NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of December 4, 2015

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

The meeting was called to order at 12:31 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen M. Anderson, Hon. Paul S. Berch, Hon. R. Laurence Cullen, John A. Curran, Esq., Hon. N. William Delker, Hon. Daniel J. Feltes, Hon. Michael H. Garner, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Maureen Raiche Manning, Esq., Emily G. Rice, Esq. (leaving early), Patrick W. Ryan, Esq., and Hon. Robert J. Lynn.

Also present was the Secretary to the Committee, Carolyn Koegler, Esq.

Justice Lynn began the meeting by welcoming two new members to the Committee – Honorable Michael H. Garner, who will replace Judge Hampe as the Supreme Court's Circuit Court judge appointee, and John A. Curran, who will replace Derek Lick as the New Hampshire Bar Association President's appointee.

Justice Lynn reminded the Committee that there are a number of items included in the public hearing notice that the Committee voted by email to put out for public hearing. He stated that the Committee would need to vote to accept comment on the items.

Upon motion made and seconded the Committee voted to accept comment on the items set forth in the public hearing notice dated October 26, 2015.

1. Public Hearing

   a. 2013-002. Interlocutory Appeals

Justice Lynn inquired whether there was anyone present to be heard on this issue. This proposed amendment to the Superior Court Rules would adopt a provision similar to Federal Rule of Civil Procedure 54(b). It would allow a trial court, if it makes a decision which finally disposes of some but not all of the claims or some but not all of the parties, to make certain findings and issue

an order saying that final disposition of those claims or parties should be treated as immediately appealable.

Deputy Clerk of the New Hampshire Supreme Court Tim Gudas submitted a comment to the Committee by memo dated December 3, 2015.

Attorney David Slawsky submitted a comment by email dated October 7, 2015.

b. 2015-007. Circuit Court – Family Division Rule 2.29.

Justice Lynn explained that this is the proposal to make a number of changes to the family division rules to clarify when certain court orders become effective. He inquired whether anyone wished to speak on this issue.

Joshua Gordon noted that a memo had been distributed at the start of the public hearing that responds to a proposal Justice Lynn had submitted to the Committee a few days before the public hearing suggesting changes to the proposal that had been set forth in the public hearing notice. Judge Lynn stated that he had proposed eliminating the language in proposed Rule 2.29(A)(1) relating to when orders are announced from the bench, because it didn't seem likely that a court would actually issue what it regarded as its last word on the subject, from the bench. He stated that one would almost always expect that a judge will follow orders up with a written order.

Attorney Gordon stated that he had assumed the opposite, that many of these orders might be something like "thou shalt not drive by her house." However, attorney Gordon acknowledged that with an order like that, the judge is probably also going to say, "effective right now." Attorney Gordon stated that he is agnostic about Justice Lynn's proposed change. If it is a sort of judgment that should be effective immediately, then the judge is likely to say so. Justice Lynn's proposed change puts the onus on the judge to say, "effective immediately." He stated that the way his subcommittee had originally drafted the proposal, the language was "the earliest of the two," and that language was included in the public hearing notice. He noted that the language comes from *State v. Looney* and *Gray v. Kelly*. He stated that he does not know which language is preferable.

Judge Lynn asked attorney Ryan whether he had any thoughts on the subject. Attorney Ryan inquired what Judge Garner's reaction to the two proposals is. Judge Garner stated that it is unique to the order. In his experience, if a court is going to issue an oral order, particularly a protective-type order, the court expects it to be effective immediately because the parties are about to walk outside the courtroom. He does not believe it is unfair to put the onus on the court to make that clear. Alternatively, if the court were determined to have the clerk issue a formal notice of that order, typically the

Court would say, I am going to issue an order, you need to stay in the lobby of the courthouse to get the clerk's order - if it is a protective type order. With respect to a parenting plan/uniform support order/order on payment of alimony, the court may anticipate what it is going to be, but the thought in the court's mind is that it is almost always to be thought effective on the date the written order is issued by the court. Judge Garner noted that his conclusion about this is based on his experience.

Attorney Gordon stated that he believes that the second of Justice Lynn's proposed changes, relating to payment of expenses, is a good change.

Attorney Gordon noted that he and attorney Ryan had spoken about B(4), the paragraph that begins, "Any party files an appeal . . ." and the language "during this period, no orders as to marital or parental status" because Tim Gudas had expressed confusion about parental status in a December 4, 2015 email comment regarding the proposal. Attorney Gordon stated that as a result of his conversations with attorney Ryan, he sees two ways to clarify what the term "parental status" means. He has set forth "option 1" and "option 2" in the proposal he distributed to the Committee.

Attorney Gordon stated that section (D) of the proposal put out for public hearing is of greater concern. He noted that when his subcommittee reviewed the rules, the subcommittee did not pay a great deal of attention to section (D) except to change the word "final" to "effective," but he now realizes that this may have been in error. Section (D) is not about effective dates. It is about what one does after the decree is effective and, for example, two years later someone wants to reopen it. Following his conversation with attorney Hastings this morning, attorney Gordon concluded that the rule probably belongs in Family Division Rule 2.3, which is the rule that governs how one opens a family division case. The language Judge Lynn has drafted is essentially a restatement of Rule 2.3, so attorney Gordon believes that the two should probably be brought together.

