THE STATE OF NEW HAMPSHIRE
ADVISORY COMMITTEE ON RULES
SUPREME COURT

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Lorrie Platt, Secretary

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Agenda – June 4, 2021

1. PUBLIC HEARING

(a) 2020-010 Supreme Court Rule 12-A(1) – Mediation

This proposal would expand the class of persons who may conduct mediation of cases pending in the supreme court. See Appendix A.

(b) 2020-008 Superior Court Rule 12(g) – Motions for Summary Judgment

This proposal would amend the procedure for filing motions for summary judgment and responses thereto in superior court. See Appendix B.

(c) 2020-005 Superior and Circuit Court Rules – Dismissal of Actions

These proposals would amend the rules governing the effect of the dismissal of civil actions in superior and circuit courts. See Appendices C, D, E, and F, and April 6, 2021 e-mail from Attorney Israel Piedra

(d) 2020-006 NH Rule of Criminal Procedure 12 – Discovery of Defendant's Criminal Record

This proposal addresses the discovery of a defendant's criminal record. See Appendix G.

(e) 2020-009 NH Rule of Criminal Procedure 12(b)(1)(f) – Notice of State's Intention to Offer at Trial Evidence of Defendant's Prior Crimes/Acts

This proposal addresses the State's obligation to provide notice of its intention to offer at trial pursuant to NH Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant. See Appendix H.

2. DISCUSSION AND VOTE ON PUBLIC HEARING ITEM

(a) 2020-010 Supreme Court Rule 12-A(1) – Mediation

(b) 2020-008 Superior Court Rule 12(g) – Motions for Summary Judgment

(c) 2020-005 Superior and Circuit Court Rules – Dismissal of Actions

(d) 2020-006 NH Rule of Criminal Procedure 12 – Discovery of Defendant's Criminal Record

(e) 2020-009 NH Rule of Criminal Procedure 12(b)(1)(f) – Notice of State's Intention to Offer at Trial Evidence of Defendant's Prior Crimes/Acts

3. APPROVAL OF MARCH 19, 2021 MEETING MINUTES

See DRAFT MARCH 19, 2021 meeting minutes (revised) **e-mailed to members on May 27, 2021**

4. NEW SUBMISSIONS

(a) 2021-002 Supreme Court Rule 35

May 24, 2021 memo from David Peck. See Appendix I.

5. OTHER BUSINESS

(a) 2021-001 Technical amendments to Supreme Court Rules 50-A and 53.4

March 25, 2021 memo from Tim Gudas to Supreme Court. See Appendix J

6. REMAINING 2021 MEETING DATES

Friday, September 10
Friday, December 10

APPENDIX A

Amend Supreme Court Rule 12-A(1) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(1) Cases pending at the supreme court may be referred to the office of mediation and arbitration for mediation as set forth in this rule. All mediation will be conducted by a retired full-time judge**[,]** ~~or a~~ retired full-time marital master**[, or other qualified mediator as determined by the supreme court in conjunction with the office of mediation and arbitration]**.

APPENDIX B

Amend Superior Court Rule 12(g) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(g) *Motions for Summary Judgment.*

(1) *Motion for Summary Judgment.* Motions for summary judgment shall be filed, defended and disposed of in accordance with the provisions of RSA 491:8-a as amended. Such motions, **[objections]** ~~and responses~~ thereto **[and supporting memoranda to such motions and objections]** shall provide specific page, paragraph, and line references to any pleadings, exhibits, answers to interrogatories, depositions, admissions, and affidavits filed with the court in support of or in opposition to the Motion for Summary Judgment. Only such materials as are essential and specifically cited and referenced in the ~~Motion for Summary Judgment,~~ **[motion, objection]**, ~~responses,~~ and supporting memoranda shall be filed with the court. In addition, except by permission of the court received in advance ~~of filling the memoranda~~, no ~~such~~ motion, ~~response, or~~ **[and]** supporting memorandum ~~of law~~, **[if filed]**, together shall exceed ~~20~~ **[25]** double-spaced pages **[and similarly no objection and supporting memorandum, if filed, shall exceed 25 double-spaced pages]**. The purpose of this rule is to avoid unnecessary and duplicative filing of materials with the court. Excerpts of documents and discovery materials shall be used whenever possible.

