter declared by state law~~ to be presumptively or prima facie genuine or authentic.

offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.]

~~(12) *Certified foreign records of regularly conducted activity.* – In a civil case, the original or a duplicate of a foreign record of regularly conducted activity, which would be admissible under Rule 803(6), and which is accompanied by a written declaration by the custodian thereof or another qualified person that the record –~~

~~(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;~~

~~(B) was kept in the course of the regularly conducted activity; and~~

~~(C) was made by the regularly conducted activity as a regular practice.~~

~~The declaration must be signed in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.~~

[(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a statute or the Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic and substantive changes to the rule.

The language of the amended rule is identical to the language of Federal Rule of Evidence 902. For additional guidance regarding the substantive changes to the rule see the notes following Federal Rules of Evidence 902 (Notes of Advisory Committee on 2000 amendments).

APPENDIX M(69)

Amend New Hampshire Rule of Evidence 903 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 903. Subscribing Witness~~'~~ ~~Testimony Unnecessary~~

~~The testimony of a subscribing witness is not necessary to authenticate a writing unless otherwise required by statute.~~

[A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(70)

Amend New Hampshire Rule of Evidence 1001 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1001. Definitions [that Apply to this Article]

~~For purposes of this article the following definitions are applicable:~~

[In this article:]

~~(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.~~

[(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.]

~~(2) *Photographs.* "Photographs" include still photographs, X ray films, video tapes, and motion pictures.~~

[(c) A "photograph" means a photographic image or its equivalent stored in any form.]

~~(3)~~**[(d)]** ~~*Original.* -~~ An "original" of a writing or recording **[means]** ~~is~~ the writing or recording itself or any counterpart intended to have the same effect by **[the]** ~~a~~ person **[who]** execut**[ed]**~~ing~~ or issu**[ed]**~~ing~~ it. **For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.** ~~An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."~~

~~(4) *Duplicate.* A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and~~

~~miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.~~

[(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(71)

Amend New Hampshire Rule of Evidence 1002 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1002. Requirement of [the] Original

~~To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.~~

[An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(72)

Amend New Hampshire Rule of Evidence 1003 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as ~~an~~ **[the]** original unless ~~(1)~~ a genuine question is raised **[about]** ~~as to the authenticity of~~ the original**['s authenticity]** or ~~(2) in~~ the circumstances **[make]** it ~~would be~~ unfair to admit the duplicate**[.]** ~~in lieu of the original.~~

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(73)

Amend New Hampshire Rule of Evidence 1004 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1004. Admissibility of Other Evidence of Contents

~~The~~ **[An]** original is not required~~,~~ and other evidence of the content~~s~~ of a writing, recording, or photograph is admissible if**[:]** –

~~(1)~~**[(a)]** ~~*Originals lost or destroyed.* –~~ ~~A~~[a]ll **[the]** originals are lost or ~~have been~~ destroyed, **[and not by]** ~~unless~~ the proponent **[acting]** ~~lost or destroyed them~~ in bad faith; ~~or~~

~~(2)~~**[(b)]** ~~*Original not obtainable.* –~~ **[An]** ~~No~~ original can**[not]** be obtained by any available judicial process ~~or procedure~~; ~~or~~

~~(3) *Original in possession of opponent.* At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or~~

[(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or]

[(d)] ~~(4) *Collateral matters.* –~~ ~~T~~**[t]**he writing, recording, or photograph is not closely related to a controlling issue.

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(74)

Amend New Hampshire Rule of Evidence 1005 and add a 2016 Update Committee note to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1005. [Copies of] Public Records [to Prove Content]

~~The contents of an official record or public document recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.~~

[The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(75)

Amend New Hampshire Rule of Evidence 1006 and add a 2016 Update Committee note, to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1006. Summaries [to Prove Content]

[The proponent may use a summary, chart, or calculation to prove] ~~T~~**[t]**he content~~s~~ of voluminous writings, recordings, or photographs ~~which~~ **[that]** cannot **[be]** conveniently ~~be~~ examined in court**[.]** ~~may be presented in the form of a chart, summary, or calculation.~~ **[The proponent must make]** ~~T~~[t]he originals~~,~~ or duplicates~~, shall be made~~ available for examination or copying, or both, by other parties at **[a]** reasonable time and place. **[And]** ~~T~~**[t]**he court may order **[the proponent to]** ~~that they be~~ produce~~d~~ **[them]** in court.

