NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Hearing and Meeting of December 12, 2014

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

The meeting was called to order at 12:38 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen Anderson, Hon. R. Laurence Cullen, Hon. N. William Delker, Ralph D. Gault, Joshua L. Gordon, Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Emily G. Rice, Esq., Patrick W. Ryan (arriving at 2:00 p.m.), Frederick W. Stephens, Jr., Raymond W. Taylor, Esq., and Hon. Robert J. Lynn.

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

Justice Lynn began the meeting by noting that in light of the fact that a quorum was not present at the September meeting, it would be necessary for the Committee to vote to hold a public hearing on the items listed in the Notice of Public Hearing dated October 24, 2014. Upon motion made and seconded, the Committee voted to hold a public hearing.

1. Public Hearing

Members of the Committee received the views of the public, the bench and the bar on the following proposed rules and rule amendments set forth in the October 24, 2014 Notice of Public Hearing:

(a) 2013-010. Rules of Professional Conduct: ABA 20/20 Initiative

The proposed amendments to the New Hampshire Rules of Professional Conduct are recommended by the New Hampshire Bar Association Ethics Committee ("Ethics Committee"). The proposed amendments were prompted by the Ethics Committee's review of recent changes made to the American Bar Association ("ABA") Model Rules of Professional Conduct and accompanying comments in light of advances in technology and global legal practice development. The ABA reports and background materials may be found at http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html. Although not all of the ABA updates have prompted a recommendation to amend the applicable New Hampshire rule, each New Hampshire rule potentially impacted by the ABA Model Rules of Professional

Conduct updates is set forth here, along with the accompanying Ethics Committee comments and the ABA comments to the model rules. The Advisory Committee on Rules will accept comment on the proposed amendments to the New Hampshire Rules as well as the recommendation not to adopt certain amendments to the New Hampshire rules that have been made to the ABA Model Rules of Professional Conduct. The Advisory Committee on Rules does not recommend for adoption or amendment, and the Supreme Court does not adopt or amend the ABA Model Rules, ABA Comments or Ethics Committee Comments. Therefore, the Advisory Committee on Rules will not accept comment on any of these texts, which are provided below solely to help provide context to the proposed amendments. Input on the Ethics Committee Comments should be directed to the Ethics Committee.

1. The Ethics Committee recommends amending Rule 1.0 ("Definitions") and the ABA has amended its comment to the model rule, as set forth in Appendix A.

2. The ABA has not amended Model Rule 1.1 ("Competence"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 1.1("Competence"), but both have amended the accompanying comments, as set forth in Appendix B.

3. The ABA has not amended Model Rule 1.4 ("Communications") and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 1.4 ("Client Communications"), but the ABA has amended its comment to the model rule, as set forth in Appendix C.

4. The ABA has amended Model Rule 1.6 ("Confidentiality of Information") and the accompanying comment and the Ethics Committee recommends amendments to Rule 1.6 ("Confidentiality of Information") and the accompanying comment, as set forth in Appendix D.

5. The ABA has not amended Model Rule 1.17 ("Sale of Law Practice"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 1.17 ("Sale of Law Practice"), but the ABA has amended its comment to the model rule, as set forth in Appendix E.

6. The ABA has not amended Model Rule 1.18 ("Duties to Prospective Client"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 1.18 ("Duties to Prospective Client"), but the ABA has amended its comment to the model rule, as set forth in Appendix F.

7. The ABA has not amended Model Rule 4.4 ("Respect for Rights of Third Persons"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 4.4 ("Respect for Rights of Third Persons"), but the ABA has amended its comment to the model rule and the Ethics Committee has amended its comment to the New Hampshire Rule, as set forth in Appendix G.

8. The ABA has not amended Model Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 5.3 ("Responsibilities Regarding Nonlawyer Assistance"), but the ABA has amended its comment to the model rule, as set forth in Appendix H.

9. The ABA has amended Model Rule 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice of Law") and its comment to the model rule, and the Ethics Committee recommends amendments to Rule 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice of Law"), as set forth in Appendix I.

10. The ABA has not amended Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 7.1 ("Communications Regarding a Lawyer's Services"), but the ABA has amended its comment to the model rule, as set forth in Appendix J.

11. The ABA has not amended Model Rule 7.2 ("Advertising"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 7.2 ("Advertising"), but the ABA has amended its comment to the model rule, as set forth in Appendix K.

12. The ABA has amended Model Rule 7.3 ("Direct Contact With Prospective Clients") and its comment to the model rule, but the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 7.3 ("Direct Contact with Prospective Clients"), as set forth in Appendix L.

