

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Hearing and Meeting of December 7, 2018

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 Patrick E. Donovan, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Hon. Paul S. Berch, Hon. R. Laurence Cullen, John A. Curran, Esq., Hon. N. William Delker, Hon. Michael H. Garner, Sean Gill, Esq., Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Ari Richter, Patrick W. Ryan, Esq., Janet L. Spalding, CPA, Charles P.E. Stewart, and Hon. Patrick Donovan.

Also present were the Secretary to the Committee, Carolyn Koegler, Esq., Charlene Desrochers and Claire Mackinaw, Staff.

1. Public Hearing

Justice Donovan opened the public hearing. The public hearing items are listed below in the order in which testimony was taken on them. The names of the speakers who testified are listed beneath the public hearing item title. Few details are provided regarding the testimony offered. A CD recording of the hearing is available upon request at the Supreme Court.

(a) 2018-006. Type-Volume Limitations for Supreme Court Briefs.

This proposed amendment would amend Supreme Court rules to change the type-volume limitations for Supreme Court briefs.

Attorney Tim Gudas, deputy clerk of the New Hampshire Supreme Court, addressed the Committee. He provided background regarding how the Court arrived at a 9,500 word limit for Supreme Court briefs.

Attorney Joshua Gordon, appellate lawyer and member of the Advisory Committee on Rules, addressed the Committee. He spoke in support of his proposal to change the word limit from 9,500 words to 11,250 words.

(b) 2018-004. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

This proposed amendment to Supreme Court Rule 36 would allow students who have completed a 9 hour training program for the DOVE project to start supervised practice right away, rather than wait until the end of the spring semester of their second year.

No one asked to speak about this issue.

(c) 2017-016. Supreme Court Rule 40. Procedural Rules of Committee on Judicial Conduct.

This proposal would amend the definition of “judge” in Supreme Court Rule 40 to make it clear that a member of court staff is included in the definition of “judge” only when he or she performs an adjudicatory function.

No one asked to speak about this issue.

(d) 2018-008. Rule of Professional Conduct 6.5 Nonprofit and Court-Annexed Legal Services Programs.

This proposal would adopt on a permanent basis a comment adopted by the Court on a temporary basis.

No one asked to speak about this issue.

2. Discussion and Vote on Public Hearing Items.

(a) 2018-006. Type-Volume Limitations for Supreme Court Briefs.

Judge Cullen asked attorney Gordon: (1) what percentage of the briefs filed with the Supreme Court are the long briefs attorney Gordon referred to in his comments; and (2) how burdensome it is for an attorney to file a request to extend the word-limit? Attorney Gordon stated that it is not burdensome to file a motion to extend the word-limit, but the problem is that an attorney often does not know until the last minute that he or she is going to exceed the word-limit, so the practice usually is to file a motion to extend the page limit along with the brief. This can be very nerve-racking because the attorney does not know what is going to happen if that motion is not granted – is the brief rejected? Only partially read?

Attorney Gordon moved that the Committee recommend that the Court change the type-volume limitation for briefs of 9,500 words set forth in existing Supreme Court Rules to 11,250 words, as set forth in the Appendices C and D of the public hearing notice. Representative Berch seconded the motion.

The Committee voted 8-6 against recommending the change set forth in Appendices C and D of the public hearing notice. The following committee members voted against recommending the change: Judge Cullen, attorney Curran, Judge Delker, Justice Donovan, attorney Gill, attorney Herrick, Mr. Richter, attorney Ryan. The following committee members voted to recommend the change: Attorney Albee, Representative Berch, Judge Garner, attorney Gordon, Ms. Spalding, and Mr. Stewart.

Mr. Richter stated that attorney Gordon's analysis seems correct – that is, it does seem that the limit of 35 pages was flexible, so that, in effect, the old limit gave parties more room. So, if the Court believes that this change was not sufficiently aired and that there should be more discussion about the change, than it would not be unreasonable for the Court to seek comment on that.

Judge Cullen stated that it seems the question is, where should the limit be, not whether there should be a limit. It may be necessary to have a procedure in place for situations in which the limit is to be exceeded. It is clear that a lot of thought has been given to this. This is not an easy issue.

Justice Donovan noted that the Court took the federal number and rounded up, and that the rule put the New Hampshire limit in the middle of what all of the other states are doing.

Attorney Gordon acknowledged that that is true, but that his point is that this is a decrease in length from what was permissible under the prior rule.

(b) 2018-004. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

Justice Donovan reminded the Committee that the proposal put out for public hearing would allow students who have completed a 9 hour training program for the DOVE project to start supervised practice right away, rather than wait until the end of the spring semester of their second year.

Following brief discussion and upon motion made by attorney Albee and seconded by Judge Cullen, the Committee voted to recommend that the Court amend Supreme Court Rule 36, as set forth in Appendix A of the public hearing notice.

