ADVISORY COMMITTEE ON RULES
December 12, 2007

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

The meeting was called to order at 12:15 p.m.

The following Committee members were present:
Hon. Linda S. Dalianis
William F.J. Ardinger, Esquire
Mr. Robert L. Chase
Hon. R. Laurence Cullen
Hon. Richard A. Hampe
Martin P. Honigberg, Esquire
Hon. Philip Mangones
Hon. Paul E. McEachern
Jennifer L. Parent, Esquire
Emily G. Rice, Esquire

Also present were David S. Peck, Secretary to the Advisory Committee on Rules, and Margaret Haskett, staff.

On motion of Attorney Honigberg, seconded by Judge Cullen, the Committee approved the minutes of the September 12, 2007 meeting, as amended.

In preparation for the public hearing, written comments from several individuals were distributed to members. Judge Dalianis suggested changing the procedure for hearing testimony to accommodate her recusal and that of Attorney Rice from the discussion on the death penalty appellate rules, which are on the public hearing agenda. She appointed Judge Mangones as chair to preside over the hearing in her absence.

Relative to the ratification of the email vote taken in October 2007 to place the death penalty appellate rules on the public hearing agenda, following a brief discussion, and on motion of Attorney Ardinger, seconded by Judge Hampe, the

Committee voted to ratify the vote. Judge Dalianis and Attorney Rice were not present during the discussion and did not participate in the vote.

Relative to a vote taken at the September 2007 meeting of the Committee pertaining to Supreme Court Rule 38, Canon 4(F) and Supreme Court Rule 38, Application Section B, David Peck explained that he had mistakenly reported that the Supreme Court referred these two rules to the Committee for consideration as to whether they should be adopted on a permanent basis when, in fact, they had been adopted by the Supreme Court on a permanent basis. He requested that the Committee reconsider its vote of putting those rules on the public hearing agenda. On motion of Judge Hampe, seconded by Attorney Rice, the Committee voted to reconsider the vote on those rules taken during the September 12, 2007 meeting.

Relative to action taken by the Court since the Committee's last meeting, David Peck reported that the Supreme Court adopted most of the rules contained in the Committee's annual report, with one exception. After further revisions and review, the Supreme Court adopted, on a temporary basis, the alternative dispute resolution proposal, Superior Court Rule 170, in November and it is on today's agenda for consideration on whether it should be adopted on a permanent basis.

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

Relative to Systemwide Guardian ad Litem Guidelines, following discussion, and on motion of Judge Hampe, seconded by Attorney Rice, the Committee voted to further amend the guidelines as suggested by Chief Justice Lynn and to include said guidelines on the Committee's next public hearing agenda.

Relative to the Report of the Committee on the Status of the Legal Profession, action was deferred until the Committee's next meeting. David Peck will follow up with Attorney Goodwin.

Relative to an ABA Model Code Rule pertaining to provision of legal services following determination of a major disaster, this matter was deferred until the Committee's next meeting.

Relative to Supreme Court Rule 55 pertaining to the public protection fund, following a brief discussion, the Committee appointed a subcommittee to review the proposals submitted and to report back to the full Committee at its next meeting on which proposal, if any, should be adopted. The subcommittee members are: Attorney Jennifer Parent, Mr. Robert Chase and Representative Paul McEachern.

Relative to Supreme Court Rule 38 pertaining to the Code of Judicial Conduct, Judge Dalianis reported that the subcommittee established to review the Code plans to file recommendations with this Committee before its next meeting.

Relative to the Rules of Civil Procedure and the Rules of Probate Administration, this item was deferred until the Committee's next meeting.

The Committee next discussed new items and the following action was taken:

Relative to Superior Court Rule 98 pertaining to discovery in criminal cases, following a brief discussion, the Committee established a subcommittee to review the issues raised in Attorney Howard Zibel's September 27, 2007 email and to report back to the Committee at its next meeting. Subcommittee members are: Judge Laurence Cullen, Judge Philip Mangones, Attorney Ann Rice and Attorney Michael Iacopino.

Relative to Family Division Court Rules, David Peck reported that the Supreme Court adopted these rules on a temporary basis and referred them to the Committee to determine whether they should be adopted on a permanent basis. Because Judge Kelly would like six months to see how the rules are working, the Committee deferred action on these rules until its June 2008 meeting.

Relative to amendments to Superior Court Rules 45 and 45-A pertaining to transcript of videotape depositions, following discussion, and on motion of Judge Dalianis, seconded by Judge Mangones, the Committee voted to further amend Superior Court Rule 45-A, as contained in Appendix A of these minutes, and to include it on the Committee's June 2008 public hearing agenda.