13. The ABA has not amended Model Rule 8.5 ("Disciplinary Authority; Choice of Law"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 8.5 ("Disciplinary Authority; Choice of Law; Application of Rules to Nonlawyer Representatives"), but the ABA has amended its comment to the model rule, as set forth in Appendix M.

Justice Lynn explained that there are proposals reflected in appendices A-M of the public hearing notice, and that some of these are provided only for informational purposes. Many of the appendices reflect that changes

have been made to the ABA rule or the ABA comments to the rule, but make no change to the corresponding New Hampshire Rule.

Disciplinary counsel Sara Greene addressed the Committee and reported that the Attorney Discipline Office has no concerns about the 20/20 suggestions. She noted that only two rules changes actually change the New Hampshire rules. She explained that she and Elizabeth Murphy would be happy to answer any questions from Committee members.

No other comments were submitted on this item.

(b) Supreme Court Rule 7. References to "the clerk's written notice of the decision on the merits."

This proposed amendment to Supreme Court Rule 7 would clarify the time within which an appeal in a criminal or juvenile delinquency proceeding must be filed.

1. Amend Supreme Court Rule 7, regarding appeals from trial court decisions on the merits, as set forth in Appendix N.

Carolyn Koegler noted that Attorney Tim Gudas had submitted a comment by email dated December 12, 2014, recommending a couple of changes to the language of the proposal. She distributed his submission to the members of the Committee.

Judge Lynn reminded the Committee that Supreme Court Rule 7 currently says that timing of an appeal to the Supreme Court is 30 days from the Court's written notice of decision. This proposal would clarify that in a criminal case, an appeal must be filed within 30 days from the imposition of the sentence. The proposal was prompted by a case that the Supreme Court had within the last year in which for some reason a sentence was imposed but the mittimus was not issued the same day. One of the questions raised on appeal was whether the 30 days run from the date of the imposition of sentence or from the issuance of the mittimus. The Court held that it was from the date of the imposition of sentence, but the Court felt that the rule should be clarified. The original proposal was designed to do this. Justice Lynn noted that Attorney Gudas makes two suggestions, both of which he believes are very good suggestions.

Justice Lynn explained that Attorney Gudas has pointed out that the proposal suggests an amendment only to the section on discretionary appeals, and that the same change should also be made to mandatory appeals. The second point attorney Gudas makes is the proposal had used the term "imposition of sentence." He suggests changing "imposition" to "pronouncement." Justice Lynn noted that this is a subtle change, but that

attorney Gudas's concern is that the use of the term "imposition" may cause some confusion because of the way the Court uses the term "imposed" in another context. For example, if someone is sentenced today to 2-4 years in state prison but the sentence is suspended, but then sometime in the future the person gets into trouble during the period of suspension, the State might ask for a hearing and the sentence might be "imposed." That is, the person has to go to jail. To avoid questions about what is meant by "imposed" attorney Gudas recommends the use of the term "pronouncement."

Justice Lyn stated that he believes that the two suggestions attorney Gudas makes make sense, and inquired whether anyone had any comment on this.

Attorney Witkus noted that there is often "a problem with Zoning Boards making decision and then sending things out much later," and asked whether the rules address this. A Committee member explained that this proposed change does not impact the rules relating to zoning appeals because the change relates only to criminal cases.

(c) 2014-001. Supreme Court Rules 37 and 37A. Attorney Discipline – Warnings

These proposed amendments would eliminate the authority of the attorney discipline office general counsel, the complaint screening committee and the professional conduct committee to issue warnings when it is determined that an attorney acted in a manner which did not constitute a clear violation of the rules of professional conduct but which involved behavior requiring attention.

1. Amend Supreme Court Rule 37, regarding the attorney discipline system, as set forth in Appendix O.

2. Amend Supreme Court Rule 37A, regarding the rules and procedures of the attorney discipline system, as set forth in Appendix P.

Justice Lynn asked whether anyone had any comment on the specific proposal to eliminate warnings.

Attorney Lanea Witkus explained to the Committee that she is generally happy with the changes that New Hampshire made that were a departure from the ABA rules because it "goes in the direction of common sense." She stated that she has a couple of particular concerns that are a "bit picky." She noted that there is one suggested change where the respondent attorney did not have certain investigatory rights until they were charged. She stated that she believes that "if you have a claim against you, you ought to be able to do interrogatories or subpoenas." She also noted that she was appalled to learn

that the attorney discipline office did not have a right to issue subpoenas, but noted that the proposed rule change takes care of that.

