NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Hearing and Meeting of
December 8, 2017

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

The meeting was called to order at 12:37 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Hon. Paul S. Berch, Hon. R. Laurence Cullen, John Curran, Esq., Hon. N. William Delker, Hon. Michael H. Garner, Sean Gill, Esq., Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Ari Richter (leaving at 2pm), Pat W. Ryan, Esq., Frederick H. Stephens, Charles Stewart and Hon. Robert J. Lynn.

Also present was the Secretary to the Committee, Carolyn Koegler, Esq., Charlene Desrochers, staff and Claire MacKinaw, staff (for the public hearing only).

1. PUBLIC HEARING

The public hearing items are listed below in the order in which testimony was taken on them. Because the public hearing was quite lengthy summaries of the testimony are not provided below. A CD recording of the hearing is also available upon request at the Supreme Court.

(a) 2017-006. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

Justice Lynn reminded the Committee that this proposed amendment to Supreme Court Rule 36(3)(a) would allow part-time law students interning for, and supervised by, a New Hampshire attorney to appear before the Court, and asked if there was any one present who wished to speak to the proposed amendment.

No testimony was offered on this proposal.

(b) 2017-005. Supreme Court Rule 37 (12). Reciprocal Discipline.

Janet DeVito, General Counsel of the Attorney Discipline Office, testified in support of this proposal.

Attorney Rothstein, Chair of the Professional Conduct Committee, raised a question about this proposal relating to the Professional Conduct Committee's role in the process.

(c) 2015-011. Supreme Court Rule 37. Reinstatement and Readmission.

Justice Lynn reminded the Committee that this proposed amendment would delete and replace Supreme Court Rule 37(14). The proposed new rule sets out in three distinct sections the procedures to be followed in reinstatement and readmission cases, depending upon whether an attorney has been: (a) suspended for six months or less; (b) suspended for more than six months; or (c) has been disbarred.

Attorney Sara Greene, Disciplinary Counsel at the Attorney Discipline Office spoke in support of the proposal.

Carolyn Koegler noted that if these changes are made to Rule 37, Rule 37A will need to be amended to ensure that Rule 37A is consistent with the changes to Rule 37.

(d) 2017-014. Supreme Court Rule 37(16). Dispositive Stipulations.

Justice Lynn reminded the Committee that this proposed amendment would address attorney discipline matters resolved by dispositive stipulation.

Attorney Sara Greene, Disciplinary Counsel at the Attorney Discipline Office spoke in support of this proposal.

(e) 2017-003. Supreme Court Rule 37A. Procedure After Receipt of a Grievance.

Justice Lynn reminded the Committee that these proposed amendments to Supreme Court Rule 37A would give the Attorney Discipline Office discretion not to docket a grievance if it determines that a hearing panel would be unlikely to find clear and convincing evidence that the respondent attorney violated the Rules of Professional Conduct.

One written comment was submitted expressing concern about the proposal and proposing alternative language. *See* 12/06/17 letter from the Professional Conduct Committee.

Attorney Janet DeVito, General Counsel of the Attorney Discipline Office, spoke in support of the proposal.

Attorney Rothstein, Chair of the Professional Conduct Committee and Attorney Beeson, a member of the Professional Conduct Committee expressed concern about the language of the proposal and proposed alternative language for the Committee to consider.

Attorney Mitchell Simon addressed the Committee and expressed support for the proposal, but also offered alternative language for the Committee to consider.

Attorney Greene Sara Greene provided background about the process.

(f) 2016-014. Superior Court Rules and Supreme Court Rules. In Camera Review of Documents.

Justice Lynn reminded the Committee that the Committee requested comment on two different sets of proposed rules and that both sets of proposed rules would amend the Superior Court Rules to codify the procedure used by the Superior Court when conducting the *in camera* review of confidential records and would amend the Supreme Court Rules to codify the procedure for appellate review of rulings on these matters. Justice Lynn noted that the proposal would also include changes to Circuit Court Rules as well.

A comment was submitted by the Attorney General's Office expressing concern about the proposals. *See* 12/07/17 letter from Deputy Attorney General Ann Rice.

