

APPENDIX B

Adopt new Rules of Criminal Procedure as follows:

NEW HAMPSHIRE RULES OF CRIMINAL PROCEDURE

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I. SCOPE, INTERPRETATION, ADOPTION AND EFFECTIVE DATE

Rule 1. Scope and Interpretation

(a) *Scope.* These rules govern the procedure in district and superior courts when a person is charged as an adult with a crime or violation.

(b) *Interpretation.* These rules shall be construed to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Comments

These rules apply to all proceedings in which a person is charged as an adult with an offense, whether a crime, such as a felony or a misdemeanor, or a violation. See RSA 625:9. The rules establish a uniform system of procedure for the district and superior courts, except as otherwise specifically provided. The rules do not govern juvenile proceedings or collateral proceedings such as habeas corpus or mandamus. The rules are subject to suspension by the court when the interest of justice so requires. See Rule 37. However, a court's power to suspend a rule may be limited by the state or federal constitution, state statutes or common law.

Rule 2. Adoption and Effective Date

(a) *Adoption.* The Supreme Court adopts these rules pursuant to Part II, Article 73-A of the New Hampshire Constitution.

(b) *Effective Date.* These rules govern all proceedings filed or pending in the district and superior courts on **[insert date]**. In exceptional circumstances, when the court finds that the application of these rules to cases pending as of the effective date would not be feasible or would work an injustice, the court may exempt such cases from the application of these rules or from a particular rule.

Comments

Since these rules are intended to incorporate all current rules and practices, application of the rules to pending cases should not create many problems. In the rare case where application of the new rules to a pending case would work an injustice, a court may exempt that case from application of the rules or a particular rule.

II. PRELIMINARY PROCEEDINGS

Rule 3. Complaint, Arrest Warrant, Summons and Release Prior to Arraignment

(a) *Complaint.* The complaint is a written statement of the essential facts constituting the offense charged. A complaint charging a crime

shall be signed under oath. Unless otherwise prohibited by law, the court may permit a complaint to be amended if no additional or different offense is charged and if substantive rights of the defendant are not prejudiced.

(b) *Issuance of Arrest Warrant.* If it appears from an application for an arrest warrant that there is probable cause to believe that an offense has been committed in the State of New Hampshire, and that the defendant committed the offense, an arrest warrant for the defendant may be issued.

(c) *Arrest.* When a person is arrested with or without a warrant, the complaint, the affidavit of probable cause and other documentation of the arrest shall be filed in a court of competent jurisdiction without unreasonable delay.

(d) *Summons.* When the complaint charges a felony, a summons may not be issued. In any case in which it is lawful for a peace officer to make an arrest for a violation or misdemeanor without a warrant, the officer may instead issue a written summons in hand to the defendant. In any other case in which an arrest warrant would be lawful, upon the request of the state, the person authorized by law to issue an arrest warrant may issue a summons. A summons shall be in the same form as an arrest warrant except that it shall summon the defendant to appear before a court at a stated time and place. If a defendant fails to appear as required by the summons, a warrant may issue. A person who fails to appear in response to a summons may be charged with a misdemeanor as provided by statute. Upon issuance of a summons, the complaint and summons shall be filed with a court of competent jurisdiction without unreasonable delay.

(e) *Release Prior to Arraignment.* On application of a person who is arrested for a bailable offense, at any time before arraignment on that offense, any bail commissioner may set bail as provided by law.

Comments

Rule 3(a) follows the procedure in RSA 592-A:7(I) and N.H. Dist Ct. Rule 2.1(B).

Rule 3(b) is consistent with RSA 592-A:8 and states the general constitutional requirement of probable cause for arrest. U.S. Const., 4th Amd.; N.H. Const. pt. 1, art 19; *State v. Fields*, 119 N.H. 249 (1979).

Rule 3(c) is consistent with current practice.

Rule 3(d) is based on RSA 594:14, which provides that in any case in which a police officer would be authorized to arrest for a misdemeanor or violation, without warrant, the officer may instead issue a summons. If the summoned party fails to appear, an

arrest warrant may be issued. RSA 594:14(II) provides that a person who fails to appear in response to a summons may be charged with a misdemeanor.

Rule 3(e) is based on RSA 597:18.

Rule 4. Initial Proceedings in District Court

(a) *Initial Appearance; Bail.* Any person who has been arrested and who is not released on bail set by a bail commissioner shall be taken before the district court having jurisdiction over the complaint without unnecessary delay but in any event within twenty-four hours of arrest, Saturdays, Sundays and holidays excepted. Such persons shall be arraigned and shall be entitled to review of the bail commissioner's order at that time. If the person is released prior to being taken before the district court, the person shall be directed to appear, without unreasonable delay, in district court for arraignment at a stated time and date. District Court bail orders may be reviewable by the Superior Court as provided by statute.

(b) *Gerstein Determination.* If the defendant was arrested without a warrant and is held in custody, or if the defendant was arrested pursuant to a warrant that was not issued by a judge, the court shall require the state to demonstrate probable cause for arrest. This determination may be made at the district court arraignment, but in any event, must be made within forty-eight hours of the defendant's arrest.

(1) The state may present proof by way of sworn affidavit or by oral testimony. Oral testimony, if submitted, shall be under oath and recorded.

(2) The defendant does not have the right to be present, present evidence or cross-examine witnesses. The proceeding shall be non-adversarial.

(3) The court shall make a written finding on the issue of probable cause. The finding and the affidavit shall become part of the public record, shall be available to the defendant and must be filed with the appropriate court on the next business day.

(4) If a motion to seal the affidavit has been filed with the request for a *Gerstein* determination, the court shall rule on the motion to seal when ruling on the issue of probable cause.

(c) *Copy of Complaint.* No later than at the time of the first appearance in court, the defendant shall be provided with a copy of the complaint.

(d) *Arraignments on Misdemeanors and Violations.* The following procedures apply to arraignments on violations and misdemeanors.

(1) If the defendant is charged with a misdemeanor or violation, the court shall inform the defendant of the nature of the charges, the maximum possible penalty, the right to retain counsel, and in class A misdemeanor cases, the right to have an attorney appointed by the court pursuant to Rule 5 if the defendant is unable to afford an attorney. The defendant shall be asked to enter a plea of guilty, not guilty or, with the consent of the court, *nolo contendere*. If a defendant refuses to plead or if a court refuses to accept a plea of guilty, the court shall enter a plea of not guilty. Upon entry of a plea of not guilty, the case shall be scheduled for trial.

(2) Violation cases and class B misdemeanors may be continued for arraignment or arraignment and trial without the personal appearance of the defendant where the defendant is not in custody, where timely motion is made in writing, and where the court is satisfied with the terms of bail.

(3) Class A misdemeanor cases may be continued for arraignment, or arraignment and trial without the personal appearance of the defendant where the defendant is not in custody and is represented by counsel, and where a timely motion is made by counsel in writing, and the court is satisfied with the terms of bail.

(e) *District Court Appearance on Felonies.* If the defendant is charged with a felony, the defendant shall not be called upon to plead. The court shall inform the defendant of the nature of the charges, the maximum possible penalty, the right to retain counsel, and the right to have an attorney appointed by the court if the defendant is unable to afford an attorney. The court shall inform the defendant of the right to a probable cause hearing which will be conducted pursuant to Rule 6.

(f) *Plea by Mail - Time for Filing Complaint.* In all cases where the defendant may enter a plea by mail and a summons has been issued to the defendant, the complaint must be filed with the court not later than fifteen days from the date of the issuance of the summons. Any complaint filed with the court after the filing date has passed shall be summarily dismissed by the court unless good cause is shown.

(g) *Continuance of a Scheduled Trial or Preliminary Hearing.* Once a case is scheduled for trial or preliminary hearing, motions to continue should be filed in writing unless exceptional circumstances necessitate an oral motion in court. A written motion to continue shall state the

reasons for the motion, whether the opposing party assents or objects to the motion, and whether either party requests a hearing (if there is not agreement). Every defendant shall be entitled to a reasonable time to prepare for trial.

Comments

Rule 4(a) is derived from the statutory scheme outlined in RSA 594, which requires that a criminal defendant be taken before a district or municipal court within twenty-four hours of arrest if the defendant has been committed to a jail. RSA 594:19-a, 20-a; N.H. Dist. Ct. Rule 2.6A(3), B(1). A person who is released on bail after arrest need not be taken before a judge within the described time limits. The rule also provides that bail shall be considered at the initial hearing. The availability of bail is determined by statute.

Rule 4(b) provides for a detention hearing to satisfy the Fourth Amendment requirements as set forth in *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991) and *Gerstein v. Pugh*, 420 U.S. 103 (1975). The rule is derived from District Court Administrative Order 91-01, which was enacted by the District Court Administrative Judge in light of the *McLaughlin* decision. Rule 4(c) is consistent with the June 16, 2006 amendments to District Court Administrative Order 91-01.

Rule 4(c) is based on N.H. Dist. Ct. Rule 2.1(C).

Rule 4(d) is based on N.H. Dist. Ct. Rules 2.4 and 2.6(A).

Rule 4(e) is based on N.H. Dist. Ct. Rule 2.6(B).

Rule 4(d)(1) and Rule 4(e) do not require a judge to advise a defendant of the constitutional right to remain silent. Although courts do sometimes warn defendants about their rights, all committee members agree that there is no statute or rule which requires this warning (or any type of *Miranda* warning from the judge) and that giving such warnings is not a consistent or common practice. Several committee members believe that requiring such a warning is appropriate and suggest that the court add the required warning to the rule. The rule, as rewritten, states current practice. *See generally State v. Williams*, 115 N.H. 437 (1975).

Rule 4(f) is based on N.H. Dist. Ct. Rule 2.5A. *See also* N.H. Dist. Ct. Rule 2.5, RSA 262:44 and RSA 502-A:19-b.

Rule 4(g) is based on N.H. Dist. Ct. Rule 2.6(C), (E)-(H).

Rule 5. Appearance and Appointment of Counsel in District and Superior Court

(a) *Filing of Petition for Appointment.* At any time, if a defendant requests appointed counsel or a determination of eligibility for appointed counsel, the court shall provide the defendant with a petition for assignment of counsel and financial affidavit forms. If the defendant is in custody, the defendant shall be provided a sufficient opportunity to complete the petition and affidavit before the initial appearance or arraignment. The court shall request that the defendant file the form and

affidavit on the day of the initial appearance or arraignment, if the defendant has not had an opportunity to do so in advance.

(b) *Determination of Eligibility.* The court shall review and act upon petitions for assignment of counsel without unreasonable delay but in any event not later than three days after receipt of the petition and financial affidavit, Saturdays, Sundays and holidays excepted.

(c) *Withdrawal.* No attorney shall be permitted to withdraw an appearance after the case has been assigned for trial or hearing, except upon motion granted by the court for good cause shown, and on such terms as the court may order. Any motion to withdraw filed by counsel shall set forth the reasons for the motion but shall be effective only upon approval of the court. A factor which may be considered by the court in determining whether good cause to withdraw has been shown is the client's failure to pay for the attorney's services. Whenever the court approves the withdrawal of appointed defense counsel, the court shall appoint substitute counsel forthwith and notify the defendant of said appointment by mail.

(d) *Multiple Representation*

(1) A lawyer shall not represent multiple defendants if such representation would violate the Rules of Professional Conduct.

(2) A lawyer shall not be permitted to represent more than one defendant in a criminal action unless:

(A) The lawyer investigates the possibility of a conflict of interest early in the proceedings and discusses the possibility with each client; and

(B) The lawyer determines that a conflict is highly unlikely; and

(C) The lawyer notifies the court of the multiple representation and a hearing on the record is promptly held. The court shall inquire into all relevant facts, including, but not limited to, the following:

(i) Evidence of the lawyer's discussion of the matter with each client;

(ii) Evidence of each client's informed consent to multiple representation based on the client's understanding of the entitlement to conflict-free counsel; and

(iii) A written or oral waiver by each client of any potential conflict arising from the multiple representation.

(D) The court finds by clear and convincing evidence that the potential for conflict is very slight.

(e) *Counsel of Record; Bail.* An attorney shall not post bail or assume any bail obligations in a case in which the attorney is counsel of record.

Comments

Rule 5 is consistent with RSA 604-A:2 I, which requires the court to instruct the defendant to complete a financial affidavit upon the defendant indicating a financial inability to obtain counsel. A defendant's right to counsel attaches at the commencement of formal criminal proceedings and applies in all "critical" stages of a criminal proceeding. See N.H. Const. pt. 1, art. 15; *State v. Parker*, 155 N.H. 89 (2007); *State v. Bruneau*, 131 N.H. 104 (1988); *State v. Delisle*, 137 N.H. 549 (1993); *State v. Gibbons*, 135 N.H. 320 (1992).

Rule 5(a) and (b) require prompt action on petitions for appointment of counsel. Currently, there is no 3 day rule but the committee believes prompt appointment of counsel is reasonable and consistent with the practice of New Hampshire courts.

Rule 5(c) expresses the traditional New Hampshire rule that once an attorney has appeared for a client, the attorney may withdraw only with the permission of the court. See N.H. Dist. Ct. Rule 1.3. The last sentence of 5(c) is based on N.H. District Court Rule 1.3(H) and Superior Court Rule 20.

Rule 5(d) is based on N.H. Dist. Ct. Rule 2.2-A. The rule reflects the requirement of the New Hampshire Rules of Professional Conduct and the New Hampshire Constitution. The rule sets forth both substantive and procedural requirements. Substantively, the rule prohibits multiple representation if it would violate Rule 1.7 of the Rules of Professional Conduct. The committee expressly references the Rules of Professional Conduct because Rule 1.7 is broader than N.H. Dist. Ct. Rule 2.2-A. See generally *Abbott v. Potter*, 125 N.H. 257 (1984); *Hopps v. New Hampshire Board of Parole*, 127 N.H. 133 (1985); *Wheat v. United States*, 486 U.S. 154 (1988).

Rule 5(e) is based on N.H. Dist. Ct. Rule 2.2(D).

Rule 6. District Court Probable Cause Hearing

(a) *Jurisdiction.* A probable cause hearing shall be scheduled in accordance with this rule in any case which is beyond the trial jurisdiction of the district court and in which the defendant has not been indicted.

(b) *Scheduling.* The court shall hold a probable cause hearing within ten days following the arraignment if the defendant is in custody. The court shall hold the hearing within twenty days of the arraignment if the defendant is not in custody. The probable cause hearing shall not be

held if the defendant is notified before the hearing of an indictment on the charge which would have been the subject of the hearing. A probable cause hearing may be adjourned for reasonable cause.

(c) *Evidence.* The Rules of Evidence shall not apply at the hearing. The defendant may cross-examine adverse witnesses, testify and introduce evidence. If the defendant elects to be examined, the defendant shall be sworn, but it shall always be a sufficient answer that the defendant declines to answer the question; and if at any time the defendant declines to answer further, the examination shall cease. The parties may request sequestration of the witnesses.

(d) *Finding of Probable Cause.* If the court determines that there is probable cause to believe that a charged offense has been committed and the defendant committed it, the court shall hold the defendant to answer in superior court.

(e) *Finding of no Probable Cause.* If the court determines that there is no probable cause to believe that a charged offense has been committed or that the defendant committed it, the court shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense or another offense.

(f) *Waiver.* A defendant may waive the right to a probable cause hearing. The waiver shall be in writing.

Comments

A preliminary examination allows a defendant to challenge the decision of the prosecuting authorities to limit the defendant's liberty pending consideration of the matter by a grand jury. *State v. Arnault*, 114 N.H. 216 (1974); *Jewett v. Siegmund*, 110 N.H. 203 (1970). The preliminary examination is not a trial on guilt or innocence. It is merely an examination to determine if the State can establish if there is enough evidence to proceed to trial. In essence, it is a hearing to determine whether probable cause exists.

This rule is generally based on RSA 596-A.

Rule 6(a) recognizes that preliminary examinations are held only in cases in which a defendant is charged with a charged offense and the defendant has not been indicted. Rule 6(b) requires that a hearing be scheduled in accordance with New Hampshire District Court Order 91-03. If a person is indicted before the date of the preliminary examination, no preliminary examination will be held. See N.H. Dist. Ct. Rule 2.16; *State v. Gagne*, 129 N.H. 93 (1986).