Attorney Wittkus stated that the biggest concern she has about the way the PCC is functioning is that "the PCC rejects facts." She noted that this had happened to her. In her case, the PCC was presented with a set of facts agreed to by stipulation, and the PCC did not accept those facts. Attorney Witkus stated that if the PCC is essentially a review body, it cannot be both the prosecutor and the decider. It needs to be clarified through the rules what its role is.

Attorney Chris Keating of the New Hampshire Judicial Council suggested that the Committee consider providing direction to the ADO about existing warnings. That is, the warnings that are on the website and that are in the files. He stated that if the Committee votes to recommend that the Court eliminate warnings, the attorney discipline office will probably need some direction about what to do with existing warnings. Justice Lynn inquired whether attorney Keating has any views on this. Attorney Keating responded that he believes that warnings ought to be eliminated from public view and ought to be destroyed. He noted that he is particularly concerned about what exists on the website, and how long those will remain in place. The current rule states that paper records "may be destroyed" three years after "the date of the notice of dismissal with or without a caution."

Attorney Sara Greene addressed the Committee and stated that Attorney Keating's interpretation of the current rule is correct. The current rule states paper records may be destroyed three years after a finding of no misconduct with or without a "caution," "caution" being a warning. They are also posted on the attorney discipline office website under the link "non-disciplinary warnings." Therefore, if warnings were eliminated by, say January 1, 2015, paper records would be in the process of being destroyed as the three years ran. Attorney Greene stated that she presumes that the attorney discipline office would want to take warnings off of the website as well. She noted that this question "is on the radar of General Counsel Janet DeVito – if they go away, what do we do with our current records?" Attorney Greene also stated that she believes that when the Rule 37 and 37A subcommittee considered the issue of public records, the proposed final rule change would remove the phrase "paper" records. The subcommittee deleted the word "paper," so that the rule would say "records may be destroyed after three years." Attorney Greene's understanding is that this change would mean that any records, including any record on the attorney discipline office website, word documents, hard drive, any records of warnings would be destroyed.

Attorney Greene stated that as prosecutor she has found warnings hard to utilize because they weren't discipline. On the General Counsel side, with

complaint screening, when a grievance comes through the attorney discipline office, if General Counsel dockets it and it gets investigated, the lawyers on the general counsel side then make a recommendation to the complaint screening committee. That complaint screening committee can dismiss it, dismiss it with a warning or send it to disciplinary counsel for formal proceeding. To the extent that warnings have had any pragmatic use, it has been by that complaint screening committee where they don't think a rule was technically violated, but that the attorney came very close. They might issue a warning, saying "please be careful about "a, b and c." Attorney Greene stated that it would be interesting to see if with the elimination of warnings more complaints will be sent to disciplinary counsel, but that she does not have an objection to the elimination of warnings because if there is no rule violation, there is no rule violation. Why should there be something out there be that has a negative effect for that lawyer, if there was no rule violation?

Judge Lynn noted that of concern to the committee is the fact that there is a negative impact on the attorney, but there is no ability to appeal because it is not discipline. Attorney Greene agreed, noting that an additional problem is that laypeople may not understand – a warning sounds bad, and if there is one on the website, someone may decide not to hire that lawyer. A change to eliminate warnings would force the complaint screening committee to say, there is a problem, send it to disciplinary counsel, or there is no problem, so it is dismissed. Justice Lynn stated that he agrees, with a close case, it is human nature to take the way out where you can make a half decision. But it has the unfortunate consequence of blemishing an attorney's reputation, without providing the attorney any opportunity to appeal.

Attorney Greene stated that she believes that if the Court eliminates warnings, the existing warnings should all get destroyed. She noted that if the Advisory Committee on Rules would like some language for the rule to reflect that, she is available to provide it.

One Committee member inquired whether the existence of the warning aids the attorney discipline system generally to provide some mechanism when an attorney comes close to the line, to educate an attorney. Does the elimination of warnings take away that ability? What is going to happen in a situation when "finger wagging" may be necessary? Attorney Greene explained that she does not believe that the rules micromanage the way General Counsel or the complaint screening committee write those dismissal letters. Attorney Greene supposes that they could say "we dismiss this," but then include a practice pointer, if they choose to do so, but it just won't be called a warning, and won't be on the website. There will no longer be that level of "non-discipline" that is actually kind of disciplinary. But attorney Greene does not believe that would prevent the complaint screening committee or General Counsel, who has the power to dismiss outright, from including what she would call a "practice tip." She does believe that warnings serve an educational

function at times – a lawyer now understands a nuance he or she did not before.

Another Committee member inquired whether the rule says, "may destroy the records" or "shall destroy the records." The rule says "may."