Relative to an amendment to Supreme Court Rule 40(7)(c) pertaining to Judicial Conduct Committee proceedings, following a brief discussion, the Committee deferred action on this item until its next meeting.

Relative to an amendment to Supreme Court Rule 40(11)(j) pertaining to Judicial Conduct Committee proceedings, following a brief discussion, and on motion of Judge Mangones, seconded by Mr. Chase, the Committee voted to have David Peck amend the current courtroom media access rule to reflect today's discussion and to include it on the Committee's next public hearing agenda. Attorney Rice was not present during the discussion and did not participate in the vote.

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 first heard testimony on the death penalty appellate rules, during which Judge Dalianis and Attorney Rice were not present, followed by testimony on the remaining

rules. The Committee received comments from several individuals on various proposed rules changes. It took no action during the public hearing.

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

Relative to the death penalty appellate rules, following a lengthy discussion, and on motion of Attorney Ardinger, seconded by Representative McEachern, the Committee voted, 7 to 1, to ask the subcommittee to prepare a two-part report based upon today's discussion. Said report will be presented to Committee members by email for a final vote before its submission to the Supreme Court. Judge Dalianis and Attorney Rice did not participate in the vote.

Judge Dalianis returned to the meeting and Representative McEachern and Attorney Rice left the meeting. The Committee continued its discussion on the public hearing proposed rules changes as follows:

Relative to adopting new Rules of Criminal Procedure, on motion of Judge Hampe, seconded by Attorney Parent, the Committee voted to request that its subcommittee review the public comments and report its recommendations for any amendments to the proposed rules to the full Committee.

Relative to an amendment to Supreme Court Rule 42(4)(a) pertaining to pre-law school education requirements for bar applicants, following consideration of comments made during the public hearing, and on motion of Judge Hampe, seconded by Attorney Ardinger, the Committee voted to recommend to the Supreme Court that said rule be adopted as submitted to the public hearing.

Relative to an amendment to Supreme Court Rule 40 pertaining to expenses related to discipline enforcement, following discussion, and on motion of Judge

Dalianis, seconded by Judge Hampe, the Committee voted to recommend to the Supreme Court that it adopt the first of two alternatives submitted to the public hearing.

Following a brief discussion, and on motion of Judge Dalianis, seconded by Judge Cullen, the Committee agreed that the following rules, upon which no comments were received, should be recommended to the Supreme Court for adoption: Supreme Court Rules 37A(II)(a)(3), 37A(IV), 42(4)(c), 42(5)(h), 42(5)(j), 42-D.

The Committee then continued its discussion on new items and the following action was taken:

Relative to an amendment to Supreme Court Rule 3 pertaining to definition of mandatory appeals, following discussion, and on motion of Judge Dalianis, seconded by Judge Hampe, the Committee voted to recommend to the Supreme Court that Supreme Court Rule 3 be adopted on a permanent basis, as contained in Appendix B of these minutes.

Relative to an amendment to Supreme Court Rule 37A pertaining to six-month suspensions, following discussion, and on motion of Judge Dalianis, seconded by Judge Hampe, the Committee voted to send Supreme Court Rule 37A(II)(d)(2), as contained in Appendix C of these minutes, to the Committee's next public hearing.

Relative to an amendment to Supreme Court Rule 42(13) pertaining to the Webster Scholar Program, on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to recommend to the Supreme Court that said rule, as contained in Appendix D of these minutes be adopted on a permanent basis by technical amendment.

Relative to amendments to Superior Court Rule 62(I) pertaining to initial structuring conference and Superior Court Rule 170 pertaining to alternative dispute resolution, on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to send said rules, as contained in Appendices E & F respectively of these minutes, to the Committee's next public hearing.

Relative to amendments to Supreme Court Rules 37(20)(f), 37(21)(c) and 40(3)(f), on motion of Judge Dalianis, seconded by Judge Hampe, the Committee voted to send said rules, as contained in Appendices G & H respectively of these minutes, to the Committee's next public hearing.

The Committee's next meeting is scheduled for March 12, 2008 at 12:00 p.m.

No further business to come before the Committee, the meeting adjourned at 3:40 p.m.

APPENDIX A

Amend Superior Court Rule 45-A as follows:

45-A. A party who intends to use a videotape deposition at trial shall provide the Court at the pretrial settlement conference or five business days prior to trial, whichever is earlier, with a transcript of the entire videotape proceedings. This requirement may be waived in whole or in part only by the court; the parties may not dispense with this requirement by agreement alone.

