NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Special Public Meeting of July 5, 2016

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

The meeting was called to order at 12:35 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, Honorable Michael H. Garner, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek D. Lick, Esq. Maureen Raiche Manning, Esq., Ari Richter, Patrick W. Ryan, Esq., Frederick H. Stephens, Jr. and Hon. Robert J. Lynn. John A. Curran, Esq. and Ari Richter excused themselves from the meeting at 2:30 p.m. Karen Anderson excused herself at 3:00 p.m.

Also present was the Secretary to the Committee, Carolyn Koegler, Esq., and Professor Albert E. Scherr.

1. Discussion and Vote on Public Hearing Items

(a) 2015-022. New Hampshire Rules of Evidence – Update

Justice Lynn stated that, as he recalled, the Committee had agreed not to take this matter up at the meeting today because changes would need to be made to the proposed new rules based upon the discussion at the June meeting. This item will be included on the September agenda. Committee members agreed.

(b) 2015-021. Payment of Fines. New Hampshire Rules of Criminal Procedure 29(e).

Justice Lynn reported that he had had a conversation with members of House leadership and that the view of the House seems to be that this is a legislative issue and that the House does not support the Court's instituting a pilot program at this time. He stated that he had also spoken with members of the Court and that the Court is disinclined to adopt a rule like this. The Court notes that the constitutional issue is an open question which the Court will decide if the case is brought challenging the current procedure. Justice Lynn stated that this does not mean that the Committee should not recommend the adoption of this rule to the Court. He is only reporting that the view of the

House and the Court seems to be that this is a public policy issue that should not be decided by the rulemaking process.

Senator Feltes noted that the fact that the Senate and the House disagree on this is not unusual. He stated that the view of the Senate is that there are three approaches to take with this: (1) authorize it; (2) not authorize it; or (3) institute a pilot program to inform the outcome on the legislative issue. He stated that the Senate does not intend to suggest that the Supreme Court does not have the authority to adopt this rule. The Senate believes that it is just better if this issue is ultimately resolved legislatively.

Judge Delker noted that the main point of contention seems to be about the appointment of counsel issue, but he stated that there are other important issues as well, such as the burden of proof issue and the types of evidence the court may consider when deciding whether a defendant has an ability to pay. He believes that these are other issues that are better decided by the legislature. He also noted that there are some additional problems with the current draft of the rule. For example, it is not clear to him that the ability to pay hearing should be extended to restitution payments as well. The current draft of the rule seems to apply to both fines and restitution.

Justice Lynn stated that there are concerns about the financial impact. He noted that while representations have been made to the Committee that the financial impact would be minimal, the study that was done about the potential financial impact was based only upon people who actually went to jail for not paying a fine. He stated that there is no way to know how many people threatened with jail "right now" paid the fine. He stated that in his experience at the Superior Court, this threat was made to people who failed to pay child support. He stated that judges often said, "You haven't paid child support, you are going to jail right now," and that nine times out of ten the person would pay the child support. So if one assumes that there is a similar dynamic going on in Circuit Court regarding the payment of fines, and one assumes that when the judges say, "you haven't paid the fine, you are going to jail right now," that nine times out of ten the person will pay the fines, one also has to assume that the State will have to pay for counsel, not just for the person who ended up in jail, but also the nine other people.

Senator Feltes stated that Senate leadership does not have any concerns about the proposed rule being adopted by the Court on a pilot basis to gather data about the financial impact of the rule.

Justice Lynn stated that he has concerns about what the financial impact will be even it is only adopted on a short-term basis. He noted that there is no money in the budget to cover any costs associated with this.

Ari Richter inquired whether there is a reason that the pilot cannot be initiated in the legislature. Senator Feltes stated that the primary reason is that this will take a long time. He said that it is his intention to submit legislation on this in 2017, but what he submits will depend upon what the Court decides to do with this proposal.

Justice Lynn stated that he wished to make clear that no one on the Court suggests that the legislature should not do this. The Court's position is only that this issue is better left to the legislative process.