Attorney Greene next addressed attorney Witkus' concern about stipulations. She noted that the Committee is aware that there is a proposed rule change to eliminate that consequence ever again - so that the Professional Conduct Committee would be required to consider stipulations with an "up or down" approach. The Professional Conduct Committee would be able to accept the stipulation or reject it or conditionally accept it, but in any event they "don't tinker with it." The respondent would have the opportunity to have their day in court and say "no thanks, I don't like that change to my stipulation, the proposed conditional change."

(d) 2013-019. Superior Court (Civ.) Rule 26 Depositions: Notice or Subpoena Directed to an Organization

This proposed amendment would amend Rule 26 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions to add a provision as subsection (m) which would allow a party to name as a deponent a public or private corporation, a partnership, an association, a governmental agency, and require the named organization to designate one or more officers, directors, managing agents or other persons who consent to testify on its behalf. An additional proposed amendment would amend Rule 26(f) to change the rule regarding altering a deposition transcript with respect to Rule 26(m) depositions.

1. Amend Rule 26 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions, as set forth in Appendix Q.

Justice Lynn explained that the Committee had agreed in September to put out for public hearing this amendment to the original proposal to add subsection (m) that had been put out for public hearing in June. This new proposed amendment to Rule 26(f) had been designed to address a concern raised in Attorney Irvin Gordon's June 6, 2014 letter. Justice Lynn explained that he now believes that the proposed amendment to Rule 26(f), which he drafted, may create more trouble than it is worth.

Following the September meeting, Justice Lynn asked Judge McNamara to provide his input on attorney Gordon's letter. In a letter dated October 16, 2014 (distributed to the Committee by email), Judge McNamara provided a very lengthy response. Justice Lynn explained that the letter basically says that adopting a rule on organizational depositions is a good thing, but that it is unnecessary to amend Rule 26(f) because the way it is worded now would allow

the Court to have the discretion to allow a re-deposition if necessary. If someone in the course of correcting his or her deposition actually changed it in substance in a way that the other party felt was really sandbagging them, then they can go to court to ask for a remedy. The Court would have discretion to say, "you cannot make a change," or "I am going to allow you to re-depose the witness or the like to address any improper behavior."

No other comment was offered on this item.

(e) 2014-013. Supreme Court Rule 47. Counsel Fees and Expenses-Indigent Criminal Cases

This proposed amendment would raise the hourly rate for assigned counsel working on major crimes cases to $100 per hour.

1. Amend Supreme Court Rule 47, as set forth in Appendix R.

Attorney Keating stated that the proposal asks the rules committee to consider increasing the assigned counsel rate from $60 per hour, where it has been since 1992, to $100 per hour in a "very circumscribed subset of criminal cases" – assigned counsel cases involving major crimes. He stated that the public defender program takes 85% of the indigent defense case load and handles the vast majority of homicides in NH. Contract counsel who work on a contract basis with the Judicial Council handle 14% of the caseload. The remaining 1% of the case load is handled by assigned counsel attorneys who are paid by the hour. It is their hourly rate that is set by Supreme Court rule. The Judicial Council sets the contract rate for contract counsel. The public defenders are salaried. So really the only variable in the control of the Supreme Court is the assigned counsel rate for that 1% of cases. Of that 1% of all the indigent defendant cases in NH, the Judicial Council, which is unanimously in support of this proposal, is requesting a rate change only for those most serious cases - that is, homicide cases, aggravated felonious sexual assault cases, felonious sexual assault cases and first degree assault cases. Numerically, this is about 20 cases per year. Attorney Keating estimates that adding this extra $40 onto every assigned counsel case in a major crimes instance would cost, on average, about $80,000 per year.

Attorney Keating stated that he had met the day before with Governor's legal counsel, her budget director, and her chief of staff to discuss line 1091 in the Judicial Council budget, which funds assigned counsel. Attorney Keating assured them that based on his forecasting at this point, there is enough money in the line that funds the assigned counsel both in the proposed budget for fiscal years 2016 and 17, but also in this fiscal year as well, if this proposed rule meets with the approval of the Supreme Court.