Rule 6(c) recognizes that the Rules of Evidence are not applicable at a probable cause hearing. N.H. Rule of Evidence 1101(d)(3); *State v. Arnault*, 114 N.H. 216 (1974). A defendant may testify at the hearing, however, the defendant's testimony may be

introduced by the State in subsequent proceedings. *State v. Williams*, 115 N.H. 437 (1975). Courts and parties should note that RSA 596-A:3 requires the court to caution a defendant about the right to counsel and the right to remain silent. In addition RSA 596-A:5 provides for limited testimony by the defendant and RSA 596-A:6 provides for sequestration of witnesses.

Rule 6(d) and (e) are based on RSA 596-A:7. There are two issues in a probable cause hearing. The first issue is whether probable cause exists to believe that a charged offense has been committed. The second issue is whether there is probable cause to believe that the defendant committed the offense. RSA 596-A:7; *State v. Arnault*, 114 N.H. 216 (1974). If probable cause is found, the defendant is bound over until a meeting of the grand jury. During the bindover period, the defendant may be admitted to bail as provided by statute.

Rule 6(f) simply provides that a defendant may waive the right to a probable cause hearing in writing. The language of New Hampshire District Court Rule 2.19 has not been incorporated because the procedure described in that rule is not commonly followed.

III. CHARGING DOCUMENTS IN SUPERIOR COURT

Rule 7. Definitions

(a) *Indictment*. Misdemeanors punishable by a term of imprisonment exceeding one year and felonies shall be charged by an indictment. Misdemeanors punishable by a term of imprisonment of one year or less may be charged in an indictment. An indictment shall be returned by a grand jury and shall be prosecuted in superior court.

(b) *Information*. An information charges a misdemeanor punishable by a term of imprisonment of one year or less. An information is filed by the prosecuting authority and shall be prosecuted in superior court.

(c) *Misdemeanor Complaint*. When a misdemeanor conviction is appealed to superior court, the charging document is the complaint which was filed in the district court.

Comments

Part I, Article 15 of the New Hampshire Constitution has been interpreted to require that criminal defendants have the right to indictment by a grand jury before they may be tried for any offense punishable by more than one year. *State v. Canatella*, 96 N.H. 202 (1950). See also RSA 601:1. For that reason, an indictment may be amended in form, but not in substance. *State v. Erickson*, 129 N.H. 515 (1987). An accused person may only be tried for a misdemeanor in which the State is seeking an extended term of imprisonment when the accused has been indicted by a grand jury. *State v. Ouelette*, 145 N.H. 489, 491 (2000). When a misdemeanor complaint is appealed to superior court, the State may amend the complaint unless otherwise prohibited by law.

Rule 8. The Grand Jury

(a) *Summoning Grand Juries.* The superior court shall order a grand jury to be summoned and convened at such time and for such duration as the public interest requires, in the manner prescribed by law. The grand jury shall consist of no fewer than twelve nor more than twenty-three members. The grand jury shall receive, prior to performing its duties, instructions from a justice of the superior court relative thereto and shall be sworn in accordance with law.

(b) *Conduct of Proceedings.*

(1) State's counsel or the foreperson of the grand jury shall swear and examine witnesses. The State shall present evidence on each matter before the grand jury.

(2) The grand jury's role is to diligently inquire into possible criminal conduct. The grand jury may also consider whether to return an indictment on a felony or misdemeanor.

(3) Upon request, a grand jury witness shall be given reasonable opportunity to consult with counsel.

(4) If twelve or more grand jurors find probable cause that a felony or misdemeanor was committed, the grand jury should return an indictment.

(5) Upon application of the Attorney General or upon the court's own motion, a justice of the superior court may authorize a stenographic record of the testimony of any witness. Disclosure of such testimony may be made only in accordance with Supreme Court rules.

(6) A grand juror, interpreter, stenographer, typist who transcribes recorded testimony, attorney for the state, or any person to whom disclosure is made under paragraph (C) below, shall not disclose matters occurring before the grand jury, except:

(A) As provided for by the provisions of the Supreme Court rules;

(B) To an attorney for the state for use in the performance of such attorney's duties;

(C) To such state, local or federal government personnel as are deemed necessary by an attorney for the state to assist the attorney for

the state in the performance of such attorney's duty to enforce state criminal law;

(D) When so directed by a court in connection with a judicial proceeding;

(E) When permitted by the court at the request of an attorney for the state, when the disclosure is made by an attorney for the state to another grand jury in this state; or

(F) When permitted by a court at the request of an attorney for the state upon a showing that such matters may disclose a violation of federal criminal law or the criminal law of another state, to an appropriate official of the federal government or of such other state or subdivision of a state, for the purpose of enforcing such law.

(c) *Notice to Defendant.* If the grand jury returns a no true bill after consideration of a charge against a defendant who is incarcerated or is subject to bail conditions, the court shall immediately notify the defendant or the defendant's attorney.

(d) The Superior Court will dismiss without prejudice and vacate bail orders in all such cases in which an indictment has not been returned 90 days after the matter is bound over, unless, prior to that time, the prosecution files a motion seeking an extension of time to seek an indictment and explaining why the extension is necessary.

Comments

This rule is based on RSA 600, 600-A, common law and current practice.

Rule (b)(6) restates the traditional rule of grand jury secrecy. This paragraph is based on Federal Rule of Criminal Procedure 6 and prohibits grand jurors, interpreters, stenographers, typists who transcribe recorded testimony or an attorney for the State, or any person to whom disclosure is made under the rule, from disclosing information received except under a few narrow circumstances. It is important, however, to note that this rule does not bar a witness from later revealing the substance of the witness's testimony before a grand jury.

Rule 9. Waiver of Indictment

An offense which is punishable by death or a term of imprisonment exceeding one year may be prosecuted by a complaint with a waiver of indictment. If the charge proceeds by a waiver of indictment, the defendant shall be informed of the nature of the charge and the right to have the charge presented to a grand jury. The waiver must be in open court and on the record. If a defendant waives indictment as to a charge punishable by death or a term of imprisonment exceeding one year, the

complaint shall not be amended substantively without the defendant's consent.

Comments

Since the right to trial upon an indictment exists to benefit a defendant, it may be waived by a defendant. *State v. Albee*, 61 N.H. 423 (1881); RSA 601:2.

IV. ARRAIGNMENT, PLEAS AND PRETRIAL PROCEEDINGS

Rule 10. Arraignment in Superior Court

(a) *Arrest on a Charge Originating in Superior Court.* Any person who is arrested on a warrant or capias issued pursuant to an indictment or information shall be taken before the superior court for arraignment without unreasonable delay but, in any event, within twenty-four hours of arrest, Saturdays, Sundays, and holidays excepted.

(b) *Arraignment on Felonies.* Arraignment shall be conducted in open court. The court shall read the indictment or information to the defendant or state to the defendant the substance of the charge. If the defendant appears *pro se*, the court shall inform the defendant of the maximum possible penalty, the right to retain counsel, and the right to have an attorney appointed by the court pursuant to Rule 5 if the defendant is unable to afford an attorney. The defendant shall be called upon to plead to the charge, unless unrepresented by counsel, in which case a plea of not guilty shall be entered on the defendant's behalf. The defendant shall be given a copy of the charge.

(c) *Waiver of Arraignment.* A defendant who is represented by an attorney may enter a plea of not guilty and waive formal arraignment as follows. Before the arraignment hearing, the attorney shall file a written statement signed by the defendant certifying that the defendant has reviewed a copy of the indictment or information. The attorney shall further certify that the defendant read the indictment or information or that it was read to the defendant, and that the defendant understands the substance of the charge and the maximum possible penalty, waives formal arraignment, and pleads not guilty to the charge. See Appendix for form.

(d) *Arraignment on Misdemeanor Appeal.* No arraignment shall be held on a misdemeanor appeal. Upon the filing of a misdemeanor appeal in superior court, a trial schedule consistent with these rules shall be issued. The date of the issuance of the trial schedule shall be the equivalent of an arraignment and entry of not guilty plea for the purpose of determining deadlines.

Comments

Rule 10(a) is derived from section I of RSA 594:20-a, entitled “Place and Time of Detention,” which requires that, following an arrest, the arrestee be taken before a district court to answer for the offense within twenty-four hours of arrest, Saturdays, Sundays, and holidays excepted.

Rule 10(b) obligates the superior court at arraignment to advise a *pro se* defendant of the maximum penalty for the offense and of the defendant’s constitutional right to counsel.

Rule 10(c) is derived from present Superior Court Rule 97, entitled “Entry of Not Guilty Plea and Waiver of Formal Arraignment,” which allows a defendant who is represented by counsel to waive formal arraignment and plead not guilty upon certifying that the defendant: (1) has reviewed a copy of the indictment; (2) has read it or had it read or explained; (3) understands the substance of the charge; (4) waives formal arraignment; and (5) pleads not guilty to the charge.

Rule 10(d) specifically provides that no arraignment shall be held on a misdemeanor appeal to superior court. Current practice among the superior courts is not uniform on this issue. At present, some superior courts hold an initial hearing on misdemeanor appeals, which is treated as the equivalent of an arraignment; other superior courts do not hold such a hearing. Where Rule 12, derived from current Superior Court Rule 98, uses the date of arraignment as a starting point for the scheduling of certain pretrial deadlines, it is desirable to have a rule establishing a uniform starting point for purposes of discovery and other deadlines in misdemeanor appeal cases. Rule 10(d) designates the date of the issuance of the trial notice by the superior court as the equivalent of an arraignment and entry of not guilty plea for purposes of Rule 12 deadlines.

Rule 11. Pleas

(a) District Court

(1) *Violations.* A plea of guilty or *nolo contendere* to a violation may be accepted by the court without formal hearing unless the violation carries a statutorily enhanced penalty upon a subsequent conviction subjecting the defendant to incarceration

(2) *Plea by Mail.* In all cases in which a defendant may enter a plea by mail pursuant to RSA 262:44, the defendant may enter a plea by mail in accordance with the procedures provided by RSA 502-A:19-b.

(3) *Plea by Mail – Time for Filing Complaint.* In any and all cases whereby the defendant may enter a plea by mail and a summons has been issued to the defendant, the complaint must be filed with the designated court not later than fifteen days from the date of the issuance of the summons. Any complaint filed with the court after the filing date

has passed shall be summarily dismissed by the court unless good cause is shown.

(4) *Misdemeanors and Enhanced Violations.* Before accepting a plea of guilty or, with the consent of the court, a plea of *nolo contendere*, to any misdemeanor, or to a violation that carries a statutorily enhanced penalty upon a subsequent conviction, the court shall personally address the defendant and determine on the record that:

(A) There is a factual basis for the plea;

(B) The defendant understands the crime charged and the factual basis of that charge;

(C) The defendant's plea is knowing, intelligent and voluntary;

(D) The defendant's plea is not the result of any unlawful force, threats or promises; and that

(E) The defendant understands and waives the statutory and constitutional rights as set forth in the Acknowledgement and Waiver of Rights.

(5) *Acknowledgment and Waiver of Rights Forms.* The appropriate Acknowledgment and Waiver of Rights form shall be read and signed by the defendant, counsel, if any, and the presiding justice.

(b) *Superior Court*

(1) *Deadlines for Filing Plea Agreements.* The court may establish deadlines for the filing of plea agreements.

(2) *Pleas.* Before accepting a plea of guilty or, with the consent of the court, a plea of *nolo contendere*, to any misdemeanor or to a violation that carries a statutorily enhanced penalty upon a subsequent conviction, the court shall personally address the defendant and determine on the record that:

(A) There is a factual basis for the plea;

(B) The defendant understands the crime charged and the factual basis of that charge;

(C) The defendant's plea is knowing, intelligent and voluntary;

(D) The defendant's plea is not the result of any unlawful force, threats or promises; and that

(E) The defendant understands and waives the statutory and constitutional rights as set forth in the Acknowledgement and Waiver of Rights.

(3) *Acknowledgment and Waiver of Rights Forms.* The appropriate Acknowledgment and Waiver of Rights form shall be read and signed by the defendant, counsel, if any, and the presiding justice.

(c) *Negotiated Pleas – District and Superior Courts*

(1) *Permissibility.* If the court accepts a plea agreement, the sentence imposed by the court shall not violate the terms of the agreement.

(2) *Court's Rejection of Negotiated Plea.* If the court rejects a plea agreement, the court shall so advise the parties, and the defendant shall be afforded the opportunity to withdraw the plea of guilty or *nolo contendere*.

(3) *Sentence Review.* When a defendant is sentenced to more than one year in jail pursuant to a plea agreement, both the defendant and the state have the right to have the sentence reviewed by the sentence review division, unless the plea agreement includes a waiver of this review. As a condition of acceptance of the plea agreement, the court may require a written waiver of sentence review from the defendant and the state.

Comments

Rule 11(a)(1) permits the district court, without formal hearing, to accept guilty and *nolo contendere* pleas to violations that do not carry enhanced penalties upon a subsequent conviction subjecting the defendant to incarceration. Such a rule promotes timely resolution of cases where incarceration is not possible, and the rule is consistent with current practice.

Rule 11(a)(2) is derived from current District Court Rule 2.5, entitled "Plea By Mail." Current District Court Rule 2.5 cites RSA 262:44 ("Waiver in Lieu of Court Appearance") which permits pleas by mail in certain motor vehicle cases. Rule 11(a)(2) further provides that in the case of motor vehicle offenses covered by RSA 262:44, the defendant may enter a plea by mail in accordance with the detailed procedures outlined in RSA 502-A:19-b, entitled "Pleas by Mail; Procedure." As the two cited statutes have been amended several times over the years, the Committee decided it is appropriate to simply reference the two laws in this rule.

Rule 11(a)(3) is derived from current District Court Rule 2.5A entitled “Plea By Mail – Time For Filing Complaint.” The rule states that in cases where the defendant may plea by mail and a summons was issued to the defendant, a complaint must be filed in the appropriate court within 15 days of the summons being issued. If this filing provision is not met, the complaint may be summarily dismissed by the court unless good cause is shown by the state.

Rule 11(a)(4) and (a)(5), applicable to district court pleas, and Rule 11(b)(2) and (b)(3), applicable to superior court pleas, address the colloquy required between the court and defendant in cases where incarceration upon conviction is possible. In sum, these provisions require the record to reflect that a factual basis for the charge exists; the defendant understands the crime charged and its factual basis; the plea is knowing, intelligent, and voluntary; the plea is not the result of threats or promises; and the defendant appreciates the constitutional rights being waived as part of the plea. In practice, the factual basis for the charge referred to in Rule 11(a)(4)(A) and (b)(2)(A) is provided by the state in its offer of proof during the plea hearing.

The rule reflects the constitutional requirement that the trial court affirmatively inquire, on the record, into the defendant's volition in entering the plea. *Boykin*, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); *Richard v. MacAskill*, 129 N.H. 405 (1987). For a plea to be knowing, intelligent, and voluntary, the defendant must understand the essential elements of the crime to which a guilty plea is being entered. *Thornton*, 140 N.H. 532, 537 (1995). To find that a plea has been intelligently made, the court must fully apprise the defendant of the consequences of the plea and the possible penalties that may be imposed. *State v. Ray*, 118 N.H. 2 (1978); *State v. Manoly*, 110 N.H. 434 (1974). A defendant need not be apprised, however, of all possible collateral consequences of the plea. *State v. Elliot*, 133 N.H. 190 (1990); see *State v. Chace*, 151, N.H. 310, 313 (2004) (defendant need not be advised that loss of license will be collateral consequence of pleading guilty to DWI). If the record does not reflect that a plea is voluntarily and intelligently made, it may be withdrawn as a matter of federal constitutional law. *Boykin*, 395 U.S. at 238.

Rule 11(c) addresses negotiated pleas. Rule 11(c)(2) provides that if a court rejects the plea agreement, the defendant has the right to withdraw the negotiated plea. This provision is consistent with practice and case law. *State v. Goodrich*, 116 N.H. 477 (1976). As a guilty plea must be “voluntary” to be valid, a defendant cannot be forced to plead guilty even if the defendant has reached an unexecuted plea agreement with the state. *State v. LaRoche*, 117 N.H. 127 (1977). Similarly, in the ordinary course, neither the state nor federal constitutions bar a prosecutor from refusing to perform an executory plea agreement. *State v. O'Leary*, 128 N.H. 661 (1986); *Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2543 81 L.Ed.2d 437 (1984). N.H. Rule of Evidence 410 provides that a plea of guilty or *nolo contendere* which was later withdrawn, and statements made in the course of plea proceedings or plea discussions, are generally inadmissible. Rule 11(c)(3) provides that in cases where a defendant is sentenced to more than one year of incarceration, both the defendant and the state have the right to seek review of the disposition by the sentence review division, unless such a review is waived as part of the plea agreement. Additionally, the court may require written waivers of sentence review from the parties as a condition of accepting the plea agreement. Rule 29(k) addresses sentence review procedures in more detail.