Representative Berch stated that he has two points to make, one relating to process, and the other, to substance. Regarding the substance, the question is, "should this class of citizens get a lawyer?" This is the kind of thing that when presented to the legislature leads to an enormous amount of debate. He notes that a subset of indigent defendants already have lawyers. They have been sentenced, and this is essentially a resentence, so they may have the same lawyer. Speaking as a member of the judiciary committee, Representative Berch noted that the judiciary committee has to wrestle with this question all of the time. That is, the question of whether something is an issue for the Court or the legislature. He stated that the judiciary committee is sensitive to this issue. The judiciary committee appreciates having more information, rather than less. Putting in place a pilot program to gather data about this will better inform the process. If this goes to the legislature without data, the debate will be a debate in the abstract. Having data from the pilot project will allow for a more valuable debate. Regardless of whether the Court or the legislature ultimately decide to make this change on a permanent basis, the pilot project will have served a useful purpose.

Judge Delker noted that he disagrees with Representative Berch's assertion that many of these people will already have a lawyer. If a person was charged with a class B misdemeanor, no public defender will have been appointed and counsel will then have to be appointed. There is no way to know how many people fall into this category.

Justice Lynn stated that if the court is imposing a fine as a penalty, but has the authority to put someone in jail as a punishment, there is no question that these people have a right to counsel. But the people the Committee is talking about today are people who could not be sent to jail as a punishment anyway.

Representative Berch stated that he finds it problematic that there can be this situation – that someone is charged with something for which they cannot be sent to jail, so they get no lawyer at that point. But, then later they can face the possibility of going to jail, but still get no lawyer.

Professor Sherr stated that most of the people – a huge majority- that the ACLU identified were people who were charged with class A misdemeanors but were, in the end, just fined.

Judge Lynn stated in response that these people were then entitled to a lawyer at the beginning.

Professor Scherr agreed, but noted that these people were not being told, when they decided to take a plea, for example, that if they didn't pay the fine, they would go to jail. He noted that he agrees that there is certainly a class of people who, when threatened with jail, come up with the money. He understands the concern. But, he stated that he believes that the funnel process that the rule sets up addresses that concerns. He believes that saying to a defendant at the last "non-jail hearing," "ok, we've reached the endpoint now - the next time you appear before me, you may go to jail," is almost the same threat as "pay up right now or go to jail," and will be successful in getting these people to pay.

Representative Berch stated that he would like the Committee to spend less time focusing on the end-point of the process. He stated that society tolerates an indigent defendant going through the criminal process without a lawyer because the indigent defendant is guaranteed that he or she will not go to jail as a consequence of being convicted. The consequence of a conviction will be something less than going to jail. Under the current system, in which counsel is not appointed at the endpoint – *i.e.,* at the ability-to-pay hearing, this would be accepting an imperfect conviction, and yet the person now faces the likelihood of going to jail. If someone is told at the beginning of the process, you are not getting a lawyer because you are not going to jail, the weight of that promise is still there.

Justice Lynn stated that he believes Representative Berch's premise is wrong. What is happening in the end is that the defendant is going to jail for refusing to pay. The defendant can only be sent to jail as a coercive matter. This is a critical difference. If the sentence imposed was only a fine, at that point the Court cannot say, "I am changing the sentence."

Judge Delker noted that the defendant's recourse at that point is to request a hearing on whether to withdraw the plea.

Attorney Herrick stated that she does not believe that the Constitution requires the appointment of counsel in these circumstances. She believes that the Constitution requires jail being linked more closely than in the situation Representative Berch describes.

Professor Scherr stated that he and the ACLU brought three habeas corpus petitions, all of which were granted. He noted that the ACLU can go on

for decades bringing the habeas petitions, but there are judges that will keep doing this. This is a public policy issue. His group came to the Court with a proposal for a rule change rather than file a broad class action because it seemed more appropriate to request a rule change rather than bring 189 habeas corpus petitions in one year. He also noted that the problem with being so successful on the habeas petitions is that the issue never reaches the New Hampshire Supreme Court. He stated that the people he has worked with on this asked themselves what they could do to change this practice, and that requesting a rule change seemed to be the most system-friendly way to do this.

