

ADVISORY COMMITTEE ON RULES
December 13, 2006

Supreme Court Conference Room
Frank Rowe Kenison Supreme Court Building
Concord, New Hampshire

The meeting was called to order at 10:05 a.m.

The following Committee members were present:

Hon. Linda S. Dalianis
Hon. R. Laurence Cullen
Alice Guay
Hon. Richard Hampe
Martin Honigberg, Esquire
Hon. Philip Mangones
Emily G. Rice, Esquire
Raymond W. Taylor, Esquire

Also present was David S. Peck, Secretary to the Advisory Committee on Rules.

On motion of Judge Cullen, seconded by Judge Dalianis, the Committee amended page 2 of the draft minutes of the March 22, 2006 meeting, and approved the minutes as amended.

No action was taken on the question of whether the June 2006 minutes require amendment.

David Peck reported to the Committee as to action taken by the Supreme Court since the Committee's last meeting.

The Committee next discussed items still pending before it and the following action was taken:

Relative to the Rules of Civil Procedure and the Rules of Criminal Procedure, Attorney Honigberg reported that the goal is to have them distributed to the

Committee so that it could be possible to have them on the agenda for the June 2007 public hearing.

Attorney William F.J. Ardinger arrived.

Relative to the Professional Conduct rules, following discussion, it was agreed that an informal subcommittee consisting of the attorneys on the Committee would review the revisions submitted by the Bar's Ethics Committee on the Rules of the Professional Conduct and on the comments to said rules, and the revisions to Professional Conduct Rule 6.1 submitted by the Bar's Pro Bono Referral Program, and all comments received thereon prior to the March 2007 meeting.

Representatives of the Bar's Ethics Committee will be invited to attend the March 2007 meeting to provide information and answer questions on the proposals.

Relative to the systemwide guardian ad litem guidelines, which were a subject of the June 21, 2006 public hearing, Judge Hampe stated that he would report to the Committee regarding them at the March 2007 meeting.

Relative to the pro hac vice rules, Attorney Ardinger gave a presentation on the subcommittee's work to date. Feedback was obtained from the Committee on various preliminary issues, and Attorney Ardinger indicated that the subcommittee intends to prepare a draft rule for consideration by the Committee at its next meeting.

Attorney Jennifer L. Parent arrived.

Relative to Supreme Court Rule 38, Attorney Taylor indicated discussions are ongoing as to how "judge" should be defined under the Judicial Conduct Code, and stated that he will report on this matter at the next meeting of the Committee.

Relative to Evidence Rule 609, on motion of Judge Dalianis, seconded by Judge Mangones, the Committee voted to send the proposed amendment as set forth in Appendix A to the next public hearing.

Relative to Supreme Court Rule 42 pertaining to admission/bar requirements for pro bono attorneys, Attorney Ardinger requested on behalf of the subcommittee that this matter be deferred until the next meeting.

The Committee turned its attention to the new items before it and the following action was taken:

Relative to a suggestion to amend Supreme Court Rule 50-A(1) pertaining to annual trust accounting, after discussion, and on motion of Judge Cullen, seconded by Judge Hampe, the Committee voted not to recommend any change to Rule 50-A(1).

Relative to Superior Court Rule 185, after discussion, and on motion of Attorney Honigberg, seconded by Judge Hampe, the Committee voted to recommend to the Supreme Court that Rule 185 be amended as set forth in Appendix B on a temporary basis, and further voted to put the proposed amendment on the agenda for the next public hearing.

Relative to public access to confidential records procedures, after discussion, and on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to recommend to the Supreme Court that the court rules be amended as set forth in Appendix C on a temporary basis, and further voted to put the proposed amendment on the agenda for the next public hearing.

Representative Robert H. Rowe and Mr. Robert Chase arrived.

The Committee adjourned so that members could attend the public hearing scheduled for 1:00 p.m. in the courtroom. During the public hearing, the Committee heard testimony on proposed court rules changes. In addition, it received written comments from several individuals on various proposed rules changes. The Committee took no action during the public hearing.

When the meeting reconvened, the Committee considered what action it wished to take on the proposed rules changes discussed during the public hearing.