(c) 2017-016. Supreme Court Rule 40. Procedural Rules of Committee on Judicial Conduct.

Justice Donovan reminded the Committee that the proposal put out for public hearing would amend the definition of "judge" in Supreme Court Rule 40

to make it clear that a member of court staff is included in the definition of “judge” only when he or she performs an adjudicatory function.

Attorney Albee referred the Committee to the December 6 comment submitted by a former clerk of the Superior Court, Dana Zucker. She stated that she tends to agree that this rule should apply to clerks, not only when they are performing an adjudicatory function, but also when they leave the courthouse.

Judge Delker noted that currently, the rule is very inclusive, and that this proposal narrows when the JCC can get involved.

There was some discussion regarding whether this rule should apply only to attorneys, and whether there are any clerks of court in the Superior or Circuit Court who are not attorneys. Attorney Ryan stated that only two Circuit Court clerks are attorneys. It was noted that all Superior Court Clerks are attorneys.

Judge Delker asked whether it is ever appropriate for the JCC to decide the fate of non-judicial staff. He noted that the JCC exists because judges are appointed and, therefore, the personnel rules do not apply to them. All others are employees of the judicial branch and are subject to the personnel rules. Judge Delker stated that it is not clear why the JCC needs to be involved. If judicial staff is not behaving appropriately, then the supervising judge should be taking some action. If the supervising judge does not do so, then, arguably, the JCC should take some action with respect to the supervising judge. The reason the JCC exists is because there is no other way to discipline a judge because they are not subject to the personnel rules. Judge Delker questions the wisdom of the JCC’s being involved in employment decisions.

Justice Donovan directed the Committee’s attention to the April 16, 2018 letter from attorney Mittelholzer, the Executive Director of the Judicial Conduct Committee. The letter sets forth the long history of the rule, and includes an explanation about why New Hampshire may be the only state in which the Code of Judicial Conduct applies to “court stenographers, monitors or reporters, clerks of court or deputy clerks, including registers of probate or deputy registers and/or any other persons performing the duties of a clerk or register”

Attorney Gordon stated that there is clearly something wrong with the current rule. He stated that the purpose of the JCC is to discipline judges. The current rule is way too broad. He believes that neither the current rule nor the proposal is adequate.

Justice Donovan asked whether the Committee wants to table this proposal.

Judge Delker stated that the rule as it is written is inadequate, and that making the change proposed would be better than doing nothing.

Mr. Stewart proposed striking the language, “a court stenographer, monitor or reporter.”

Upon motion made and seconded, the Committee voted to recommend that the Court amend the definition of judge, as suggested by Mr. Stewart.

(d) 2018-008. Rule of Professional Conduct 6.5 Nonprofit and Court-Annexed Legal Services Programs.

Justice Donovan reminded the Committee that the proposal put out for public hearing would adopt on a permanent basis a comment adopted by the Court on a temporary basis. He noted that the Court had adopted the comment in an order dated July 13, 2018.

Following some brief discussion and upon motion made by attorney Albee and seconded by attorney Gordon, the Committee voted to recommend that the Court adopt the comment on a permanent basis.

3. Approval of Minutes of September 7, 2018 Meeting

Upon motion made by Mr. Stewart and seconded by Representative Berch, the Committee approved the September 7, 2018 minutes. Judge Cullen and attorney Ryan abstained from voting because they were not present at the September 7 meeting.

4. Items Still Pending Before the Committee

(a) 2017-018. Supreme Court Rule 37. Attorney Discipline System. Access to Confidential Records.

Carolyn Koegler directed the Committee’s attention to a November 19, 2018 memo from the subcommittee charged with setting out a procedure outlining when, and in what manner, the Attorney Discipline Office may access confidential court files. She explained that the subcommittee had met to discuss the issues. Thereafter, a draft proposal was circulated to the subcommittee members and also to attorney David Rothstein, Chair of the Professional Conduct Committee. Carolyn Koegler noted that Attorney Greene, who worked on the subcommittee, was present at the meeting and was prepared to answer any questions Committee members might have.

Judge Delker’s expressed concern about subsection 2(F) of the proposed rule. He noted that that provision states that the confidential records are to be made available to a very long list of people, including “respondents or actual

witnesses” which is a concern, particularly in light of the fact that there does not seem to be any “triggering mechanism” for release of the records, for example, the filing of the notice of charges. The way the rule is drafted, once the ADO has all of the records, all of the other participants in the process have the records as well.

Attorney Greene noted that the reason for this is that Supreme Court Rule 37A sets forth a disclosure obligation.

Judge Delker suggested that it might make sense to consider placing some limitations on the point in the proceedings when the materials are disclosed (*e.g.*, perhaps only after the filing of a notice of charges?) and/or having the court remain involved after providing the ADO with access to the records so that it controls, to some degree, to whom the records are made available and/or whether a protective order should be issued at the time the records are made available. In other words, he believes that there should be some procedures built in so that the confidential information is not immediately widely disseminated.