Justice Lynn inquired whether, if you take away the language suggested in his proposal, and left (D) as it was, once an order becomes effective, wouldn't there then be a problem? Attorney Gordon agreed and stated that (D) should probably say, "Once a Decree becomes final, any further request must be by petition." Attorney Gordon believes that the language in the proposal changing "final" to "effective" should be changed back, and the whole paragraph should then be moved to Family Division Rule 2.3.

Attorney Hastings addressed the Committee next. She stated that she has practiced family law for 33 years and is the author of the New Hampshire Divorce Handbook, a Consumer Guide to the Process. This is her fourth or fifth appearance before the rules committee. She has been a member of the Bar for 35 years and frequently appears at hearings before legislative

committees on family law. She drafted the Parental Rights and Responsibilities Act. When she goes to the legislature to testify, she is always asked "what is the problem?" and "how does your proposal solve it?"

Regarding the problem with Family Division Rule 2.29, under the existing rule, it is hard to tell when Family Division orders take effect. It is confusing to *pro ses* and clients. Even new lawyers are confused by it. Attorney Hastings noted that when she was litigating, she litigated the issue of effective dates two or three times because someone wanted a divorce certificate, but they weren't divorced yet. This proposed rule solves this problem because it deals with each and every situation. Instead of having a short rule, it breaks it out so that different circumstances mean a different thing for the effective date. It makes it clear that some orders take effect immediately. Lawyers have always assumed that that is so, but there is nothing in the rule that would lead a *pro se* to understand that that is so. This rule change should cut down on questions to the clerk's office.

Attorney Hastings supports the proposed amendments, but has a couple of comments. First, regarding (B)(1), she prefers the proposal as originally drafted by the subcommittee, but also believes that Justice Lynn's revision allows the judge to say from the bench that "that overdue mortgage payment shall be paid today," for example. It isn't just protective orders. There could be other things, for example, "turn the child over to the other parent now." Second, she agrees with attorney Gordon that the proposal to add language to clarify 1(D) to include "ongoing expenses" is very common. Paying a bill might be a very urgent matter.

Regarding (B)(4), attorney Hastings supports "option 1," that is, the "marital status or parentage" because it is cleaner and accomplishes the same thing. That is, who is the legal parent. Those things should wait to the end, and should not be temporary. This should be excepted just like the divorce. There should be a single effective date that is final. There is a case that came out just this week that talks about that. Once someone has been divorced, they cannot be "undivorced," unless there has been fraud or other bad behavior.

Regarding (D), Attorney Hastings supports the very last part of attorney Gordon's proposal. She believes that the provision should not stay where it is, but should be moved to Rule 2.3 and Rule 2.3 should be relettered. The paragraph has nothing to do with effective dates. It has to do with what papers one has to file. She notes that *pro ses* need to know that the part of the rule that is there now says, "this is how you file a domestic action" but in fact when someone brings back a case, it is the same court, even if you have moved, it is where the original case was.

Senator Feltes asked attorney Hastings whether she believes that the words set forth in B(1), "unless the court specifies another date" captures an oral

order. Attorney Hastings stated that she believes it does, and that this is important. It will solve the problem of people knowing the effective date. The important part of this rule is the list of orders under B(1).

Attorney Patti Blanchette addressed the Committee next. She noted that it is great to have a rule that defines what the effective date of a decree is, because people have struggled with that. She has a concern about the provision that says orders for alimony can be effective at one point, but then property settlement is not effective until some other time in the future. She just received a decision from the Court in *In Re Obrey.*

In that matter, the lower court ordered alimony for her client that was to begin after the decree of divorce. The judge's order for the length of the alimony was predicated upon the fact that her client would be receiving income-producing assets, and after a two-year period, she would get sufficient income from the income-producing assets in order for the alimony to be reduced. Attorney Blanchette is a little concerned because this rule proposal says that the alimony order would have taken effect immediately but the property settlement portion would not have taken effect until the end of the appeal. If this new rule had been applied in her client's case, her client would not have been receiving the income-producing property which the court used to lower the alimony. So, she is concerned about having two different effective dates for things that may be interrelated.

For simplicity, as a practitioner, attorney Blanchette stated that she would be perfectly happy having the definition be that all of the orders take effect after the supreme court appeal is finished, in the event of an appeal, whether that is the date of the supreme court mandate, or after all of the proceedings have been completed. But she believes that if you have cases where the property and the support orders are interrelated, it is not fair to have one part of the decree take effect at one date, and another part on another date. The trial court always has the opportunity on support issues of indicating that the support orders will take effect in the event of an appeal. Attorney Blanchette stated that, having just lived through this kind of hybrid case, she is sensitive to the fact that it might not be fair to have one part take effect, but have one part have to wait until the completion of the appeal.