A comment was submitted by the New Hampshire Coalition Against Domestic and Sexual Violence expressing support for a rule codifying the existing procedure for requesting and releasing confidential information, "provided that the rule does not lower the standard for access to confidential records in civil or criminal cases, and that the rule provide for an in camera review, rather than review by counsel." *See* 12/08/17 letter from Lyn M. Schollett, Executive Director of the Coalition Against Domestic and Sexual Violence

Attorney Jeffrey Kaye expressed concern about the proposals, stating that he believes that the defense attorney should be involved in reviewing the materials and evaluating whether they are exculpatory.

Lyn M. Schollett, the Executive Director of the New Hampshire Coalition Against Domestic and Sexual Violence, stated that the Coalition opposes any proposal that would utilize review by counsel of confidential records.

Attorney Kaye Drought, Litigation Director at New Hampshire Legal Assistance, expressed concern about the proposals, stating that she believes that the standards proposed are inconsistent with New Hampshire's existing case law.

Attorney David Rothstein, Deputy Director of the New Hampshire Public Defender, expressed support for the proposal made by attorney Johnson that records containing "exculpatory evidence" would have to be disclosed to defense counsel.

(g) 2016-013. Superior Court Rule 12(g). Motions for Summary Judgment.

Justice Lynn reminded the Committee that this proposed amendment would delete and replace Superior Court Rule 12(g). The proposed amendment would require both sides in the context of a motion for summary judgment to submit a single document identifying any undisputed facts and any facts. The purpose of the proposed amendment is to make it easier for the judge to determine what facts are in dispute and what are not.

A comment was submitted expressing concern about the proposals. *See* 12/07/17 email from attorney Geist.

No testimony was offered on this proposal.

(h) 2017-015. Superior Court (Civ.) Rule 7 and Criminal Procedure Rule 21. Motions.

Justice Lynn reminded the Committee that these proposed amendments would prohibit filers from combining multiple motions seeking separate and distinct relief into a single filing. He noted that what is being proposed is similar to the federal courts procedure.

No testimony was offered on this proposal.

(i) 2017-011. New Hampshire Rule of Evidence 404(b).

Justice Lynn reminded the Committee that this proposed amendment would codify the three-part test adopted by the New Hampshire Supreme Court for admitting evidence under Rule 404(b), but would change the second prong of the test. The second prong

currently requires "clear proof" that the person committed the other crime, wrong or act. This proposed amendment would change the second prong to adopt the federal standard.

A comment was submitted by attorney David Rothstein, Deputy Director of the New Hampshire Public Defender, and co-signed by attorney Charles Keefe, President of the New Hampshire Association for Criminal Defense lawyers, expressing concern about the proposal. *See* 11/06/17 letter.

Attorney David Rothstein, Deputy Director of the New Hampshire Public Defender, stated the he believes that the clear proof prong should not be changed.

Attorney Richard Samdperil, appearing on behalf of the New Hampshire Association of Criminal Defense Attorneys, stated that the New Hampshire Association of Criminal Defense Attorneys supports the codification of the three part test for admission under Rule 404(b), but does not believe that the "clear proof" prong of the test should be changed.

Attorney Michael Iacopino, of Brennan and Iacopino, stated the he believes that the clear proof prong should not be changed.

(j) 2016-008. Rules of Professional Conduct and Conflicts Between State or Local Law and Federal Law.

Justice Lynn reminded the Committee that this proposed amendment to New Hampshire Rule of Professional Conduct 1.2 would address the application of Rule 1.2(d) to cases in which conduct expressly permitted by state or local law conflicts with federal law.

A comment was submitted by Attorneys Alexander W. Campbell and Kara J. Dowal expressing support for the proposal. *See* 12/07/17 letter.

Attorney Peter Beeson expressed support for the proposal.

Attorney Richard Samdperil expressed support for the proposal.

2. DISCUSSION AND VOTE ON PUBLIC HEARING ITEMS

(a) 2017-006. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

Justice Lynn noted that no testimony had been offered on this proposal. Following some discussion, and upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed rule changes.

(b) 2017-005. Supreme Court Rule 37 (12). Reciprocal Discipline.

Justice Lynn reminded the Committee that the Court had requested that the Committee consider whether the rule should be amended to include a procedure for determining final discipline if the court finds that reciprocal discipline should not be imposed due to the existence of some factor or factors set forth in the rule.

The proposal the Committee put out for public hearing had been made by a subcommittee in a June 12, 2017 memo to the Committee. Attorney Discipline Office General Counsel Janet DeVito, who served on the subcommittee, testified in support of the proposal. Attorney David Rothstein, Chair of the Professional Conduct Committee, offered comment on the proposal at the public hearing.

