

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of September 11, 2020 Public Meeting

Supreme Court Courtroom
Frank Rowe Kenison Supreme Court Building
One Charles Doe Drive
Concord, NH 03301

The meeting was called to order at 12:35 p.m. by Justice Donovan, Committee Chair. The following Committee members were present in person: Abigail Albee, Esq., Hon. N. William Delker, Hon. Michael Garner, Janet Spalding, CPA, Sean Gill, Esq., and Charles Keefe, Esq. The following Committee members appeared remotely: Hon. Paul Berch, Hon. R. Laurence Cullen, Jeanne P. Herrick, Esq., Derek Lick, Esq., Ari Richter, Patrick W. Ryan, Esq., Susan A. Lowry, Esq., and Hon. Patrick Donovan. Attorney Herrick left the meeting at 1:00 p.m.

Lorrie Platt, Esq., Secretary to the Committee, and Timothy Gudas, Esq., Clerk of the Supreme Court, were also present in person. Claire Mackinaw and Charlene Desrochers, Court Staff, were present in person for the public hearing.

1. Public Hearing

Justice Donovan opened the public hearing. He inquired whether anyone from the public wished to comment on a proposed amendment to Supreme Court Rule 42 (XI)(f). The amendment would eliminate the provision that prohibits applicants who have failed the bar examination four times from being eligible for admission to the New Hampshire bar on motion without examination. No one from the public appeared at the hearing. Justice Donovan then closed the hearing.

2. Discussion and Vote on Public Hearing Item

(a) 2020-002. Supreme Court Rule 42(XI)(f) -- submission of Sherry M. Hieber

Justice Donovan reported to the committee that the Board of Bar Examiners supports the amendment.

Upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed amendment.

3. Approval of Minutes of March 6, 2020 Meeting

Upon motion made and seconded, the Committee approved the March 6, 2020 minutes. Charles Keefe and Janet Spalding abstained from voting because they were not present at the meeting.

Although the minutes of the March 6 meeting indicated that the next public meeting of the committee would include a public hearing and take place on Friday, May 29, 2020, the committee noted that the meeting did not take place due to COVID-19 and that it had voted by e-mail to postpone the public hearing until its September 11 meeting.

4. Items Still Pending Before the Committee

(a) 2016-013. Superior Court Civil Rule 12(g)

In April 2019, the Court adopted Rule 12(g). The order stated: “The amendments shall take effect on July 1, 2019. The amendment set forth in Appendix S shall be referred to the Advisory Committee on Rules. In June of 2020, the Advisory Committee on Rules shall begin to evaluate how the rule has worked in practice and as soon as possible thereafter, shall recommend whether the rule should remain in effect or should be amended further.

The committee discussed whether to hold a public hearing in order to obtain input from members of the bar.

Upon motion made and seconded, the committee voted to schedule a public hearing to precede its December 2020 meeting. Attorney Sabin Maxwell and the Bar Association will be informed that the public hearing has been scheduled.

(b) Supreme Court Rules 38, 40 and Superior Court Administrative Rule 1-6; Code of Judicial Conduct

Attorney Albee reported that, after review, she did not find other rules that should be amended. The committee discussed whether “adjudicatory function” should be further defined to draw a line between “adjudicatory function” and “administrative function.”

Upon motion made and seconded, the Committee voted to table the matter.

5. New Submissions

(a) 2020-005. Superior Court Rule 41 & a. - submission of David Peck

Justice Donovan proposed that a subcommittee be established to review the Peck proposal. Judge Delker agreed to serve as the subcommittee chair. Attorney Albee, Judge Garner, Attorney Ryan, and Attorney Lick were appointed to the subcommittee. Attorney Peck will also be asked to serve as a working member of the subcommittee.

(b) 2020-006 Criminal Procedure Rule 12 - submission of Attorney David Rothstein from the Office of the New Hampshire Public Defender

Prior to the Committee meeting, Judge Delker had provided a copy of Superior Court Administrative Order 2020-006 (issued July 14, 2020) relative to discovery of criminal records in all New Hampshire Superior Courts prior to bail hearings/arraignments. No similar rule or order exists in the Circuit Court. The Superior Court administrative order appears to be broader than the proposal submitted by the Public Defender.

At Justice Donovan's request, Attorney Keefe agreed to draft a proposal that can be applied to both superior court and circuit court proceedings. Judge Garner agreed to review the proposal. Judge Delker observed that it would be helpful to receive input from law enforcement because there may be certain restrictions set forth in federal law or federal rules that prevent full disclosure of all records. At Justice Donovan's request, Attorney Gill agreed to work with Attorney Keefe and Judge Garner to develop proposed language. The committee will review the proposal at its December 4 meeting.

Upon motion made and seconded, the committee tabled the issue until its December meeting.

(c) 2020-007 Supreme Court Rule 42 (IV) (a) (3) – submission from Caroline Kelleigh Driscoll

On September 10, 2020, the Committee received a submission from Caroline Kelleigh Driscoll. She requested that the Committee recommend that the Court adopt a "temporary, emergency waiver of Supreme Court Rule 42 (IV)(a)(3)" that would grant "diploma privilege' licensure relief to 2020 applicants to the New Hampshire State Bar."

Judge Delker recommended that the Committee rules be waived to allow public input on the issue. Ms. Driscoll addressed the committee and expressed concern about bar exam issues that included technical challenges, including Internet access, and the delay in the exam date, as well as the merits of the bar exam itself.

The committee discussed Ms. Driscoll's concerns at length and she provided additional input during their discussion. The committee agreed that the sole issue to be considered was whether to recommend that the Court adopt a rule

authorizing an emergency diploma privilege. Justice Donovan reported that the Court had also discussed the issues raised today and that he had consulted with Sherry Hieber, General Counsel to the Committee on Bar Admissions, with respect to the issues raised by Ms. Driscoll. He noted that individuals who had registered for the exam would take two mock tests before the actual bar exam and that the Office of Bar Admissions was working with two individuals who had reported concerns about Internet access.

Upon motion made and seconded, the Committee voted that it will not recommend that the Court amend Rule 42 (IV)(a)(3). Attorney Albee abstained from the discussion and vote as she is a member of the Board of Bar Examiners.

6. Adjournment

Upon motion made and seconded, the committee voted to adjourn the meeting. The next public meeting of the committee, which shall include a public hearing, is scheduled for Friday, December 4, 2020.