Attorney Gordon noted that section 4 of the proposed rule, says, "if any party files an appeal, all orders described in subsection 1 shall continue in effect until the supreme court mandate or the conclusion of such further proceedings as the supreme court may order. During this period, no orders as to marital or parental status or as to property divisions take effect." He asked Attorney Blanchette whether this is the section she is commenting on. Attorney Blanchette confirmed that this is her concern.

Attorney Blanchette stated that there is an additional issue that comes to mind. In the case that she referred to earlier, there was the alimony period, and then there was a question about when the alimony began. The court had said that beginning after the decree, the alimony shall be paid. So, the issue in the case was when the alimony began. The lower court said, "you are going to have this amount of alimony for two years, and after that, it will be decreased." Attorney Blanchette's client's position in the case was that the alimony began after all of the supreme court proceedings had been completed, all of the proceedings following remand on some of the issues had been completed, and the certified copy of the decree of divorce was issued thirty days later. So the issue on appeal was, did the alimony begin then, or did it begin at the time of the supreme court mandate? The court ruled that it began as of the time of the mandate, but that still was not the completion of the divorce, because there were proceedings following remand.

Attorney Blanchette believes that there has to be some clear resolution to this issue because there are other issues that are impacted by this. For example, for purposes of things like life insurance or health insurance which won't begin until there is an actual certified copy of the decree, those kinds of things have to be decided. That is another example of things that are effective before one actually has a certified copy of the decree. There may be problems in deciding when does COBRA coverage start for your health insurance. Attorney Blanchette stated that her preference would be that everything be made effective at the end when you get the certified copy of the divorce decree. Everyone knows when you are divorced. However, her second position would be that in the case where there is alimony or child support tied to property, it would be unfair to have the support piece start at one point, if the property is not received until the end of an appeal. One way or the other, it would be helpful to know when it is. If things are going to be effective as of the date of the mandate, which is what attorney Blanchette's case said, then parties need to be able to get a divorce decree then. Because if they cannot get a divorce decree then, then they are stuck in limbo on health insurance and some of the other benefits that depend on actually having the divorce decree take effect.

Judge Delker suggested that some of attorney Blanchette's concerns could be addressed by a request to the trial court to clarify in those unusual situations where there is a hybrid order, which portions of the order will take effect when. If the court doesn't say, then the parties should ask for clarification. This part takes effect now, that part takes effect later. Attorney Blanchette stated that that is what happened in the case she just litigated. The other side asked to have the alimony take effect pending appeal, but the lower court said no, that temporary orders would stay in effect pending the appeal. So, then the question became, when did the appeal end? The Supreme Court remanded the case on a limited property issue, so attorney Blanchette's client took the position that until all of the issues had been completed, including the remanded issue, and then thirty days after that, you

got your certified copy of the decree of divorce. But the court said, no the alimony piece started as of the date of the mandate from the supreme court, even though there was this other issue yet to be decided by the lower court.

As a result, the alimony started at the end of November/December but attorney Blanchette's client was not able to get a certified copy of the decree until March. So, what happens to all of those other issues that depend on having a certified copy of the decree, such as health insurance? Attorney Blanchette is concerned about having orders making different things effective at different times. She understands why there is a desire for the rule, but believes that if the court says, I am going to put this into effect pending appeal, that should be sufficient. If the court says, I am not going to, that would be fine. She understands the unfairness of the situation and believes that this all should be defined by rule, because at the moment all of this is argued based on the case law, which makes it difficult for everyone. She is sensitive to the hybrid case.

Attorney Hastings noted that she was grateful that in 24 years of litigation, she did not have such a hybrid decision. She believes that if the Committee recommends the proposal for adoption, and the court adopts the proposed amendments, then judicial officers may have to be more attentive to these distinctions. They will know that unless they say otherwise, the listed types of orders take effect when the order is issued from the clerk's office.

Justice Lynn stated that his impression, based upon his experience when the superior court was doing marital cases, was that if a judge thought that someone should receive alimony, for example, for 5 years, that generally meant that it should be 5 years, not seven years if there was an appeal taken, unless there were really unusual circumstances. That is, the judges did not figure in the appeal period when deciding about alimony. In a case where alimony is somehow tied to income-producing property, maybe that should be different. But attorney Blanchette's point is well taken that a trial judge can be explicit and can say, "I am ordering alimony in a final decree for five years. It has already been a year since the temporary alimony went into effect, so that means I am ordering alimony to be paid for four additional years," for example.

Attorney Hastings stated it may be the case that the trial judge did not do well by the case that Miss Blanchette described. If the court adopts the changes that are being proposed, then practitioners and pro ses will have the guidelines and the judges will know that these things will happen immediately unless they say otherwise. They might just have to say so, and proposed orders put in by litigants are going to say things about effective dates. There are many ways around it, but you just have to be explicit. You just have to have a routine of effective date, and in those unusual cases, hybrid cases, etc. someone just has to write out what they intend, and that will avoid the confusion. She stated that she would hate to see this section lost, which will

be helpful in an overwhelming majority of litigated cases, because of the lack of clarity in one order which has caused an unfortunate amount of litigation.