Following some discussion, and upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed rule changes set forth in the public hearing notice.

(c) 2015-011. Supreme Court Rule 37. Reinstatement and Readmission.

Justice Lynn reminded the Committee that the Court had requested that the Committee consider whether Supreme Court Rule 37(14)(b) should be amended to clarify the procedure for readmission to the bar.

The proposal the Committee put out for public hearing had been made by a subcommittee in a September 11, 2017 memo to the Committee. Attorney Sara Greene, Disciplinary Counsel at the Attorney Discipline Office, who served on the subcommittee, testified in support of the proposal. Carolyn Koegler noted that if these changes are made to Rule 37, Rule 37A would need to be amended to ensure that Rule 37A is consistent with the changes to Rule 37.

Following some discussion, and upon motion made and seconded, the Committee voted to recommend that the Court amend: (1) Supreme Court Rule 37, as set forth in the public hearing notice; and (2) Supreme Court Rule 37A to make the language of the rule consistent with the changes to Rule 37.

(d) 2017-014. Supreme Court Rule 37(16). Dispositive Stipulations.

Justice Lynn reminded Committee members that attorney Sara Greene had submitted this proposed amendment in August 2017. She testified at the public hearing in support of the proposed change.

Upon motion made and seconded, the Committee voted to recommend that the Court amend Supreme Court Rule 37(16), as set forth in the public hearing notice.

(e) 2017-003. Supreme Court Rule 37A. Procedure After Receipt of a Grievance.

Justice Lynn reminded Committee members that the Court had requested that the Committee consider whether Supreme Court Rule 37A should be amended to make clear that the Attorney Discipline Office may decline to docket a grievance as a complaint if it concludes that a hearing panel would not likely find clear and convincing evidence that the attorney violated the rules of professional conduct. In response to a request from the Committee to do so, the Attorney Discipline Office proposed some language to amend the rule in a May 30, 2017 email to Carolyn Koegler. The Committee voted to put that language out for public hearing.

Justice Lynn noted that the Professional Conduct Committee had submitted a letter to the Committee expressing concern about the proposed amendments and suggesting language to amend proposed Rule 37(II)(a)(3)(v), as set forth in the public hearing notice at Appendix F, as follows (proposed deletions in ~~strikethrough~~; additions in **bold**):

> (v) *Sufficiency of* ***[Evidence Supporting]*** *Allegations.* The attorney discipline office may decide not to docket a grievance as a complaint if it determines, based on its evaluation of the grievance, that ~~a hearing panel would be unlikely to find~~ clear and convincing evidence **[of a violation *does not exist* and *will not be developed* through reasonable investigation after docketing.]** ~~that the respondent attorney violated the rules of professional conduct.~~

Attorney David Rothstein, Chair of the Professional Conduct Committee and attorney Peter Beeson, a member of the Professional Conduct Committee, testified at the hearing.

Attorney Mitchell Simon also testified at the hearing and proposed some alternative language to amend proposed Rule 37(II)(a)(3)(v), as set forth in the public hearing notice at Appendix F, as follows (proposed deletions in ~~strikethrough~~; additions in **bold**):

> (v) *Sufficiency of Allegations.* The attorney discipline office may decide not to docket a grievance as a complaint if it determines, based on its evaluation of the grievance **[that there is no reasonable likelihood]**, that a hearing panel would ~~be unlikely to~~ find clear and convincing evidence that the respondent attorney violated the rules of professional conduct.

Attorney Gordon stated that he likes the language of the initial proposal, as set forth in the public hearing notice, but has some concerns that it is too subjective. He believes that what attorney Simon has proposed is better because it is more objective.

Mr. Stewart stated that he likes the language proposed in the Professional Conduct Committee's December 6, 2017 letter.

Representative Berch stated that he likes the compromise language proposed by Attorney Simon because he believes that the "will not be developed language" proposed by the Professional Conduct Committee is too strong and is misleading to the complainant.

Attorney Lick noted that he is comfortable with the language set forth in the public hearing notice amended as Attorney Simon suggests, because the decision by the Attorney Discipline Office can be appealed to the Complaint Screening Committee to take another look.

Upon motion made by Attorney Lick and seconded by Attorney Curran, the Committee voted to recommend that the Court adopt the proposed change to Supreme Court Rule 37(II)(a)(3)(v), as set forth in the public hearing notice, as amended to include the language proposed by Attorney Simon.

