NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting and Public Hearing of December 14, 2012

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 pm by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen M. Anderson; William F.J. Ardinger, Esq., Honorable R. Laurence Cullen; Ralph D. Gault, Hon. Richard A. Hampe, Jeanne P. Herrick, Esq., Martin P. Honigberg, Esq.; Hon. Richard B. McNamara (arriving late), Jennifer L. Parent, Esq., Emily G. Rice, Esq. (leaving early), Patrick Ryan, Esq.; Raymond W. Taylor (arriving late), Esq. and Hon. Robert J. Lynn.

Also present were Secretary to the Committee, Carolyn Koegler, Esq., Irene Dalbec and Claire MacKinaw, staff.

I. Public Hearing

The Committee received comments from the public on the following matters, as set forth in the November 7, 2012 Public Hearing Notice.

a. 2011-015(i). Exchange of Pleadings By Email

(i) Supreme Court Rule 26(3). See November 7, 2012 Public Hearing Notice, Appendix A.

(ii) Superior Court Rule 21. See November 7, 2012 Public Hearing Notice, Appendix B.

(iii) Circuit Court - District Division Rule 1.3-A. See November 7, 2012 Public Hearing Notice, Appendix C.

(iv) Circuit Court - Probate Division Rule 21. See November 7, 2012 Public Hearing Notice, Appendix D.

(v) Circuit Court - Family Division Rule 1.23. See November 7, 2012 Public Hearing Notice, Appendix E.

A comment was submitted to the Committee via email by Jared O'Connor on November 9, 2012.

b. 2011-015(ii). Notice of Appeal Deadline

(i) Supreme Court Rule 7(1). See November 7, 2012 Public Hearing Notice, Appendix F.

A comment was submitted to the Committee via email by Jared O'Connor on November 9, 2012.

c. 2011-015(iii). Appeals in Family Law Cases

(i) Supreme Court Rule 3. See November 7, 2012 Public Hearing Notice, Appendix G.

A comment was submitted to the Committee via email by Jared O'Connor on November 9, 2012.

d. 2011-002. Admission to the Bar of Foreign Law School Graduates

(i) Supreme Court Rule 42(V)(c). See November 7, 2012 Public Hearing Notice, Appendix H.

A letter was submitted to the Committee by Attorney John M. Sullivan on December 11, 2012. Attorney Sullivan was also present at the public hearing and stated that he had proposed in his letter that the Committee consider two changes to the proposed amendment.

Attorney Sullivan noted, first, that he is concerned that proposed Rule 42(V)(c)(1), which requires that an attorney be either a member in good standing of the bar of the foreign country or a member of the bar of one of the States of the United States ignores the fact that many foreign law graduates work in legal capacities without formal bar membership. He notes that in Germany, for example, law school graduates routinely take state exams to become "qualified" for bar membership, but upon passing and qualification, do not actively seek bar membership. He suggests an amendment to the proposal to emphasize an applicant's qualifications, rather than his or her bar membership.

Justice Lynn stated that this issue is a tricky one because not having a requirement like membership in a bar association makes it very difficult when someone is trying to verify someone's qualifications. He inquired whether there is some other licensing organization to be referenced, other than bar associations. Attorney Sullivan stated that he would be happy to assist the Committee with research regarding this issue and submit a second letter summarizing the way this works in a number of different countries.

Judge Cullen inquired how the attorney discipline system works in the countries Attorney Sullivan referenced. Attorney Sullivan responded that he was not sure how it worked, but that it probably would not work the same way it does in this country.

The second issue Attorney Sullivan raised was to note that the proposed rule requires that the applicant have received his or her education in an English Common Law Country, but that this is not the rule in a number of U.S. States. He suggests that the Committee consider one of the following two options: (1) eliminating the requirement that the foreign law school be located in an English-speaking, common law country; or (2) providing an opportunity for an applicant's practical experience in a common law country to meet the requirement. That is, to allow an applicant the opportunity to demonstrate familiarity and experience with the English Common law.

One committee member noted that there is a provision in the draft rule which allows the board of bar examiners some flexibility to determine that educational sufficiency has been demonstrated in other ways, even if the applicant has not met the educational requirements set forth in the first part of the rule.

e. 2012-017. Transcripts of Court Proceedings

(i) Supreme Court Rule 15. See November 7, 2012 Public Hearing Notice, Appendix I.

(ii) Supreme Court Rule 59. See November 7, 2012 Public Hearing Notice, Appendix J.

(iii) Supreme Court Rule 7 Notice of Discretionary Appeal form. See November 7, 2012 Public Hearing Notice, Appendix K.

(iv) Supreme Court Rule 7 Notice of Mandatory Appeal form. See November 7, 2012 Public Hearing Notice, Appendix L.