(2) **[*Moving Party's*]** *Statement of Material Facts.*

(A) *Content.* Every motion for summary judgment **[or its supporting memorandum]** shall be accompanied by a separate statement of the material facts as to which the moving party contends there is no genuine issue to be tried, set forth in consecutively numbered paragraphs, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Failure to include the foregoing statement shall constitute grounds for denial of the motion.

(B) *Additional Service of Electronic Form of Statement of Material Facts to other Parties.* At the time the motion and separate statement of material **[undisputed]** facts are filed with the court, the statement of material facts shall also be contemporaneously sent in electronic form by email to all parties against whom summary judgment is sought ~~in order~~ to facilitate the requirements of the following paragraph. The statement of material facts in electronic form shall be sent as an attachment to an email and shall be in a

Microsoft Word document (or a document convertible to Word) unless the parties agree to use another word processing format. The requirement to **[separately]** email the statement of material facts to the opposing party does not alter the date or method of service **[for filing motions, memoranda or statements of material undisputed facts with the court]**. ~~The requirement for transmission by email of the statement of material facts in electronic form shall be excused if (A) the moving or any opposing party is appearing *pro se*, (B) the attorney for the moving party certifies in an affidavit that he or she does not have access to email, (C) the attorney for the moving party certifies in an affidavit that an opposing party's attorney has no email address or has not disclosed his or her email address, or (D) the parties believe that the process outlined herein will be unworkable due to particular circumstances in their case and receive advance approval from the Court for filing separate documents.~~

(3) *The Non-Moving Party.*

(A) *Response to the Motion and the Statement of Material Facts.* The non-moving party shall have 30 days after **[the]** filing **[of the motion for summary judgment]** to object ~~to a motion for summary judgment~~, unless another deadline is established by order of the court. An objection to a motion for summary judgment shall **[be accompanied by]** ~~include~~ a response to the moving party's statement ~~identifying the facts the moving party contends are material and undisputed~~ **[of material undisputed facts identifying which, if any, of the purported undisputed facts identified in the moving party's statement the nonmoving party contends are in dispute]**. ~~In its response, the nonmoving party shall indicate which, if any, of the purported undisputed facts identified in the moving party's statement the nonmoving party contends are in dispute.~~ The form of the nonmoving party's response shall be consistent with the requirements of paragraph B. For purposes of summary judgment, any fact set forth in the moving party's statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.

(B) *Filing a Single Document Containing all Parties' Positions.* To permit the court to have in hand a single document containing the parties' positions as to material facts in easily comprehensible form, the opposing party shall save the moving party's statement of material facts as a new document and shall set forth a response to each directly below the appropriate numbered paragraph, including, if the response relies on opposing evidence, page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Where the obligation to send the statement of material facts in electronic form has been excused, the response to the statement of material facts may be in a separate document.

(C) *Statement of Additional Material Facts.* Along with its response to the moving party's statement of facts, the nonmoving party may assert an

additional statement of material facts with respect to the claims on which the moving party seeks summary judgment, each to be supported with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents.

[(D) *The Moving Party's Reply to Additional Material Facts.* The moving party shall reply to the opposing party's additional statement of material facts within 20 days of filing and in the manner required by Paragraph (g)(3). For purposes of summary judgment, any fact set forth in the opposing party's additional statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.]

~~(D)~~ **[(E)]** *Filing a Single Document with Additional Material Facts.* Such an additional statement **[and reply]** shall be a continuation of the opposing party's response described in Paragraph (g)(3)(A)**[-(B)]**, with an appropriate heading, and shall not be a separate document. Where the party opposing summary judgment includes such an additional statement in its response, the response, including the additional statement, also shall be sent in electronic form by email to the moving party, unless excused as provided in Paragraph ~~(g)(2)~~ **[(g)(4)]**.