Deputy Clerk of the New Hampshire Supreme Court Tim Gudas submitted a comment to the Committee by memo dated December 3, 2015.

c. 2015-012. Rule of Professional Conduct 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

No comments were offered on this proposal.

Justice Lynn closed the public hearing.

2. Discussion and Vote on Public Hearing Items

a. 2013-002. Interlocutory Appeals

Justice Lynn asked Committee members to consider the written comment on this proposal submitted in a December 3 memo from Tim Gudas, deputy clerk of the New Hampshire Supreme Court. In the memo, Attorney Gudas explains that he has concerns about the language being proposed, and believes that the language should be amended to make clear that an appeal from a Superior Court Rule 46(b) order should only be treated as a mandatory appeal if a final decision of the merits of that entire case would be a mandatory appeal. Attorney Gudas also expresses concerns "about characterizing every appeal from a Superior Court Rule 46(b) order as a 'mandatory appeal' even as to those cases in which a truly final order (resolving all claims and all parties) would give rise to a mandatory appeal."

Justice Lynn stated that he believes attorney Gudas raises a good point about the language being proposed, and recommends that the Committee consider adding the language, "if a final decision on the merits of the entire case would be a mandatory appeal" to the proposed amendments to Supreme Court Rule 3 and Superior Court Rule 46(b), as proposed by attorney Gudas.

Attorney Gordon stated that he has some concerns about whether adding this language to Superior Court Rule 46 is appropriate. He believes that the language might be better suited to Rule 41 ("Dismissal of Actions"). Judge Delker disagrees because the judgment triggers an appeal, so the language should be included at Rule 46.

Regarding attorney Gudas' concern about characterizing every appeal from a Superior Court Rule 46(b) order as a mandatory appeal, Judge Delker notes that he has trouble imagining any cases coming up under this rule which would NOT be a mandatory appeal.

Upon motion made and seconded, the Committee voted to adopt the proposal with the amendments proposed by attorney Gudas to add the language "if a final decision on the merits of the entire case would be a mandatory appeal" to the proposed amendments to Supreme Court Rule 3 and Superior Court Rule 46(b).

b. 2015-007. Circuit Court – Family Division Rule 2.29.

Justice Lynn stated that he believes that Attorneys Gordon and Hastings have made some good points. He also believes that attorney Blanchette has raised valid concerns, but that these concerns can be addressed in trial court orders. He recommends that the Committee adopt the proposal with the changes that were discussed at the public hearing.

Attorney Gordon stated that he believes that this proposal needs further work before it can be recommended for adoption. For example, consideration should be given to moving 2.29(D) to rule 2.23. Attorney Ryan noted that the Family Division rules had been drafted with a great deal of attention being given to the flow of the rules and that he would like to consider whether moving (D) to Rule 2.23 would interfere with that flow.

Attorney Manning inquired whether there might be a way to improve the proposal to address attorney Blanchette's concerns. Some discussion ensued regarding Attorney Blanchette's case. Attorney Gordon noted that two issues were raised in the case: (1) when does the divorce decree take effect post-appeal; and (2) what happens, as far as effective dates go, when alimony and property division are conjoined.

Attorney Gordon asked whether the insertion of the words, "whichever is last" at the end of the first sentence of proposed rule 2.29(B)(4) would address attorney Blanchette's first concern. The language would be amended to read as follows (additions in **bold**): "If any party files an appeal, all orders described in subsection 1 shall continue in effect until the supreme court mandate or the conclusion of such further proceedings as the supreme court may order**, whichever is last.**" Committee members generally agreed that this would address the issue.

Regarding the second issue, the Committee generally agreed that no change to the proposal was necessary because the rule allows the judge the discretion to set different effective dates. Therefore, in cases in which two issues are intertwined – *e.g.,* alimony and property division, the judge may "specify another effective date," as stated in proposed 2.29(B)(1).

Upon motion made and seconded, the Committee voted to adopt the proposal, as amended.

c. 2015-012. Rule of Professional Conduct 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

It was noted that the proposed changes to the rule clarify that a lawyer who is licensed in another jurisdiction but does not practice New Hampshire law need not obtain a New Hampshire license to practice law solely because the lawyer is present in New Hampshire.

Upon motion made by Justice Lynn and seconded by Judge Cullen, the Committee voted to recommend that the Court adopt the proposed change to Rule 5.5.

3. Approval of Minutes of the September 11, 2015 Meeting

Upon motion made by Judge Cullen and seconded by Senator Feltes, the Committee voted to approve the minutes of the September 11, 2015 meeting. Ms. Anderson, attorney Curran, Honorable Michael Garner, attorney Herrick and attorney Rice abstained from voting because they were not present at the September 11 meeting.

4. Status of Items Still Pending Before the Committee

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

This item is on hold.

b. 2012-010(1) and (2) District Division Rules. Counsel at Arraignment

Justice Lynn reminded the Committee that the Court adopted these rules by Court order dated February 20, 2014, and that the rules have been implemented statewide. The rules have been incorporated into the Felonies First Rules that have been adopted by the Court for Strafford and Cheshire Counties, effective January 1, 2016. They will also be incorporated into the new Rules of Criminal Procedure which will soon be adopted by the Court, and will be effective statewide on March 1, 2016 in all counties except for Cheshire and Strafford. Justice Lynn noted that while these have been incorporated into these two new sets of criminal procedure rules, the Committee has not yet held a hearing on them.