The provisions of Rule 41 with respect to objections to testimony or evidence shall also apply to a videotape deposition.

APPENDIX B

Amend the definition of "mandatory appeal" in Supreme Court Rule 3 as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

> "Mandatory appeal": A mandatory appeal shall be accepted by the supreme court for review on the merits. A mandatory appeal is an appeal filed by the State pursuant to RSA 606:10, or an appeal from a final decision on the merits issued by a superior court, district court, probate court, or family division court, that is in compliance with these rules. Provided, however, that the following appeals are NOT mandatory appeals:
>
> (1) an appeal from a final decision on the merits issued in a post-conviction review proceeding (including petitions for writ of habeas corpus and motions for new trial);
>
> (2) an appeal from a final decision on the merits issued in a collateral challenge to any conviction or sentence;
>
> (3) an appeal from a final decision on the merits issued in a sentence modification or suspension proceeding;
>
> (4) an appeal from a final decision on the merits issued in an imposition of sentence proceeding;
>
> (5) an appeal from a final decision on the merits issued in a parole revocation proceeding;
>
> (6) an appeal from a final decision on the merits issued in a probation revocation proceeding;
>
> (7) an appeal from a final decision on the merits issued in a landlord/tenant action filed under RSA chapter 540 or in a possessory action filed under RSA chapter 540; ~~and~~
>
> (8) an appeal from an order denying a motion to intervene**[; and**
>
> **(9) an appeal from a final decision on the merits issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A); provided, however, that an appeal from a final divorce decree or decree of legal separation shall be a mandatory appeal]**.

Comment

A trial court order denying a motion by a non-party to intervene in a trial court proceeding is treated as a "final decision on the merits" for purposes of appeal. Thus, such an order is immediately appealable to the supreme court. Pursuant to this rule, however, such an appeal is not a mandatory appeal. Therefore, a non-party who wishes to appeal the trial court's denial of the non-party's motion to intervene must file an appeal pursuant to Rule 7(1)(B) within the time allowed for appeal under that rule.

[Under paragraph (9), only appeals from final divorce decrees or decrees of legal separation are mandatory appeals. Any other appeal from a final decision on the merits issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A) is not a mandatory appeal. The amendment to this rule that added paragraph (9) shall apply to any appeal in which the notice of appeal is docketed in the supreme court on or after January 1, 2008.]

APPENDIX C

Amend Supreme Court Rule 37A(II)(d)(2) as follows (new material is in **bold and brackets**; deleted material is in ~~strike-out~~ mode):

(2) *Application for Reinstatement or Readmission.*

(A) *Timeliness after Suspension.* An attorney who has been suspended for a specific period, whether by the court or the professional conduct committee, may not move for reinstatement until the expiration of the period of suspension, and upon the completion of all the terms and conditions set forth in the order of suspension.

(B) *Procedure.* A motion for reinstatement by an attorney suspended by the court for misconduct rather than disability or an application for readmission by a New Hampshire licensed attorney who has been disbarred or has resigned while under disciplinary investigation shall be referred to the professional conduct committee by the supreme court. A motion for reinstatement by an attorney suspended by the professional conduct committee shall be filed directly with the professional conduct committee.

Upon receipt of a motion for reinstatement or an application for readmission, the professional conduct committee shall refer the motion or application to the hearings committee for appointment of a hearing panel. The attorney discipline office shall then cause a notice to be published in a newspaper with statewide circulation, and one with circulation in the area of respondent's former primary office, as well as the New Hampshire Bar News that the respondent has moved for reinstatement or applied for readmission. The notice shall invite anyone to comment in writing to the attorney discipline office within twenty (20) days. All comments shall be made available to the respondent and shall be part of the public file. Where feasible, the attorney discipline office shall give notice to the original complainant. The hearing panel shall promptly schedule a hearing at which the respondent shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this state and that the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration for justice nor subversive to the public interest. The attorney discipline system shall be represented at the hearing by disciplinary counsel. At the conclusion of the hearing, the hearing panel shall promptly file a report containing its findings of

fact, conclusions and recommendations in written reports, along with the record, to the professional conduct committee. Following receipt of written memoranda by disciplinary counsel and respondent, the hearing transcript and oral argument, the professional conduct committee shall review the record in its entirety and shall file its own recommendations and findings with the court, together with the record. After the submission of briefs and oral arguments to the court, if any, the court shall enter a formal order.