Comments were submitted by email by Attorney Joshua Gordon and summarized in a November 20, 2012 memorandum to the Committee from Carolyn Koegler.

f. 2012-018. Law Clerk Code of Conduct

(i) Supreme Court Rule 46, Canon 2. See November 7, 2012 Public Hearing Notice, Appendix M.

An email comment dated November 16, 2012 was submitted by Attorney Quentin Blaine, requesting that the Committee consider using gender neutral language in Supreme Court Rule 46, Canon 2.

g. 2011-012. Juror Questionnaires

(i) Existing juror questionnaire form, NHJB-2103-S. See November 7, 2012 Public Hearing Notice, Appendix N.

(ii) Proposed Superior Court Rule 33. See November 7, 2012 Public Hearing Notice, Appendix O.

(iii) Proposed Criminal Rule of Procedure 22. See November 7, 2012 Public Hearing Notice, Appendix P.

(iv) Supreme Court Administrative Order 2009-03 (Management and Retention of Superior Court Files). See November 7, 2012 Public Hearing Notice, Appendix Q.

Comments were submitted in a November 27, 2012 email and attachments from Judge Nadeau to the Advisory Committee on Rules.

2. Discussion and Vote on Public Hearing Items

a. Exchange of Pleadings by Email

The Committee was reminded that the proposed amendments would allow counsel to agree that pleadings filed and communications addressed to the court may be furnished to all other counsel by email. Attorney Honigberg stated that the Committee is in the position to vote to recommend that the Court adopt the proposed amendments. Upon motion made by Attorney Honigberg and seconded by Judge Cullen, the Committee voted to recommend that the Court adopt the proposed amendments. Judge McNamara abstained from voting.

b. Notice of Appeal Deadline

The Committee was reminded that the proposed amendment would resolve an ambiguity in Supreme Court Rule 7 regarding the Notice of Appeal Deadline when a trial court grants a motion for reconsideration. Upon motion made by Attorney Ardinger and seconded by Attorney Honigberg the Committee voted unanimously to recommend that the Court adopt the proposed amendment.

c. Appeals in Family Law Cases

The Committee was reminded that the proposed amendment would address a concern that Supreme Court Rule 3 is unlawful and unconstitutional to the extent that it provides for mandatory review of appeals involving married parents but discretionary review of appeals involving non-married parents.

Justice Lynn noted that the Committee had received a November 9, 2012 email comment from attorney Jared O'Connor expressing concern about the language "first final order" used in the proposed amendment. Mr. O'Connor had noted, in particular, that:

> . . . . For all married couples, their "first" final order will be the decree of divorce, with all the accompanying orders on property division, parenting plan and uniform support order. And for most unmarried couples, their "first" final order will most likely be an order that addresses both a parenting plan and child support issues.
>
> But not necessarily . . . .

Justice Lynn stated that he understands Mr. O'Connor's concern, but that he does not believe it will be possible to get the language so tight as to account for every single potential scenario, like the ones Mr. O'Connor describes in his letter. He noted that he believes that in the scenario Mr. O'Connor describes, in which a "final order" was issued in a state-initiated action for child support and there was a later dispute between the parents, that the parents would not be barred from appealing a "final order" in that subsequent dispute. Committee members generally agreed that it would be difficult to draft a rule to account for the scenario described by Mr. O'Connor.

Carolyn Koegler noted that if the Committee recommends that the Court adopt the proposed amendment to Supreme Court Rule 3, the Comment following Supreme Court Rule 3(9) will need to be amended.

Upon motion made and seconded, the Committee voted unanimously to recommend that the Supreme Court adopt the proposed amendment, and directed Carolyn Koegler to draft a proposed amendment to the Comment following the Rule to comport with the proposed amended rule.

d. Admission to the Bar of Foreign Law School Graduates

The proposed amendment would change what graduates of law schools in foreign countries would be required to prove to be eligible to sit for the bar examination in New Hampshire or to apply for admission upon motion.

Judge McNamara noted, regarding Attorney Sullivan's proposal, that graduates of foreign law schools located in countries with civil law traditions be permitted to sit for the bar exam, that countries with civil law systems are very different from countries with common law traditions. He questioned how likely it is that someone coming from a country with a civil law tradition would want to be a member of the New Hampshire Bar, that is, why someone from this background would want to sit for the Bar Examination. He inquired whether the discussion about amending the rule is a "tempest in a teacup," that is, whether this is a real issue, with a practical application.

Attorney Ardinger stated that he believes this is a genuine issue, and that it is not difficult to imagine a situation in which an attorney from a foreign country spends three months working out of the office of their local counsel in New Hampshire. In this scenario, such a person would really be "practicing law," and, as such, should apply for admission to the bar in New Hampshire.

Judge McNamara raised the same question he did at a previous meeting. That is, whether there is some provision in GATT that precludes states from excluding from admission to the bar attorneys in countries that are signatories to GATT.