Attorney Keating stated that he urges this rule change on the Committee because as the person responsible for finding counsel for indigent accused in major crimes cases, he is having difficulty finding counsel willing to take these cases. $60 per hour is not enough to cover a lawyer's overhead, but lawyers are always willing to take misdemeanor cases and minor felony cases, on an assigned counsel basis of $60 per hour because, attorney Keating believes, these lawyers are good hearted people who believe it is their professional obligation to take on these cases. Attorney Keating believes that attorneys can accept putting in 20 hours on a case, and losing the corresponding amount of money, recognizing that is part of their professional obligation. But he cannot find lawyers willing to do the work of a homicide case or a major crimes case that could easily involve 200 to 400 hours of work. Lawyers might be individually willing to do that, but not willing to do that to their partners or families, for that matter. Attorney Keating stated that he had occasion to have to find counsel in a homicide case recently because the public defender program had a conflict of interest. He was not able to find an attorney willing to take on the case for $60 per hour. He told the lawyer that the rule amendment was pending, and perhaps the attorney could ask the Superior Court to increase the fee to $100 per hour for this case. Leveraging that experience and the difficulty he was having trying to find someone willing to take the case - that motion was granted by the trial court. So, attorneys are being paid more now, out of necessity. It is important to ask the rules committee now to formalize this.

One Committee member asked whether we know what other states are paying. Attorney Keating reported that Vermont has had a rate of $50 per hour for all cases, since 1991. Maine has a rate of $55 for all cases. Massachusetts has rate of $100 per hour for homicide cases. Connecticut has a rate for $75 for all felony cases, and $100 per hour for felony capital cases. The committee member noted that others have gone through the same logic, so New Hampshire would not be setting the standard for New England at this time.

Attorney Keating stated that he agrees, and also emphasizes that this is 20 cases per year to the indigent defense delivery system. The Committee would be recommending a very narrow change to the rule and application.

Judge Delker inquired whether it would be necessary to increase the maximum fee associated with this category of cases. He noted that it seems that one would run through the additional $40 per hour pretty quickly in, for example an AFSA case where it is not uncommon to have a week-long trial. Attorney Keating noted that Judge King had made the point that if judges honor the fee cap, this change would actually reduce the amount of time that counsel would spend on behalf of clients. But he stated that it is the experience of the Judicial Council in reviewing bills that the trial courts raise the fee caps when they consider it appropriate and necessary. Therefore, the

Judicial Council is not requesting a change in the fee caps because the fee caps are pretty generalized right now. The Judicial Council did not feel it necessary to get into the specificity of what an aggravated felonious sexual ought to be, what a first degree assault fee cap ought to be. The Judicial Council prefers to leave it to the sound discretion of the trial court to determine whether or not it is appropriate to permit counsel to exceed the fee cap in appropriate cases.

Justice Lynn stated that he knows that under the current practice in Circuit Court, requests to exceed the fee caps have to be approved by Judge Kelly, and asked whether this is true at the Superior Court now. Judge Delker responded that it is not necessary to have Chief Judge Nadeau approve the request to exceed. This is just done by the trial judge. Another Committee member inquired whether the rule has a standard by which the trial judge measures that. Judge Delker stated that the standard is "Good cause and exceptional circumstances."

Attorney Joshua Gordon stated that he does a lot of Criminal Justice Act work and the fee doesn't bother him, but the fee cap is always a challenge. So, an increase in the rate would not benefit him. He would just advocate raising the fee cap.

Attorney Keating stated that he does not see trial courts denying requests to exceed the fee caps in felony cases. He does see the supreme court almost routinely denying these requests.

Carolyn Koegler inquired whether Attorney Keating is requesting that the Committee make this recommendation to the supreme court immediately, rather than have the Committee wait to include this in the Annual Report. Attorney Keating confirmed that the Judicial Council is requesting that the recommendation be made immediately.

Attorney Taylor inquired what the rate for assigned counsel is at the federal court. Attorney Keating stated that it is $126 per hour for all felonies. He does not know what the cap is.

(f) 2014-017. Supreme Court Rule 12. Confidentiality of a Case Record or Portion of a Case Record in a Supreme Court Case.

These amendments would clarify that a trial court's ruling on confidentiality will presumptively apply on appeal, but that the supreme court may determine on its own motion, or upon motion of the party that that there is no statute, administrative or court rule, or other compelling interest that requires that the case record or portion of the case record be kept confidential.

1. Amend Supreme Court Rule 12(2) regarding the procedure for requesting confidentiality of a case record or a portion of a case record in a supreme court

case, and 12(3), regarding the procedure for seeking access to case records that have been determined to be confidential, as set forth in Appendix S.

Justice Lynn noted that this proposal would give the Supreme Court the ability, despite what a trial court may have done, to take another look at the issue of confidentiality.

No comments were received regarding this proposal.

Justice Lynn closed the public hearing at 1:16 p.m.

2. Discussion and Vote on Public Hearing Items

(a) 2013-010. Rules of Professional Conduct: ABA 20/20 Initiative

Following brief discussion, upon motion made by Emily Rice and seconded by Ms. Anderson, the Committee voted that the supreme court adopt the proposals made by the Ethics Committee.