(C) *Readmission after Resignation.* Upon receipt of a referral from the supreme court, pursuant to Rule 37(15), of a motion for readmission after resignation, the professional conduct committee shall further refer the motion to the hearings committee for the appointment of a hearing panel. The hearing panel shall promptly schedule a hearing at which the attorney shall have the burden of demonstrating by a preponderance of the evidence that he or she has the competency and learning in law required for readmission. At the conclusion of the hearing, the hearing panel shall promptly file a report containing its findings and recommendations and transmit same, together with the record, to the professional conduct committee. Following receipt of written memoranda of disciplinary counsel and the attorney, review of the hearing transcript, and oral argument, the professional conduct committee shall review the record in its entity, and shall file its own recommendations and findings, together with the record, with the court. Following the submission of briefs, if necessary, and oral argument to the supreme court, if any, the court shall enter a final order.

(D) *Special Rule for Suspensions of Six Months or Less:* Notwithstanding the provisions of Rule 37A(II)(d)(2)(B), a lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated by the court following the end of the period of suspension by filing with the court and serving upon disciplinary counsel a motion for reinstatement accompanied by: (1) an affidavit stating that he or she has fully complied with the requirements of the suspension order and has paid any required fees and costs; and (2) evidence that he or she has satisfactorily completed the Multistate Professional Responsibility Examination since his or her suspension.

APPENDIX D

Amend Supreme Court Rule 42(13) on a permanent basis as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

(13) An applicant who is domiciled in the United States, is of the age of 18 years, and meets the following requirements may~~,~~ ~~upon motion,~~ be admitted to the practice of law after taking and passing a variant of the New Hampshire bar examination to consist of rigorous, repeated and comprehensive evaluation of legal skills and abilities, the criteria for which will be established by the supreme court, and which will amount to more than the twelve hours of testing required for the conventional bar examination. The applicant shall:

(a) Have, prior to admission, and within one year of the date upon which the ~~motion~~ **[application for admission]** is filed, successfully completed, to the satisfaction of the board of bar examiners, the Daniel Webster Scholar Honors Program offered at the Franklin Pierce Law Center in Concord, New Hampshire, and been certified by the board of bar examiners as satisfying this requirement;

(b) Prior to admission, produce evidence that the Multistate Professional Responsibility Examination has been satisfactorily completed;

(c) Establish that the applicant is currently a member in good standing in all jurisdictions where admitted, if any;

(d) Establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;

(e) Establish that the applicant possesses the character and fitness to practice law in New Hampshire; and

(f) Designate the clerk of the supreme court for service of process.

[An applicant seeking admission to the practice of law in accordance with this provision shall, not later than January 15 of the year in which the applicant intends to request admission, file with the clerk of the supreme court an

application for admission pursuant to New Hampshire Supreme Court Rule 42(13), and two copies of the petition and questionnaire for admission to the bar. The questionnaire shall contain a certificate signed by two (2) persons certifying the applicant's good moral character, and shall be executed under oath. The foregoing requirement as to the time of filing may be waived by the court for good cause shown. The application and petition shall be accompanied by the application fee payable to the State of New Hampshire, and the fee for character and fitness investigation, payable to the New Hampshire Supreme Court Character and Fitness Committee. Both fees shall be nonrefundable.]

APPENDIX E

Amend Superior Court Rule 62(I) on a permanent basis as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

62. (I) **Initial Structuring Conference**

(A) The Clerk shall schedule a Structuring Conference for each case entered on the civil and equity dockets unless otherwise ordered by the court. The Structuring Conference shall be held within forty-five (45) days after the return date or at such other time as the court may order.

(B) (1) Participation in Structuring Conference. Unless otherwise ordered by the court, structuring conferences shall be held at the courthouse and shall require the personal attendance of counsel, or parties if unrepresented. However, any counsel, or party if unrepresented, desiring to participate in the structuring conference telephonically may file a motion to do so at least fifteen (15) days prior to the structuring conference, indicating in said motion whether or not a record is requested. Although such motions should generally be granted, the court may consider the following factors, among others, in ruling on a request for telephonic participation: the complexity of the case; whether there has been an objection to the request for telephonic participation; whether the parties have reached agreement on all matters specified in section (I)(C) of this rule and have filed the comprehensive stipulation described in section (I)(D) of this rule; whether any party is unrepresented; the distance counsel, or parties if unrepresented, must travel to attend the conference in person; and the potential for successful resolution or settlement of the case at the initial screening conference.