Representative Berch noted that he has tried to find out what is happening in the courts in an anecdotal sense. He has been trying to understand whether criminal defendants are actually getting counsel, but there is no data on this. Attorney Ryan stated that he is not sure how data would be gathered on this. Representative Berch inquired how the Committee is supposed to know how effective the rules are. Justice Lynn stated that his

impression is that there are now many more cases in which counsel is actually present.

c. 2014-005. Electronic Filing Pilot Rules

Carolyn Koegler stated that it is her understanding that electronic filing will be implemented next in civil cases filed in the Superior Court. Judge Delker stated that his understanding is that the target date for this has changed, and is no longer March 1, 2016.

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

Justice Lynn noted that the Committee is awaiting a report from the subcommittee chaired by attorney Rice, but that attorney Rice had had to leave the meeting early.

e. 2015-011. Supreme Court Rule 37(14)(b)

Carolyn Koegler reminded the Committee that it had received and reviewed a June 5, 2015 memo from Eileen Fox stating that the Court had asked the Committee to propose an amendment to Rule 37(14)(b). As is noted in the September 2015 minutes, Carolyn Koegler is working with Abigail Albee, Eileen Fox, Sherry Hieber and Sara Green to draft a proposal. Carolyn stated that she hopes to be able to submit a proposal for the Committee's consideration in March

f. 2015-013. Superior Court (Civ) Rule 201. Fees for Copied Material; *and*
g. 2015-014. Circuit Court Rules. Fees for Copied Material

Justice Lynn reminded Committee members that both the Superior Court and Circuit Court have submitted proposals to amend the rules relating to the fees to be charged to people who request copies of Court documents. At the September meeting, a Committee member inquired why the fee increases from $.25 per page to $.50 per page when someone copies more than 10 pages.

Pat Ryan explained that following the implementation of e-filing in the respective courts, most of the printing done in superior court cases will be done in offices. In the circuit court, most of the printing will likely be done at the kiosks. The circuit court is concerned about the large volume of records that will be printed by professionals doing background checks.

Attorney Curran noted that the federal court charges $.10 per page. Representative Berch stated that the cost to the public should be roughly the same as the actual cost to the state.

Justice Lynn stated that the cost should be the same across the court system. Representative Berch agreed.

Justice Lynn proposed that the cost be $.25 per page across the court system, without an increase in the charge when the number of copies is high. Judge Delker stated that the superior court would be fine with this. Pat Ryan stated that the circuit court might have some concerns about this. He stated that he would gather some information on this, in particular, what the actual cost to the State is for the printing. Attorney Curran stated that this would be helpful. He noted that if RSA 91-A applied to the court system, there should be a correlation – the expense should be roughly the same as what is being charged. He suggests that the rule should go with a number as low as the court system can live with without losing money.

h. 2015-018. Supreme Court Rule 51. Retention of Advisory Committee on Rules Files

Carolyn Koegler reminded Committee members that they had considered her September 10, 2015 memo at the September meeting. The memo stated that the Court had asked that the Committee provide its opinion about whether the rules should make clear that after three years, Advisory Committee on Rules records will be destroyed.

At the September meeting, Committee members generally agreed that Committee records should *not* be destroyed after three years. Some Committee members suggested that Committee records should be maintained electronically, which will allow records to be retained for a very long time. Carolyn Koegler agreed at the September meeting that she would see whether it would be possible to create files by docket number on the Advisory Committee on Rules webpage which would allow members of the Advisory Committee on Rules as well as the public to view online all documents considered by the Committee that relate to a particular issue.

Carolyn Koegler reported that she had consulted with Brian Eddy and that, starting in March, she would create files by docket number and post them on the Advisory Committee on Rules webpage. She also reported that the Court would continue to retain the paper records until a determination could be made about whether, and, if so, how, files could be maintained electronically, rather than in paper form.

5. New Submissions

a. 2015-019. Probate Division Rule 169. Fees.

Pat Ryan explained that the Circuit Court had proposed a change to the probate fees provision to strike “Petition for Involuntary Admission” and

"Petition Guardian of Incompetent Veteran (RSA 465)" so that no fee will be applicable to either filing.

Following brief discussion, it was decided that no hearing on this item would be necessary. Upon motion made by Justice Lynn and seconded by Maureen Manning, the Committee voted to recommend that the Court adopt the proposed amendment.

b. 2015-020. District Division Rules 5.4, 5.7 and 5.9. Landlord and Tenant Actions.

Justice Lynn reminded the Committee that David Peck had submitted a November 4, 2015 memorandum to the Committee proposing amendments to District Division Rules relating to Landlord and Tenant Actions.