Justice Lynn stated that in the cases that the ACLU cited, the writs were granted because the Superior Court found that it had not been established that there was willful refusal to pay the fine. It is clear that judges do indeed do this, unfortunately, but this is a judicial conduct issue. It is not clear how the presence of a lawyer in these situations would make a difference.

Professor Scherr stated that he believes that the presence of a lawyer will make a difference. He stated that with the individuals the ACLU represented, it was fortunate that the ACLU was there. It is easier to right the wrong in the moment.

A committee member asked whether one option might be for the committee to recommend that the Supreme Court decide the constitutional question. Justice Lynn stated that, although there are some exceptions, the Court generally does not issue advisory opinions.

Mr. Richter stated that the debate occurring during the meeting is illustrative of why this issue should be resolved in the legislature. There should be a discussion before the judiciary committee and before the legislature. At the same time, perhaps, there is a concern about people going to jail who should not because they do not have an ability to pay. So, perhaps the Court can issue an instruction to judges to clean up their acts. And, perhaps, if a judge continues to send people to jail who should not be going to jail, that judge should be brought before the judicial conduct committee.

Justice Lynn stated that the ACLU proposal is in the public interest. He noted that with respect to some parts of the proposal, there is no disagreement. There are parts of the proposal that nobody objects to. To the extent that a few of the judges have not gotten the message, it is clear that that should be addressed, either by cases, or via a Judicial Conduct Committee complaint. If there is no evidence of willful failure to pay a fine, that person should not be sent to jail.

Attorney Gordon stated that he has several points to make: (1) whether or not there is a constitutional right to counsel, it seems clear that what this rule does goes beyond what the constitution requires; (2) the current rule as

drafted does not create a "funnel effect" - the proposal tries to create the funnel that is not in the current rule - the funnel should be created regardless of whether a defendant gets counsel at the ability to pay hearing or not, but there is still work to do on the funnel; and (3) a pilot program is a good idea. If the Committee votes to recommend a pilot program, it should add a provision to require the reporting of numbers to a central authority.

Professor Scherr noted that Judges Kelly and King have said that they are willing to collect the data and that attorney Christopher Keating suggested that perhaps the Executive Director of the Judicial Council could run the project. Professor Scherr noted that people believe that in terms of a pilot project, there are resources available for a six-month period.

Attorney Lick stated that he does not practice in this area, so his comments are based upon what he has been hearing during Committee discussions about this issue. He made the following points: (1) he is concerned that there may be some indigent defendants who are going to jail; (2) he notes that Judges Kelly and King were involved in drafting the proposed rule, and he has concerns about not following the advice of the judges who are working in this area; and (3) he recognizes that there may be some funding concerns about implementing this on even a short term basis, but nevertheless is inclined to recommend that the Court move forward on a pilot project on a six-month to a year-long basis.

Attorney Richter inquired whether Judges Kelly and King are in favor of the appointment of counsel piece as well. Professor Scherr stated that they are.

Justice Lynn stated that the judges know that there is a problem, but their concern is that there is a class of cases of people who are not indigent but balk at the system unless or until the judge says, "you are going to jail right now." These are simple decisions that do not require the appointment of counsel. Justice Lynn noted that the United States Supreme Court's decision in *Turner v. Roger*s, 564 U.S. 431 (2011), supports the view that a defendant does not necessarily have a constitutional right to counsel in these kinds of cases. He stated that that even in criminal cases, a defendant is not routinely granted a right to counsel in connection with making the threshold determination of whether the defendant is financially eligible for counsel. Justice Lynn acknowledged that the question here is not exactly the same, but stated that since the eligibility for counsel determination closely resembles the ability-to-pay determination, it seems logical to conclude that, except in unusual cases, there should be no right to counsel in connection with an ability-to-pay proceeding.

Professor Scherr stated that he and the people he worked with on this proposal – Giles Bissonnette, and Judges Kelly and King - are aware that there

are some people out there who balk at the system. He noted that Judges Kelly and King received and reviewed draft after draft of the proposed new rule and he feels confident that the rule does a much better job of seeking these people out than the existing rule does. He stated that under the proposed new rule, the Court has the power at the front end to look at the financial affidavits. Judges Kelly and King have instituted training to teach how to identify indigence.