(2) Counsel, or parties if unrepresented, shall participate in the Structuring Conference and shall be prepared and authorized to discuss the issues and set schedules for discovery and other case preparation, including additional conferences with the court, Alternative Dispute Resolution, Summary Jury Trial, and settlement or trial.

(3) The record, if any, for any telephonic conference will be taken by electronic recording device or such other method as may be approved by the court.

(C) No later than twenty days prior to the Structuring Conference counsel for all parties, or parties if unrepresented, shall either meet and confer personally or by telephone to discuss the claims, defenses and counterclaims and to attempt to reach agreement on the following matters: (1) a proposed date for trial and an estimate of the length of the trial; (2) an election to proceed either under standard discovery or fast track discovery; (3) a discovery schedule, including dates for the disclosure of each party's experts and experts' reports, and deadlines for the filing of pretrial motions of various kinds; (4) the scope of discovery, including particularly with respect to information stored electronically or in any other medium, the extent to which such information is reasonably accessible, the likely costs of obtaining access to such information and who shall bear said costs, the form in which such information is to be produced, the need for and the extent of any holds or other mechanisms that have been or should be put in place to prevent the destruction of such information, and the manner in which the parties propose to guard against the waiver of privilege claims with respect to such information; and (5) **[if the case is subject to ADR under Rule 170, a proposed agreement relating to Alternative Dispute Resolution (ADR), including an agreement upon the ADR process, the neutral to be used, and the schedule for mediation.]** ~~a proposed date by which the parties will be ready for Alternative Dispute Resolution (ADR), the form of ADR to be used, and an estimate of the time required for ADR.~~

(D) Ten days prior to the Structuring Conference the parties shall file a comprehensive written stipulation, signed by all counsel, or by parties if unrepresented, addressing all of the foregoing matters on which agreement was reached. If the parties have been unable to reach agreement on one or more issues, each party shall submit a proposed order on those matters as to which agreement has not been reached **[with the exception of ADR. If the parties are unable to reach an agreement on ADR, the specifics of the ADR process shall be determined in accordance with Rule 170(B)]**. At the same time, all parties shall file summary statements necessary to support their respective claims, defenses or counterclaims. This summary statement shall be comprehensive and made in good faith, but shall not be admissible at trial. The purpose of the summary statement is to apprise the court of the nature of the claims, defenses, and legal issues likely to arise.

(E) At the initial structuring conference, after consultation with counsel, or with parties if unrepresented, the court shall order that the case proceed under one of the following discovery options: (1) fast track; or (2) standard. In determining which discovery option shall be employed, the Court shall consider the following:

(a) the likely amounts in dispute;
(b) the nature and complexity of the issues presented;
(c) the resource equality of the parties; and
(d) the importance to a just adjudication of permitting discovery beyond that generally permitted under the fast track option.

Cases selected for standard discovery shall be governed by the Superior Court Rules other than Rule 62(II) below. Cases selected for fast track discovery shall be governed by the Superior Court Rules including Rule 62(II).

At or immediately after the initial structuring conference the court shall, and with the approval of the presiding justice the clerk may, issue a STRUCTURING CONFERENCE ORDER. Said order may approve the stipulation(s) reached by the parties, may adopt the proposals made by one or more of the parties, or may establish such other trial and pretrial dates and schedules as the court deems appropriate.

APPENDIX F

Amend Superior Court Rule 170 on a permanent basis by deleting said rule and replacing it with the following:

170. ALTERNATIVE DISPUTE RESOLUTION (ADR)

(A) *Cases for Alternative Dispute Resolution.*

(1) All writs of summons, transfers of actions from the district court, and such equity cases as the court may deem or the parties may agree are suitable, shall be assigned to ADR, with the exception of those exempted in paragraph (2).

(2) The following categories of civil and equity actions are exempt from the requirements of this rule.

(a) Actions by or against or appeals taken from decisions of the state, counties, or municipalities (including their subdivisions, departments, agencies, boards, and agents), except where the action contains a claim for personal injury or monetary damages, unless the parties agree to ADR and the court approves.

(b) Actions where the parties represent by joint motion that they have engaged in formal ADR before a neutral third party prior to suit being filed.

(c) Actions exempted by the court on motion and for good cause, but only when said motion is filed within 180 days of the return date.

(B) *Election of Specific Alternative Dispute Resolution Procedure and Selection of a Neutral.*

(1) Promptly after the filing of an answer or appearance in the superior court or upon removal from the district court, the parties shall confer and select an ADR process (that is, mediation, neutral evaluation, or arbitration) and a neutral third party to conduct the process. If the parties cannot agree on the ADR process, they will be required to submit to mediation.