Rule 12. Discovery

(a) District Court

(1) Upon request, the prosecuting attorney shall furnish the defendant's attorney, or the defendant, if *pro se*, 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 list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, it anticipates introducing at trial.

(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.

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

(1) Pretrial Disclosure by the State

(A) Within ten calendar days after the entry of a not guilty plea by the defendant, the state shall provide the defendant with 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) Within thirty calendar days after the entry of a not guilty plea by the defendant, the state shall provide the defendant with the materials specified below:

(i) Copies of all police reports; statements of witnesses; 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.

(ii) The defendant's prior criminal record.

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

(iv) 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).

(v) Notification of the state's intention to offer at trial pursuant to N.H. 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*

(A) If the defendant intends to rely upon an alibi or any other defense specified in the New Hampshire criminal code, the defendant shall within thirty calendar days after the entry of a plea of not guilty file a notice to this effect with the court and the prosecution as provided in Superior Court Rules 100 and 101.

(B) If a defendant in a case to which Superior Court Rule 100-A applies intends to offer evidence of prior sexual activity of the victim with a person other than the defendant, the defendant shall not less than forty-five calendar days prior to jury selection file a motion in conformance with the requirements of said rule.

(C) Not less than thirty calendar days prior to jury selection 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 (i) 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 and (ii) all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by experts which the defendant anticipates calling as a witness at the trial or hearing, as well as a summary of each such expert's qualifications.

(3) *Exchange of Information Concerning Trial Witnesses*

(A) Not less than twenty calendar days prior to jury selection or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the state shall provide the defendant with a list of the names of the witnesses it anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to paragraph (b)(1)(B)(i) of this rule the state shall also 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.

For each expert witness included on the list of witnesses, the state shall provide a brief summary of the expert's education and relevant experience, state the subject matter on which the expert is expected to testify, state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.

(B) Not later than the final pretrial conference or ten calendar days before jury selection, whichever occurs first, 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 also 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. For each expert witness included on the list of witnesses, the defendant shall provide a brief summary of the expert's education and relevant experience, state the subject matter on which the expert is expected to testify, state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.

(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.

(4) *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 (i) notification that the statement or report in question has been redacted and (ii) (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.

(5) *Motions Seeking Additional Discovery.* Subject to the provisions of paragraph (b)(7), the discovery mandated by paragraphs (b)(1), (b)(2), and (b)(3) of this rule shall be provided as a matter of course and without the need for making formal request or filing a motion for the same. No motion seeking discovery of any of the materials required to be disclosed by paragraphs (b)(1) through (b)(3) 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)(3), all motions seeking additional discovery, including motions for a bill of particulars

and for depositions, shall be filed within sixty calendar days 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)(3) shall be filed no later than seven calendar days after such disclosure occurs.

(6) *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 order are generated or as a party learns that discovery previously provided is incomplete, inaccurate or misleading.

(7) *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.

(8) *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 attorneys fees against the party or counsel who has violated the terms of this rule.

Comments

Rule 12(a) is derived from current District Court Rule 2.10, entitled "Discovery." Rule 12(b) is derived from current Superior Court Rule 98, also entitled "Discovery." The Committee recognizes that these rules are well established in New Hampshire criminal practice and provide clear directives concerning discovery obligations of the parties and the timing of discovery. For this reason, in Rule 12, the respective courts' rules have been unaltered by the Committee with the exception of two sections of current Superior Court Rule 98 relating to pretrial motions and motions in limine. These sections are addressed in Rule 15, entitled "Pretrial Motions."

Rule 13. Discovery Depositions

(a) *When Permitted.* In criminal cases either party may take the deposition of any witness, other than the defendant, by agreement of the parties, except as prohibited by statute.

(b) *Finding by Court.* The court in its discretion may permit either party to take the deposition of any witness, except the defendant, in any criminal case upon a finding by a preponderance of the evidence that such deposition is necessary:

(1) to preserve the testimony of any witness who is unlikely to be available for trial due to illness, absence from the jurisdiction or reluctance to cooperate; or

(2) to ensure a fair trial, avoid surprise or for other good cause shown.

In determining the necessity, the court shall consider the complexity of the issues involved, other opportunities or information available to discover the information sought by the deposition, and any other special or exceptional circumstances which may exist.

(c) *Expert Witness.* In any felony case either party may take a discovery deposition of any expert witness who may be called by the other party to testify at trial.

(d) *Witnesses Under Sixteen Years of Age.* No party in a criminal case shall take the discovery deposition of a victim or witness who has not achieved the age of sixteen years at the time of the deposition.

(e) *Fees for Lay Witnesses.* Deposition witnesses under subpoena shall be entitled to witness fees as in any official proceeding unless expressly waived by the parties.

(f) *Scope of Depositions.* The deponent in a deposition shall ordinarily be required to answer all questions not subject to privilege or excused by the statute relating to depositions, and it is not grounds for refusal to answer a particular question that the testimony would be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege.

Comments

Rule 13 is derived from New Hampshire RSA 517:13. Paragraph (a) authorizes discovery depositions by agreement of the parties, except where prohibited by statute.

Paragraph (d) is consistent with RSA 517:13, V which prohibits the taking of a discovery deposition of a victim or witness who has not achieved the age of 16 at the time of the deposition. Paragraph (c) reflects that, in felony cases, experts may be deposed without the need for court approval. Under Paragraph (b), upon a finding of necessity by a preponderance of the evidence, the trial court may order a deposition over a party's objection. The New Hampshire Supreme Court has addressed trial courts' application of the necessity standard in several reported cases. *See, e.g., State v. Sargent*, 148 N.H. 571 (2002); *State v. Howe*, 145 N.H. 41 (2000); *State v. Hilton*, 144 N.H. 470 (1999); *State v. Ellsworth*, 142 N.H. 710 (1998); *State v. Chick*, 141 N.H. 503 (1996); *State v. Rhoades*, 139 N.H. 432 (1995).

Rule 13(e) provides that deposition witnesses under subpoena are entitled to a witness fee as in other official proceedings, unless the fee is expressly waived by the parties. Paragraph (f) is derived from current Superior Court Rule 44 and provides guidance as to the proper scope of discovery deposition questioning and the witness's obligation to answer all questions not subject to privilege or excused by statute.

Rule 14. Notices

(a) *District Court*. In addition to the notice requirements in (c), affirmative defenses must be raised by written notice at least five days in advance of trial.

(b) *Superior Court*. In addition to the notice requirements in (c), the following notice requirements apply in Superior Court.

(1) The State's Notice Obligations

(A) *Evidence of Other Crimes, Wrongs or Acts*. Within thirty calendar days after the entry of a not guilty plea by the defendant, the state shall provide the defendant with notification of the state's intention to offer at trial pursuant to N.H. 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.

(B) *Extended Term Sentences*. Notice that an extended term of imprisonment may apply pursuant to RSA 651:6 shall be provided to the defendant at least 21 days prior to the commencement of jury selection.

(C) *Psychiatric Reports*. Within three days after an order under RSA 135:17 for a psychiatric evaluation of a defendant in a criminal proceeding, the attorney for the prosecution shall furnish a brief written statement of the factual background of the incident to the clerk of the superior court of the county in which the prosecution is brought, who shall then forward a copy of the statement to the psychiatric personnel performing the evaluation. The defense counsel shall also have the

opportunity to provide the clerk with such a statement, which shall then similarly be forwarded. The prosecution shall also furnish to the clerk a copy of the defendant's criminal record as reasonably soon as the same can be obtained, and the clerk shall forward a copy of said record to the psychiatric personnel. The statements and criminal record so provided are for the purpose of the psychiatric evaluation only and may not be used for any other purpose without permission of the court.

(D) *Alibi*. The state may have further notice obligations under Rule 14(b)(2)(C) regarding alibi witnesses.

(2) *The Defendant's Notice Obligations*

(A) *General Notice Obligations*. If the defendant intends to rely upon any defense specified in the criminal code, the defendant shall within thirty calendar days after the entry of a plea of not guilty file a notice of such intention setting forth the grounds therefore with the court and the prosecution, or within such further time as the court may order for good cause shown. If the defendant fails to comply with this rule, the court may exclude any testimony relating to such defense or make such other order as the interest of justice requires.

(B) *Prior Sexual Activity of Victim*. Not less than forty-five days prior to the scheduled trial date, any defendant who intends to offer evidence of specific prior sexual activity of the victim with a person other than the defendant shall file a motion setting forth with specificity the reasons that due process requires the introduction of such evidence and that the probative value thereof to the defendant outweighs the prejudicial effect on the victim. If the defendant fails to file such motion, the defendant shall be precluded from relying on such evidence, except for good cause shown.

(C) *Alibi*. If a defendant intends to rely upon the defense of alibi, notice shall be provided to the prosecution in writing of such intention within thirty calendar days of the plea of not guilty and file a copy of such notice with the clerk. The notice of alibi shall be signed by the defendant and shall state the specific place where the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Within ten days after the receipt of such notice of alibi from the defendant, the prosecution shall furnish the defendant, or counsel, in writing with a list of the names and addresses of the witnesses upon whom the prosecution intends to rely to establish the defendant's presence at the scene of the alleged offense. If prior to or during trial, a party learns of an additional witness whose identity, if

known, should have been included in the information required by this rule, the party shall forthwith notify the other party, or counsel, of the existence and identity and address of such additional witness. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify concerning the alibi notwithstanding the failure to give notice. The court may waive the requirements of this rule for good cause shown.

(3) *Notice of Use of Criminal Record During Trial.* If a party plans to use or refer to any prior criminal record during trial, for the purpose of attacking or affecting the credibility of a party or witness, the party shall first furnish a copy of same to the opposing party, or to counsel, and then obtain a ruling from the court as to whether the opposing party or a witness may be questioned with regard to any conviction for credibility purposes. Evidence of a conviction under this rule will not be admissible unless there is introduced a certified record of the judgment of conviction indicating that the party or witness was represented by counsel at the time of the conviction unless counsel was waived.

(c) *Special Notice Requirements.* The following notice requirements apply in all criminal proceedings in either district or superior court.

(1) In any case in which a road or way is alleged to be a “way,” as defined in RSA 259:125, or a public highway, a party shall notify the opposing party or counsel at least ten days prior to trial if said “way” or public highway must be formally proved; otherwise, the need to formally prove said “way” or public highway will be deemed to be waived.

(2) Whenever a party intends to proffer in a criminal proceeding a certificate executed pursuant to RSA 318-B:26-a(II), notice of an intent to proffer that certificate and all reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least twenty days before the proceeding begins. An opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection and the specific grounds for the objection within ten days upon receiving the adversary's notice of intent to proffer the certificate. Whenever a notice of objection is filed, admissibility of the certificate shall be determined not later than ten days before the beginning of the trial. A proffered certificate shall be admitted in evidence unless it appears from the notice of objection and specific grounds for that objection that the composition, quality, or quantity of the substance submitted to the laboratory for analysis will be contested at trial. A failure to comply with the time limitations regarding the notice of objection required by this section shall constitute a waiver

of any objection to the admission of the certificate. The time limitations set forth in this section shall not be relaxed except upon a showing of good cause.

(3) If counsel has a bona fide question about the competency of a defendant to stand trial, counsel may notify the court, or the court may raise the issue on its own. When such a bona fide question arises, the court shall proceed in accordance with RSA 135:17, RSA 135-!7-a and any other applicable statutes.

Comments

Rule 14(a) derives from current District Court Rule 2.8 B, entitled “Motions.”

Rule 14(b)(1)(A), requiring the state to provide notice of its intent to introduce evidence of prior bad acts under N.H. Rule of Evidence 404(b), derives from current Superior Court Rule 98(A)(2)(v).

Rule 14(b)(1)(B), requiring the state to provide notice that it may seek an extended term of imprisonment under RSA 651:6, derives from current Superior Court Rule 99-A.

Rule 14(b)(1)(C) derives from current Superior Court Rule 102, entitled “Furnishing Background Material To Psychiatric Personnel Performing An Evaluation.” This rule does not reflect current practice. In cases where a psychiatric evaluation has been ordered under RSA 135:17, the prosecution and defense do not customarily provide written information to the clerk of court for the purpose of forwarding such documents to the psychiatric evaluator. Rather, under current practice, the clerk is not contacted, and the parties provide information directly to the professional tasked with conducting the evaluation.

Rule 14(b)(2)(A) derives from current Superior Court Rule 98(B)(1) and current Superior Court Rule 101, entitled “Notice of Criminal Defense.”

Rule 14(b)(2)(B) derives from current Superior Court Rule 98(B)(2) and current Superior Court Rule 100-A, entitled “Prior Sexual Activity.”

Rule 14(b)(2)(C) derives from current Superior Court Rule 98(B)(1) and current Superior Court Rule 100, entitled “Notice of Alibi.”

Rule 14(b)(3) governing use of prior criminal records derives from current Superior Court Rule 68.

Rule 14(c)(1) derives from current Superior Court Rule 89, entitled “Formal Proof of Highway Waived Unless Demanded (Civil And Criminal).”

Rule 14(c)(2), governing introduction of chemical analyses certificates, derives from RSA 318-B:26-a(II).

Rule 15. Pretrial Motions

(a) District Court

(1) General

(A) Any request for action by the court shall be by motion. All motions, other than those made during trial or hearing, shall be made in writing unless otherwise provided by these rules. They shall state with particularity the grounds upon which they are made and shall set forth the relief or order sought.

(B) The court will not hear any motion grounded upon facts unless they are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed to and stated in writing signed by the parties or their attorneys; and the same rule will be applied as to all facts relied on in opposing any motion.

(C) Any party filing a motion shall certify to the court that a good faith attempt to obtain concurrence in the relief sought has been made, except in the case of dispositive motions, motions for contempt or sanctions, or comparable motions where it can be reasonably assumed that the party or counsel will be unable to obtain concurrence.

(D) Unless the opposing party requests a hearing upon any motion and sets forth the grounds of the objection by a pleading and, if required, an affidavit within ten days after the filing of the motion, that party shall be deemed to have waived a hearing and the court may act thereon.

(E) Any motion which is capable of determination without the trial of the general issue shall be raised before trial, but may, in the discretion of the court, be heard during trial.

(F) Motions to dismiss will not be heard prior to the trial on the merits, unless counsel shall request a prior hearing, stating the grounds therefore; all counsel shall be prepared, at any such hearing, to present all necessary evidence.

(2) Motions to Suppress.

(A) Whenever a motion to suppress evidence is filed before trial in any criminal case, the court will determine, in its discretion, whether to hear the motion in advance of trial or at the trial when the evidence is offered.

(B) If a hearing is held in advance of trial, neither the prosecution nor the defendant shall be entitled to a further hearing by the court on the same issue at the trial. If the evidence is found to be admissible in advance of trial, it will be admitted at the trial without further hearing as to its admissibility. If the evidence is found to be inadmissible, it will not be admitted at the trial and the prosecution shall not refer to such evidence at any time thereafter. The justice presiding at the pretrial hearing need not disqualify himself from presiding at the trial. Objections to the court's ruling in advance of trial admitting the evidence shall be noted by the court and the trial shall proceed as scheduled.

(C) All motions to suppress evidence filed in advance of trial shall be in writing and shall specifically set forth all the facts and grounds in separate numbered paragraphs upon which the motions are based. Such motions shall be filed before the commencement of the trial. The court, in its discretion, may grant such a motion after trial commences.

(D) Upon request of any party, the court shall make sufficient findings and rulings to permit meaningful appellate review.

(3) *Motions to Continue.*

(A) All motions for continuance shall be in writing, signed by the moving party stating the reasons therefore and stating that the opposing party does not desire a hearing on the motion, if such is the case.

(B) No motion for continuance shall be granted without a hearing unless approval of the opposing party is obtained. The moving party shall have the burden of obtaining such approval.

(C) Agreement of the parties shall constitute a waiver of hearing on a motion to continue; but notwithstanding agreement of the parties, the court shall exercise its sound discretion in granting such continuances.

(D) In exceptional situations, motions to continue may be made orally in accordance with these rules and shall be effective as such, but it shall be the burden of the moving party to establish a record thereof by confirming such request in writing. Only attorneys, police prosecutors, or parties *pro se*, shall be permitted to orally move for a continuance.