Relative to proposed Supreme Court Rule 58, on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to amend section 4.70 to include the procedures for public access to confidential records set forth in Appendix C, to place the appropriate portions of the COS/CJJ commentary at the end of Rule 58 (but not to adopt the commentary as part of the rule), and to authorize Judge Dalianis and Attorney Taylor to revise the rule by filling in the portions that are currently blank and to reviewing the COS/CJJ commentary so as to include only those portions of the commentary relevant to proposed Rule 58. Upon completion of that review and revision, the amended proposal shall be forwarded to the Supreme Court with the recommendation that it be adopted and that the current Guidelines for Public Access to Court Records that took effect on December 9, 1992, be repealed.

Relative to the Rules of Professional Conduct and the revisions to Professional Conduct Rule 6.1 submitted by the Bar's Pro Bono Referral Program, no formal action was taken by the Committee. After discussion, however, an informal show of hands indicated that a majority of the Committee does not favor recommending

adoption of the revision to Rule 6.1 submitted by the Bar's Pro Bono Referral Program.

Relative to Supreme Court Rule 38, Representative Rowe moved, and Judge Cullen seconded, that the proposed amendments to this rule be tabled. After discussion, Representative Rowe withdrew his motion. On motion of Judge Dalianis, seconded by Judge Hampe, the Committee voted to recommend adoption of the proposed amendments to Rule 38 provided to the Committee at the public hearing by Chief Justice Robert Lynn during his public testimony. A copy of the proposed amendments appears in Appendices D and E.

The Committee agreed that amendments to (or adoption of) the following rules should be recommended to the Supreme Court: Supreme Court Rules 21(6-A), 37, 37A, 39, and 55(5); Superior Court Rules 97-A, and 201 to 202-E; and District Court Rule 2.9-A.

The next meeting of the Commission is scheduled for March 14, 2007 at 12:00 p.m.

No further business to come before the Committee, the meeting adjourned.

APPENDIX A

Amend Evidence Rule 609 as follows (additions are in bold; deletions are in strike-out):

Rule 609. Impeachment by Evidence of Conviction of Crime

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

(1) evidence that **a witness other than an accused** ~~the witness~~ has been convicted of a crime shall be admitted, **subject to Rule 403**, ~~if elicited from the witness or established by public record during cross examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he or she~~ **the witness** was convicted, and **evidence that an accused has been convicted of such a crime shall be admitted if** the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the ~~defendant~~ **accused; and** ~~or~~

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

(b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of **pardon**, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if **(1) the conviction has been the subject of a pardon, an annulment, certificate or rehabilitation, or other equivalent procedure or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.**

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

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

APPENDIX B

Amend Superior Court Rule 185 as follows (additions are in bold; deletions are in strike-out):

185. ANSWER AND CROSS-PETITION. An answer to a petition or a cross-petition is required in cases where the responding party wishes to seek ~~alimony or other~~ affirmative relief **other than alimony**, or to assert an affirmative defense. In all other cases, an answer may be filed. All answers shall be dated and signed under oath. A cross-petition must follow the format set forth in Rules 173 and 174. An answer to a petition, or a cross-petition, shall be filed within thirty days after the return day. Any answer to a cross-petition shall be filed within ten days after filing of the cross-petition. **Any party who wishes to seek alimony may either file an answer as set forth in this rule, or file a motion in accordance with the requirements of RSA 458:19.**

APPENDIX C

Amend the Superior Court, District Court, Probate Court, and Family Division Rules to adopt the following new rules relative to public access to confidential records:

SUPERIOR COURT RULE

Any person or entity not otherwise entitled to access may file a motion or petition to gain access to: (1) a financial affidavit filed pursuant to Superior Court Rule 197 or 198 and kept confidential under RSA 458:15-b, I; or (2) to any other sealed or confidential court record. See Petition of Keene Sentinel, 136 N.H. 121 (1992).

Filing Fee: There shall be no filing fee for such a motion or petition.

Notice: In open cases, the person filing such a motion shall provide the parties to the proceeding with notice of the motion by first class mail to the last mail addresses on file with the clerk.

In closed cases, the court shall order that the petitioner notify the parties of the petition to grant access by certified mail to the last known address of each party, return receipt requested, restricted delivery, signed by the addressee only, unless the court expressly determines that another method of service is necessary in the circumstances.

RULE FOR FAMILY DIVISION

Any person or entity not otherwise entitled to access may file a motion or petition to gain access to: (1) a financial affidavit filed pursuant to Family Division Pilot Program Domestic Relations Rule 13 and kept confidential under RSA 458:15-b, I, or (2) any other any other sealed or confidential court record. See Petition of Keene Sentinel, 136 N.H. 121 (1992).