(2) The parties shall select a neutral third party to conduct the dispute resolution process from the court lists of approved neutrals. Prior to making such a selection, the parties shall determine whether they wish to select a neutral from the list of approved volunteer neutrals, or from the list of approved paid neutrals.

(a) If the parties choose a neutral from the list of approved paid neutrals, the parties shall notify the neutral and request that the neutral provide the parties with a schedule of fees and expenses.

(b) Unless the court orders or the parties otherwise agree, the neutral's fees and expenses shall be apportioned and paid in equal shares by each party, and shall be due and payable according to fee arrangements agreed to directly by the parties and the neutral. Fees and expenses paid to the neutral shall be allowed and taxed as costs in accordance with Superior Court Rule 87(a).

(c) If the parties choose a neutral from the list of approved volunteer neutrals, the parties shall be subject to a one-time administrative fee of $50.00 per party, which shall be paid to the court at the time the Stipulation for ADR is filed with the court. This fee will be designated for use by the Office of Mediation and Arbitration. Parties who are indigent may petition the court for waiver of the $50.00 administrative fee.

(d) Parties may select a neutral who is not on the court's lists of approved neutrals if the parties agree on the choice of the neutral.

(3) If the parties cannot agree on the selection of a neutral, they shall so indicate in their Stipulation. The court shall designate a neutral at the structuring conference. If the parties have not selected an ADR method and neutrals by the time the structuring conference occurs, the court shall, at the structuring conference, set a date certain by which ADR shall have occurred.

(C) *Stipulation and Court Order for Alternative Dispute Resolution.*

(1) No later than ten days prior to the initial structuring conference provided for in Rule 62(I), the parties must file with the court a comprehensive written stipulation, signed by all counsel, or by parties if unrepresented, containing:

(a) An agreement to seek resolution of the issues involved in the action by designating one or more of the following alternative dispute resolution methods to be carried out as provided in this rule:

i. Mediation;

ii. Neutral Evaluation;

iii. Binding Arbitration; or

iv. Any other method of dispute resolution agreed upon by the parties.

(b) The designation of a Rule 170 neutral, to serve in the agreed-upon process, or an agreement to accept a neutral chosen by the court from a list provided by the clerk;

(c) A schedule for the completion of the agreed-upon ADR process including the filing of case statements and the completion of any necessary discovery, or including the agreement to accept the assistance of the neutral designated under subparagraph (C)(1)(b) in setting a schedule for completion of the process. The schedule must provide for completion of the process within the shortest possible time after filing of the Stipulation, consistent with completion of the minimum amount of discovery necessary to make the process meaningful, but in any event not more than eight months after the date of the Stipulation.

(d) The time, date and location of the session.

(2) At the initial structuring conference, after consultation with counsel, or with parties if unrepresented, the court shall issue an order stating: (a) the specific ADR procedure to be used; (b) the identify of, and contact information for, the neutral; (c) the date by which the ADR procedure must be completed; (d) whether the ADR shall be at the courthouse or off-site; and (e) the anticipated time needed for the ADR method chosen. If the court chooses a neutral from the volunteer list, the court shall order the parties to pay a one-time administrative fee of $50.00 per party.

Except for the date by which the ADR procedure must be completed, the structuring conference order regarding ADR may thereafter be amended by agreement of the parties by filing an amended Stipulation with the court. The court may permit an extension of the date by which the ADR procedure must be completed on the motion of either party for good cause shown.

(3) Upon receipt of notice of appointment in a case, the neutral shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If the neutral withdraws, has a conflict of interest, or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

(D) *Alternative Dispute Resolution Proceeding.*

(1) Upon receipt of the structuring conference order, the parties shall contact the designated neutral and shall schedule the ADR proceeding. The neutral shall advise the parties in writing of the schedule for submission and exchange of summaries. Unless the neutral advises otherwise, each party shall exchange a summary, not to exceed five pages, of the significant aspects of their case. The parties may also attach to the summary copies of pertinent documents. Upon receipt of a party's submission, any party may send additional information responding to that submission. Unless the neutral advises otherwise, all submissions shall be exchanged with opposing counsel and shall contain a statement of compliance with the exchange requirement.

(2) Thirty days before the date of the first scheduled ADR session, each party must certify to the neutral that party's readiness to proceed on the scheduled date or request that the neutral reschedule the ADR session. At any time, upon written request of a party for good cause shown, the neutral may reschedule the ADR session for a date prior to the date set forth in the structuring conference order for completion of the ADR proceeding.