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(76)

Amend New Hampshire Rule of Evidence 1007 and add a 2016 Update Committee note, to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1007. Testimony ~~or Written Admission of Party~~ [or Statement of a Party to Prove Content.]

[The proponent may prove the] ~~C~~**[c]**ontent~~s~~ of **[a]** writing~~s~~, recording~~s~~, or photograph~~s~~ ~~may be proved~~ by the testimony**[,]** ~~or~~ deposition **[or written statement]** of the party against whom **[the evidence is]** offered**[. The proponent need not account for the original.]** ~~or by the party's written admission, without accounting for the nonproduction of the original.~~

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(77)

Amend New Hampshire Rule of Evidence 1008 and add a 2016 Update Committee note, to be placed after the original Reporter's Note, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1008. Functions of [the] Court and Jury

~~When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact~~.

[Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.]

[2016 NHRE Update Committee Note

The 2016 amendment made stylistic changes to the rule.]

APPENDIX M(78)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court add a 2016 Update Committee note to be placed directly following New Hampshire Rule of Evidence 1101Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 1101. Applicability of Rules

(a) *Courts.* - These rules apply to the proceedings in the district and probate divisions of the circuit court, the superior court, and the supreme court.

(b) *Proceedings Generally.* - These rules apply generally to all civil and criminal proceedings unless otherwise provided by the constitution or statutes of the State of New Hampshire or these rules.

(c) *Rule of Privilege.* - The rules with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) *Rules Inapplicable.* - The rules (other than with respect to privileges) do not apply in the following situations:

(1) *Preliminary Questions of Fact.* - The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) *Grand Jury.* - Proceedings before grand juries.

(3) *Miscellaneous Proceedings.* - Proceedings for extradition or rendition; preliminary examinations in criminal cases; juvenile certification proceedings under RSA 169-B:24; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; proceedings with respect to parole revocation or probation violations; recommittal hearings; **[domestic relations cases within the jurisdiction of the Family Division of the Circuit Court.]** ~~divorce cases; and domestic violence proceedings.~~[51]

[51] Judge Garner raised a concern about the use of the word "divorce" in 1101(d)(3). He proposes the language set forth here for the reasons set forth in the November 3, 2016 memorandum from Carolyn Koegler.

[2016 NHRE Update Committee Note

A technical change has been made to New Hampshire Rule of Evidence 1101. No change was made as the result of the restyling of the Federal Rules of Evidence. The rule is a New Hampshire specific rule on the applicability of the New Hampshire rules and is still germane.]

APPENDIX M(79)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court add a 2016 Update Committee note to be placed directly following the New Hampshire Rule of Evidence 1102 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 1102. Amendments

Amendments to the Rules of Evidence may be made as provided by **[law.]** ~~the Supreme Court.~~

[2016 NHRE Update Committee Note

The language "the Supreme Court" was deleted and replaced with "law." This change recognizes that the Supreme Court's rulemaking power is not exclusive. *See State v. Carter,* 167 N.H. 161, 165-170 (2014); *Petition of S.N.H. Med. Ctr.*, 164 N.H. 319, 327 (2012).]

APPENDIX M(80)

The NHRE Update Committee and the Advisory Committee on Rules recommend that the Court add a 2016 Update Committee note to be placed directly following the New Hampshire Rule of Evidence 1103 Reporter's Note, as follows (new material is in **[bold and in brackets]**):

Rule 1103. Title

These rules may be known and cited as the New Hampshire Rules of Evidence.

[2016 NHRE Update Committee Note

No change has been made to New Hampshire Rule of Evidence 1103 because the rule is a New Hampshire specific rule on the name of the New Hampshire Rules and is still germane.]