(f) 2016-014. Superior Court Rules and Supreme Court Rules. In Camera Review of Documents.

Justice Lynn reminded Committee members that the Committee had put out for public hearing two different sets of proposed rules, each of which would amend the Superior Court Rules to codify the procedure to be used by the Superior Court when conducting in camera review of confidential records. He also reminded the Committee that the Circuit Court had asked the Committee to consider adopting rules to apply to the Circuit Court.

Judge Garner stated that he has two concerns about the proposals. First, he asked whether in modifying standards that have been set by the Supreme Court, the Committee is exceeding the bounds of its role. He wonders whether this issue be made by tweaks to the common law or by the legislature, or in some other forum. He also noted that there was testimony at the public hearing making clear that there is a difference between when a private party seeks access to confidential records and when a criminal defendant seeks access to confidential records. Judge Garner believes that the Committee should think about this distinction and consider different approaches to this issue for civil vs. criminal cases.

Attorney Gordon agreed with Judge Garner's concerns about the difference between civil and criminal cases. He notes that the family law bar, for example, has not been engaged on this issue.

Representative Berch noted that, as is reflected in its December 7, 2017 letter, the Attorney General's Office does not favor the adoption of the proposed rules in civil cases. Representative Berch also noted that the Committee has not heard a great deal of feedback from stakeholders in the civil context.

Justice Lynn stated that he shares the views expressed by Judge Garner, Attorney Gordon and Representative Berch, and has concluded that the Committee may have been a bit ambitious in trying to craft a rule to be applicable in civil cases. He notes that the area that is really most troubling is when the defendant in a criminal case is seeking access to confidential documents. He believes that whatever proposal the Committee recommends, it should be limited only to criminal cases – or to defendants' requests in criminal cases.

Judge Delker referred to the *Desclos* case and noted that his sense is that the Court treats these issues the same way, but that he is in favor of delaying a decision regarding the civil rule. In terms of the criminal rule, he notes that the prosecution and the defense are currently treated the same. The process is the same. The issue comes up often, so a rule would be helpful.

Justice Lynn stated that, staying focused on the criminal rule, the Committee has before it two proposals – the one set forth in the public hearing notice at Appendix G (the "Delker Proposal") and the one set forth in the public hearing notice at Appendix H (the "Lynn Proposal"). He asked the group to consider initially whether it can agree to the change that would say that "reasonably necessary" means information that would: "(1) constitute compelling evidence supporting the requesting party's position in the litigation; and (2) is not reasonably available from other non-privileged sources."

Representative Berch inquired about the "material and relevant" standard. Judge Delker noted that the December 7, 2017 letter from the Attorney General's Office recommends keeping the language "material and relevant." He notes that the letter also expressed concerns about subparagraph (a)(3) of the rule set forth in Appendix G(1). The Attorney General's Office recommends that this be changed to require that the Court issue orders directly to the keeper of the records, rather than require the prosecution to serve the order of production on the keeper of records. Judge Delker stated that it is the Superior Court's view that this responsibility should belong to the prosecutor.

Justice Lynn inquired whether there should be a lower standard for the defendant gaining access to confidential information. He notes that his proposal lowers the standard to "exculpatory." What this means is that if the judge reviews the documents and finds any part of the records to be exculpatory, then he turns over those documents to the lawyers on both sides. Then, the lawyers would make arguments that the documents meet the next standard, such that the documents can be used in connection with the case. The Delker proposal would change the wording slightly, but would essentially leave the standard where it is.

Justice Lynn stated that he understands that his proposal would mean that defense counsel and the prosecutor would get more information than if the standard is not changed. But his view is that this makes sense, especially if the disclosure is subject to a protective order. If the judge decides that some information is exculpatory, then by definition it has *some* value. Justice Lynn's view is that if underlying our system is the idea that it is "better for ten guilty people to go free than for one innocent person to be convicted," then this tips the balance in favor of the criminal defendant, and allows the criminal defense attorney to make an argument about why the information meets the second standard.

Attorney Gordon stated that regardless of the standard that is ultimately adopted, he has a concern about the complexity of this. The people who have to deal with this are doctors who have to answer the question from patients, "is anyone going to hear this?" Attorney Gordon fears the further dilution of the doctor/patient privilege. He realizes that this conflicts with the criminal side, but he is uncomfortable with a doctor having to think about cautioning a patient, "don't discuss this with me – it could get used in court."