It was generally agreed that the proposal to amend Supreme Court Rule 42(V)(c) is not something the Committee is prepared to recommend to the Court at this time. The Committee asked Carolyn Koegler to work with Attorney Sullivan on this issue, and to present a revised proposal to the Committee at the March meeting.

e. Transcripts of Court Proceedings

Upon motion made and seconded, the Committee voted unanimously to recommend that the Court adopt on a permanent basis temporary amendments to the rules and forms relating to the preparation of transcripts of court proceedings and appeal transcripts.

f. Law Clerk Code of Conduct

Upon motion made by Attorney Ardinger and seconded by Attorney Parent, the Committee voted unanimously to adopt on a permanent basis temporary amendments to Supreme Court Rule 46, relating to the Law Clerk Code of Conduct, governing the use of writing samples for job search purposes.

It was noted that the Committee had received a comment from Attorney Blaine encouraging the Committee to make the rule gender neutral. Some discussion followed regarding the need to make the rules gender neutral, and it was agreed that this would be done at some point.

g. Juror Questionnaires

Carolyn Koegler reminded the Committee that the proposed amendments would amend the proposed Superior Court Rules and New Rules of Criminal Procedure as set forth in the Advisory Committee on Rules 2010 Annual Report, not Court Rules currently in effect. She also reminded the Committee that it had put out for public comment changes proposed by the subcommittee on juror questionnaires, and that she understood that it was not the Committee's intention to recommend these to the Court at this time, but that the purpose of putting the proposals out for public comment was to alert the public that the Committee is working on this issue, and to solicit input. Justice Lynn noted that it was his recollection that some items in the proposals might need to be "tweaked" when the Superior Court has finished making changes to its electronic system.

It was agreed that Ray Taylor, as chair of the subcommittee on juror questionnaires, would: (1) address the question of whether there is any need to "tweak" the proposals; and (2) inquire of Judge Nadeau whether the Superior Court is ready for these to be implemented. The Committee agreed that it would take a final vote on this item in March.

3. Approval of Minutes of September 14, 2012 Meeting

Upon motion made by Judge Cullen and seconded by Ralph Gault, the Committee voted to approve the September 14, 2012 minutes, as amended to strike the words "Attorney Anderson" on page 3 and replace them with "Ms. Anderson." Jennifer Parent abstained from voting.

4. Status of Pending Items

a. District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure

Judge Cullen stated that he understood that Judges Kelly and Nadeau would be meeting with the Supreme Court in early January regarding the New Civil Rules and Criminal Rules of Procedure. He noted that because he has been using the new civil rules as a model and adapting them for use in the district court, it seems to make some sense to wait to submit to the Committee a final set of proposed district division rules after the meeting in January. He will submit to the Committee in March a printout of the rules showing what changes need to be made, with the idea that the proposed new district division rules be put out for public hearing in June.

b. 2008-013. Judicial Conduct Committee Procedures

Carolyn Koegler informed the Committee that following the September meeting, at the Committee's request, she wrote to Bob Mittelholzer, Executive Secretary of the JCC, asking the JCC to consider, and comment on: (1) the question of whether Supreme Court Rule 40(11)(j) should be amended to be consistent with the language of temporary Superior Court Rule 78 (amended by Supreme Court order dated January 25, 2012); and (2) A proposal submitted by Joseph R. Adamaitis requesting that the Committee consider amending Supreme Court Rule 40(4)(c)(2), to eliminate or change the period of limitations. She reported that she had heard back from Attorney Mittelholzer, and that the JCC would respond to the Committee prior to the Committee's March meeting.

c. 2012-005. Superior Court Rule 59-A. Preservation of Issues for Appeal.

Justice Lynn reminded the Committee that before the Committee is a proposal to codify the Supreme Court's opinion in New Hampshire Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002) by amending Superior Court Rule 59-A as follows:

> 59-A. (1) A motion for reconsideration or other post-decision relief shall be filed within ten (10) 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 (10) pages. **[To preserve issues for an appeal to the Supreme Court, an appellant must have given the superior court the opportunity to consider such issues; thus, to the extent that the superior court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal.]** A hearing on the motion shall not be permitted except by order of the Court.

(2) No answer to a motion for reconsideration or other ~~postdecision~~ **[post-decision]** relief shall be required unless ordered by the Court, but any answer or objection must be filed within ten (10) days of notification of the motion.

(3) 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.

(4) The filing of a motion for reconsideration or other ~~postdecision~~ **[post-decision]** relief shall not stay any order of the Court unless, upon specific written request, the Court has ordered such a stay.

[Commentary:

The third sentence of paragraph (1) derives from N.H. Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002), and is not intended to preclude a party from raising an issue on appeal under the plain error rule set forth in Supreme Court Rule 16-A.]