(E) Where a trial has been scheduled in one case prior to the scheduling of another matter in another court where an attorney or

party has a conflict in date and time, the case first scheduled shall not be subject to a continuance because of the subsequently scheduled matter which is in conflict as to time and date except as follows:

(i) A subsequently scheduled case involving trial by jury in a superior or federal district court, or argument before the Supreme Court.

(ii) The court finds the subsequently scheduled case should take precedence due to the rights of a victim under RSA 632-A:9.

(iii) The court finds that the subsequently scheduled case should take precedence due to a defendant's rights to speedy trial or other constitutional rights.

(iv) Unusual circumstances causing the respective courts to agree that an order of precedence other than the above shall take place.

(F) Other grounds for continuance may be illness of a defendant, defense attorney, or prosecutor; want of material testimony, documents, or other essential evidence; unavoidable absence of an essential witness; and such other exceptional grounds as the court may deem to be in the interest of justice.

(G) Grounds for a continuance shall be set forth in detail in the motion.

(b) *Superior Court*

(1) *Pretrial Motions.* The parties shall file all pretrial motions other than discovery related motions, including but not limited to motions to dismiss, motions to suppress, and motions to sever charges or defendants, no later than forty-five days prior to the scheduled jury selection date.

(2) *Motions to Suppress.* Whenever a motion to suppress evidence is filed before trial in any criminal case, the court will determine, in its discretion, whether to hear the motion in advance of trial or at the trial when the evidence is offered. If a hearing is held in advance of trial, neither the prosecution nor the defendant shall be entitled to a further hearing by the court on the same issue at the trial. If the evidence is found to be admissible in advance of trial, it will be admitted at the trial without further hearing as to its admissibility. If the evidence is found to be inadmissible on behalf of the prosecution, the prosecution shall not refer to such evidence at any time in the presence of the jury, unless otherwise ordered by the court. Objections to the court's ruling in advance of trial admitting the evidence shall be transferred on appeal

after trial and not in advance of trial except in the discretion of the court in exceptional circumstances. Except for good cause shown, motions to suppress shall be heard in advance of trial. Every motion to suppress evidence:

(A) shall be filed in accordance with section (b)(1) of this rule;

(B) shall be in writing and specifically set forth all the facts and grounds in separate numbered paragraphs upon which the motion is based; and

(C) shall be signed by the defendant or counsel and verified by a separate affidavit of the defendant or such other person having knowledge of the facts upon which the affidavit is based. Upon request of any party, the court shall make sufficient findings and rulings to permit meaningful appellate review.

(3) *Motions in Limine*. The parties shall file all motions in limine no less than five calendar days prior to jury selection. For purposes of this paragraph, a motion which seeks to exclude the introduction of evidence on the ground that the manner in which such evidence was obtained was in violation of the constitution or laws of this state or any other jurisdiction shall be treated as a motion to suppress and not a motion in limine.

(4) *Motions to Continue*

(A) All requests for continuances or postponements by the defendant in a criminal case shall be in writing signed by the defendant and counsel. The request shall include an express waiver of the defendant's right to a speedy trial as it relates to the motion.

(B) Where a trial has been scheduled in one case prior to the scheduling of another matter in another court where an attorney or party has a conflict in date and time, the case first scheduled shall not be subject to a continuance because of the subsequently scheduled matter which is in conflict as to time and date except as follows:

(i) A subsequently scheduled case involving trial by jury in a superior or federal district court, or argument before the Supreme Court.

(ii) The court finds the subsequently scheduled case should take precedence due to the rights of a victim under RSA 632-A:9.

(iii) The court finds that the subsequently scheduled case should take precedence due to a defendant's rights to speedy trial or other constitutional rights.

(iv) Unusual circumstances causing the respective courts to agree that an order of precedence other than the above shall take place.

(5) *Requirements Relating to Motions.* The court will not hear any motion grounded upon facts, unless they are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed to and stated in writing signed by the parties or their attorneys; and the same rule will be applied as to all facts relied on in opposing any motion. Any party filing a motion shall certify to the court that a good faith attempt was made to obtain concurrence in the relief sought, except in the case of dispositive motions, motions for contempt or sanctions, or comparable motions where it can be reasonably assumed that the party or counsel will be unable to obtain concurrence. Any answer or objection to a motion must be filed within ten days of receipt of the motion. Failure to object shall not, in and of itself, be ground for granting a motion.

Comments

Rule 15(a)(1) addresses motions in district court and derives from current District Court Rule 1.8.

Rule 15(a)(2) governing motions to suppress in district court derives from current District Court Rule 2.8(c).

Rule 15(a)(3) addresses motions to continue in criminal cases and derives from current District Court Rules 1.8-A and 1.8-B.

Rule 15(b)(1) governing pretrial motions in superior court derives from current Superior Court Rule 98(F), entitled "Other Pretrial Motions."

Rule 15(b)(2) addresses motions to suppress in superior court and derives from current Superior Court Rule 94, entitled "Criminal Proceedings, Motions To Suppress Evidence."

Rule 15(b)(3) governs motions in limine in superior court and derives from current Superior Court Rule 98(G), entitled "Motions in Limine."

Rule 15(b)(4) governs motions to continue in superior court and derives from current Superior Court Rule 96, entitled "Requests For Continuances or Postponements" and current Superior Court Rule 49-A.

Rule 15(b)(5) addresses requirements relating to motions and derives from current Superior Court Rules 57, 57A, and 58. While the current superior court rules do not explicitly establish ten days as the time in which a party must object to a motion, such a deadline is recognized in current practice and is consistent with the deadline for responding to motions to reconsider under current Superior Court Rule 59A.

Rule 16. Videotape Trial Testimony

(a) The state may move to take videotape trial testimony of any witness, including the victim, who was sixteen years of age or under at the time of the alleged offense. Any victim or other witness who was sixteen years of age or under at the time of the offense may also move to take videotape trial testimony. The court shall order videotape trial testimony if it finds by a preponderance of the evidence that:

(1) The child will suffer emotional or mental strain if required to testify in open court; or

(2) Further delay will impair the child's ability to recall and relate the facts of the alleged offense.

(b) Videotape trial testimony taken pursuant to this rule shall be conducted before the judge at such a place as ordered by the court in the presence of the prosecutors, the defendant and counsel, and such other persons as the court allows. Examination and cross examination of the child shall proceed in the same manner as permitted at trial. Such testimony shall be admissible into evidence at trial in lieu of any other testimony by the child.

(c) Unless otherwise ordered by the court for good cause shown, no victim or witness whose testimony is taken pursuant to this section shall be required to appear or testify at trial.

(d) The attorney general or a county attorney conducting the prosecution in a criminal case may take the deposition of any witness the prosecution intends to call at the trial, if it is determined by a justice of the superior court that:

(1) The defendant in the case in which the deposition is sought has been arrested or bound over to the grand jury or has been indicted, and

(2) There is reason to believe the life or safety of the witness is endangered because of the witness's willingness or ability to testify, and the testimony expected from the witness is material to the prosecution of the case.

Comments

Rule 16 derives from RSA 517:13-a which permits the state, under certain circumstances, to take the videotaped trial testimony of any witness, including the victim, who is 16 years of age or under at the time of the alleged offense. Under this

rule, the court shall order videotaped trial testimony if it finds by a preponderance of the evidence that: (1) The child will suffer emotional or mental strain if required to testify in open court; or (2) Further delay will impair the child's ability to recall and relate the facts of the alleged offense. Rule 16 reflects the requirement under RSA 517:13-a, II that the videotaped proceeding be conducted in the same manner as would an examination at trial.

The New Hampshire Supreme Court has held that once a videotaped trial deposition has been taken under RSA 517:13-a, it is not *per se* admissible at trial; rather, the court must make a specific finding at the time of trial that the deponent continues to be “unavailable” to testify for Confrontation Clause purposes. *State v. Peters*, 133 N.H. 791 (1986). In current practice, this rule is rarely utilized by prosecutors. The status of this rule is uncertain in light of the new standards relative to confrontation clause rights as articulated by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. (2004) and its progeny.

Rule 17. Subpoenas

(a) *For Attendance of Witnesses; Form; Issuance.* A subpoena for court hearings, depositions or trials may be issued by the clerk of any court or any justice as defined by statute. A notary may issue a subpoena for depositions only. A subpoena shall comply with the form required by statute and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(b) *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein at the time and place specified therein.

(c) *Service.* Service of a subpoena shall be made by reading the subpoena to the person named or by giving that person in hand an attested copy thereof, and by paying or tendering to that person the fee for one day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the state or court-appointed counsel. Witnesses subpoenaed by court-appointed counsel shall be paid and reimbursed through the clerk's office. Witnesses subpoenaed by the state shall be paid and reimbursed directly by the state. A subpoena may be served by any other person who is 18 years of age or older.

(d) *Subpoena for Out-of-State Witnesses.* A subpoena for witnesses located outside the state shall be requested by application to the court with subject matter jurisdiction, which may be made *ex parte*, and shall be issued in accordance with the terms and provisions of law.

(e) *Pro se Defendants Unable to Pay.* The court may order that a subpoena be issued for service upon a named witness on an *ex parte*

application of a *pro se* defendant upon a satisfactory showing that the *pro se* defendant is financially unable to pay the fees of the witness. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid through the clerk's office.

(f) *Contempt.* Failure to obey a subpoena without adequate excuse may be punishable by contempt of court.

(g) *Motions to Quash.* An individual may request that the court quash a subpoena on the grounds of improper service, hardship, or otherwise as provided by law. Notice of the motion must be served on all parties. The court shall notify all parties of any hearing on the motion and the decision.

Comments

Rule 17(a) derives from RSA 516:1-3. RSA 516:3 provides in pertinent part that any justice may issue writs for witnesses in any pending New Hampshire case. Under this statute, a justice of the peace may issue a subpoena for witnesses, even if the justice is an attorney for one of the parties. See *Hazelton Company v. Southwick Construction Company*, 105 N.H. 25 (1963).

Rule 17(b) permits a party to seek production of books, papers, documents or other objects through the service of a subpoena *duces tecum*.

The first sentence of paragraph (c) sets forth the appropriate methods of service and is a consistent restatement of RSA 516:5. This paragraph reflects the state's statutory exemption from the requirement of tendering witness fees in advance of trial or hearing. *State v. Tebetts*, 54 N.H. 240 (1874). Paragraphs (c) and (e) extend this principle to cases in which counsel has been appointed for the defendant or in which a defendant demonstrates an inability to pay the fees and mileage allowed by law.

Rule 17(d) addresses the summoning of witnesses located outside the state and reflects the procedure for summoning out-of-state witnesses established by the Uniform Act, RSA 613. The rule recognizes the current practice whereby applications to summon out-of-state witnesses may be made *ex parte*. A party is not required by law or rule to give notice of its intent to summon a witness regardless of whether the witness is located in the state.

V. TRIAL PROCEDURES

Rule 18. Venue

(a) *Venue Established.* Every offense shall be prosecuted in the county or judicial district in which it was committed. If part of an offense is committed in one county, and part in another, the offense may be prosecuted in either county.

(b) *Change of Venue.* If a court finds that a fair and impartial trial cannot be had in a county or judicial district in which the offense was committed, it may, upon the motion of the defendant, transfer the case to another county or judicial district where a fair and impartial trial may be had.

Comments

In accordance with Part I, Article 17 of the New Hampshire Constitution and RSA 602:1, paragraph (a) provides that if some aspect of an offense is committed in one county and other parts of the crime are committed in another, the offense may be prosecuted in either county. Also in accordance with N.H. Const. pt. I, art. 17, paragraph (b) provides that upon a defendant's request, venue may be changed on the grounds that a fair and impartial trial cannot be held in the county where the offense was allegedly committed.

Venue is an element of every offense and a court must, upon the request of a defendant, instruct the jury concerning the state's burden of proving venue beyond a reasonable doubt. *State v. Wentzell*, 129 N.H. 151 (1988).

Rule 19. Transfer of Cases

When any party files a motion in any superior or district court requesting the transfer of a case, or of a proceeding therein, there pending to another court, the presiding judge may, after giving notice and an opportunity for a hearing to all parties, order such transfer.

Comments

Rule 19 derives from current Superior Court Rule 113 entitled, "Consolidation of Actions," discussed in *Barnard v. Elmer*, 128 N.H. 386, 387-88 (1986). Superior Court Rule 113 deals with the scheduling of multi-county cases for trial in one county. Rule 19 more broadly contemplates the transfer of whole cases, or of particular proceedings in cases, even in the absence of a related pending case or proceeding in the county to which transfer is sought.

The rule provides a method whereby a party may ask a court to transfer cases for a plea as well as for trial. After notice has been provided to all parties involved in the case, the presiding judge may order such a transfer. This rule should be distinguished from Rule 18 which provides for change of venue to insure a fair and impartial trial.

Such a rule promotes the interest of judicial economy. The transfer of a case or proceeding therefore does not imply the disqualification of any judge or prosecutor from further participation in that case.

Rule 20. Joinder of Offenses and Defendants

(a) *Joinder of Offenses*

(1) *Related Offenses.* Two or more offenses are related if they:

(A) Are alleged to have occurred during a single criminal episode; or

(B) Constitute parts of a common scheme or plan; or

(C) Are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

(2) *Joinder of Related Offenses for Trial.* If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice.

(3) *Joinder of Unrelated Offenses.* Upon written motion of a defendant, or with the defendant's written consent, the trial judge may join for trial two or more charges of unrelated offenses upon a showing that failure to try the charges together would constitute harassment or unduly consume the time or resources of the parties. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interest of justice.

(4) *Relief from Prejudicial Joinder.* If it appears that a joinder of offenses is not in the best interests of justice, the court may upon its own motion or the motion of either party order an election of separate trials or provide whatever other relief justice may require.

(b) *Joinder of Defendants.* If two or more defendants are charged with related offenses as defined in Rule 20(a)(1), the court may order joinder of the trials of the defendants so long as joinder does not violate the constitutional rights or otherwise unduly prejudice any of the defendants.

Comments

Rule 20(a) was drafted by a special committee created by the New Hampshire Supreme Court after the decisions in *State v. Ramos*, 149 N.H. 118 (2003) and *State v. Abram*, 153 N.H. 619 (2006) (noting the need for revision of the rule by committee). See also *Petition of State of N.H. (State v. San Giovanni)*, 154 N.H. 671 (2007).

Rule 20(b) adopts the same definitions and principles with respect to joinder of defendants, allowing for exceptions as in *Bruton v. United States*, 391 U.S. 123 (1968).

Rule 21. Trial by the Court or Jury

(a) District Court

(1) *Trial.* A defendant shall be tried in the district court by a judge unless otherwise provided by law. In all prosecutions for misdemeanors in which appeal for *trial de novo* is allowed, the court, in its discretion, may allow the defendant, upon advice of counsel, to plead not guilty, waive the presentation of evidence by the state and the presentation of a defense. The court shall require the prosecution to make an offer of proof. The court may find the defendant guilty and impose sentence. The defendant may appeal to the superior court. The trial court may stay imposition of the sentence during the appeal.

(2) *Appeal to Superior Court.* An appeal to the superior court may be taken by the defendant by giving notice in open court after the court pronounces its verdict or sentence, or by filing written notice with the clerk of the district court within three days of the verdict. A defendant who was prevented from appealing through mistake, accident, or misfortune, and not from neglect, may, within thirty days, request the superior court to allow an appeal. The motion shall set forth the reason for appealing and the cause of the delay. The court may make such order thereon as justice may require. In the event of an appeal, the court may review the defendant's bail status, at the request of either party. If, upon appeal to the superior court, the defendant waives the right to a jury trial, the court shall remand the matter to the district court for imposition of the originally imposed sentence.

(3) *Appeal to Supreme Court.* A person sentenced by a district court for a class A misdemeanor may, if no appeal for a jury trial in superior court is taken, appeal therefrom to the Supreme Court at the time the sentence is declared or within thirty days after the sentence is declared. The Supreme Court's review shall be limited to questions of law.

(4) *Transcripts.* Whenever a party desires to use a sound recording of district court proceedings on appeal, a written transcript of the sound recording will be required.

(b) Superior Court.

Trial shall be before a jury of twelve persons unless the defendant, on the record, waives this right. If two or more defendants are to be tried together, the trial shall be before a jury unless all defendants waive the right to a jury trial. The consent of the state is not necessary for the defendant to waive the right to trial by jury.