Pat Ryan agreed to work on this with the goal of making a recommendation in March about whether the Committee should recommend that the Court adopt the proposed amendments. Attorney Manning suggested that an effort be made to provide New Hampshire Legal assistance with a copy of David Peck's memo, and that NHLA should be asked to comment on the proposal. She inquired whether there is a Bar Association Committee that can be contacted about this and asked for comment on the proposal - perhaps the real estate section?

c. 2015-021. District Division Rule 2.7. Payment of Fines.

Justice Lynn reminded the Committee that this issue relates to proposed revisions to Circuit Court Rule 2.7 that were jointly submitted by the American Civil Liberties Union of New Hampshire, Judge King and Judge Kelly in a letter dated November 20, 2015. The proposed amendments to the current rules are designed to address concerns raised relating to the process for the use of incarceration as a means of enforcing the collection of fines. As is noted in the letter, the proposed changes aim to assure "that no person in New Hampshire is jailed for nonpayment of fines when the reason for nonpayment is an inability to pay." Justice Lynn noted that Albert E. (Buzz) Scherr, Chair of the Board of Directors of ACLU-NH and Professor of Law at the University of New Hampshire School of Law and Giles Bissonette, the Legal Director of the ACLU-NH, were in attendance at the meeting to express support for the proposed amendments.

Attorney Scherr explained to the Committee the District Division Criminal Rule 2.7, relating to the payment of fines, does not clearly delineate what kind of an inability to pay hearing, if any, is required before someone is sent to jail for willful failure to pay the fine. Both he and Attorney Bissonette believe that this is unconstitutional. He explained that attorney Bissonette has litigated three cases challenging this, and was successful in all three cases. According

to Attorney Scherr, both he and attorney Bissonette decided that, rather than litigate individual cases, it makes more sense to try to bring about systematic change. Therefore, they collected data from the House of Corrections to obtain lists of all of those who were incarcerated in 2013 in lieu of paying fines. They then requested and reviewed transcripts of the hearings.

Attorney Scherr stated that of the 289 cases they reviewed, there were probably 150 circumstances in which the person did not have an ability to pay hearing OR counsel. It is too difficult to estimate how many judges are engaging in this practice. The transcripts of the hearings are remarkable – many of them lasted only two minutes. Attorneys Scherr and Bissonettee put their findings into a report that is posted on the ACLU-NH website. They concluded from their research that Rule 2.7 should be rewritten to ensure that an individual is provided what attorneys Scherr and Bissonette believe is a constitutionally-required inability to pay hearing before that individual is sent to jail for failing to pay a fine. They worked with the Governors of the New Hampshire Bar Association, the New Hampshire Public Defender, New Hampshire Legal Assistance, the New Hampshire Association of Criminal Defense Lawyers and the Executive Director of the New Hampshire Judicial Council. All of these organizations support the proposed amendments. Both the New Hampshire Public Defender and the Executive Director of the New Hampshire Judicial Council have stated that they do not believe that the proposed amendments, if adopted, will have a significant fiscal impact.

Attorney Scherr explained that the idea behind the proposal is to: (1) create a funnel, to ensure that there are fewer cases in which jail is even "on the table;" and (2) in those case in which jail is "on the table," there is an inability to pay hearing and counsel available to assist the defendant.

There is a great deal in the proposed new rule to support the "funnel." For example, it makes clear that there are options other than "pay the fine or go to jail." Many circuit courts do not have a robust list of community service options. There is currently a pilot project underway at the law school. Six students are working in three circuit courts to compile lists of appropriate community service options. Judges Kelly and King have provided criteria to assist the students in developing a robust list to be available to circuit court judges.

Attorney Gordon asked whether, regarding Rule 2.7(C), the court's ability to waive the fine conflicts with statutes. Attorney Scherr acknowledged that in some cases, in DWI cases, for example, there is a conflict, but the court would then have the community service option.

Judge Delker inquired what would happen in cases in which defendants prefer to go to jail rather than perform community service.

Attorney Scherr stated that they should have counsel. There are simply some people who are not able to pay. What he and attorney Bissonette have seen is that there are too many courts that are not distinguishing between those who cannot pay and those who are refusing to pay.

Senator Feltes stated, in the interest of full disclosure, that he is currently working on a bill to increase the amount of money a defendant is credited toward the payment of his or her fine for each day of incarceration. He also reviewed the November 20 proposal before it was submitted. He then asked for Attorney Scherr's reaction to the language set forth in a proposal Judge Lynn submitted by email dated December 3. Justice Lynn raised a number of concerns about the proposal, including a concern that the new proposal does not contain any language that allows the court to consider sources of payment available to the defendant from a spouse or family or from borrowing. To address this concern, Justice Lynn proposed that the following language be added following the last sentence of proposed 2.7(B):

> The Court may also consider (1) spousal, partner and family income or assets to the extent they are available to the defendant: (2) the defendant's ability to access credit; and (3) the diligence exercised by the defendant in pursuing employment or other means of satisfying his financial obligations.

Attorney Scherr stated that he has some concerns about how broad (1) and (3) are. He noted that Circuit Courts almost never find an inability to pay, so this broad language increases the danger. In addition, he wonders whether it is advisable to implead all of these people. The expansiveness of the language makes meaningless a finding that anyone has the ability to pay. He noted that it might be possible to tighten the language.