Justice Lynn reminded the Committee that it had put this proposal out for public hearing in June, and that Chief Appellate Defender Christopher Johnson had submitted written and oral comments on the proposal. He was concerned that the proposed amendment reflected in section 1 (above) is broader than the rule set forth in Butland, urged the Committee not to recommend the proposal to the Court, and urged the Committee to consider recommending alternative language for the amendment.

Justice Lynn noted that he had prepared a memorandum to the Committee responding to the concerns Attorney Johnson raised. He stated that while he understands Attorney Johnson's concerns, he

believes that all the proposed amendment does is to codify the Court's existing case law. He stated that in addition to the published cases of DeBenedetto and Lamontagne, there are a number of unpublished orders that apply the rule set forth in the proposed amendment to Supreme Court Rule 59-A. He inquired whether the Committee was ready to vote on whether to recommend this amendment to the Supreme Court

Upon motion made by Attorney Taylor and seconded by Judge Cullen the Committee voted unanimously to recommend that the Supreme Court adopt the proposed amendment to Superior Court Rule 59-A and the analogous rules in the other trial courts.

d. 2010-015. Model Rules for Client Trust Account Records.

Carolyn Koegler reminded the Committee that before it is a recommendation regarding the ABA Model Rules for Client Trust Account records, PCC Rule 1.14(a) and Supreme Court Rule 50 submitted by Attorney Rolf Goodwin. She stated that the recommendation is a joint recommendation made by the Bar Association's Ethics Committee and the Attorney Discipline Office and approved by the Board of Governors of the Bar Association.

Upon motion made by Attorney Honigberg and seconded by Attorney Parent the Committee voted unanimously to recommend that the Supreme Court adopt the proposals to amend Rule of Professional Conduct 1.14(a) and Supreme Court Rule 50 as set forth in Attorney Goodwin's submission.

e. 2011-014. Counsel Fees and Guardians Ad Litem Fees Rules

Justice Lynn reminded the Committee that at issue with respect to this item is whether the Committee should recommend that the temporary rules adopted by Court order on July 12, 2011 be made permanent. The Committee had agreed in June that the rules should be continued in a temporary status for the next six months.

Judge Hampe stated that his sense is that the rules are working fine, but that he would like to have Judge Kelly's input on whether these rules should be adopted on a permanent basis. Justice Lynn agreed to contact Judge Kelly to inquire about this.

f. 2011-021. Superior Court Pilot Rules—PAD

Justice Lynn reminded the Committee that the Court had adopted a temporary amendment to the temporary rule, which expanded the PAD rules into Hillsborough North and South. Attorneys Honigberg and

Taylor suggested, and members of the Committee generally agreed, that the PAD Rules should remain temporary for at least another six months, before they are put out for public hearing.

g. 2007-001. Superior Court Rule 170 (ADR)

Judge McNamara reported that he had circulated a draft memorandum to the Committee prior to the meeting summarizing the changes in the Alternative Dispute Resolution Rule proposed to replace existing Superior Court Rule 170. He noted that the text of the draft replacement rule had been circulated to Committee members in March as an attachment to his email dated March 9, 2012. He noted that three members of the ADR subcommittee were present at the meeting and prepared to respond to any questions Committee members might have about the proposed new rule.

Judge McNamara stated that the subcommittee had reviewed the old rule, made some changes to the rule based on the experiences people had had with it, simplified the rule, and made it more practical. The replacement rule is much shorter than the existing rule, and the main thrust of the rule is to: (1) make everything subject to mandatory mediation; and (2) make the process more court-centered so that people take it more seriously, and it is made part of the judicial system.

Judge McNamara noted that a big concern for members of the subcommittee was that the operation of Superior Court Rule 170 had become perfunctory. He stated that the view of the subcommittee was that the structuring conference is the ideal place to hash out the mediation-related issues, that there ought to be a discussion at that stage among the parties and the judge as to what form ADR should take, what the timetable should be, that there should be greater judicial involvement in all aspects of ADR, and that it should be an active and ongoing process.

Attorney Philpot stated that he had two points to make regarding mediation. First, he noted that the subcommittee had considered the issue of whether cases involving municipalities should be exempt from mandatory mediation. He stated that while there may be cases for which mediation would not be practical, there are some cases which could benefit from mediation. Therefore, it is the view of the subcommittee that municipalities should not be exempt and that in those cases in which it would not be practical, the parties could file a motion to be exempt from the requirement.

Attorney Philpot next stated that he shares Judge McNamara's belief that judicial involvement in identifying issues and timing around

mediation is important. He notes that there will be cases in which early mediation is better, and some cases in which mediation is more effective after discovery.

Mr. Osman echoed Mr. Philpot's point that municipalities should not be exempt from mediation. There are some cases in which there is a high probability of cases involving municipalities being resolved.

Judge McNamara noted that Section (F)("Surcharge") of the proposed rule to replace existing Superior Court Rule 170 would require statutory changes.