~~(4) *The Moving Party's Reply to Additional Material Facts.* The moving party shall reply to the opposing party's additional statement of material facts within 20 days of filing and in the manner required by Paragraph (g)(3), resulting in a final, single consolidated document for the court's consideration, unless the obligation to send the additional statement of material facts in electronic form has been excused. For purposes of summary judgment, any fact set forth in the opposing party's additional statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.~~

[(4) *Exemption for Submission of a Consolidated Statement of Material Facts.* The requirement for transmission by email and filing of a consolidated statement of material facts shall automatically be excused if (i) the moving or any opposing party is appearing pro se, (ii) the moving or any opposing party is incarcerated, (iii) the attorney for the moving party certifies in an affidavit that he or she does not have access to email, or (iv) the attorney for the moving party certifies in an affidavit that an opposing party's attorney has no email address or has not disclosed his or her email address. In addition, prior to the obligation to electronically transmit and file a consolidated statement of material facts any party may file a motion to excuse the obligation to submit a consolidated statement of facts setting forth any circumstances establishing good cause to relieve the parties' obligations to comply with Paragraph (g)(3)(B)-(E). Good cause to excuse the requirement for a consolidated statement includes, without limitation, the process outlined herein will be

unworkable due to the involvement of multiple parties in the summary judgment process, unnecessary or unduly burdensome as certified by the parties that the issues to be determined on summary judgment are solely issues of law and not fact, or where the costs of compliance with this rule do not warrant its enforcement.]

(5) *Page Limits.* Neither the statement of material facts as to which there is no genuine issue to be tried nor the response thereto shall be subject to the ~~20~~ **[25]**-page limitation in paragraph (g)(1) of this rule.

(6) *Cross-Motions.* Cross-motions for summary judgment and oppositions thereto shall comply with the requirements of Paragraph (g)(3), with the result that there shall be a single consolidated document for both ~~motions for summary judgment (multiple documents may only be filed with advance leave of court) containing the respective statements of material facts and responses thereto,~~ **[the original motion for summary judgment and the cross-motion containing the respective statements of material facts and responses thereto]**, unless excused as provided in Paragraph (g)(2)**[(B)]**.

(7) *Partial Summary Judgment.* Where a plaintiff successfully moves for summary judgment on the issue of liability or a defendant concedes liability and the case proceeds to trial by jury, the parties must provide the trial judge with a statement of agreed facts sufficient to explain the case to the jury and place it in a proper context so that the jurors might more readily understand what they will be hearing in the remaining portion of the trial. The court shall present the jury with the agreed statement of facts. Absent such an agreement on facts, the court shall provide such a statement.

(8) *Sanctions for Noncompliance.* The court need not consider any motion or opposition that fails to comply with the requirements of this rule and may deny or grant a motion for summary judgment based on the failure of the moving party or the non-moving party

APPENDIX C

Amend Superior Court Rule 41 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 41. Dismissal of Actions

~~All cases which shall have been pending upon the docket for 3 years, without any action being shown on the docket other than being placed on the trial list, shall be marked "dismissed," and notice thereof sent to the parties or representatives who have appeared in the action.~~

[(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Superior Court Rule 16(k) and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, and may be as to one or more, but fewer than all plaintiffs and defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded

by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for three years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]

APPENDIX D

Amend District Division Rule 1.27 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1.27. Dismissal of [Cases] ~~cases pending without action~~

~~With the exception of a case which has been accepted for appeal by the New Hampshire Supreme Court, any non-criminal matter which has been pending without action for three calendar years from the date of the last court action may be dismissed by the court. Thirty days prior to dismissal the court shall send a notice of the pending dismissal to the last known address of all parties and counsel of record. A case may be considered "pending without action" in the following circumstances:~~

1. ~~No court hearing has been scheduled or requested;~~
2. ~~No pleadings are pending before the court;~~
3. ~~No judgment has been entered in the case; and~~
4. ~~No court order has been issued to stay the case.~~