Filing Fee: There shall be no filing fee for such a motion or petition.

Notice: In open cases, the person filing such a motion shall provide the parties to the proceeding with notice of the motion by first class mail to the last mail addresses on file with the clerk.

In closed cases, the court shall order that the petitioner notify the parties of the petition to grant access by certified mail to the last known address of each party, return receipt requested, restricted delivery, signed by

the addressee only, unless the court expressly determines that another method of service is necessary in the circumstances.

RULE FOR PROBATE AND DISTRICT COURTS

Any person or entity not otherwise entitled to access may file a motion or petition to gain access to any sealed or confidential court record. See Petition of Keene Sentinel, 136 N.H. 121 (1992).

Filing Fee: There shall be no filing fee for such a motion or petition.

Notice: In open cases, the person filing such a motion shall provide the parties to the proceeding with notice of the motion by first class mail to the last mail addresses on file with the clerk.

In closed cases, the court shall order that the petitioner notify the parties of the petition to grant access by certified mail to the last known address of each party, return receipt requested, restricted delivery, signed by the addressee only, unless the court expressly determines that another method of service is necessary in the circumstances.

APPENDIX D

Amend Supreme Court Rule 38, Canon 4 as follows (additions are in bold; deletions are in strike-out):

F. Service as Arbitrator or Mediator.

(1) Except as provided in subsection 2 below, A a judge shall not ~~act as an~~ provide services as a private arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

(2) A judge who is in senior active service pursuant to RSA 493-A:1 or who has reached age 70 but continues to sit as a judicial referee pursuant to RSA 493-A:1-a may serve as a private mediator or arbitrator, and may be privately compensated for such services in accordance with this subsection. To the extent the senior judge or judicial referee provides mediation services pursuant to Superior Court Rule 170 or 170-B, he or she shall comply with the certification requirements of Rule 170.

(a) A senior judge or judicial referee may be associated with entities that are solely engaged in offering mediation or other alternative dispute resolution services but that are not otherwise engaged in the practice of law. However, such senior judge or judicial referee shall not associate with a law firm, or advertise or solicit business in a manner that identifies his or her position as a senior active judge or judicial referee or prior service as a judge, but he or she may include the fact of prior service as a judge, along with other background and experience, in a resume or curriculum vitae.

(b) A senior judge or judicial referee who serves as a mediator or arbitrator shall disclose to the parties to the mediation or arbitration whether he or she has presided over a case involving any party to the mediation or arbitration within the past three years. A senior judge or judicial referee shall not solicit service as a mediator or arbitrator in any case in which he or she is or has presided or in which he or she has ruled upon any issues other than routine scheduling matters, but he or she may serve as a mediator or arbitrator in such a case if requested to do so by all parties to the case; provided, however, that once a senior judge or judicial referee serves as a mediator or arbitrator in such a case, he or she shall not thereafter preside over any aspect of the case or rule upon any issue in the case in a judicial capacity.

(c) A senior judge or judicial referee shall disclose if he or she is being utilized or has been utilized as a mediator or arbitrator by any party, attorney or law firm involved in the case pending before the senior judge or judicial referee. Absent express consent from all parties, a senior judge or judicial referee is prohibited from presiding over any case involving any party,

attorney or law firm that is utilizing or has utilized the senior judge or judicial referee as a mediator within the previous three years. A senior judge or judicial referee also shall disclose any negotiations or agreements for the provision of mediation or arbitration services between the senior judge or judicial referee and any of the parties or counsel to the case.

(3) The provisions of subsections (1) and (2) above do not apply to a judge, senior judge or judicial referee who performs mediation services for the judicial branch and without private compensation pursuant to Superior Court Rules 170 or 170-B.

APPENDIX E

Amend Supreme Court Rule 38, Section B of the Application of the Code of Judicial Conduct, to read as follows (new matter is shown in bold; deleted matter is shown in strike-out mode):

B. All retired judges ~~eligible for recall to judicial service~~ **who have elected to take senior active status or who wish to serve as judicial referees or temporary justices of the supreme court** shall comply with the provisions of this Code governing part-time judges, **except that they shall comply with the provisions of Section 4F if they wish to serve as a private mediator or arbitrator for compensation. A retired judge who does not take senior active status and who does not desire to serve as a judicial referee or a temporary justice of the supreme court is not subject to Section 4F of this Code.**