Justice Lynn stated that he had contacted Don Goodnow about the fees issue. Justice Lynn noted that when rule 170 was adopted in 2007, the legislature funded the program for one year, but expected that after the first year, the program would be self-funded. Currently, the $50 fee that is collected in superior court goes to subsidize the cost in the circuit court because, unlike the superior court mediators, the circuit court mediators are paid by the court system if the parties are financially unable to pay. Justice Lynn reported that he had asked Don Goodnow to run the numbers to determine what fee would be required to make the program revenue neutral. He is awaiting a response. Justice Lynn noted that this is an important issue because the legislature will have questions if the program is not revenue-neutral.

Attorney Philpot noted that there are currently inconsistencies in how the $50 fee is collected.

Discussion turned to issues related to fees charged to the neutrals. Attorney Taylor noted that the rostering fee for neutrals is $350. Jennifer Parent inquired what the Committee's thought process is regarding the continuing education requirement for neutrals. It was noted that many mediators feel that the $350 rostering fee is quite burdensome and that many people are dropping out because it is not worth their while. It was noted that while neutrals receive free training with their rostering fee, volunteers also receive free training.

Justice Lynn noted that, as he recalls, a big part of the reason for both the $50 fee and the $350 fee was to get the program going. His sense is that there is a need for some change with respect to the fees. There are problems collecting the $50 fee, and the $350 rostering fee is driving people out of the program.

It was suggested that the filing fee may be the best way to collect the $50 fee. Justice Lynn noted that the court system will need to have a

discussion about the money, and that it is not reasonable to continue to ask the bar to fund something that is a public responsibility.

Jennifer Parent noted that she recalls that at its inception Rule 170 was quite robust, but now there seem to be more lawyers participating on a volunteer basis because of the fees and the training. She noted that there are 38 hours of initial training, and eight hours per year of refresher training.

Justice Lynn noted that he recalls the issue of training being the subject of vigorous debate at the superior court level. He noted that a number of people inquired why it was necessary to require so much training. Others felt that the evidence suggested that the training of neutrals is really important. The current rule came out of that debate. Perhaps some consideration should be given to requiring less training.

Attorney Osman stated that he recalls notes from Laurie Levin reflecting that the $50 fee and the $350 fee are not popular. Administratively, there are costs associated with collecting the fees. He suggests that some consideration be given to tweaking the filing fee, and inquired about the constitutionality of raising the fee in this way. On the question of training, Attorney Osman noted that mediation is a different kind of skill. He believes that lawyers and judges can become good mediators, but believes that this is not automatic, and that some training is necessary. He believes that there is an argument to be made to not scale back on the training requirement.

Attorney Philpot stated that he advocated for the training. He believes that training is very important. It is important to learn how to step back from the advocacy role and to help people come to decisions themselves. He started as a mediator twenty years ago and still learns something new at each training session.

Justice Lynn stated that he believes that the Committee needs to further discuss some of these issues, but that his sense is that the proposal is good as a general proposition. He suggests that the Committee put the proposal out for public hearing in June, and that, in the interim, if people have proposals to make with respect to the training requirement, or other items that might need to be tweaked, they should be raised with Judge McNamara.

Attorney Honigberg suggested that the Committee wait until the March meeting to vote to put the proposal out for public hearing.

Justice Lynn suggested that if Committee members have proposals to change the training requirement, they should let Judge McNamara

know within thirty days. Jennifer Parent stated that she would raise the issue at the meeting of the Bar Association Board of Governors next week. Judge McNamara stated that he would submit a final version to the Committee in time for the March meeting.

Ray Taylor inquired whether a statutory change would be necessary before the new Rule 170 was adopted. Justice Lynn noted that it is possible to make the substantive changes, and just keep the $50 fee for now, while Don Goodnow completes the task of determining what fee would be required to make the program revenue-neutral.

h. 2012-004. IOLTA.

Judge Lynn reminded that Committee that a subommittee had been formed to consider the proposal, made by Attorney Middleton, that the Annual Trust Accounting Compliance Certificate be amended to include questions relative to whether the attorney completing the form has any interest in a title or closing company that handles real estate closings. The Committee will address the questions of what entities can be subject to IOLTA, and what entities should be subject to IOLTA.

i. Supreme Court Rule 37(9)(b)

Carolyn Koegler informed the Committee that she is still researching the question of whether it would be appropriate to amend Supreme Court Rule 37(9)(b) to include the language of the ABA rule as follows:

(9) *Attorneys Convicted of Serious Crime:*

(a) Upon the filing with the court of a certified copy of any court record establishing that an attorney has been convicted of a serious crime as hereinafter defined, the court may enter an order suspending the attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction.