(3) All parties and their counsel must attend a scheduled ADR session, unless the court, for good cause, excuses an individual from participation or authorizes an individual to participate by speaker telephone. A corporation, partnership, or other entity that is a party, and a liability insurer that is defending the action, must each be represented by a person, other than outside counsel, who has settlement authority and authority to enter into stipulations. With the agreement of all parties and the neutral, any person having an interest that may be materially affected by the outcome of the proceeding may be invited to attend the session in person or by counsel.

(4) Within 15 days after the conclusion of an ADR proceeding, other than binding arbitration, the neutral must report the results of the process to the court in writing. The report may not disclose the neutral's assessment of any aspect of the case or substantive matters discussed during the session or sessions except as is required to report the information required by this paragraph. The report must contain the following items:

(a) The date on which the session or sessions were held including the starting and finishing times;

(b) The names and addresses of all persons attending, showing their role in the session and specifically identifying the representative of each party who had decision-making authority;

(c) A summary of any substitute arrangement made regarding attendance at the session;

(d) The results of the session, stating whether full or partial settlement was reached and appending any agreement of the parties;

(5) In any action in which ADR does not result in a settlement, the action will proceed in accordance with any agreement reached in the ADR process, or in the absence of an agreement, as ordered by the court.

(6) ADR proceedings shall not stay, alter, suspend, or delay pretrial discovery, motions, hearings, or conferences nor the requirements and time deadlines of New Hampshire Superior Court Rules 62 and 63.

(E) *Inadmissibility of Alternative Dispute Resolution Proceedings.*

(1) ADR proceedings and information relating to those proceedings shall be confidential. Information, evidence, or the admission of any party or the valuation placed on the case by any neutral shall not be disclosed or used in any subsequent proceeding. Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. All non-binding ADR proceedings are deemed settlement conferences consistent with the Superior Court Rules and Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding, the fact that there was an ADR proceeding or any other matter concerning the conduct of the ADR proceedings except as required by the Rules of Professional Conduct or the Mediator Standards of Conduct.

(2) Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its use in an ADR proceeding.

(F) *Sanctions.*

If a party or a party's counsel fails without good cause to appear at an ADR session scheduled pursuant to this rule, or fails to comply with any order made hereunder, the court may, on its own or upon motion of a party, impose any sanction that is just under the circumstances.

(G) *Qualifications of and Approval Process for Neutrals*

(1) Qualifications of Neutrals

(a) Good standing. All neutrals (neutral evaluators, mediators, arbitrators) must be attorneys admitted to practice in New Hampshire who are in good standing.

(b) Moral character. Neutrals must be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court.

(c) Disclosures. Applicants must disclose criminal convictions or findings of professional misconduct, which have not been annulled. The Administrative Council may refuse to approve an applicant who has been convicted of a criminal offense or has been found to have committed professional misconduct. Failure to disclose complete and accurate information may constitute grounds for decertification.

(d) Specific Requirements.

(i) Mediators -- All Rule 170 mediators must have at least 20 hours of training in civil mediation. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in mediating case(s) with an approved Rule 170 mediator/mentor. The 20-hour training requirement may be satisfied by way of training provided by the Office of Mediation and Arbitration for a fee, or the mediator may provide to the Office of Mediation and Arbitration documentation of equivalent training, subject to its approval. A mediator/mentor must be approved as a mediator/mentor by the Administrative Council before serving as a mentor.

New Rule 170 mediators shall be subject to the 20-hour training requirement. All mediators who were on the court's approved list of Rule 170 mediators prior to January 1, 2008, will not be subject to the 20-hour training requirement; they will, however, be subject to a biennial 8-hour refresher-training requirement. The 8-hour refresher training must be completed by January 1, 2009. The refresher training requirement may be satisfied by way of court-sponsored training, which shall be provided without charge to mediators, or a mediator may provide to the Office of Mediation and Arbitration documentation of equivalent training, subject to its approval.

(ii) Neutral Evaluators -- Neutral evaluators must be attorneys who have a minimum of 10 years experience in litigation in the subject matter areas to which they may be assigned as neutral evaluators. All neutral evaluators must have at least 20 hours of training in ADR and an additional 4 hours of training in neutral

evaluation. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in neutral evaluation of case(s) with an approved Rule 170 neutral evaluator/mentor. The neutral evaluator/mentor must be approved by the Administrative Council before serving as a neutral evaluator/mentor.