Comments

Rule 21(a) derives from the present New Hampshire District Court Rules, including Rule 2.14, and from the statutes codified at RSA 502-A:12 and at RSA 599:1 through 599:1-b. The rule provides that a defendant may, with the court's permission, plead not guilty, waive the presentation of evidence by the state, and the presentation of a defense, and accept the finding of guilty and be sentenced. This allows the defendant to proceed to trial in the superior court in misdemeanor cases which allow for trial de novo. Paragraph (a)(4) of the rule is derived from superior court Rule 93-B.

Rule 21(b) derives from RSA 606:7, which provides that a defendant may, in a criminal case other than a capital case, at any time before the jury is impaneled, waive the right to trial by jury by signing a written waiver thereof and filing the same with the clerk of court. It has long been assumed in New Hampshire that the prosecutor's assent to the waiver of jury need not be obtained by a defendant and the state cannot compel the defendant to be tried by a jury in a non-capital case. This assumption seems to have its genesis in the case of *State v. Albee*, 61 N.H. 423, 428 (1881), in which the court stated that:

The benefit of statutory and constitutional protections, both in civil and criminal jurisprudence, may be waived by the party interested.

See also State v. Foote, 149 N.H. 323, 325 (2003) (finding valid waiver of right to jury trial in actions of defendant and defense counsel).

Rule 22. Selection of Jury

(a) *Juror Questionnaires*. The clerk of the superior court for each county shall maintain a list of jurors presently serving, together with copies of their completed questionnaire forms, which shall be available for inspection by attorneys and parties representing themselves. The clerk's office shall permit attorneys who have jury cases scheduled for trial to have a photocopy of the questionnaires which have been completed by the jurors presently serving. An attorney shall not exhibit such questionnaire to anyone other than the attorney's client and other lawyers and staff employed by the attorney's firm. Violation of this rule may be treated as contempt of court.

(b) *Examination*. In all cases, the court shall have the responsibility to ensure that each empanelled juror is qualified, fair, and impartial. In capital cases or first degree murder cases, the court shall allow counsel to conduct individual *voir dire*. In other cases, *voir dire* may be conducted by counsel in the discretion of the court. When the court conducts the examination, it shall permit the defendant or the defense attorney and the attorney for the state to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions formulated by the parties or their attorneys as it deems proper. All proceedings relating to the examination of prospective jurors shall be recorded and should be conducted in the presence of counsel.

(c) *Peremptory Challenges*. For offenses punishable by death, the defendant shall be accorded, in addition to challenges for cause, no fewer than twenty peremptory challenges; and, the state shall be afforded, in addition to challenges for cause, no fewer than ten peremptory challenges. In first degree murder cases, both the state and the defendant shall be afforded, in addition to challenges for cause, fifteen peremptory challenges. In all other criminal cases the defendant and the state shall, in addition to challenges for cause, be entitled to no fewer than three peremptory challenges. In trials involving multiple charges, the number of peremptory challenges shall be the number of challenges allowed for the most serious offense charged.

(d) *Alternate Jurors*. Upon request by either the state or the defendant, or *sua sponte*, the court may direct that alternate jurors be chosen. The number of peremptory challenges allotted to both the state and the defendant for selection of the alternate panel shall be in accordance with the following schedule:

- 1-3 alternates -- 1 peremptory challenge
- 4-6 alternates -- 2 peremptory challenges

Comments

Paragraph (a) of the rule, relating to the collection and release of juror questionnaires, is derived from Superior Court Rule 61-A.

The court must allow counsel to ask questions on *voir dire* in capital or first degree murder cases. See *State v. Fernandez*, 152 N.H. 233, 239 (2005); *State v. Saucier*, 128 N.H. 291, 295 (1986); *State v. Colby*, 116 N.H. 790, 793 (1976). Superior court judges may allow counsel to conduct *voir dire* in other cases. In all cases, the court has an obligation to ensure the fairness and impartiality of the selected jurors.

In all cases, RSA 500-A:12 requires the court to ask a number of questions of the panel. The court may supplement those statutory questions as the court believes necessary. *State v. Cere*, 125 N.H. 421 (1984); *State v. Wright*, 126 N.H. 643 (1985); *State v. Colbath*, 133 N.H. 708 (1990). A court has great discretion in determining what questions should be asked on *voir dire*. *State v. Vandebogart*, 136 N.H. 365 (1992).

The rule requires that all communication with the panelists be recorded, and further provides that all communications should be conducted in the presence of counsel. *State v. Bailey*, 127 N.H. 416 (1985); *State v. Brodowski*, 135 N.H. 197, 201 (1991). The rule does not absolutely foreclose the possibility that the court could communicate with potential jurors outside the presence of counsel, in recognition of the fact that, in relatively rare instances, the interest in full disclosure by jurors of sensitive, but relevant, matters may be advanced by allowing the court to inquire into those matters in private with the juror. Those communications, though, like all other communications with jurors, must be recorded.

Paragraph (c) governs the exercise of peremptory challenges. A party may exercise its peremptory challenges as the party sees fit, subject of course to the state and federal constitutional requirements of equal protection of the laws. *See generally Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

Rule 22 reflects current practice in New Hampshire as set forth in RSA 606:3, 4 with respect to the number of peremptory challenges available to each party. Paragraph (c) also provides that in trials adjudicating multiple charges, the number of peremptory challenges available to the parties depends on the most serious charge. Paragraph (c) does not provide for cases of multiple defendants, thus leaving intact the traditional practice in New Hampshire of allowing each defendant the full number of challenges provided by the law. *State v. Doolittle*, 58 N.H. 92 (1877). Paragraph (c) allows the trial court discretion with regard to control of the manner, order and timing of the parties' peremptory challenges. *State v. Farrell*, 118 N. H. 296, 307 (1978); *State v. Prevost*, 105 N.H. 90 (1963).

Paragraph (d), regarding alternate jurors, derives from current practice and RSA 500-A:13.

Rule 23. Juror Notes and Written Questions

(a) *Note-Taking by Jurors*. It is within the court's discretion to permit jurors to take notes. If the court permits note-taking, after the opening statements the court will supply each juror with a pen and notebook to be kept in the juror's possession in the court and jury rooms, and to be collected and held by the bailiff during any recess in which the jurors may leave the courthouse and during arguments and charge. After a verdict, the court will immediately destroy all notes.

(b) *Questioning of Witnesses by Jurors*. With the consent of all parties, the trial judge may permit jurors to pose written questions. If a trial judge decides to permit jurors to pose written questions at trial, the court shall use the following procedure:

(1) At the start of the trial, the judge will announce to the jury and counsel the decision to allow jurors to pose written questions to witnesses. At this time the judge will instruct the jurors on taking notes and, as to the scope of questioning, the procedure to be followed.

(2) Trial will proceed in the normal fashion until questioning of the first witness has been completed by both counsel.

(3) When questioning of the first witness is completed, the court will allow jurors to formulate any questions they may have, in writing. Jurors will be asked to put their seat number on the back of the question. The judge is the only person who will see the number.

(4) The bailiff will collect the anonymous questions and deliver them to the judge.

(5) At the bench, the judge and counsel will read the proposed questions. Counsel will be given the opportunity to make objections on the record to any proposed question after which the judge will decide if they are appropriate and whether, under the circumstances of the case, the judge will exercise discretion to permit the questions.

(6) Questions may be rephrased by the judge, or the judge may ask the question in a way mutually agreeable to the parties. The question should, however, attempt to obtain the information sought by the juror's original question.

(7) After all the chosen questions are answered, each counsel will have an opportunity to re-examine the witness. The party who called the witness will proceed first. The judge should allow only questions which directly pertain to questions posed by the jurors. The judge may also impose a time limit. If the judge does plan to impose a time limit, counsel should be notified and given an opportunity to object to the length outside the hearing of the jury.

(8) The judge shall instruct the jury substantially as follows.

(A) *Instructions to the Jury at Beginning of Trial:*

Ladies and gentlemen of the jury, I have decided to allow you to take a more active role in your mission as finders of fact. I will permit you to submit written questions to witnesses under the following arrangements.

After each witness has been examined by counsel, you will be allowed to formulate any questions you may have of the witness. Please remember that you are under no obligation to ask questions, and questions are to be directed only to the witness. The purpose of these questions is to clarify the evidence, not to explore your own legal theories or curiosities.

If you do have any questions, please write them down on a pad of paper. Do not put your name on the question, and do not discuss your questions with fellow jurors. The bailiff will collect the questions, and I will then consider whether they are permitted under our rules of evidence and are relevant to the subject matter of the witness' testimony. If I determine that the question or questions may be properly asked of the witness pursuant to the law, I will ask the question of the witness myself.

It is extremely important that you understand that the rejection of a question because it is not within the rules of evidence, or because it is not relevant to the witness' testimony, is no reflection upon you. Also, if a particular question cannot be asked, you must not speculate about what the answer might have been.

(B) *Instructions to the Jury when Decision Whether to Ask Questions is Made:*

Ladies and gentlemen of the jury, I remind you of my earlier remarks regarding juror questions. Some questions cannot be asked in a court of law because of certain legal principles. For this reason there is the possibility that a question you have submitted has been deemed inappropriate by me and will not be asked. I alone have made this determination, and you should not be offended, or in any way prejudiced by my determination.

(C) In its discretion, the court may add additional instructions.

Comments

The note-taking provision derives from New Hampshire Superior Court Rule 64-A. The provision authorizing a court to allow the jurors to ask questions of witnesses derives from Superior Court Rule 64-B.

Rule 24. Trial Procedure

(a) *District Court*

(1) *Opening Statements.* Opening statements are not permitted in district court trials except with permission of the court for good cause shown. When opening statements are permitted, the prosecution shall make an opening statement prior to presenting evidence. At its option in such a case, the defense may open immediately thereafter or after the prosecution has concluded its case-in-chief and before presenting defense evidence. Opening statements shall not be argumentative, and except by prior leave of the court, shall be no longer than thirty minutes.

(2) *Order of Evidence.* The prosecution shall present evidence first in its case-in-chief. During the case-in-chief, the defense may introduce evidence through the prosecution's witnesses. After the prosecution has rested, the defense may present evidence.

(3) *Rebuttal Evidence.* Evidence that is strictly rebutting may be permitted at the discretion of the court upon good cause shown.

(4) *Attorneys Examining.* Only one attorney for each party is permitted to examine or cross-examine each witness.

(5) *Objections; Offers of Proof.* When objecting or responding to an objection, counsel shall state the basis for the objection or response. Upon request, the court shall permit counsel to present offers of proof in support of the objection or response. Only the attorney examining or cross-examining a witness may raise objections or respond to objections regarding that witness.

(6) *Re-Examining and Recalling Witnesses.* Redirect examination shall be limited to topics covered on cross-examination except for good cause shown. Prior to being dismissed, a witness is subject to recall by either party. After being dismissed, a witness may be recalled with the court's permission.

(7) *Testimony of Witnesses.* In all proceedings, the testimony of witnesses shall be given, by oath or affirmation, orally in open court, unless otherwise provided by law.

(8) *Closing Argument*

(A) Only one attorney shall argue for each party, except by leave of the court.

(B) After the close of evidence, the defense shall argue first and the prosecution shall argue last. In cases in which the defense of insanity has been raised and the case has been bifurcated for trial, the defense shall have the right to argue last on the issue of insanity.

(C) Before any attorney shall in closing argument read any excerpt of testimony prepared by the court reporter, the attorney shall furnish opposing counsel with a copy thereof prepared by the reporter.

(9) *Motions to Dismiss; Motions for Mistrial.* Motions to dismiss or for a mistrial shall be made on the record.

(10) *Reopening Evidence.* Prior to submission of the case to the court, a party may reopen evidence for good cause shown. After submission of the case, but before the return of a verdict, a party may reopen evidence after showing good cause, in the discretion of the court.

(b) *Superior Court*

(1) *Opening Statements.* Prior to presenting evidence, the prosecution shall make an opening statement. At its option, the defense may make an opening statement. The defense may open immediately thereafter or after the prosecution has concluded its case-in-chief and before presenting defense evidence. Opening statements shall not be argumentative, and except by prior leave of the court, shall be no longer than thirty minutes.

(2) *Order of Evidence.* The prosecution shall present evidence first in its case-in-chief. During the case-in-chief, the defense may introduce evidence through the prosecution's witnesses. After the prosecution has rested, the defense may present evidence.

(3) *Rebuttal Evidence.* Evidence that is strictly rebutting may be permitted at the discretion of the court upon good cause shown.

(4) *Attorneys Examining.* Only one attorney for each party is permitted to examine or cross-examine each witness.

(5) *Objections; Offers of Proof.* When objecting or responding to an objection before the jury, counsel shall state only the basis, without elaboration, for the objection or response. Upon request, the court shall permit counsel a reasonable opportunity, on the record and outside the hearing of the jury, to present additional grounds, argument, or offers of proof in support of the objection or response. Only the attorney examining or cross-examining a witness may raise objections or respond to objections regarding that witness.

(6) *Re-Examining and Recalling Witnesses.* Redirect examination shall be limited to topics covered on cross-examination except for good cause shown. Prior to being dismissed, a witness is subject to recall by either party. After being dismissed, a witness may be recalled with the court's permission.

(7) *Testimony of Witnesses.* In all proceedings, the testimony of witnesses shall be given, by oath or affirmation, orally in open court, unless otherwise provided by law.

(8) *Closing Argument*

(A) Each party shall be limited to one hour of argument unless otherwise ordered by the court in advance. Only one attorney shall argue for each party except by leave of the court.

(B) After the close of evidence, the defense shall argue first and the prosecution shall argue last. In cases in which the defense of insanity has been raised and the case has been bifurcated for trial, the defense shall have the right to argue last on the issue of insanity.

(C) Before any attorney shall in closing argument read to the jury any excerpt of testimony prepared by the court reporter, the attorney shall furnish opposing counsel with a copy thereof prepared by the reporter.

(9) *Jury Instructions*

(A) Prior to the selection of the jury, or at such other time during the trial as the court may reasonably permit, any party may request specific jury instructions.

(B) The court shall inform counsel of its intended jury instructions prior to counsel's closing arguments. All objections to the charge should be taken on the record before the jury retires. Opportunity shall be given to make objections outside of the hearing of the jury.

(10) *Motions to Dismiss; Motions for Mistrial.* Motions to dismiss or for mistrial shall be made on the record outside the hearing of the jury.

(11) *Reopening Evidence.* Prior to submission of the case to the fact-finder, a party may reopen evidence for good cause shown. After submission of the case, but before the return of a verdict, a party may reopen evidence after showing good cause, in the discretion of the court.

Comments

Rule 24(a) describes a trial procedure generally similar to that prescribed for superior court trials in 24(b). The rule, thus, draws upon the same sources as does the superior court version. In recognition of the distinct nature of district court trials, the rule omits any reference to a jury, and allows the court discretion as to whether to permit opening statements.

Rule 24(b) derives from current practice and from Superior Court Rules 65, 66, 67, 69, 70, and 71.

Rule 24(b)(1) explicitly recognizes that a defendant may open after the State's opening or may wait until the start of the defendant's case-in-chief.

Rule 24(b)(5) contemplates that counsel making an evidentiary objection will state only a basis for the objection unless requested to provide further argument by the court. The rule specifically provides that counsel should be afforded the opportunity to approach the bench when discussing evidentiary rulings. This rule, as does prior

Superior Court Rule 66, recognizes that jurors cannot be expected to decide cases on admissible evidence alone if they have heard offers of proof and arguments on objections to inadmissible evidence that the court ultimately excludes. *State v. Brown*, 128 N.H. 606, 616-7 (1986).

Rule 24(b)(6) recognizes that the trial judge has a great deal of discretion in determining whether or not to allow a party to recall a dismissed witness. *See, e.g., State v. Smart*, 136 N.H. 639 (1993).

Rule 24(b)(7) allows witnesses to affirm rather than swear in accordance with the provisions of RSA 516:20. *See generally State v. Sands*, 123 N.H. 570 (1983).

Rule 24(b)(8) is derived from Superior Court Rule 71 and reflects traditional practice. The New Hampshire Supreme Court has held that, while a court has discretion to alter the order of closing argument, a criminal defendant has no right to present the last closing argument, even if the defendant bears the burden of proof with respect to an affirmative defense where the State still has the burden of proof on other issues. *State v. Sundstrom*, 131 N.H. 203 (1988). However, the Court has indicated that a defendant does have the right to present the last closing argument in the insanity phase of a bifurcated trial. *State v. Blomquist*, 153 N.H. 216, 220 (2006).