[(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, and may be as to one or more, but fewer than all plaintiffs and defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for three years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously

dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]

APPENDIX E

Amend Probate Division 172 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 172. DISMISSAL OF CASES ~~PENDING WITHOUT ACTION~~

~~With the exception of a case which has been accepted for appeal by the New Hampshire Supreme Court, any non-criminal matter which has been pending without action for two calendar years from the date of the last court action may be dismissed by the court. Thirty days prior to dismissal the court shall send a notice of the pending dismissal to the last known address of all parties and counsel of record. A case may be considered "pending without action" in the following circumstances:~~

~~1. No court hearing has been scheduled or requested;~~

~~2. No pleadings are pending before the court;~~

~~3. No judgment has been entered in the case; and~~

~~4. No court order has been issued to stay the case.~~

[(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, and may be as to one or more, but fewer than all plaintiffs and defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or

any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for three years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]

APPENDIX F

Amend Family Division Rule 1.32 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

1.32. Dismissal of Cases: ~~Pending Without Action:~~ ~~With the exception of a case which has been accepted for appeal by the New Hampshire Supreme Court, any non-criminal matter which has been pending without action for two calendar years from the date of the last court action may be dismissed by the court. Thirty days prior to dismissal the court shall send a notice of the pending dismissal to the last known address of all parties and counsel of record. A case may be considered "pending without action" in the following circumstances:~~

~~1. No court hearing has been scheduled or requested;~~

~~2. No pleadings are pending before the court;~~

~~3. No judgment has been entered in the case; and~~

~~4. No court order has been issued to stay the case.~~

[(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, and may be as to one or more, but fewer than all plaintiffs and defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for three years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously

dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]

2020-005

Lorrie Platt

From: Israel Piedra <ipiedra@lawyersnh.com>
Sent: Tuesday, April 6, 2021 10:34 AM
To: RulesComment
Subject: Comment re proposed amendment to Rule 41

To the Rules Committee:
I am responding to the proposed change to Superior Court Rule 41 announced in the Committee's June 4 public hearing notice.

I have no objection to the general concept of conforming the rule to mirror the federal rules. However, I believe Rule 41(a)(2) could be read as imposing a substantive change New Hampshire law regarding the voluntary dismissal of claims. New Hampshire has a substantial body of law on the notion of voluntary non-suits. The general rule is that a "plaintiff may take a voluntary nonsuit as a matter of right at any time prior to opening the case at a trial or final hearing unless the plaintiff has so far committed to the case by actions or agreements that discontinuance of the suit a that time would be unjust to the defendant or third parties." 5 N.H. CIVIL PRACTICE AND PROCEDURE § 32.07 (2020). While I agree that a motion for voluntary nonsuit after the filing of an Answer should require leave of the Court, traditionally the standard in New Hampshire has been extremely permissive towards granting such a motion. In my opinion, the proposed rule could be read to modify that permissive standard, and to that extent I believe the commit should include a clarifying language or comment stating that the intent is not to modify existing NH common law or this point.

Thank you
Israel

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APPENDIX G

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

Rule 12. Discovery

[(a) *Discovery of Criminal Record Prior to Arraignment*

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

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

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

~~(a)~~ **[(b)]** *Circuit Court-District Division*

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

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

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

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

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

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

(B) all exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995); and

(C) notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts.

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

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

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

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

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

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

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

(1) *Pretrial Disclosure by the State.* If a case is initiated in superior court, the State shall provide the materials specified in RSA 592-B:6. In addition, within

forty-five calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with the materials specified below. If a case is originated in circuit court-district division, within ten calendar days after the entry of a not-guilty plea by the defendant, the State shall provide the defendant with the materials specified below.

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

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

(C) The defendant's prior criminal record.

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

(E) All exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995).

(F) Notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts.

(2) *Pretrial Disclosure by the Defendant*

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

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

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

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

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

(D) If a plea agreement is not reached at the dispositional conference, the matter shall be set for trial. The court may also schedule hearings on any motions discussed during the dispositional conference. Counsel shall be prepared to discuss their availability for trial or hearing as scheduled by the court.