(iii) Arbitrators -- Arbitrators must be attorneys who have a minimum of 10 years of experience in litigation in the subject matter areas which they may be assigned as arbitrators. All arbitrators must have a minimum of 20 hours of training in ADR and an additional 8 hours of training in arbitration under this rule. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in actual arbitration of case(s)with an approved Rule 170 arbitrator/mentor. The arbitrator/mentor must be approved by the Administrative Council before serving as an arbitrator/mentor. Arbitrators shall adhere to all codes of conduct generally applicable to both commercial and private arbitrations.

(2) Application and Approval Process

(a) In order to serve as a neutral, an attorney must apply and be approved by the Administrative Council. In approving neutrals, the Administrative Council may consider the applicant's alternative dispute resolution experience or other relevant factors, such as length of practice or trial experience.

(b) Neutrals may choose to be listed on the volunteer list, the paid list, or both. Neutrals shall pay an annual rostering fee pursuant to a fee schedule established by supreme court order. The amount of the fee may vary depending upon which list the neutral chooses to be included. The fee will be used to support the Office of Mediation and Arbitration. The neutral may provide biographical information for inclusion on the list, as well a description of those areas of the law in which the neutral has enhanced knowledge. All neutrals, regardless of whether they are on the paid or volunteer list, shall agree to act as a volunteer neutral for a minimum of at least two days but not more than four days annually. Neutrals in these volunteer cases must also agree to travel to the courthouse in which the case is located if the parties and counsel have chosen to have the ADR proceeding there.

(c) Neutrals shall apply for inclusion on the court's lists by submitting an application, the applicable rostering fee, and three letters of reference as set forth in this rule to the Office of Mediation/Arbitration. Inclusion on the court's list of approved

neutrals remains valid for a one year period from July 1 through June 30 of each year. To request continued inclusion on the court's list or lists, a neutral, prior to June 1 of each year, shall:

(i) File a statement that there have been no material changes in his or her initial application for inclusion, or if there have been material changes, list and explain them.

(ii) File documentation that the neutral has completed required refresher training in the field of alternative dispute resolution in accordance with section (G)(1)(c).

(iii) Pay the rostering fee set for inclusion on the court's list of approved neutrals.

(d) All neutrals agree that as a condition of inclusion on the Court's list of approved neutrals, they may be required to provide at least two days but no more than four days of volunteer ADR sessions each year.

APPENDIX G

Amend Supreme Court Rules 37(20)(f) and 37(21)(c) as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

Supreme Court Rule 37(20)(f)

(f) *Protective Orders*: Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise confidential or privileged information concerning the complainant, a witness, or the attorney. In order to protect the interests of the complainant, witness, or attorney, the professional conduct committee, may, upon request, or on its own initiative, issue a protective order prohibiting the disclosure of confidential, malicious, personal, privileged information or material submitted in bad faith. Any person aggrieved by a decision on a protective order may, within thirty (30) days of the decision, request that the **supreme** court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the court has acted or the period for requesting court review has expired. ~~A motion for review of the professional conduct committee's decision about issuance of a protective order shall be filed as a confidential matter in the court.~~

Supreme Court Rule 37(21)(c)

(c) *Protective Orders*: Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise confidential or privileged information concerning the complainant, a witness, or the attorney. In order to protect the interests of the complainant, witness, or attorney, the professional conduct committee, may, upon request, or on its own initiative, issue a protective order prohibiting the disclosure of confidential, malicious, personal, privileged information or material submitted in bad faith. Any person aggrieved by a decision on a protective order may, within thirty (30) days of the decision, request that the **supreme** court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the court has acted or the period for requesting court review has expired. ~~A motion for review of the professional conduct committee's decision about issuance of a protective order shall be filed as a confidential matter in the court.~~

APPENDIX H

Amend Supreme Court Rule 40(3)(f) as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

Supreme Court Rule 40(3)(f)

(f) Protective order. Any person or entity may request from the committee, or the committee may issue on its own initiative, a protective order prohibiting the disclosure of confidential, malicious, personal, or privileged information or materials submitted in bad faith, and directing that the proceedings be so conducted as to implement the order. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the committee. The committee shall act upon the request within a reasonable time. Within 30 days of the committee's decision on a request for protective order, or of the committee's issuance of one on its own initiative, an aggrieved person or entity may request that the **supreme** court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the supreme court has acted, or the period for seeking supreme court review has expired. ~~A motion for review of the committee's decision on a request for protective order shall be filed as a confidential matter in the supreme court.~~