Rule 24(b)(9) provides that a court has discretion to require the attorneys to file jury instruction requests in advance of the actual charge so that the trial court has an adequate opportunity to consider them. The rule requires the court to inform counsel of its actions on the request prior to charge so that counsel may fashion a closing argument accordingly.

Rule 24(b)(9) and (10) are designed to effectuate the New Hampshire Rules of Evidence by insuring that a jury is not influenced by inadmissible evidence or irrelevant argument. *See State v. Brown*, 126 N.H. 606, 616-617 (1986).

Rule 24(b)(11) reflects the principle stated by the Court in *State v. Thomas*, 133 N.H. 360, 363 (1990), which allows a party to re-open a case prior to submission of the jury on "good cause shown." When a motion to re-open is filed during jury deliberations, the court has discretion whether to permit re-opening.

Rule 25. Verdict

(a) *Non-Jury Cases*. The court shall return its verdict within a reasonable time after trial.

(b) *Jury Cases*. The verdict shall be unanimous and shall be returned by the jury in open court.

(c) *Poll of Jury*. When a verdict is returned and before it is recorded the jury may be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(d) *Bail*. After a verdict, either party may request a change in bail as provided by law.

(e) *Motion to Set Aside Verdict.* A motion to set aside a jury verdict shall be filed within ten days after its rendition, and a motion to set aside any other verdict or decree shall be filed within ten days from the date on the clerk's written notice with respect to same, which shall be mailed by the clerk on the date of the notice. In each case, the motion shall fully state all reasons and arguments relied on.

Comments

Rule 25(a) reflects present practice and permits a judge in a non-jury case to take a case under advisement and return a verdict at a later time. The rule does provide that verdicts be returned within a reasonable time.

Rule 25(c) leaves to the discretion of the court the decision whether to poll the jury. *See generally State v. Kenna*, 117 N.H. 305, 309 (1977).

Rule 25(e) derives from Superior Court Rule 73.

Rule 26. Presence of Counsel

After a case has been submitted to the jury and the jury has retired for deliberations, counsel shall not leave the courthouse without permission of the court. The court may permit counsel to leave the courthouse upon appropriate conditions. If counsel is absent from the courthouse without permission when a jury requests additional instructions, such absence shall constitute a waiver of the right to be present during instructions given in response to the request.

Comments

Rule 26 is derived from Superior Court Rule 114. The committee has deleted the words "with or" in the opening clause of the last sentence of Rule 114. As Rule 26 reflects, the committee believes that if counsel has left the courthouse with the court's permission, counsel has not waived the right to be present when an instruction is to be given in response to a jury's question. Counsel should only be deemed to have waived that right when counsel has left the courthouse without the court's permission.

Rule 27. Disability of Judge

If by reason of death or serious disability the judge before whom a jury trial has commenced is unable to proceed with the trial or postverdict duties, another judge may perform those duties. If a manifest necessity requires it, a new trial shall be ordered.

Comments

The New Hampshire Supreme Court has recognized that circumstances may arise that unavoidably preclude a trial judge from continuing to preside over an already-started trial. *State v. Donovan*, 120 N.H. 603, 605-606 (1980). The committee has taken

the view, embodied in the rule, that mid-trial substitutions of judges should take place only in unusual circumstances, when substitution is necessitated by the death or serious disability of the presiding judge. *Donovan* recognizes that a substitute judge may then preside “for the purpose of ruling on a variety of motions.” *Id.* The rule also acknowledges that, under some circumstances, the loss of a presiding judge will require the declaration of a mistrial or the grant of a new trial.

Rule 28. Communication with Jurors

(a) *During Trial.* Before and during trial, no attorney, party or witness shall personally or through any agent converse or otherwise communicate with any juror or any member of the venire from which the jury will be selected. However, when the judge must communicate with any juror or any member of the venire before the jury is excused, the communication shall be on the record.

(b) *Post Trial.* For thirty days after discharge of the jury venire on which a juror has served, no attorney or party shall personally or through an agent interview, examine or question any juror or family member with respect to the trial, verdict or deliberations. At no time, however, shall an attorney, party or any person acting for either of them ask questions of or make comments to a juror that are calculated to harass or embarrass the juror or to influence the juror’s actions in future jury service.

(c) *Protective Order.* Upon application of any person the court may issue appropriate protective orders and/or sanctions as justice may require.

Comments

Rule 28 derives from present Superior Court Rule 77-B. The rule is designed to ensure that jurors are protected from embarrassment and harassment. The rule does not affect any substantive rights of a defendant, since the testimony of a juror to impeach a verdict is generally inadmissible. *State v. Brown*, 132 N.H. 321 (1989).

VI. SENTENCING AND POST-SENTENCE PROCEDURES

Rule 29. Sentencing Procedures

(a) *General*

(1) Following a finding or verdict of guilty the court shall hold a sentencing hearing and impose sentence without unreasonable delay. Sentencing hearings in misdemeanor cases shall take place immediately following the finding or verdict of guilty unless the court orders otherwise. In felony cases, the sentencing hearing shall be scheduled for a later date, unless the court orders otherwise.

(2) At all sentencing hearings, the defendant has the right to counsel, to present witnesses and evidence, and to testify with regard to the sentence to be imposed. As provided in New Hampshire Rule of Evidence 1101(d)(3), the Rules of Evidence do not apply at the hearing.

(b) *Pre-Sentence Report*

(1) Upon a judgment of conviction or the filing of a notice of intent to plead to a felony, the court shall order the department of corrections to conduct a pre-sentence investigation unless both parties agree or the court indicates that a pre-sentence investigation report may be waived. Such waiver by both parties or the court shall be placed on the record. Upon judgment of conviction or the filing of a notice of intent to plead to a misdemeanor, the court may order the department of corrections to conduct a pre-sentence investigation pursuant to RSA 651:4.

(2) The contents of and any attachments to the pre-sentence report shall be confidential and shall not be disclosed to anyone except as required by statute or ordered by the court. Either party may refer to the contents, recommendations and attachments of the pre-sentence report in any sentence related hearing, except where the court has ordered otherwise on the motion of a party or *sua sponte*. The defendant and the state shall be provided a reasonable opportunity to review the contents of the pre-sentence report and any attachments before sentencing.

(c) *Sentencing Hearing*

(1) Both the defendant and the state will be afforded the opportunity to address the court, call witnesses, and present evidence relevant to sentencing. The court shall review the pre-sentence report and afford the defendant and state a reasonable opportunity to challenge, rebut or correct factual material contained within the report which might bear on the sentence.

(2) The victim or next of kin of the victim shall be afforded the opportunity, where provided by law, to address the court prior to the imposition of sentence. No person who gives a victim impact statement shall be subject to questioning by counsel. The prosecutor shall be responsible for informing the victim or next of kin of the right to so address the court.

(d) *Extended Term*. Prior to imposition of an extended term of imprisonment, the court shall hold a hearing to determine if the jury or the court has made the necessary factual findings.

(e) *Monetary Assessments*

(1) If, at the time of sentencing, the defendant asserts a present inability to pay fines, restitution or penalty assessments imposed, the court shall hold a hearing inquiring into the defendant's finances. A defendant shall not be incarcerated if the failure to pay is a result of a present inability to pay.

(2) Upon finding of present inability to pay the monies due, either in whole or in part, the court shall establish a reasonable payment schedule. The court may, in its discretion and if allowable by law, suspend all or part of fines, restitution or penalty assessments.

(3) If payment is not made as required, the defendant shall appear on a date set by the court and show cause why incarceration in lieu of payment should not be ordered. If a defendant fails to appear after proper notice, the court may issue a *capias* for the arrest of the defendant.

(f) *Probation.* The terms and conditions of probation, unless otherwise prescribed, shall be as follows: The probationer shall:

(1) Report to the probation or parole officer at such times and places as directed, comply with the probation or parole officer's instructions, and respond truthfully to all inquiries from the probation or parole officer;

(2) Comply with all orders of the court, board of parole or probation or parole/probation officer, including any order for the payment of money;

(3) Obtain the probation or parole officer's permission before changing residence or employment or traveling out of State;

(4) Notify the probation or parole officer immediately of any arrest, summons or questioning by a law enforcement officer;

(5) Diligently seek and maintain lawful employment, notify probationer's employer of probationer's legal status, and support dependents to the best of probationer's ability;

(6) Not receive, possess, control or transport any weapon, explosive or firearm, or simulated weapon, explosive, or firearm;

(7) Be of good conduct, obey all laws, and be arrest-free;

(8) Submit to reasonable searches of probationer's person, property and possessions as requested by the probation or parole officer and permit the probation or parole officer to visit probationer's residence at reasonable times for the purpose of examination and inspection in the enforcement of the conditions of probation or parole;

(A) Not associate with any person having a criminal record or with other individuals as directed by the probation or parole officer unless specifically authorized to do so by the probation or parole officer;

(B) Not indulge in the illegal use, sale, possession, distribution, or transportation, or be in the presence, of controlled drugs, or use alcoholic beverages to excess;

(C) Agree to waive extradition to New Hampshire from any state in the United States or any other place and agree to return to New Hampshire if directed by the probation or parole officer; and

(D) Comply with such of the following, or any other, special conditions as may be imposed by the court, the parole board or the parole/probation officer:

(i) Participate regularly in Alcoholics Anonymous to the satisfaction of the probation or parole officer;

(ii) Secure written permission from the probation or parole officer prior to purchasing and/or operating a motor vehicle;

(iii) Participate in and satisfactorily complete a specific designated program;

(iv) Enroll and participate in mental health counseling on a regular basis to the satisfaction of the probation or parole officer;

(v) Not be in the unsupervised company of minors of one or the other sex at any time;

(vi) Not leave the county without permission of the probation or parole officer;

(vii) Refrain totally from the use of alcoholic beverages;

(viii) Submit to breath, blood or urine testing for abuse substances at the direction of the probation or parole officer; and

(ix) Comply with designated house arrest provisions.

(g) *Conditional Discharge.* The terms of conditional discharge under RSA 651:2, VI, unless otherwise prescribed, shall be the same as Rule 29(f). Other terms or conditions may be imposed by the court and shall be presumed to be in addition to the foregoing.

(h) *Subdivision of Suspended Sentences.* Whenever a sentence, or any part thereof, is suspended, the court may thereafter subdivide said suspended sentence into two or more parts, and the defendant may be required to serve any part thereof, with the balance remaining suspended, until further order of the court, and the defendant may be required to serve the sentence in installments or by intermittent incarceration.

(i) *Correction of Sentence.* The court has the discretion to correct an illegal or illegally imposed sentence as provided by law.

(j) *Reduction, Suspension or Amendment of Sentence.* A party may seek reduction, suspension or amendment to a sentence as provided by law. Whenever any petition to suspend, amend, reduce or otherwise change the custody status of any person incarcerated in New Hampshire state prison is filed with the court, a copy thereof shall be forwarded by counsel for the defendant to the prosecutor and the warden of the state prison. In the event that the defendant files such petition *pro se*, the clerk shall forward a copy thereof to the prosecutor and the warden of the state prison. The prosecutor and the warden of the state prison shall have a period of thirty days in which to file a response thereto with copies thereof furnished to petitioner, or petitioner's counsel, if represented. This rule does not apply to petitions for habeas corpus. The victim of the crime or next of kin shall have an opportunity to address the court prior to the court reaching its decision where provided by law. The prosecutor shall be responsible for informing the victim or next of kin of the right to so address the court.

(k) *Sentence Review*

(1) In any prosecution where a defendant is sentenced to a term of one year or more in the state prison, whether or not it is suspended, deferred or otherwise modified, except in any case in which a different sentence could not have been imposed, the clerk of court shall give oral and written notice to the state and the person sentenced of their right to apply for a review of the sentence before the sentence review board. This notice shall include a statement that review of the sentence may result in the affirmation of the sentence or a decrease or increase of the

minimum or maximum term within the limits fixed by law. An application form shall accompany the notice. Defendant's trial counsel shall protect the defendant's interest in this respect. Defense counsel shall further ensure that the defendant understands that sentence review may result in an increase, decrease or affirmation of the sentence. All completed applications filed with the court shall be forwarded forthwith by the court to the review division. The review division shall provide notice of application to the defendant, defendant's attorney of record, state's attorney of record, the chief justice of the superior court and sentencing judge. The sentencing judge may transmit a statement of reason(s) to the review division. The sentencing judge shall submit such a statement if requested to do so by the review division within seven days of such a request.

(2) The defendant or state shall file an application for sentence review within thirty days of the date of sentencing and not thereafter but for good cause shown. The filing of an application shall not stay execution of the sentence.

(3) Upon acceptance of an application for sentence review, the sentence review board shall schedule a hearing with notice to the defendant and the state. The defendant has the right to appear and be represented by counsel at a hearing held by the sentence review board. After hearing, the board may increase, decrease, otherwise modify or affirm the sentence. The sentence review board will issue a written decision with reason(s) for any change in sentence stated within the decision. The decision of the sentence review board shall be a final order on sentencing.

Comments

Rule 29 has been edited to comport with current practice, Superior Court Rules, the New Hampshire Rules of Evidence and state statutes.

Rule 29(a) notes that the New Hampshire Rules of Evidence are not applicable at 57 sentencing hearings. N.H. Rule of Evidence 1101(d) 3.

Rule 29(b) allows a waiver of the pre-sentence report and the review of the report by the defendant and state prior to sentencing consistent with RSA 651:4 and Superior Court Rule 112. The rule does not include the current practice of the court of proceeding to sentencing without the benefit of a pre-sentence report after the defendant and/or state has requested that one be completed.

Rule 29(b)(2) makes the pre-sentence report confidential as it was under Superior Court Rule 112. The intent of the rule is to allow the parties to make use of the presentence report as needed in sentencing related matters while preventing access to or use of the report in other proceedings. For example, use of the pre-sentence report in civil proceedings involving the defendant or crime victim is not permitted under this rule except as permitted by statute. *See, e.g.,* RSA 135-E.

Rule 29(c) notes that the victim/next of kin of certain crimes has the right by law to address the sentencing judge and the judge may consider such statements prior to the imposition of sentence. Section (c) also reflects present practice and current statutory law.

Extended term may be imposed upon a defendant if notice is lawfully provided and the court or jury finds that the prerequisites have been met. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Rule 29(d) reflects the developments in this area of the law. Rule 29(d) provides that in every case in which a prosecutor may seek the imposition of an extended term of imprisonment pursuant to RSA 651:6, the prosecutor must give notice to the defendant prior to the commencement of the trial. In any case in which there exists the possibility that the court may *sua sponte* impose an extended term, notice must be given by the trial judge prior to the commencement of the trial. *State v. Toto*, 123 N.H. 619 (1983). Regarding required notice of extended term, *see* Rule 14.

Rule 29(e) does not address the issue of attorney fees and obligations to the Office of Cost Containment. This section permits the suspension of the payment of certain obligations where allowed by law in consideration of minimum mandatory fines prescribed by statute.

Rule 29(i) indicates that an illegal or illegally imposed sentence may be corrected as provided by law to cover the possibility that the discovery of the illegal order may be immediate or many years later. *See State v. Stern*, 150 N.H. 705, 713 (2005) which identifies the due process limitations on correction of a sentence. The court has inherent authority to correct an error inadvertently made in its record of sentence. *Doyle v. O'Dowd*, 85 N.H. 402 (1932). Even if a defendant wanted to agree to the imposition of a particular illegal sentence, it is still illegitimate, as a "defendant cannot by agreement confer on the court the authority to impose an illegal sentence." *State v. Burgess*, 141 N.H. 51, 54 (1996) citing to *Williams v. State*, 500 So. 2d 501, 503 (Fla. 1986). *See also* Federal Rules of Criminal Procedure, Rule 35(a) which limits the correction of erroneous sentences resulting from arithmetical, technical, or other clear error to seven (7) days after sentencing and New Hampshire Supreme Court Rule 16-A which allows the court to consider errors not brought to the attention of the trial court. Supreme Court Rule 16-A is for use in "circumstances in which a miscarriage of justice would otherwise result." *State v. McInnes*, 151 N.H. 732, 736-37 (2005).

Rule 29(j) is a reference to RSA 651:20 and the jurisprudence interpreting that statute. Rule 29(j) further notes that certain victims have the right to input at a hearing to consider the reduction, suspension or amendment of a sentence as provided in RSA 651:4-a and RSA 21-M:8-k.