Senator Feltes stated that he and Senator Bradley have submitted legislation to amend the statute that credits a criminal defendant $50 per day of incarceration toward the payment of the fine. All members of the legislature are aware of the ACLU Report and of the habeas petitions that have been filed, and view this as a problem. Senator Feltes proposed that the Committee isolate what issues Committee members can agree upon, and explore what they disagree about.

Pat Ryan stated that he works for Judges Kelly and King at the Circuit Court and is able to provide some background about how the determination regarding indigence is made. He stated that at the Circuit Court, with respect to the appointment of counsel issue, there is no judicial discretion involved, at least at the outset. A defendant fills out a very brief affidavit and the numbers are plugged into a form. If the defendant is denied counsel, he or she can appeal that decision. At that point, it would go to a judge. But, at the outset, no judge is involved. The situation the Committee is discussing now is different from the situation in which a determination is made about whether a defendant should go to jail because he or she has the ability to pay a fine. Attorney Ryan stated that he agrees that there are some folks who thumb their nose at the system, but there is also a group of folks who are not in their element, who are afraid, who are not at their best for whatever reason and who would benefit from the appointment of counsel.

Attorney Herrick noted that in her experience at the public defender, she would see people arrested who would just write "0" on their financial affidavit. She stated that she likes the new framework in the rule, but is concerned about what judges might do with this information. If a judge is faced with having to decide whether to sentence someone to jail or requiring them to pay the fine, and the judge knows from the financial affidavit that the person does not have the ability to pay, based upon the assets they have, the outcome may be that judges send more people to jail. The current draft of the rule does not make clear what the judges are being asked to think about.

Justice Lynn noted that some of the issues of concern in the draft rule include: (1) the burden of proof issue; (2) the "what resources can be considered" issue; and (3) the question of whether restitution should be included in the rule. With respect to the "what resources can be considered" issue – it is important to understand that if the rule proposed by Professor

Scherr and Judges Kelly and King is adopted, this would constitute a change to existing law. With respect to the burden of proof issue – the case law says that in cases in which a condition is imposed on a criminal defendant, but is not met, the State has the obligation to show only that the condition was not met, and then the burden shifts to the defendant.

Judge Delker noted that the burden of proof issue depends upon the context. *Fowlie*, for example, involved a violation of probation. In this case, it was not improper for the initial burden to be on the State, and then shift to the defendant. In *State v. Wallace*, which involved criminal contempt, the burden was on the State for all elements. The question really relates back to what is the nature of this proceeding? Is this a criminal contempt proceeding? A civil contempt proceeding? Something else? Judge Delker stated that the rule does not seem to be sure what it is trying to accomplish. In some ways, it is not consistent with the case law, and it attempts to meld different areas that do not meld. There are some fundamental issues relating to this proposal that are outside the purview of this Committee. Judge Delker stated that his recommendation would be to vote not to recommend, to suggest that the Court hold oral argument on this, and have the Court decide.

Representative Berch stated that it seems that the State is spending a great deal of time and money trying to collect money in cases in which a crime was too trivial to send someone to jail. Attorney Gordon noted that that is the irony of due process.

Attorney Manning stated that even if one person goes to jail who should not, then shame on us. She stated that she believes the problem should be fixed.

Justice Lynn inquired whether there are any concerns about the rule other than the following issues: (1) restitution; (2) appointment of counsel; (3) burden of proof; (4) what resources should be considered.

Attorney Gordon stated that he believes that the Committee should improve what it can, and not address these other issues.

Senator Feltes suggested that perhaps the judicial branch should state that no one should go to jail until the legislature has fixed this problem. Mr. Richter noted that this is tantamount to saying that no one need pay their fine. Professor Scherr suggested that perhaps the rule should be, in the interim, that judges cannot send someone to jail for failure to pay a fine unless the defendant has been appointed counsel.