(b) Supreme Court Rule 7. References to "the clerk's written notice of the decision on the merits."

Justice Lynn proposed that the Committee recommend the proposal for adoption, with the changes recommended by attorney Gudas. Another committee member suggested that a comment be added to the rule, referencing the Supreme Court's decision in State v. Mottola, 151 N.H. 56 (2004).

Upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt the proposal, as amended by the Committee to: (1) make the same language change to Supreme Court Rule 7(1)(A); and (2) change the word "imposed" to "pronounced;" and (3) add a comment referencing the Supreme Court's decision in State v. Mottola, 151 N.H. 56 (2004).

(c) 2014-001. Supreme Court Rules 37 and 37A. Attorney Discipline – Warnings

Attorney Rice stated that she believes that the rule stating that records "may be destroyed in three years" should be amended to read, "shall be destroyed." She also reminded the Committee that it had been asked to provide guidance to the Attorney Discipline office regarding what is to happen to warnings that are currently posted on the ADO website, if the Committee recommends that warnings be eliminated.

Justice Lynn agreed to speak with Attorney DeVito to learn whether it is her intention to remove warnings from the website if the Court amends the rule to eliminate warnings. He will report back to the Committee.

Upon motion made by Attorney Rice and seconded by Judge Cullen, the Committee voted to recommend that the Supreme Court amend Supreme Court Rules 37 and 37A to eliminate the authority of the attorney discipline office general counsel, the complaint screening committee and the professional conduct committee to issue warnings when it is determined that an attorney acted in a manner which did not constitute a clear violation of the rules of professional conduct but which involved behavior requiring attention.

(d) 2013-019. Superior Court (Civ.) Rule 26 Depositions: Notice or Subpoena Directed to an Organization

Justice Lynn stated that his recommendation to the Committee is not to recommend any changes to Rule 26, other than the addition of subsection (m), which would allow a party to name as a deponent a public or private corporation, a partnership, an association, a governmental agency, and require the named organization to designate one or more officers, directors, managing agents or other persons who consent to testify on its behalf. He believes that the additional proposed amendment to amend Rule 26(f) to change the rule regarding altering a deposition transcript with respect to Rule 26(m) depositions is unnecessary.

Attorney Taylor noted that Judge McNamara had proposed, on page 8 of his letter commenting on the proposed amendment to Rule 26(f), that the Committee might wish to consider adding the following comment to Rule 26(m):

> The jurisprudence developed by the federal courts interpreting cognate Federal Rule of Civil Procedure 30(b)(6) should be used as a guide in the interpretation of this rule.

Following some further discussion, and upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed amendment to add subsection (m) to Rule 26 with the comment Judge McNamara proposes, but not adopt the proposed amendment to Rule 26(f).

(e) 2014-013. Supreme Court Rule 47. Counsel Fees and Expenses-Indigent Criminal Cases

Committee members generally agreed that the Committee should vote to recommend that the Court adopt the language change proposed by attorney Keating immediately. There was also some discussion about whether the fee cap should be raised as well.

Judge Lynn shared the group's concerns about the fee caps, but noted that attorney Keating made clear that exceeding the fee caps are not an issue in Superior Court in these kinds of cases. Judge Delker noted that it is difficult to imagine that attorneys won't exceed the fee caps in these kinds of cases, so it seems that not changing the fee caps will just mean that there is a lot of unnecessary paperwork in the form of motions to exceed the fee caps. Perhaps it would be possible to amend the fee cap language to raise the cap in only these kinds of cases.

Justice Lynn suggested doubling the fee cap to make it $8000, but limiting the fee cap change to this category of cases – that is, aggravated felonious sexual assault, felonious sexual assault, first degree assault. He inquired whether Attorney Keating could foresee any potential problems with this. Attorney Keating stated that he did not believe so, since this is a very narrow subset of cases.

Upon motion made and seconded, the Committee voted to recommend that the Court immediately adopt attorney Keating's proposed amendment to Supreme Court Rule 47(2)(a) and the following additional amendment to Supreme Court Rule 47(2)(c) (additions are in **[bold and in brackets]**):

> (c) Maximum fee for **[aggravated felonious sexual assault, felonious sexual assault and first degree assault: $8000, and for all other]** felonies: $4100.

(f) 2014-017. Supreme Court Rule 12. Confidentiality of a Case Record or Portion of a Case Record in a Supreme Court Case.

Following brief discussion and upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposal to amend Supreme Court Rule 12.