Rule 29(k) is generally an embodiment of RSA 651:57-61 and the Rules of the Sentence Review Division as adopted by the Superior Court and amended in 1985. This section clarifies that the state has the authority to apply for review and that application for review does not stay a sentence. The committee has not attempted to resolve certain dilemmas in current law. For example, Sentence Review Division Rule 17 provides that "No sentence may be increased, however, without the personal appearance by the defendant and his attorney." Since the state has the discretion to appeal a sentence to the review division, a defendant could preempt board decision to increase sentence by failing to attend the hearing.

Even though RSA 651:59 states that the sentence review division has the "jurisdiction to consider an appeal with or without a hearing," Rule 29(k)(3) affords a

right to a hearing in conformance with Sentence Review Division Rule 17 and current practice.

The rule does not include provisions to explain that the sentence review board will not consider an appeal of a negotiated sentence but will review a “capped plea sentence” and will not be bound by the terms of the “capped plea.” Although those principles are part of current practice, no current rule or statute addresses these issues.

Rule 30. Probation Revocation

(a) *Arraignment.* Arraignment on a violation shall be scheduled within ten days of the filing of the violation with the court. If the probationer is incarcerated as a result of arrest for violating the terms of probation, a preliminary hearing shall be held within seventy-two hours of the time of arrest, excluding weekends and holidays. Unless prohibited by statute, a person charged with a probation violation shall be entitled to bail.

(b) *Hearing.* A final, public, violation hearing before a judge shall be held without unreasonable delay. The probationer shall be afforded:

(1) Prior written notice of the conduct which triggers the filing of the violation;

(2) Prior disclosure to the probationer of the evidence which will be offered to prove the violation and all related exculpatory evidence;

(3) Prior notice of the right to representation by counsel, to be appointed by the court if the probationer is indigent;

(4) The opportunity to be heard in person and to present witnesses and evidence;

(5) The right to see, hear and question all witnesses;

(6) The right to compulsory process; and

(7) If a finding of chargeable is entered, a statement on the record by the court indicating in substance the evidence relied upon in reaching its determination.

(c) *Burden of Proof.* The burden of proof by preponderance of the evidence with respect to all elements of the charge shall be upon the state.

(d) *Hearing on Plea of Chargeable.* Before a plea of chargeable is accepted, the court must ensure the defendant understands that if the

court accepts the plea of chargeable, a finding of chargeable will be entered against the defendant and by pleading chargeable the defendant is giving up the following:

- (1) The right to a speedy and public hearing before a judge;
- (2) The right to see, hear and question all witnesses;
- (3) The right to present evidence and call witnesses;
- (4) The right to testify at the contested probation violation hearing;
- (5) The right to remain silent;
- (6) The right to compulsory process;
- (7) The right to have legal representation at the contested probation violation hearing and the appointment of counsel if deemed eligible;
- (8) The right to not be convicted except by proof of all elements of the charge by preponderance of the evidence; and
- (9) The right to appeal.

(e) *Sentencing*. At all sentencing hearings on probation violations, the defendant has the right to counsel, to present witnesses and evidence, and to testify with regard to the sentence to be imposed. Where appropriate notice was given, the court may impose any sentence that could have been imposed by the original sentencing judge for the crime which is the subject of the probation term. If the plea is negotiated, the defendant shall have the right to withdraw the plea of chargeable and go to hearing if the court intends to exceed the sentence agreed to by the parties.

Comments

Rule 30 tracks the due process rights established in *Stapleford v. Perrin*, 122 N.H. 1083 (1982) and its progeny. Once an individual is placed on probation, it may not be revoked without due process of law. *State v. Field*, 132 N.H. 760 (1990). The New Hampshire Rules of Evidence do not apply at such hearings. N.H. Rule of Evidence 1101(d)(3). The exclusionary rule may not apply at probation revocation hearings. *State v. Field*, *supra*. The rule is consistent with Superior Court Rules 98 and 99 as well as *Brady v. Maryland*, 373 U.S. 83 (1963), *State v. Lucius*, 140 N.H. 60 (1978), and *State v. Laurie*, 139 N.H. 325 (1995).

In current practice, the term “chargeable” is synonymous with an admission to the violation of probation.

Probation may not be revoked for failure to pay a fine or make restitution absent evidence and findings that the defendant was somehow responsible for the failure. *Bearden v. Georgia*, 461 U.S. 660 (1983); *State v. Fowlie*, 138 N.H. 234 (1994).

Rule 30(a) generally reflects current practice and statutory changes in the bail statute (RSA 597). The committee could not find any case law or statutory reference indicating that a probationer is entitled to legal representation; however, the provision was included as it is current practice. *See State v. Matey*, 153 N.H. 263 (2006).

Rule 30(d) reflects the current practice of the court which allows for the filing of an agreement stating the terms of the negotiated disposition and generally referencing the due process rights afforded a probationer under *Stapleford*. The rule allows for the imposition of the maximum allowable sentence for the underlying offense at a probation violation hearing if the defendant received notice of this possibility at the defendant's sentencing on the underlying offense as provided by *State v. White*, 131 N.H. 555 (1989).

The committee also reflected on the fact that current practice does not require probationers to adhere to any notification rule or burden of proof on affirmative defenses.

Rule 31. Annulments

(a) *General.* As provided by law, a defendant who has been convicted of a crime capable of being annulled may apply to the court in which the defendant was convicted to annul the conviction. The same procedure may be followed to annul a record of arrest when a charge has been *not proessed*, dismissed, the defendant was not prosecuted or has been found not guilty. It is within the discretion of the court to grant a petition for annulment. Notwithstanding the annulment of a conviction or arrest, records of annulled offenses may be utilized in accordance with the law.

(b) *Application.* The application shall identify: the defendant; the offense charged; the sentence imposed; and the docket number of the case. The defendant shall also assert a justification as to why the relief sought should be granted. The application shall be signed and sworn to by the defendant. A filing fee shall be assessed which may be waived by the court when, upon review of an executed affidavit of assets and liabilities, the court determines that the applicant is indigent or has been found not guilty, or the case was dismissed or not prosecuted.

(c) *Notice.* The clerk shall issue an order of notice directed to the appropriate parties who shall respond in accordance with the statutory provisions.

(d) *Hearing.* The defendant and the state may agree to waive a hearing on the petition, subject to approval by the court. Otherwise, a hearing shall be held at which the defendant must appear. At the hearing, the

defendant and the state shall be permitted to address the court regarding the petition. Any petition for annulment which does not meet the requirements as set forth by statute shall be dismissed without a hearing but without prejudice to the defendant's right to re-apply as permitted by law.

Comments

Rule 31 is derived from RSA 651:5, Superior Court Rule 108 and District Court Rule 2.18 which govern applications for annulment. The rule is consistent with current New Hampshire law and practice.

The rule contemplates that the clerk of the court issue an order of notice directed to the appropriate parties who respond in accordance with the statutory provisions. The notice is not served by the petitioning party, but sent directly to the appropriate state officer by the court.

VII. APPEALS

Rule 32. Bail Pending Appeal

(a) *Bail Permitted.* When there is an appeal after a conviction in either district court or superior court, or when either party appeals prior to or during trial, the trial court may authorize the defendant's release on bail pending the appeal as provided by statute.

(b) *Bail Denied.* In any case where release is denied pending appeal, the presiding judge shall provide for the record the reasons for such denial.

Comments

Rule 32 simply provides that bail pending appeal may be granted when a person is statutorily eligible to obtain bail. The rule requires, as does the present bail statute, that a presiding judge denying bail provide for the record the reasons for such denial. This requirement aids a reviewing court in the event that either the defendant or the state appeals a bail order. *State v. Blum*, 132 N.H. 396 (1989). See RSA 597:1-a.

Rule 33. Transcripts.

In any appeal, the appealing party shall make transcript requests in accordance with New Hampshire Supreme Court Rule 15 and all other applicable rules of the Supreme Court.

Rule 34. Deadline for Criminal Appeals

The time for filing a notice of appeal shall be within thirty days from the date of sentencing or the date of the clerk's written notice of disposition of post-trial motions, whichever is later, provided, however,

that the date of the clerk's written notice of disposition of post-trial motion shall not be used to calculate the time for filing a notice of appeal in criminal cases if the post-trial motion was filed more than ten days after sentencing.

Comments

This rule is based on the second paragraph of New Hampshire Supreme Court Rule 7(1)(C).

VIII. RULES APPLICABLE IN ALL CRIMINAL PROCEEDINGS

Rule 35. Filings with the Court

(a) All pleadings and forms filed shall be upon 8 1/2 x 11 inch paper and shall be either typewritten or hand-printed and double-spaced so that they are clearly legible. No pleading, motion, objection, or the like, which is contained in a letter, will be accepted by the clerk, or acted on by the court.

(b) A party filing a pleading shall certify that a copy of the pleading and all attachments was mailed first class or delivered to all opposing counsel and any *guardian ad litem*. This rule shall not apply to *ex parte* pleadings and shall not require a party to provide duplicate copies of documents already in another party's possession.

(c) A no contact order in a domestic violence, stalking, or similar matter shall not prevent either party from filing appearances, motions, and other appropriate pleadings. At the request of the party filing the pleading, the court shall forward a copy of the pleading to the party or counsel specified in the request. Furthermore, the no contact provisions shall not be deemed to prevent contact between counsel when both parties are represented.

(d) For the purpose of compliance with any time deadlines or statutes of limitation, the terms "filing" and "entry" shall have the same meaning and shall be used interchangeably. Whenever any document is received by the court and time-stamped as received, or the receipt is entered on the court's database, the earlier of the two shall be accepted as the filing date.

(e) In computing any period of time prescribed or allowed by these rules, by order of court, or by applicable law, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the

period shall extend until the end of the next day that is not a Saturday, Sunday, or a legal holiday as specified in RSA 288.

(f) All pleadings and the appearance and withdrawal of counsel shall be signed by the attorney of record or the attorney's associate or by a *pro se* party. Names, addresses and telephone numbers shall be typed or stamped beneath all signatures or papers to be filed or served. No attorney or *pro se* party will be heard until an appearance is so entered.

(g) By signing a pleading, an attorney certifies that the attorney has read the pleading, that to the best of the attorney's knowledge, information and belief there is a good ground to support it, and that it is not interposed for delay.

Comments

Rule 35(a) is based on Superior Court Rule 4. Rule 35(b) is based on Superior Court Rule 21. Rule 35(c) is based on Superior Court Rule 21. Rule 35(d) is based on Superior Court Rule 3. Rule 35(e) is based on Superior Court Rule 21. Rule 35(g) is based on Superior Court Rule 15.

Rule 36. Conduct of Attorneys

(a) Lawyers shall stand when addressing the court or examining a witness. The rule may be waived if the lawyer is physically unable to stand or for other good cause.

(b) An attorney may not participate in a trial in which the attorney has testified unless permitted by the Rules of Professional Conduct.

(c) No lawyer shall be compelled to testify in any case in which the lawyer represents a party unless the lawyer has been notified in writing at least thirty days in advance of trial in superior court and at least five days in advance of trial in district court. The attorney shall be provided an opportunity to be heard prior to the start of trial.

Comments

Rule 36 is consistent with existing New Hampshire practice and with Superior Court Rules 16, 17 and 18 and District Court Rule 1.3.

The issuance of a subpoena to an attorney of record is a matter also addressed by the Rules of Professional Conduct. *New Hampshire Rule of Professional Conduct* 4.5; *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984).

The committee recognized that physical disability may prevent or make difficult the requirement to stand during proceedings before the court.

Rule 37. Suspension of Rules; Violations of the Rules of Court

(a) When allowed by law and as justice may require, the court may waive the application of any rule.

(b) Upon the violation of any rule of court, the court may take such action as justice may require. Such action may include, without limitation, the imposition of monetary sanctions against either counsel or a party, which may include fines to be paid to the court, and reasonable attorney's fees and costs to be paid to the opposing party.

(c) The Court may assess reasonable costs, including reasonable counsel fees, against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion.

Comments

Rule 37 is consistent with existing New Hampshire law and makes explicit the discretionary authority of the presiding justice to waive an applicable rule when justice so requires. *See State v. Dukette*, 145 N.H. 226, 229 (2000); *Exeter Hospital v. Hall*, 137 N.H. 397, 399-400 (1993).

The rule also adopts the provisions of District Court Rule 1.2 and Superior Court Rule 59 in holding that the court may impose sanctions for a violation of a rule or the frivolous or unreasonable conduct by a party to an action.

Rule 38. Plain Error

Plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Comments

This rule is based on Supreme Court Rule 16-A and Superior Court Rule 102-A.

Rule 39. Assignment to Specific Judges

(a) District Court

(1) *Special Assignments.* The chief judge of the district court or a presiding judge in a court may specially assign a case to a specific judge.

(2) *Motion for Special Assignment.* If an attorney of record seeks a special assignment to a judge, a motion for special assignment shall be filed. The motion shall set forth the grounds justifying the request and shall state whether or not counsel of record join in or object to the motion. Thereafter, the chief judge or the presiding judge shall rule on the motion.

(b) *Superior Court*

(1) *Murder Cases.* Upon the return of an indictment alleging murder or, on information alleging a murder with a waiver of indictment filed with the clerk of the superior court, the chief justice thereof shall assign the case to a specific judge.

(2) *Complex Cases.* Those cases which are of a complex nature, or are potentially of prolonged duration, may be assigned to a specific judge by the chief justice of the superior court *sua sponte*, or upon a motion for special assignment filed by any party. A party seeking special assignment shall file a motion setting forth the grounds justifying the request and shall state whether or not counsel of record join in or object to the motion. Thereafter, the chief justice shall rule on the motion.

(3) *Assigned Docketing.* In the event that the case is brought in a superior court which uses a system of assigned docketing, the clerk shall assign the case to a particular judge.

Comments

Rule 39 reflects the present practice in the superior and district court even though there are no statutes, rules or case law authorizing such established methods with the exception of the recusal policy. See Sup. Ct. Rule 38. Requests for special assignments of district court judges are not common. Recusal of a district court judge, however, may justify special assignment. The rule is also available in particularly complex district court cases.

Rule 39(b) relating to the superior court provides that a murder case must be assigned to a specific judge and that complex cases may be assigned to a specific judge by the chief justice of the superior court *sua sponte* or upon motion for special assignment filed by an attorney of record.

The rule does not contemplate allowing parties to request a particular judge by name.

Rule 40. Recusal

All grounds for recusal that are known or should reasonably be known prior to trial or hearing shall be incorporated in a written motion for recusal and filed promptly with the court. Grounds for recusal that first become apparent at the time of or during the hearing shall be immediately brought to the attention of the judge. Failure to raise a ground for recusal shall constitute a waiver as specified herein of the right to request recusal on such ground. If a record of the proceedings is not available, the trial judge shall make a record of the request, the court's findings, and its order.

Comments

This rule is based on District Court Rule 1.8-A(H) and Superior Court Rule 50-A.

Rule 41. Immunity

(a) Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide information in a proceeding before, or ancillary to a district or superior court or a grand jury, a prosecutor may, with the prior written approval of the attorney general or county attorney for the jurisdiction where offenses are alleged to have occurred, request an order from the court requiring such individual to give testimony or provide other information which the individual refuses to give or provide on the basis of the privilege against self-incrimination, when in the judgment of the attorney general or county attorney:

(1) The testimony or other information from such individual may be necessary to the public interest.

(2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

(b) Whenever the court communicates on the record to the witness an order issued under paragraph (a), the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. No testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case or forfeiture. However, the witness may be prosecuted or subject to penalty or forfeiture for any perjury, false swearing, or contempt committed in answering or failing to answer, or in producing or failing to produce evidence in accordance with the order.

(c) The defense may request the court to confer immunity to a witness. The court shall grant immunity if required by state or federal constitutional law. Such an order shall be enforceable as provided in part (b).

Comments

Rule 41 is based on RSA 516:34, which allows a prosecutor to request an order of immunity. See *Kastigar v. United States*, 406 U.S. 441 (1972); *State v. Roy*, 140 NH 478 (1995); *State v. Winn*, 141 NH 812 (1997); *State v. Monsalve*, 133 NH 268 (1990); *State v. Kivlin*, 145 NH 718 (2001).

The Rule contemplates that an invocation of privilege should take place outside the presence of the jury. New Hampshire Rule of Evidence 512(b). A party may not call a witness simply to have the witness take the Fifth Amendment in front of a jury, because a jury is not entitled to draw any inference from the invocation of the privilege and the defendant's right to cross-examine will be violated. *State v. Breest*, 115 N.H. 504 (1975); *Abbott v. Potter*, 125 N.H. 257 (1984). The Rule is consistent with New Hampshire Rule of Evidence 512(b). *State v. Richards*, 129 N.H. 669 (1987) details the procedures trial courts should follow.