Judge Delker noted that in one of the test cases in the ACLU report, a lawyer was present and the result was that the person went to jail anyway. It is clear that in that case, the judge should be held accountable. But what this

shows is that it is not clear that the presence of a lawyer would really make any difference. Professor Scherr disagreed and said that the presence of a lawyer will make it less likely that a judge will send someone to jail who does not have the ability to pay.

Justice Lynn stated that it is his understanding, after having spoken with his colleagues at the Court, that the Court would be disinclined to adopt this proposal. The Court views this kind of proceeding more as a civil contempt kind of proceeding. The defendant holds the keys to the jailhouse door – he or she can pay the fine and get out.

Professor Scherr stated that the appointment of counsel piece improves the process of figuring out who can pay, and who cannot pay. The lawyer can help to expedite the process of determining who has the ability to pay and who does not.

Attorney Manning moved to have the Committee recommend that the Supreme Court adopt a pilot program, as recommended by Senator Feltes, and that it also recommend that the Supreme Court put a moratorium on sending people to jail who have not had a lawyer appointed to represent them at an ability to pay hearing. Representative Berch seconded the motion.

There was some discussion regarding the details of the motion. Justice Lynn clarified that the proposal is to recommend that the Court adopt the rule proposed by the ACLU on a pilot basis, and the Feltes proposal that the judicial branch collect data during the pilot program and send it to the legislature.

There was some discussion about whether the pilot program should be for six months or one year. It was generally agreed that the pilot program should be for one year, but that some data should be produced at six months. There was discussion about how the reporting should be done. One Committee member inquired whether it would be better for the reporting to be made to the Court, and then submitted to the chairs of the Finance Committee for the Senate and the House. Committee members seemed to agree that the reporting should be made directly to the House and Senate Finance Committees, with copies of the report provided to the Supreme Court and the members of the Advisory Committee on Rules. The Committee agreed that the following changes should be made to the draft comment provided by Senator Feltes (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~ format):

Comment:

> Rule 29(e)~~(7), the appointment of counsel provision,~~ is effective for ~~six months~~ **[one year]** as a pilot program, with renewal subject to legislation. **[At the conclusion of six months and again at the end of the pilot program]** ~~At the conclusion of the six month pilot program,~~ the New Hampshire Judicial Council and the New Hampshire Circuit Court shall provide a report to the Governor, the Senate President, the Speaker of the House, and the chairs of the Finance Committee for the Senate and the House **[and the Advisory Committee on Rules]**, describing, at a minimum, the number of people provided counsel, the outcome of each case, and the costs associated with the provision of counsel.

Judge Delker noted that there are still some technical problems with the rule, for example, with respect to the restitution issue. Professor Scherr agrees that there is a problem with the reference to restitution, and that it should be addressed.

Mr. Richter stated that regarding the biggest part of this proposal, the Committee is proving the difficulty of solving this problem, but there does seem to be a legitimate concern if even just a few people are incarcerated for failure to pay a fine who are unable to pay the fine. It seems that any attempt to fashion a compromise will lead to unintended consequences, and that there will be a great deal of time until the Court will take action. Mr. Richter stated that it seems to him that either there is an imperative, in which case the Committee should make the narrowest recommendation it can to address that issue right now; that is, if failure to pay a fine is to result in incarceration, a lawyer must be appointed. Or, there is no imperative, in which case, this proposal should be vetted on paper, in full.

Justice Lynn made two points: (1) there is no money appropriated for this pilot program, and the Committee has no idea how much it will cost. Perhaps the Committee recommendation will persuade the Court to do this, but it seems doubtful that the Court will act. If the legislature were to institute this as a pilot program, there would be no problem. We just don't know where the money for this is; and (2) if the order is that judges are not to incarcerate a defendant for failure to pay a fine unless counsel is appointed, then how long does this order stay in place?

Senator Feltes stated that he believes that if the Court adopts this recommendation, all this indicates is that the Supreme Court recognizes that there is a problem, but also understands that the legislature is the appropriate place to rectify the problem. He stated that he would make it clear to the Committees and to the legislature that this is not a ruling of the Supreme Court.