(b) **[Definition of "Serious Crime."]** ~~The term~~ **A** "serious crime" ~~shall include~~ **is** any felony **[or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,]** ~~and~~ or any ~~lesser~~ crime a necessary element of which, as

determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

. . . .

j. 2012-008. Protocol for In Camera Review of Documents.

Carolyn Koegler reminded the Committee that the Supreme Court had notified the Committee that the Superior Court had drafted a protocol for in camera review. Because the protocol establishes procedures that would be applicable to parties and counsel in civil and criminal cases, the Supreme Court felt that the protocol should probably be adopted in some form as one or more rules, and asked the Committee to consider this issue. At the Committee's direction, Carolyn Koegler sent copies of the proposal out to a number of different people requesting comment.

A number of concerns about the protocol were raised by the Public Defender's office and by Attorney General's office. At the September meeting, the Committee asked Carolyn Koegler to outline the concerns about the protocol in a letter to Judge Nadeau and to ask Judge Nadeau to revise the proposed forms and protocol to address the concerns. Carolyn Koegler reported that she had emailed Judge Nadeau, summarizing the Committee's concerns about the forms and the protocol. She stated that, in response, Judge Nadeau had forwarded to her a letter from Judge Nicolosi which addressed the concerns.

The Committee considered the December 13, 2012 memorandum (with attachments) from Carolyn Koegler highlighting the changes that Judge Nicolosi recommends making to the protocol in response to the Committee's request that Judge Nadeau revise the proposed forms and protocols to address the concerns raised by the Committee.

Carolyn Koegler reminded the Committee that it had not yet addressed the issue raised in Deputy Attorney General Ann Rice's letter regarding a conflict between the draft protocol and Supreme Court Rule 57-A. The draft protocol requires the trial court to retain the documents for 10 years after the appeal period has expired, but Supreme Court Rule 57-A requires the trial court to return the documents to the submitting party or individual upon the expiration of the appeal period or upon receipt of the supreme court mandate.

Judge Hampe inquired what the purpose is of keeping the documents for ten years. Other committee members asked to be reminded about the background regarding the language in the protocol. There was some discussion about the difference between the civil and criminal cases and some opined that it would be difficult to take a "one size fits all" approach to the issue of in camera documents.

Ray Taylor noted that there seem to be two options for the Committee to choose: (1) "return to the Court and destroy;" or (2) documents to be retained for ten years "unless otherwise agreed to by the parties. But then there is an open question as to how long the court must keep the documents.

Justice Lynn proposed changing the language of the protocol to state, "this protocol applies unless otherwise ordered by the court." He noted that further discussion would be needed regarding how long the documents should be preserved.

k. 2012-010. District Court Rules.

Judge Cullen reported that a subcommittee had met to address the need for a procedure to insure that counsel is available for indigent defendants at their arraignments in the district court. Members of the subcommittee include Attorney Buzz Sherr (also present at this Committee meeting), a representative from the Public Defender's office, a member from the Attorney General's office and a member of the judicial council. Judge Cullen reported that there are a few areas of active disagreement, but the biggest challenge seems to be how to make this work administratively. The members of the subcommittee will meet again and will submit something to the Committee in March, with the expectation that the proposal will be put out for public hearing in June.

Justice Lynn noted that ensuring that counsel is available for indigent defendants at their arraignments in district court will require a significant change in procedures. A rule which would require that counsel be available in these circumstances would require the bail commissioner to provide the defendant with the forms to request counsel, then the court has to provide counsel before the first appearance before the judge. This is a practical issue that needs to be worked out. The Public Defender needs to have lawyers available at court when arraignments are held. This means more public defenders are needed. It is not easy to get all of the pieces to come together, but it needs to be done.

Judge Cullen stated that when complaints are filed is another issue. He stated that the biggest problem is not with detained defendants, it is with non-detained, class-A misdemeanors or felonies.

Justice Lynn explained that the plan is to attempt to get something into place on a temporary basis with the hope that the district courts are moving in the right direction. If there are still a lot of people with no counsel at arraignments, then it may be necessary to be more insistent. This rule will cause problems at police departments, because the police will not be ale to go to Court whenever they want, but perhaps only at certain times.

Attorney Scherr noted that there is some hope that if counsel is provided two weeks ahead, that this may mean that some cases are resolved early, which would ease the burden on the district courts.

l. 2012-012. Supreme Court Rule 37(15)

At the June meeting, Attorney Ardinger was asked to address the suggestion, made by David Peck, that Supreme Court Rule 37(15) be amended to cap the fees charged to attorneys who have resigned and are seeking readmission to the bar. Attorney Ardinger agreed to research the questions of what an attorney needs to do to: (1) rejoin the bar after resignation; and (2) move from inactive to active status.