Regarding defense requests for immunity, see *State v. Kivlin*, 145 N.H. 718, 721 (2001). See also Right of criminal defendant to have immunity granted to a defense witness, 4 ALR 4th 617.

Rule 42. Non-Members of the New Hampshire Bar

(a) *Non-attorneys*. New Hampshire certified police officers who are not members of the New Hampshire Bar may prosecute misdemeanors and violation offenses on behalf of the state in the district court.

(b) *Pro Hac Vice*

(1) An attorney, who is not a member of the Bar of this State, shall not be allowed to engage in the trial or hearing in any case, except on application to appear *pro hac vice*, which will not ordinarily be granted unless a member of the Bar of this State is associated with the non-member attorney and the member attorney is present at the trial or hearing.

(2) An attorney who is not a member of the Bar of this State seeking to appear *pro hac vice* shall file a verified application with the court, which shall contain the following information:

(A) The applicant's residence and business address;

(B) The name, address and phone number of each client sought to be represented;

(C) The courts before which the applicant has been admitted to practice and the respective period(s) of admission;

(D) Whether the applicant:

(i) Has been denied admission *pro hac vice* in this state;

(ii) Had admission *pro hac vice* revoked in this state; or

(iii) Has otherwise formally been disciplined or sanctioned by any court in this state.

If so, the applicant shall specify the nature of the allegations; the name of the authority bringing such proceedings; the caption of the proceedings, the date filed, and what findings were made and what action was taken in connection with those proceedings;

(E) Whether any formal, written disciplinary proceeding has ever been brought against the applicant by any disciplinary authority in any other jurisdiction within the last five years and, as to each such proceeding: the nature of the allegations; the name of the person or authority bringing such proceedings; the date the proceedings were initiated and finally concluded; the style of the proceedings; and the findings made and actions taken in connection with those proceedings;

(F) Whether the applicant has been formally held in contempt or otherwise sanctioned by any court in a written order in the last five years for disobedience to its rules or orders, and, if so: the nature of the allegations; the name of the court before which such proceedings were conducted; the date of the contempt order or sanction, the caption of the proceedings, and the substance of the court's rulings (a copy of the written order or transcript of the oral rulings shall be attached to the application); and

(G) The name and address of each court or agency and a full identification of each proceeding in which the applicant has filed an application to appear *pro hac vice* in this state within the preceding two years; the date of each application; and the outcome of the application.

(H) In addition, unless this requirement is waived by the superior court, the verified application shall contain the name, address, telephone number and bar number of an active member in good standing of the Bar of this State who will be associated with the applicant and present at any trial or hearing.

(3) The court has discretion as to whether to grant applications for admission *pro hac vice*. An application ordinarily should be granted unless the court finds reason to believe that such admission:

(A) May be detrimental to the prompt, fair and efficient administration of justice;

(B) May be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent;

(C) One or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk; or

(D) The applicant has engaged in such frequent appearances as to constitute common practice in this state.

Comments

Rule 42(a) is founded on common law. See *State v. Urban*, 98 N.H. 346, 348-49 (1953); *State v. LaPalme*, 104 N.H. 97 (1962); *State v. Aberizk*, 115 N.H. 535 (1975); *State v. Whippie*, 115 N.H. 608 (1975); *Bilodeau v. Antal*, 123 N.H. 39, 45 (1983). Rule 42(b) derives from Superior Ct. Rule 19 and District Court Rule 1.3.

Rule 43. Motions for Reconsideration

(a) A motion for reconsideration or other post-decision relief shall be filed within ten days of the date on the clerk's written notice of the order or decision, which shall be mailed by the clerk on the date of the notice. The motion shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present; but the motion shall not exceed ten pages. A hearing on the motion shall not be permitted except by order of the court.

(b) No answer to a motion for reconsideration or other post-decision relief shall be required unless ordered by the court, but any answer or objection must be filed within ten days of notification of the motion.

(c) If a motion for reconsideration or other post-decision relief is granted, the court may revise its order or take other appropriate action without rehearing or may schedule a further hearing.

(d) The filing of a motion for reconsideration or other post-decision relief shall not stay any order of the court unless, upon specific written request, the court has ordered such a stay.

Comments

This rule is based on Superior Court Rule 59-A.

Rule 44. Special Procedures in Superior Court Regarding Sex Related Offenses Against Children

(a) In any superior court case alleging a sex-related offense in which a minor child was a victim, the court shall allow the use of anatomically correct drawings and/or anatomically correct dolls as demonstrative

evidence to assist the alleged victim or minor witness in testifying, unless otherwise ordered by the court for good cause shown.

(b) In the event that the alleged victim or minor witness is nervous, afraid, timid, or otherwise reluctant to testify, the court may allow the use of leading questions during the initial testimony but shall not allow the use of such questions relating to any essential element of the criminal offense.

(c) The clerk shall schedule a pretrial conference, to be held within forty-five days of the filing of an indictment, for the purpose of establishing a discovery schedule and trial date. At such conference, the court shall consider the advisability and need for the appointment of a *guardian ad litem* to represent the interests of the alleged victim.

(d) In the event that a *guardian ad litem* is appointed to represent the interests of a minor victim or witness, the role and scope of services of the *guardian ad litem* shall be explicitly outlined by the trial judge prior to trial.

(e) The *guardian ad litem* appointed under this rule shall be compensated at the same hourly rate and shall be subject to the same case maximums as set forth for defense counsel in misdemeanor cases under the provisions of Supreme Court Rule 47. The *guardian ad litem* shall also be reimbursed for the guardian's investigative and related expenses, as allowed under Rule 47, upon a finding of necessity and reasonableness by a justice of the appropriate court, made prior to the said expenses being incurred.

Comments

This rule is based on Superior Court Rule 93-A.

Rule 45. Criminal Contempt

(a) *Summary Disposition.* A direct criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the presence of the judge. Oral notice of the conduct observed must be given by the judge. The contemnor must be given an opportunity to speak and present a defense. The order of contempt shall recite the adjudication and sentence and shall be signed by the judge and entered of record. The disposition, when imposed, shall also be entered on a separately numbered State v. (The Contemnor) file.

(b) *Disposition Upon Notice and Hearing.* An indirect criminal contempt shall be prosecuted with notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged. The notice shall be given orally by the justice in open court in the presence of the defendant or, on application of an attorney for the state or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided by statute. In a proceeding under this rule, if the contempt charged involves disrespect to or criticism of a justice, that justice is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment.

Comments

This rule is based on Superior Court Rule 95.

Rule 46. Photographing, Recording and Broadcasting

(a) *General Principles.* The presiding judge should permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public. The presiding judge may limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequence. Except as specifically provided in this rule, or by order of the presiding judge, no person shall within the courtroom take any photograph, make any recording, or make any broadcast by radio, television or other means in the course of any proceeding.

(b) *Court Reporters and Authorized Recorders.* Official court reporters and authorized recorders are not prohibited by section (a) of this rule from making voice recordings for the sole purpose of discharging their official duties.

(c) *Proposed Limitations on Coverage by the Electronic Media.* Any party to a court proceeding – or any other interested person – shall notify the court at the inception of a matter, or as soon as practicable, if that person intends to ask the court to limit electronic media coverage of any proceeding that is open to the public. Failure to notify the court in a timely fashion may be sufficient grounds for the denial of such a request. In the event of such a request, the presiding judge shall either deny the request or issue an order notifying the parties to the proceeding and all other interested persons that such a limitation has been requested, establish deadlines for the filing of written objections by parties and interested persons, and order an evidentiary hearing during which all interested persons will be heard. The same procedure for notice and

hearing shall be utilized in the event that the presiding judge *sua sponte* proposes a limitation on coverage by the electronic media. A copy of the court's order shall, in addition to being incorporated in the case docket, be sent to the Associated Press, which will disseminate the court's order to its members and inform them of upcoming deadlines/hearing.

(d) *Advance Notice of Requests for Coverage.* Any requests to bring cameras, broadcasting equipment and recording devices into a New Hampshire courtroom for coverage of any court proceedings shall be made as far in advance as practicable. If no objection to the requested electronic coverage is received by the court, coverage shall be permitted in compliance with this rule. If an objection is made, the media will be so advised and the court will conduct an evidentiary hearing during which all interested parties will be heard to determine whether, and to what extent, coverage by the electronic media or still photography will be limited. This rule and procedures also apply to all court proceedings conducted outside the courtroom or the court facility.

(e) *Pool Coverage.* The presiding judge retains discretion to limit the number of still cameras and the amount of video equipment in the courtroom at one time and may require the media to arrange for pool coverage. The court will allow reasonable time prior to a proceeding for the media to set up pool coverage for television, radio and still photographers providing broadcast quality sound and video.

(1) It is the responsibility of the news media to contact the clerk of court in advance of a proceeding to determine if pool coverage will be required. If the presiding judge has determined that pool coverage will be required, it is the sole responsibility of the media, with assistance as needed from the court clerk, to determine which news outlet will serve as the "pool." Disputes about pool coverage will not ordinarily be resolved by the court. Access may be curtailed if pool agreements cannot be reached.

(2) In the event of multiple requests for media coverage, because scheduling renders a pool agreement impractical, the court clerk retains the discretion to rotate media representatives into and out of the courtroom.

(f) *Live Feed.* Except for good cause shown, requests for live coverage should be made at least five days in advance of a proceeding.

(g) *Exhibits.* For purposes of this rule, access to exhibits will be at the discretion of the presiding judge. The court retains the discretion to

make one “media” copy of each exhibit available in the court clerk’s office.

(h) *Equipment.* Exact locations for all video and still cameras and audio equipment within the courtroom will be determined by the presiding judge. Movement in the courtroom is prohibited, unless specifically approved by the presiding judge.

(1) Placement of microphones in the courtroom will be determined by the presiding judge. An effort should be made to facilitate broadcast quality sound. All microphones placed in the courtroom will be wireless.

(2) Video and photographic equipment must be of professional quality with minimal noise so as not to disrupt the proceedings; flash equipment and other supplemental lighting or sound equipment is prohibited unless otherwise approved by the presiding judge.

(i) *Restrictions.* Unless otherwise ordered by the presiding judge, the following standing orders shall govern.

(1) No flash or other lighting devices will be used.

(2) Set up and dismantling of equipment is prohibited when court is in session.

(3) No camera movement during court session.

(4) No cameras permitted behind the defense table.

(5) Broadcast equipment will be positioned so that there will be no audio recording of conferences between attorney and client or among counsel and the presiding judge at the bench. Any such recording is prohibited.

(6) During their term of jury service, jurors will not be photographed in connection with said service.

(7) Photographers and videographers must remain a reasonable distance from parties, counsel tables, alleged victims, witnesses and families unless the trial participant voluntarily approaches the camera position.

(8) All reporters and photographers will abide by the directions of the court officers at all times.

(9) Broadcast or print interviews will not be permitted inside the courtroom before or after a proceeding.

(10) Photographers, videographers and technical support staff covering a proceeding shall avoid activity that might distract participants or impair the dignity of the proceedings.

(11) Appropriate dress is required.

Comments

This rule is based on District Court 1.4 and Superior Court Rule 78.

As the New Hampshire Supreme Court stated in *Petition of WMUR Channel 9*, 148 N.H. 644 (2002), a presiding judge should permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public. A judge may limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequence. Closure of proceedings to the electronic media, however, should occur only if four requirements are met: (1) closure advances an overriding interest that is likely to be prejudiced; (2) the closure ordered is no broader than necessary to protect that interest; (3) the judge considers reasonable alternatives to closing the proceedings; and (4) the judge makes particularized findings to support the closure on the record.

It is the presiding judge's responsibility to ensure that trials are conducted in a fair and impartial manner, free from undue pressures and outside influences. Similarly, the presiding judge has a responsibility to the public and the press to provide reasonable access to judicial proceedings. Above all, trials must be conducted in an atmosphere of dignity and decorum.

In *Petition of WMUR Channel 9*, the New Hampshire Supreme Court held, among other things, that the presiding judge can limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequences. The Supreme Court required that trial court orders restricting coverage be: (1) based on clearly articulated findings of fact; (2) made after an evidentiary hearing during which all interested parties are entitled to be heard; (3) drawn narrowly to address a particular problem; and (4) imposed only when no other practical alternative is available.

Rule 47. Interpreters for Proceedings in Court

(a) Whenever any party reasonably believes that a defendant requires the assistance of an interpreter in order to understand proceedings in court, that party shall notify the court of that belief. Upon receipt of such notice, or *sua sponte* upon discovery by the court of grounds to believe that a defendant requires the assistance of an interpreter to understand proceedings in court, the court shall inquire into the matter. Upon determining that the belief is well founded, the court shall arrange for the presence and participation of an interpreter who meets the qualifications set forth in paragraph (e).

(b) Whenever, in the case of an indigent defendant, the defense reasonably believes that a defense witness requires an interpreter to give testimony, the defense shall notify the court of that belief. Upon receipt of such notice, or *sua sponte* upon discovery by the court of grounds to believe that a defense witness in such a case requires the assistance of an interpreter to give testimony, the court shall inquire into the matter. Upon determining that the belief is well founded, the court shall arrange for the presence and participation of an interpreter who meets the qualifications set forth in paragraph (e).

(c) Whenever the defense in a case involving a non-indigent defendant reasonably believes that a defense witness requires an interpreter to give testimony, the defense shall notify the court of that belief, and shall arrange for the presence and participation of an interpreter who meets the qualifications set forth in paragraph (e).

(d) Whenever the state reasonably believes that a prosecution witness requires an interpreter to give testimony, the state shall notify the court of that belief and shall arrange for the presence and participation of an interpreter who meets the qualifications set forth in paragraph (e).

(e) The court may appoint as an interpreter any person duly certified by the state, or nationally registered as such, or appropriately qualified. Upon such proper determination being made, an interpreter shall take oath to make true and accurate translations in an understandable form for the defendant and to the court. No person, who has assisted in the preparation of a case, or who is related to a person who is a witness, victim, or defendant in a case, shall act as interpreter at the trial thereof, if objection is made.

Comments

The Committee found relatively little extant discussion in statutes or court rules about the use of interpreters. Rule 47(e) is derived in part from Superior Court Rule 109 governing interpreters. In other respects, the Committee drew upon its sense of current best practices, in fashioning a system for the appointment of interpreters. The rule is intended to address the need for language interpreters as well as interpreters for the hearing impaired.

Rule 47(a) places upon the court the responsibility for determining whether the defendant requires the assistance of an interpreter for the purpose of translating court proceedings into a language understood by the defendant. In the event that a defendant requires an interpreter for that purpose, the court has the responsibility for procuring and compensating an interpreter to translate the court proceedings.

Rule 47(b) places upon counsel for an indigent defendant the responsibility for bringing to the court's attention an apparent need, on the part of a defense witness, of an interpreter to assist that witness in giving testimony in court. Upon finding that the witness does need an interpreter for that purpose, the court has the responsibility for

procuring and compensating an interpreter for the translation of court proceedings as necessary to enable the testimony of the witness.

Rule 47(c) applies to cases involving non-indigent defendants who wish to present the testimony of a defense witness who requires the assistance of an interpreter in order to testify. In such cases, defense counsel has the responsibility for procuring and compensating a qualified interpreter as necessary to enable such a witness to testify.

Rule 47(d) puts on the prosecution the burden of procuring and compensating a qualified interpreter, as necessary to present the testimony of a prosecution witness.

Rule 47(e), referenced by all of the other paragraphs, describes the qualifications an interpreter must possess in order to translate court proceedings.

The rule covers only the circumstance of an interpreter called upon to translate court proceedings for an official purpose. The rule does not preclude the defense from employing an interpreter to assist in the preparation of a case, or for the purpose of assisting counsel in communicating with a defendant-client during court proceedings.

Rule 48. Clerk's Office; Judge's Chambers; Communications with the Court

(a) No witnesses, police personnel, prosecutors or defendants shall be permitted into a clerk's office or judge's chambers, except when necessary and as authorized by the court.

(b) Official business should be transacted in an area set aside as being accessible to the public for that purpose.

(c) No person shall make any statement with regard to the merits of that person's case, orally or in writing, to any judge in whose court or before whom any suit, petition or other proceeding is pending or to be heard or tried except in open court or in the presence of all parties thereto.

Comments

This rule is based on District Court Rule 1.6.