Attorney Pat Ryan also raised some concerns about how the rule would apply in the Circuit Court, particularly with respect to juvenile cases.

Following some further discussion, the Committee referred this issue back to the subcommittee and asked the subcommittee to amend the proposal to address the concerns raised by Judge Delker and attorney Ryan. The Committee also asked that attorney Ryan be added to the subcommittee, and that the amended proposal be submitted prior to the March meeting.

5. New Submissions

(a) 2018-010. New Hampshire Rules of Criminal Procedure. Confidential Documents and Confidential Information.

Carolyn Koegler directed the Committee’s attention to her November 26, 2018 memorandum. She reminded the Committee that a subcommittee chaired by Judge Delker had recommended a set of proposed rules regarding the filing of confidential documents and documents containing confidential information. However, the August 1, 2018 Advisory Committee on Rules report to the Court included a proposal to amend only the Superior Court Civil Rules. Therefore, when the Court requested comment on the proposals, it requested comment only on the proposal to amend the Superior Court Civil Rules.

On November 5, 2018, the Court amended the New Hampshire Rules of Criminal Procedure and adopted the rules relating to the filing of confidential documents and documents containing confidential information for criminal cases filed in Superior Court on a temporary basis, and referred the

amendments back to the Committee for its recommendation as to whether they should be adopted on a permanent basis.

Following some brief discussion and upon motion made and seconded, the Committee voted to put the temporary rule out for public hearing in June.

(b) 2018-011. Circuit Court Rules. Confidential Documents and Confidential Information.

Carolyn Koegler directed the Committee's attention to her November 26, 2018 memorandum. She noted that the Supreme Court has not adopted, as a part of the Circuit Court Rules, the set of proposed rules regarding the filing of confidential documents and documents containing confidential information that had been proposed by the subcommittee chaired by Judge Delker.

Attorney Ryan and Judge Garner explained that the Circuit Court has some concerns about what impact this rule would have on electronic filing. Attorney Gordon noted that the Circuit Court has a number of self-represented litigants and family law cases and that adopting this rule now without carefully considering its impact in those situations is not advisable. Judge Garner noted, however, that there does not seem to be any reason that this rule should not be adopted and made applicable to Circuit Court criminal cases.

Upon motion made by Judge Garner and seconded by attorney Albee, the Committee voted to put the set of proposed rules regarding the filing of confidential documents and documents containing confidential information, to be applicable to criminal cases in Circuit Court, out for public hearing in June.

(c) 2018-012. Supreme Court Rule 57-A. Custody and return of documents and materials filed in camera in trial courts.

Justice Donovan referred Committee members to the November 26, 2018 memorandum from Carolyn Koegler, and provided background regarding why the Court had referred this issue to the Committee. He explained that a recent case had involved an appeal from a Superior Court order denying the appellant's request for the return of confidential records submitted pursuant to court order. Although both the state and the defendant agreed that the records should be returned, the Superior Court refused to return them, citing Supreme Court Rule 57-A.

There was some discussion about why Rule 57-A requires that the trial court retain records for ten years. Justice Donovan explained that the time period is ten years because in cases in which criminal have been convicted, there may be collateral attacks on the conviction. The Committee generally agreed that it would make sense to amend the rule to state that in cases in which a defendant is acquitted, the court need not retain the records for ten

years. The Committee asked Carolyn Koegler to draft a proposal to amend the language to make this clear.

Some discussion ensued about what should be done in cases in which charges are nol-prossed, there are mistrials, or there are hung juries. It was generally agreed that in these cases, the court should retain the records for a period of time. Judge Delker inquired how long the court should keep the records. He noted that sometimes the State decides not to pursue something after it has nol-prossed the case. Following some discussion, the Committee generally agreed that in these kinds of cases, the trial court should have some discretion regarding what to do with the records. Perhaps the rule should state that “for good cause, the trial court shall retain . . .” So, the amendment to the rule should be: (1) if there is a conviction, the trial court shall retain the records for ten years; but (2) if there is no conviction, the trial court shall have discretion regarding whether to retain the records.”

Attorney Gordon noted that he has some concern about leaving this entirely to the trial court’s discretion. It was generally agreed that before the records are destroyed, notice should be provided to the parties that the court is going to destroy the records, and that the parties shall have thirty days to object.

Carolyn Koegler agreed to draft a proposal to amend Supreme Court Rule 57-A to implement the decisions made by the Committee, and to submit the proposal to the Committee prior to the March meeting.

6. 2019 Meeting Dates

- Friday, March 8
- Friday, June 7
- Friday, September 6
- Friday, December 6

The meeting adjourned at 2:35 pm.