Attorney Ardinger recommended that the Committee not recommend a change to Supreme Court Rule 37(15). He outlined for the Committee the New Hampshire rules regarding how an attorney may rejoin the bar after resignation and move from inactive to active status. He notes that the rules in other jurisdictions have built into them a disincentive to resignation, and believes that this is for good reason. Attorney Ardinger believes that the best approach is to incentivize people to move to inactive status, rather than resign. The only fees an attorney on inactive status pays is $175 in dues and $10 to the PCC, so he believes it makes sense for attorneys to be encouraged to go to inactive status until they know for certain that they are “out of the game.”

One committee member inquired whether there is a continuing legal education requirement for inactive status. Jennifer Parent stated that there is, but that there is a waiver process for this, even though the rule sounds mandatory.

The Committee decided to take no action on this item.

m. 2012-013. Circuit Court Rules. Dismissal of Cases

At the June meeting, the Committee considered Judge Kelly's proposal that the Court adopt a rule, applicable to the circuit court, to provide for the dismissal by the Court of certain cases if they have seen no activity for a period of two years. Judge Hampe had requested that the Committee consider Judge Kelly's proposal after he has had the opportunity to consider how the proposed rule would impact the probate division.

Judge Hampe stated that he had considered this issue, and that he does not have any concerns about such a rule. Upon motion made by Judge Hampe and seconded by Judge McNamara the Committee unanimously voted to put this item out for public hearing in June.

n. 2012-019. Procedural Rules of the JCC

Carolyn Koegler reported that the JCC would be considering: (1) whether to recommend that the Court amend Supreme Court Rule 40(11)(j), relating to the photographing, recording and broadcasting of JCC proceedings that are open to the public, to comport with the language of the recent temporary amendment to Superior Court Rule 78; and (2) the proposal to amend Supreme Court Rule 40(4)(c)(2) submitted by letter dated July 23, 2012 by Joseph R. Adamaitis. Mr. Adamaitis has proposed an amendment to the procedural rules of the JCC to eliminate the two year period of limitations contained in Rule 40(4)(c)(2).

o. 2012-020. Proposal to make technical amendment to Supreme Court Rule 32-A.

The Committee considered a proposal, outlined in a September 5, 2012 memo to the Committee from Carolyn Koegler, to amend Supreme Court Rule 32-A to change the references from "defendant" to "party."

Upon motion made by Attorney Herrick and seconded by Attorney Honigberg, the Committee voted unanimously to recommend that the Supreme Court adopt this technical amendment when it adopts the other changes to Supreme Court Rule 32-A that were recommended in the Advisory Committee on Rules 2012 Annual Report.

p. 2012-021. Superior Court Administrative Rules. "Rules Clean-up."

Carolyn Koegler reminded the Committee that she had been charged with addressing two issues regarding the need for a "rules cleanup" of the Superior Court Administrative Rules raised in her

September 7, 2012 memorandum. She will submit a set of proposed amendments to the Committee for its consideration prior to the March meeting.

q. 2012-022. Supreme Court Rule 54.

Justice Lynn reminded the Committee that at the September meeting the Committee had briefly considered a proposal to have a liaison judge for each court. That is, it might make sense to have a "presiding judge" of the Circuit Court, who is available most of the time, where people could go to raise concerns about a local court.

Following brief discussion, and upon motion made and seconded, the Committee unanimously voted to immediately recommend that the Court adopt on a temporary basis an amendment to Supreme Court Rule 54 authorizing the administrative judge of the Circuit Court to appoint a presiding judge for each court location. The Committee also unanimously voted to recommend that the Court refer the issue to the Advisory Committee on Rules for its recommendation as to whether it should be adopted on a permanent basis.

r. 2012-011. Supreme Court Rule 45. Continuing Judicial Education

The Committee considered a December 12, 2012 memorandum from Carolyn Koegler stating that the Supreme Court would like to amend Supreme Court Rule 45 to delete references to the National Judicial College and proposing other technical changes to the rule.

Judge McNamara opined that it would make some sense for judges to go to regional conferences or colleges, for example, the Flashner Institute. He believes that this item should be put out for public hearing.

Justice Lynn stated that there are budgetary reasons to make the change. Upon motion made and duly seconded, the Committee voted unanimously to put this item out for public hearing in June.

5. New Items for Consideration

a. 2012-023. Supreme Court Rule 51(B)(1). Rulemaking Procedures

The Committee next considered a November 20, 2012 memorandum from Carolyn Koegler proposing language to amend Supreme Court Rule 51 to allow the Speaker of the House and the

Senate President some flexibility to appoint a designee for some, or all, of the meetings.

Judge Cullen spoke in favor of the proposal. Attorney Ardinger expressed concern about the language being proposed. He notes that if the language that is being proposed is adopted, then there is some risk that the Committee would lose its direct connection with the legislature because the Speaker of the House and the Senate President could appoint anyone they chose, whether the person was a member of the House or Senate, or not. The language being proposed is as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format:

B. *Appointment of Advisory Committee on Rules*

(1) There shall be an Advisory Committee on Rules, which shall be composed of sixteen members as follows:

(a) One active or retired judge from each of the following courts shall be appointed by the supreme court: district court, probate court, superior court, and supreme court.