Representative Berch acknowledged that at some level, someone will read action on this by the Supreme Court as the Supreme Court's being in favor of this; but, if the Court does not take action, that sends a message as well.

Mr. Richter stated that the Court could hold a public hearing on this.

Attorney Curran stated that it seems that everyone agrees that no one should go to jail if they do not have the ability to pay the fine. But perhaps the solution lies in training by the Circuit Court. Members of the bar know which judges do this – *i.e.,* skip steps in the process. Perhaps the easiest mechanism to address this problem is through the Circuit Court, rather than a rule change.

Professor Scherr stated that procedures are being developed through the Circuit Court to deal with this problem administratively. But Judges Kelly and King do not feel that they can effectively institute this without more support.

Mr. Curran inquired whether there is a way to address this with the judges who are problematic, "off the record." Professor Scherr responded that it is his impression that there is some resistance to instruction from "above" as to the right way to do this.

There was some discussion about whether there is a 73-A concern here, *i.e.*, whether the Court has the authority to do this. It was generally agreed that there is not.

Justice Lynn noted that there is a concern here. This involves an issue of what services the government should provide. He believes that Senate President Morse and the Speaker are right. This is the kind of thing that the legislature should do because it implicates the question of what are the priorities – what do we need to spend money on.

Judge Delker and Professor Scherr agreed to look at the draft rule and to decide where restitution fits and where it does it not.

Upon motion made and seconded, the Committee voted 8 to 7 to recommend that the Court adopt the ACLU proposal to amend the rule (subject to amendments designed to address the restitution problem), with the comment submitted by Senator Feltes (as amended). Representative Berch, Attorney Gordon, Attorney Ryan, Judge Garner, Mr. Stephens, Attorney Manning, Attorney Lick and Ms. Anderson voted in favor of recommending the proposal. Mr. Richter, Judge Delker, Attorney Curran, Justice Lynn, Attorney Herrick, Senator Feltes and Judge Cullen voted against recommending the proposal. Senator Feltes clarified that he was voting against the proposal

because the Committee is recommending a one-year pilot program, rather than a six-month pilot program.

Mr. Stephens stated that it is very important that the Committee monitor the application of this rule and to make sure that it is clear how the Court and the Committee expect the rule to be applied – to make sure that it is clear, numerically, what is going on so that the Committee has a clear picture of the financial impact of this.

Committee members generally agreed with this, and Judge Lynn stated that his assumption is that the responsibility to do this would be placed on Judge Kelly or one of his designees.

Carolyn Koegler inquired whether the Committee wished to make this recommendation immediately, or whether she should wait to include this recommendation in the next report, which is due November 1. She also inquired whether any members of the Committee wished to submit a minority report.

Attorney Manning stated that one of the people featured in the ACLU report was put in jail for seven days. She believes that it is important to do something to address this soon.

Professor Scherr noted that the Court adopted the counsel at arraignment rules on a temporary basis and inquired whether the Court could do the same thing with this proposal.

Upon motion made by Judge Delker and seconded, the Committee voted to recommend that the Court adopt the rule on a pilot basis immediately, without first requesting public comment.

It was agreed that a report on the minority view would be included in the body of the report to the Court.

Mr. Richter and attorney Curran left the meeting at 2:30 pm.

(c) 2015-020. Circuit Court – District Division Rules 5.4, 5.7 and 5.9. Landlord and Tenant.

Discussion turned to the proposal by David Peck set forth in a November 4, 2015 memo to the Committee. The proposal is to amend the District Division Rules governing the procedure followed in landlord-tenant actions when the tenant defaults either by not filing an appearance or failing to appear for trial.

Judge Delker reminded Committee members that one of the comments made at the public hearing was that last sentence of Rule 5.4[A] (as set forth in the public hearing notice) should be amended. The sentence currently provides that the writ of possession and notice of judgment should be issued at least three days after the Clerk's notice of default. A concern was expressed that three days is not enough time.

Following some discussion, it was agreed that Rules 5.4 and 5.7(A)(1) should be amended to provide that the writ of possession and notice of judgment should be issued at least five business days after the Clerk's notice of default.