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

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

(4) *Exchange of Information Concerning Trial Witnesses*

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

not already provided pursuant to paragraph ~~(b)~~**[(c)]**(1) of this rule, the State shall provide the defendant with all statements of witnesses the State anticipates calling at the trial or hearing. At this same time, the State also shall furnish the defendant with the results of New Hampshire criminal record checks for all of the State's trial or hearing witnesses other than those witnesses who are experts or law enforcement officers.

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

(C) For purposes of this rule, a "statement" of a witness means:

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

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

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

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

redactions. If the opposing party is not satisfied with the redacted version of the statement so provided, the party claiming the right to prevent disclosure of the redacted material shall submit to the court for *in camera* review a complete copy of the statement at issue as well as the proposed redacted version, along with a memorandum of law detailing the grounds for nondisclosure.

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

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

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

(9) *Sanctions for Failure to Comply.* If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this

rule, the court may take such action as it deems just under the circumstances, including, but not limited to: (A) ordering the party to provide the discovery not previously provided; (B) granting a continuance of the trial or hearing; (C) prohibiting the party from introducing the evidence not disclosed; and (D) assessing costs and attorney's fees against the party or counsel who has violated the terms of this rule.

APPENDIX H

Amend New Hampshire Rule of Criminal Procedure 12(b)(1)(f)[1] as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(F) Notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts.

[(i) Notice must be provided sufficiently in advance of trial so that the defendant has a fair opportunity to meet the evidence.

(ii) The notice must articulate the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.

(iii) The notice must be in writing, except for good cause shown.]

[1] Please note that if the proposed amendment in Appendix G is adopted, this subsection will be renamed as subsection 12(c)(1)(f).

2021-002 APPENDIX I

To: Supreme Court Rules Committee
From: David Peck
Date: May 24, 2021

Re: Supreme Court Rule 35

Supreme Court Rule 51(a) indicates that one function of the Rules Committee is to review current rules "to consider current developments, needs, and changes." Recently, in reviewing a draft of LexisNexis's new edition of New Hampshire Court Rules Annotated, I noticed that Supreme Court Rule 35 may be a candidate for such a review. Rule 35 is entitled "Guidelines for the Utilization by Lawyers of the Services of Legal Assistants Under the New Hampshire Rules of Professional Conduct." Section A of the rule purports to set forth the entirety of Rule 5.3 of the New Hampshire Rules of Professional Conduct and its related Comments. However, the version of Professional Conduct Rule 5.3 and its comments that is reproduced is not the current version -- in 2007 the Rules of Professional Conduct were repealed and replaced.

In addition, there are references in the Rule 35 Comments to various provisions of the New Hampshire Rules of Professional Conduct that are no longer accurate. For example, the Comment to Supreme Court Rule 35, Rule 1, states in part:

> Similarly, Rule 5.5(b) of the New Hampshire Rules of Professional Conduct provides that a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

Current Rule 5.5(b), however, does not contain the quoted language. Rather, current Rule 5.5(a) states that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

Other provisions of the Comments may need to be updated. For example, the Comment to Supreme Court Rule 35, Rule 9 states that the Bar Association presently has no authority to enforce directly rules of conduct for non-lawyers. However, in 2007 Professional Conduct Rule 8.5(c) was adopted,

which extends the disciplinary authority of the Rules to nonlawyers in some circumstances.

I believe the last time that Rule 35 was amended was in 1987. My suggestion is that the rule be reviewed to determine how it should be amended in light of the changes that have occurred since then. (Because it provides guidelines based upon the requirements of the Professional Conduct Rules, perhaps the Bar's Ethics Committee could be asked to review the rule and recommend possible amendments for the consideration of the Rules Committee?)