3. Approval of Minutes of September 12, 2014 Meeting

Upon motion made and seconded, the Committee voted to approve the September 12, 2014 meeting minutes.

4. Status of Pending Items

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

Justice Lynn noted that this project is currently on hold.

b. 2012-010(1) and (2). District Court Rules. Need for procedure to ensure that counsel is available for indigent defendants at arraignments in the district court.

Justice Lynn reported that Judge Kelly has put the counsel at arraignment rules into effect in all Circuit Courts.

Judge Delker noted that this issue also arises in Superior Court and that when counsel is available to indigent defendants at arraignments is informal and spotty as well. This is a concern because this is a constitutional mandate and it is not being done in Superior Court. Attorney Taylor stated that there is often no counsel at arraignments in Superior Court.

Justice Lynn stated that his impression is that the New Hampshire Public Defender's Office has had to jump through a lot of hoops to make this work in the Circuit Court. Ms. Anderson noted that it costs a lot to staff these, and that cooperation is not uniform across all courts. The public defender expects something similar in Superior Court, and will continue to request money to do it.

Justice Lynn stated that he would speak with Judge Nadeau and Randy Hawkes and Bud Scherr to see whether it would be possible to resurrect the Committee to see what is possible in Superior Court. Ms. Anderson agreed that it would be a good idea to start the conversation with attorney Hawkes.

c. 2013-003. Interlocutory Appeals.

Justice Lynn reminded the Committee that this issue relates to what happens when a trial court grants a motion to dismiss some, but not all, of the defendants in a case. Under New Hampshire case law, when some but not all defendants are dismissed from a case, the dismissed defendants must wait for a final decision to be done with the litigation unless the *plaintiff* both chooses to request an interlocutory appeal under Rule 8 and has his request granted at both the trial court and supreme court levels. Justice Lynn noted that other jurisdictions have procedures allowing trial judges to certify that an order is final and appealable with respect to certain defendants. Attorney Herrick noted that the federal rules identify classes of issues favored for immediate appeals, and she believes that this is one.

Judge Lynn noted that Attorney Ardinger had agreed to research this issue and propose a rule amendment, but that he has now resigned from the Committee. He asked for volunteers to research the issue. Attorney Gordon, Judge Delker and Ms. Anderson agreed to work together on this issue.

d. 2014-005. Electronic Filing Pilot Rules

Carolyn Koegler reminded the Committee that the Supreme Court had adopted the Electronic Filing Pilot Rules, Circuit Court – District Division Small Claims Action Pilot Rules, and amended Circuit Court – District Division General rules, on a temporary basis by Order dated June 2, 2014.

Pat Ryan reported that e-filing has been implemented in all courts in small claims. The Circuit Court will soon be asking the Court to delete the existing small claims rules and replace them with the new small claims rules that accompany the electronic filing pilot rules.

e. 2014-006 through 2014-010. Superior Court Rules (Civ).

Emily Rice reminded the Committee she had agreed to chair a new subcommittee to address the issues relating to the new Superior Court Civil Rules that are set forth in her June 4, 2014 memorandum to the Committee.

f. 2014-015. Supreme Court Rule 50-A.

Justice Lynn referred committee members to the September 4, 2014 letter from Eileen Fox to Justice Lynn stating that the Supreme Court has requested that the Committee consider whether Supreme Court Rule 50-A, which establishes the Trust Accounting Certification requirement, should be amended to increase the fees for noncompliance. The Committee had considered the proposal at its September meeting.

Committee members present at the September meeting directed Carolyn Koegler to include the proposal to amend Supreme Court Rule 50-A to increase the fines for non-compliance in the public hearing notice for December. Following the meeting, Justice Lynn directed Carolyn Koegler not to include the item in the public hearing notice, because the Court had become aware that, for a variety of reasons, the number of attorneys who failed to file by August 1 might actually be substantially lower than the Court had believed. Committee members agreed to remove this item from the agenda.

g. 2014-016. Supreme Court Rule 51.

Carolyn Koegler referred members to her September 8, 2014 memo to the Committee. The memo sets forth the Court's request that the Committee form a working group to draft a proposal to amend Supreme Court Rule 51 (Rulemaking). Carolyn Koegler explained that the Court had requested that the proposal: (1) shorten the length of time it takes for a proposal submitted to the Committee to be recommended to the Court (by requiring the Committee to report to the Court twice per year); (2) include a "fast track" provision for temporary rules and rule amendments that provides that the Court will notify

someone from the Bar Association to request comment on the proposed temporary rule or rule amendment before it is adopted; and (3) provide for only one comment period, because the Court believes it may not be necessary to put the same proposal out for public comment both before and after it is recommended to the Court.