Representative Berch stated that he could not disagree more. At issue here is the State's power to lock someone up. Representative Berch noted that the United States Supreme Court has made it clear that in some cases the information is allowed to come forward, despite the existence of a privilege. Most privileges are in derogation of finding the truth of the matter. Representative Berch believes that most doctors will not become experts. They might say, "if there is a case, this information may or may not come out." In his experience, doctors do not change their counseling because there is some possibility that information may become available in the future. If the patient expresses some concern to the doctor about that, the doctor can say, "talk to a lawyer."

Judge Delker stated that this is different from *Brady* and *Giglio*, which involves material kept in police files. What is at issue here is different. It involves statutory privilege – involving medical and psychiatric issues. The rules as they exist are designed to ensure that these privileges give way only in limited

circumstances. Exculpatory is a very low standard. People who seek counseling may discuss something that has very little to do with the issues in a case. There are collateral issues that may be exculpatory. This standard is a dramatic impediment on victims and this sacred relationship. The existing rules balance these interests, and this proposal seeks to change that.

Judge Garner noted that privileges exist to allow for candid conversations. We as a society want a patient to tell the doctor the unrestrained truth. Judge Garner has concerns about a change to the current rule and its impact in assault cases, and notes that it is important to be sensitive to this. Judge Delker's proposal codifies the existing standard. It is difficult to see the circle of what "exculpatory" means.

Justice Lynn inquired about a situation in which a victim goes to counseling and talks about substantially the same thing that he or she would testify to at trial, and then the victim goes to trial and says something different. He believes that this is troubling. There is a strong argument that the defendant should not have access to records if the victim has talked about other things, but when it is the same topic it is more complicated. Justice Lynn noted that lawyers may see *Giglio* material, but it is rare for it to go further if it involves a collateral matter.

Attorney Gordon inquired whether the standard could be something like, "exculpatory as to this incident."

Representative Berch stated that "exculpatory" is "exculpatory."

Judge Delker spoke in favor of his proposal, stating: (1) the core facts of what happened is usually not what the victim is concerned about when he or she seeks counseling. It is usually what has gone on/is going on in this person's life – this is where they need the healing. This is the collateral stuff that is the concern; (2) there should be discussion about making explicit the defendant's right to submit a memo explaining his or her defense prior to the judge's *in camera review* of documents because some judges are uncomfortable accepting *ex parte* submissions without explicit authority; and (3) the current system "ain't broke, so why fix it?" Judge Delker noted that he spoke with a number of Superior Court judges about this issue. On balance, they felt comfortable with the rule being left as it is.

Representative Berch inquired, regarding Judge Delker's second point, whether defense counsel would be able to change how the defense proceeds after the hearing. Judge Delker agreed that the defendant would not be bound by the memo. Representative Berch stated that it would be important to add this to any provision regarding *ex parte* memos.

Following some further discussion, given the lateness of the hour, the Committee agreed to take up further discussion of this matter at the March 9 meeting. But before adjourning, the Committee agreed to consider some of the other items that had been put out for public hearing.

(g) 2016-013. Superior Court Rule 12(g). Motions for Summary Judgment.

The Committee did not discuss, or vote on this proposal.

(h) 2017-015. Superior Court (Civ.) Rule 7 and Criminal Procedure Rule 21. Motions.

Upon motion made and seconded the Committee voted to recommend that the Court amend Superior Court (Civ.) Rule 7 and Criminal Procedure Rule 21, as set forth in the public hearing notice.

(i) 2017-011. New Hampshire Rule of Evidence 404(b).

The Committee did not discuss, or vote on, this proposal.

(j) 2016-008. Rules of Professional Conduct and Conflicts Between State or Local Law and Federal Law.

Upon motion made and seconded the Committee voted to recommend that the Court amend Rule of Professional Conduct 1.2, as set forth in the public hearing notice.

3. APPROVAL OF MINUTES OF SEPTEMBER 15, 2017 MEETING

Upon motion made and seconded the Committee voted adopt the minutes of the September 15, 2017 meeting. Attorney Ryan abstained from voting because he was not present at the September meeting.

4. MEETING DATES

Committee members agreed on the following meeting dates for 2018:

- March 9
- June 1 (may need to change)
- September 7
- December 7