APPENDIX J 2021-001

TO: Supreme Court
FROM: Tim Gudas
DATE: March 25, 2021

RE: Proposed Technical Amendments to Rule 50-A and Rule 53.4

The New Hampshire Bar Association seeks to simplify the process and timing for the assessment of delinquency fees on those attorneys who fail to comply with one or more of the following annual registration requirements: (1) payment of bar dues and court fees, see Rule 42A; (2) compliance with trust accounting certification, see Rule 50-A; and (3) compliance with NHMCLE, see Rule 53.4. Specifically, the Bar Association wishes to have a single date (August 2) for the assessment of delinquency fees, rather than two dates (one date for the attorney's initial noncompliance, and a subsequent date for the attorney's continued noncompliance). The date of August 2 essentially provides attorneys with a month-long grace period to come into compliance prior to the assessment of delinquency fees, but those attorneys still not in compliance by the end of the day on August 1 would face the following delinquency assessments (as applicable): $100 for nonpayment of bar dues and/or court fees;[1] $300 for failure to file the trust accounting

[1] This delinquency amount is set by the Board of Governors, pursuant to the authority delegated by the Bar Association's Constitution and By-Laws.

certification;[2] and $300 for failure to satisfy and report NHMCLE credits.[3] No additional delinquency fees would be assessed after August 2.

Justice Donovan supports the Bar Association's objectives and recommends that the court adopt the following technical amendments to Rule 50-A and Rule 53.4 (see next pages).

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[2] This delinquency amount is established by Rule 50-A(2).
[3] This delinquency amount is set by the NHMCLE Board, pursuant to the authority granted by Rule 53.4.

Rule 50-A(2)

An attorney or foreign legal consultant who fails to comply with the requirements of Rule 50with respect to the maintenance, availablity, and preservation of accounts and records, who fails to file the required annual Trust Accounting Compliance Certification, or who fails to produce trust account records as required shall be deemed to be in violation of Rule 1.15 of the Rules of Professional Conduct and the applicable Supreme Court Rule. Unless upon petition to the Supreme Court an extension has been granted, failure to file the required annual Trust Accounting Compliance Certification by July 1st shall, in addition, subject the attorney or foreign legal consultant to one or more of the following penalties and procedures:

A. On August ~~1~~ **2**, attorneys and foreign legal consultants who have not filed their Trust Accounting Compliance Certifications shall be assessed a delinquency fee of ~~$50.00~~ **$300, or as subsequently amended by order of the Supreme Court**. ~~On September 1, attorneys and foreign legal consultants who have not filed their Trust Accounting Compliance Certifications shall be assessed an additional delinquency fee of $250.00.~~

B. On or after September 1, the New Hampshire Bar Association shall provide the Supreme Court with the names of attorneys and foreign legal consultants who have not filed their Trust Accounting Compliance Certifications. The court shall initiate proceedings to suspend the attorneys from the practice of law or to suspend the licenses of the foreign legal consultants.

C. An audit of the attorney's or foreign legal consultant's trust accounts and other financial records, at the expense of the attorney or foreign legal consultant, may be required.

Delinquency fees provided for by this rule shall be collected by the New Hampshire Bar Association for the benefit of the Attorney Discipline Office. The delinquency fee may be used by the Attorney Discipline Office to pay for audits of the trust accounts of attorneys or foreign legal consultants, or for other purposes related to trust accounting compliance upon approval of the Supreme Court.

Rule 53.4

A. Delinquency -

1. Notice of Delinquency - On August ~~1~~ **2**, following the annual reporting date, any lawyer not in compliance with this rule shall be assessed a delinquency fee by the NHMCLE Board. Thereafter, the Board shall send a notice to the lawyer notifying the lawyer of the delinquency fee and directing the lawyer to comply with this rule for the prior reporting period.

2. On or before September 15 following the annual reporting date, the NHMCLE Board shall report to the Supreme Court the name of any lawyer who still has not complied with the requirements of the rule, or who has failed to certify that the lawyer is exempt from the requirements and/or has not paid any outstanding delinquency fee. Upon receiving this report, the court shall initiate a proceeding to suspend the lawyer from the practice of law.