Carolyn Koegler stated that a working group consisting of Karen Anderson, Peter Cowan, Eileen Fox, Jeanne Herrick, Carolyn Koegler, Pat Lenz, Derek Lick, Jennifer Parent, David Slawsky, Ray Taylor and Larry Vogelman had met once in October for a general discussion about how members of the group believed the rulemaking process should be amended. Carolyn Koegler then drafted a proposed new rule in an effort to implement the suggestions made by members of the group and circulated the draft. The group met again on December 5 to review the draft. After making some changes to the proposed new rule, and following approval by the working group, Carolyn Koegler circulated the draft to the Advisory Committee on Rules for consideration at the December meeting.

Carolyn Koegler noted that the most significant changes to the current process include:

- The proposed rule makes clear how someone is to submit a request for a rule change. The suggestion is sent to the Chair of the Advisory Committee on Rules;

- The Chair of the Advisory Committee on Rules reviews the suggestion. If Chair determines that the suggestion calls for a technical change, would implement a change required by statute that permits no discretion in the drafting of the language of the rule or rule amendment, or concludes that exceptional circumstances justify expedited consideration of the suggestion, the Chair may submit the suggestion directly to the Court. Otherwise, the suggestion is added to the Committee's next agenda;

- If the rule suggestion goes to the Court, the Court follows a procedure appropriate for the type of suggestion;

- If the rule suggestion goes to the Committee, the Committee will solicit comment from those who are likely to be most affected by, or interested in, a suggested rule or rule amendment. Although the Committee may hold a public hearing on the proposal, it is not required to do so;

- The Committee reports suggestions to rules changes to the Court twice per year – on April 1, and on November 1;

- The Court requests comment on the suggestions almost immediately after they are submitted. The comment period is at least 30 days;

- The Court presumptively issues only two rules orders per year (late December/early January, for rules effective March 1 and late May/early June, for rules effective July 1).

One member noted, and the Committee agreed, that the proponent of a rule change should state whether s/he wishes to be heard regarding the rule suggestion.

Another member observed that as currently written, the proposed new rule would have only one clerk or court administrator from the Circuit Court on the committee. Committee members generally agreed that it would be important to continue to have one clerk or court administrator from each of the trial courts – the Superior Court and the Circuit Court. The Committee directed Carolyn Koegler to make this change to the proposed new rule.

Attorney Rice noted that the proposed new rule does not provide for the staggering of terms, but does provide that members serve for terms of three years. She noted that it would be important to stagger the terms, because if that is not done, then at the end of the three year term, every members of the Committee could be replaced by a new member. Committee members agreed that this would be a problem, because it is important to have at least some experienced members on the Committee every year.

There was some discussion about the language of the proposal set forth at Rule 51(d)(2)(D), which stated that one of the responsibilities of the Advisory Committee on Rules would be to "hold such public hearings as the Committee deems appropriate to receive comment from any member of the public, the bench or the bar on the suggested rule and rule amendments." Justice Lynn had raised concern in a December 8, 2014 memo to the Committee that this language might predispose the Committee to hold public hearings on all the suggested rules and rule amendments. He believes that that language should be rewritten to create a presumption that public hearings will not be held at the Committee level as follows, "To hold public hearings to receive comment from any member of the public, bench, or bar on the suggested rule and rule amendments in those unusual circumstances in which the Committee believes it appropriate to obtain additional information beyond the input it received from interested persons pursuant to subsection (d)(2)(B)."

After some concern was expressed that Justice Lynn's proposed language would limit the Committee's authority to hold a public hearing, it was agreed that the language should be replaced by the following language, "to hold public hearings to receive comment from any member of the public, bench or the bar

on the suggested rule and rule amendments when the Committee believes it is appropriate to obtain additional information beyond the input it received from the interested persons pursuant to subsection (d)(2)(B)."

5. New Submissions

(a) 2014-020. Supreme Court Rule 50-A(1). Trust Accounting Certificate of Compliance form.

Justice Lynn referred members of the Committee to an October 3, 2014 letter from Attorney Michael Conlon to the Advisory Committee on Rules requesting that the Committee consider amending Rule 50(A)(1) to allow for the Trust Accounting Certificate of Compliance to be submitted electronically.

Committee members agreed that no rule change is necessary, because the rule as currently written would allow for the electronic submission of the form.

6. Meeting Dates

The 2015 meeting dates are:

Friday, March 13, 2015
Friday, June 5, 2015
Friday, September 11, 2015
Friday, December 4, 2015