(b) Two attorneys shall be appointed by the supreme court.

(c) Three lay persons shall be appointed by the supreme court.

(d) One member shall be appointed by the Governor.

(e) ~~One member of the senate shall be appointed by~~ **t[T]**he president of the senate **[, or the president's designee]**.

(f) ~~One member of the house shall be appointed by~~ **t[T]**he speaker of the house **[or the speaker's designee]**.

(g) One clerk of court shall be appointed by the supreme court.

(h) One member of the New Hampshire Bar Association Board of Governors and one member of the Committee on Cooperation with the Courts shall be appointed by the president of the New Hampshire Bar Association.

(i) One active or retired judge, master, or administrator from the family division shall be appointed by the supreme court.

After some discussion, and upon motion made by Judge Hampe and seconded by Attorney Honigberg, the Committee voted unanimously to put the proposed amendment out for public hearing in June.

b. <u>2012-024. Sheriff's Request for Dates of Birth for Civil Process.</u>

Justice Lynn explained that Judge Nadeau had forwarded to him a letter from the Rockingham Sheriff's office requesting that the court provide the Sheriff's office with dates of birth on all civil arrest warrants

and civil process. Judge Nadeau asked the Rules Advisory Committee to consider whether "an amendment, consistent with the Sherriff's request," would be appropriate.

Justice Lynn reported that he had asked Carolyn Koegler to make some inquiries regarding whether it would be possible to provide this information. She learned that, in civil cases, parties are not required by statute to provide dates of birth, and that in 98-99% of cases parties do not provide this information. Therefore, it is not possible to provide the Sheriff's Department with the information.

c. 2012-025. Supreme Court Rule 7(1)(C).

The Committee next considered a November 19, 2012 memorandum from Carolyn Koegler to the Committee stating that the Supreme Court would like the Committee to consider the following amendment to Supreme Court Rule 7(1)(C) (new material is in **[bold and in brackets]**):

> (C) The definition of "decision on the merits" in Rule 3 includes decisions on motions made after an order, verdict, opinion, decree or sentence. A timely filed post-trial motion stays the running of the appeal period for all parties to the case in the trial court including those not filing the motion. Untimely filed post-trial motions will not stay the running of the appeal period unless the trial court waives the untimeliness within the appeal period. **[In the absence of an express waiver of the untimeliness made by the trial court within the appeal period, the appeal period is not extended even if the trial court rules on the merits of an untimely filed post-trial motion.]** Successive post-trial motions will not stay the running of the appeal period. *See Petition of Ellis*, 138 N.H. 159 (1993).
>
> In criminal appeals, the time for filing a notice of appeal shall be within 30 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 10 days after sentencing.

According to the memorandum, it has been the Court's practice to apply the rule that "untimely filed post-trial motions will not stay the running of the appeal period unless the trial court waives the untimeliness within the appeal period," even when the trial court actually rules on the merits of the post-trial motion. The proposed amendment is designed to clarify that such a merits ruling by the trial court does not

impliedly waive the untimeliness of the post-trial motion, and, therefore, does not change the calculation of the appeal period.

Upon motion made by Attorney Honigberg and seconded by Attorney Parent, the Committee unanimously voted to put the proposed amendment out for public hearing in June.

d. 2012-026. Trial Court Rules – Personal Jurisdiction.

The Committee next considered the issue, raised by Justice Lynn, regarding whether the trial court rules should be changed to overrule current practice with respect to challenging personal jurisdiction. Under current New Hampshire case law, if a litigant is sued in New Hampshire and wishes to challenge the jurisdiction of New Hampshire Courts over him, he must file a special appearance and a motion to dismiss and can do nothing more than this, such as raising other defenses, because his doing so will be treated as a waiver of the challenge to jurisdiction.

After some discussion it was agreed that a subcommittee should be formed to consider this issue. Attorney Ardinger and Judge McNamara agreed to serve on a subcommittee and to ask another attorney, such as Attorney Felmly, to serve with them.

e. 2012-027. Pro Hac Vice Fees

The Committee next considered the November 15, 2012 Order temporarily amending court rules to increase the fee charged to applicants seeking permission to appear pro hac vice from $225.00 to $250.00 and referring the issue to the Advisory Committee on Rules for its recommendation as to whether the amendments should be adopted on a permanent basis.

Upon motion made by Attorney Taylor and seconded by Justice Lynn, the committee voted unanimously to put the item out for public hearing in June.

6. Miscellaneous

The next meeting date is Friday, March 15, 2013. The meeting dates for 2013 are as follows:

Friday, June 14, 2013
Friday, September 20, 2013
Friday, December 13, 2013

The meeting adjourned.