Representative Berch noted that (1) is troublesome because it is not clear how to balance the needs of the person paying the money. Regarding (2), he notes that more modern case law is moving away from expecting defendants to use the credit markets to pay off the courts.

Attorney Scherr noted that (2) concerns him less than the other provisions, because as a practical matter it is not as though many of these people have access to credit.

Some discussion followed regarding the possibility of holding ability to pay hearings prior to sentencing. Attorney Scherr stated that he believes that there should be a conversation with the judge about a defendant's ability to pay before the judge, for example, imposes a $200 fine for simple assault. He believes that there should be a conversation with the judge about the possibility of proportional sentencing. However, the judges expressed some concern about the rule's requiring this, because of the impact it would have on

the administration, *i.e.,* the flow of cases. Therefore, the language in the rule is softer.

Attorney Gordon noted that the rule makes clear that some sources of income, *i.e.,* SSDI, will not be taken into consideration regarding someone's ability to pay. In other words, if the only source of income is exempt, then the person will be found unable to pay.

Senator Feltes asked Attorney Scherr to comment on the language Justice Lynn proposes be added to 2.7(D). Justice Lynn proposes that the following sentence be added to the end of (D):

> Upon proof by the State that a defendant has failed to pay a fine ordered by the court, the burden of proof shall be upon the defendant to establish by a preponderance of the evidence that he or she does not have the ability to pay and that he or she has exercised reasonable diligence in pursuing the means to pay.

Attorney Scherr stated that he would be happy to submit something to the Committee responding to all of the language changes Justice Lynn proposes. Regarding the language being proposed at (D), he stated that he has some concerns about the individual bearing the burden of providing proof through documents that they do not have the ability to pay. He much prefers that this burden be on the State.

Justice Lynn inquired whether this means the State has the obligation to do a financial investigation. Attorney Scherr stated that the individual should be required to complete a financial affidavit which is broader than the appointment of counsel affidavit. Justice Lynn inquired whether this means that the Judge has to believe the affidavit. Attorney Scherr stated that if the judge had a basis for not believing the affidavit, the judge can look elsewhere in the file. Judge Delker noted that he has had people pull money out of their shoe on the way down to the cell block.

Justice Lynn noted that the concern that he has, and what led him to propose the changes he has, is that when a judge sends someone to jail for failure to pay a fine, this is similar to a judge sending someone to jail for their failure to pay child support, or their failure to pay a civil judgment. The difficulty he has is that this is a proposal to have the court create a right to counsel in what is effectively a civil contempt proceeding. If there is a right to counsel and a hearing created in these circumstances, then there is a good argument that in these other sorts of cases, there ought to be a right to counsel and to a hearing as well. This may be a good idea, but Justice Lynn is concerned about whether this is something the <u>court</u> should be doing.

Attorney Scherr stated that he disagrees about the nature of this hearing. He notes that this is a continuation of a sentencing proceeding, *see Stapleford v. Perrin*. But, Justice Lynn noted, this also applies to violations. Attorney Scherr stated that perhaps language could be added to make clear that this applies in criminal cases and in violations cases where fines are imposed.

Judge Delker stated that he believes that this is a civil contempt proceeding.

Attorney Scherr stated that he believes that this is a criminal contempt proceeding – it involves a violation of a direct order of the court intentionally. By case law, it is a determinate sentence. Justice Lynn stated that it is not a determinate sentence because the defendant can get out on the first day, if he or she pays the money.

Representative Berch stated that it is important to recognize that in the context of the court system, $150 is not a large amount of resources. A defendant is coming before the court and is faced with a complex question – s/he says, "I have no money, no job, no credit cards," and the Court says, "that's not good enough." The question is one of resources – who is in the best position to be able to resolve the issue. Perhaps the rule should say, "the defendant shall submit a W2 if available, tax returns if available . . . ." then the defendant has some obligation, and the judge is in a better position to know if the wool is being pulled over his or her eyes.

Attorney Herrick inquired whether Attorney Scherr had learned from his research whether there was information on the number of those who were picked up on bench warrant for failure to pay. Attorney Scherr noted that some were, some weren't.

Attorney Gordon inquired what the financial affidavit would look like – is it similar to the one required in family law cases? Attorney Scherr stated that according to Judges Kelly and King, a different kind of ability to pay affidavit is being contemplated for these circumstances.

Attorney Scherr stated that he and attorney Bissonette want the judges to think about the purpose of the fines, and about proportionality. They should be having these conversations at review hearings. He also notes that public defenders are sometimes not even allowed to speak on behalf of defendants regarding their ability to pay.

Judge Delker noted that at the Superior Court they do "violation of court order days," in which they send out 100 notices. 25% of the people show up in response to the notices, and 75% require the issuance of a bench warrant.

Attorney Scherr stated that from the 289 in their survey, only 2 of the cases came out of the Superior Court.

Attorney Herrick inquired, regarding the appointment of counsel, whether a new appointment would be required every time. Attorney Scherr stated that he had not yet finished this conversation with the public defender.

Attorney Scherr directed the Committee's attention to paragraph (G), which states that

> when the court appoints counsel to represent a defendant in a proceeding related to (E) above, the court shall grant the defendant relief from the obligation to repay the State for their appointed counsel fees under RSA 604-A:9, I-b, when the court determines that the defendant is financially unable to pay.

He noted that this language was proposed by Christopher Keating, Executive Director of the Judicial Counsel, who believes it important not to impose yet another financial obligation on the defendant after the conclusion of the proceedings, to avoid the further accumulation of debt.

There was some further discussion regarding the burden of proof in these kinds of cases.

Attorney Scherr stated that he would prepare a response to the amendments Justice Lynn proposes and will circulate the report that is posted on the ACLU webpage.

Attorney Herrick noted that it appears there is additional work to be done, so there is not likely to be a vote on this until the March meeting.

Justice Lynn stated that he believes there may be a separation of powers issue here. He has some concerns that if the Court adopts this rule, it would be establishing a new economic entitlement that is not constitutionally based. Whether it is a good idea or not, it seems like this is a legislative issue.

Attorney Scherr stated that he believes that the Court has the power to do this, and noted that the Court has done this before. By rule, the Court made all direct criminal appeals mandatory and created the 3JX system.

Senator Feltes stated that he would raise this issue with both democratic and republican leadership in the legislature. He inquired whether this will cost money, and whether it would be possible to be provided with a fiscal note from Christopher Keating on this. Justice Lynn stated that he is concerned that, even if there is not much of a fiscal impact here, how does one distinguish

these cases from the others that have been discussed – *i.e.,* the child support cases.

d. 2015-022. New Hampshire Rules of Evidence – Update.

Justice Lynn referred the Committee to a December 1, 2015 memorandum and attachment from Carolyn Koegler. He explained that some time ago, Professor John Garvey had contacted him and noted that a number of changes had been made to the Federal Rules of Evidence that had not been made to the New Hampshire Rules of Evidence. At the Court's request, a committee co-chaired by Professor Garvey and Judge Garfunkel undertook a review of the New Hampshire Rules of Evidence to consider whether changes made to the federal rules should be made to the New Hampshire Rules. The results of the committee's review are summarized in the report submitted to the Committee.

Justice Lynn noted that there are a number of proposed changes, but that most of the changes are minor. He also noted that the Court had reviewed the report and had raised a few concerns, which it asked Professor Garvey's committee to address.

Committee members noted that the report is very difficult to read, and that there might be a column missing in the chart that is affixed to the report. The Committee members asked Carolyn Koegler to contact Professor Garvey to ask someone on the Committee, or perhaps a law student, to take the existing New Hampshire Rules of evidence and to use **[bold and brackets]** to indicate where the committee proposes language be added and ~~strikethrough~~ to indicate where the Committee proposes language be deleted.

e. 2015-023. Proposed New Hampshire Rules of Criminal Procedure – Rule 12.

Committee members were asked to consider a December 1, 2015 memo from Carolyn Koegler explaining that a comment had been submitted on the proposed New Hampshire Rules of Criminal Procedure that were put out for public comment on September 28, 2015. The Court has referred the comment to the Committee because it proposes a substantive change to the rules of criminal procedure. The comment proposes the following amendment to proposed Circuit Court-District Division Rule 12(a), relating to discovery, as follows (proposed additions are in **[bold and in brackets]**, deletions are in ~~strikethrough~~):

(1) ~~Upon request,~~ **[Within 10 calendar days after the arraignment]** in misdemeanor **[cases]** and **[upon request in]** violation-level cases, the prosecuting attorney shall furnish the defendant's attorney, or the

defendant, if *pro se*, with **[any and all discovery, including but not limited to]** the following:

(A) A copy of records of statements or confessions, signed or unsigned, by the defendant, to any law enforcement officer or agent;

(B) A list of any tangible objects, papers, documents or books obtained from or belonging to the defendant; and

(C) A statement as to whether or not the foregoing evidence, or any part thereof, will be offered at the trial.

Attorney Ryan stated that he believed it would be important to solicit input from all stakeholders on this proposed change. Attorney Gordon agreed and suggested stakeholders be asked to provide their input by the date of the March meeting, with the idea that the proposed amendment would likely be put out for public hearing in June. It was agreed that Pat Ryan and Carolyn Koegler would work together to identify the stakeholders, provide them with a copy of the proposed amendment to the rule, and request comment on it. It was mentioned that a request for comment should be made to the appropriate section of the Bar Association (Criminal Defense Attorneys), Public Defenders, the Attorney General's office, and County Attorneys.

f. Miscellaneous

Attorney Manning inquired whether it might be possible to set up the meetings that include public hearings differently. She noted that it is awkward for members of the Committee sitting on the side of the table with their backs to the bar to listen to the comments being made by members of the public during the public hearings. Carolyn Koegler agreed that she would look into whether different arrangements could be made for the public hearings.

4. Meeting Dates

The 2016 meeting dates will be:

Friday, March 11
Friday, June 3
Friday, September 9
Friday, December 9