Another Committee member noted another comment made at the public hearing was that Rule 5.7 should be amended to make clear, regarding the court's order following the denial of motion to strike a default, that the amount the tenant is required to pay into the Court on a weekly basis in the event that a tenant appeals the denial, is the amount of rent, adjusted for any housing assistance paid on behalf of the tenant.

Following some discussion, it was agreed that the last sentence of proposed Rule 5.7 (as set forth in the notice of public hearing) should read as follows (deletions are in ~~strikethrough~~ format): "this amount is equal to the actual weekly rent or the periodic rent converted into a weekly sum**[, adjusted for housing assistance, if applicable.]**"

Ms. Anderson left the meeting at 3pm. Before she departed, Justice Lynn explained that Ms. Anderson had disclosed a possible conflict of interest regarding her participation in the vote on Rule 29(e) because of her involvement with the ACLU. Justice Lynn indicated that he had discussed the issue with the Court that the Court saw no reason that Ms. Anderson should not participate.

Upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposals to amend District Division Rules 5.4, 5.7 and 5.9, as amended by the Committee.

(d) 2015-023. New Hampshire Rules of Criminal Procedure - Discovery.

Justice Lynn reminded the Committee that at issue is a proposal to amend New Hampshire Rule of Criminal Procedure 12(a) to require the state to provide automatic discovery to defendants charged with misdemeanors.

Justice Lynn stated that this may be a solution in search of a problem and that based upon the testimony provided at the public hearing, there are serious potential consequences to adopting the proposed amendment.

Representative Berch stated that when felonies first was passed, certain tradeoffs were made in the legislature. The thinking was that if the legislation passed, this would free up time in the prosecutor's offices and the police departments and that that time could then be spent getting discovery to defendants more quickly.

Judge Delker noted that one of the concerns expressed at the public hearing was about the volume of paper that might have to be generated in cases in which discovery was not really necessary and the administrative burden this would create. He noted, to Justice Lynn's point that this may be a solution in search of a problem, that the Committee has not heard any testimony that people have been incarcerated who did not receive discovery. The Committee has learned of no cases in which this has been a problem.

Justice Lynn queried whether Representative Rouillard, who submitted this proposal to the Court in a comment when the Court requested comment on the new Criminal Rules of Procedure, may have proposed the amendment because she saw a discrepancy between the discovery rules for superior court and the misdemeanor rules.

Senator Feltes inquired whether it might make sense to require the Court to inform defendants of their right to request discovery, perhaps at arraignment. Representative Berch stated that a verbal statement by the Court to the defendant should be sufficient.

Some discussion ensued about when the notice should be given to the defendant, and whether the rule should be included in the section on preliminary proceedings, rather than Rule 12(a). Attorney Gordon stated that defendants not represented by attorneys can waive arraignment in class B violations, and that these are the people this rule would be designed to protect. He inquired whether it might make sense to print this on the summons.

Attorney Ryan stated that the Circuit Court does not control the summons form, and that, in his opinion, the best place for this rule is in the arraignment section of the rules, not in the preliminary proceedings section of the rules. He notes that in the class B violation cases many defendants do not waive arraignment, so the arraignment is the best place to notify the defendant about this right. He also stated that if the Committee is considering recommending that this responsibility be placed on the prosecutor, then he believes that the Committee needs to solicit comment from prosecutors.

Following some discussion of the issue, and upon motion made and seconded, the Committee voted to recommend that New Hampshire Rules of Criminal Procedure be amended to read as follows (new material is in **[bold and in brackets]**, deleted material is in ~~strikethrough~~ format):

(a) Circuit Court-District Division

(1) **[At the defendant's first appearance before the court, the court shall inform the defendant of his or her ability to obtain discovery from the State.]** Upon request, in misdemeanor and violation-level cases, the prosecuting attorney shall furnish the defendant with 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.

2. Approval of Minutes of March 11, 2016

The Committee considered the March 11 meeting minutes. Attorney Manning noted that the minutes state erroneously that she was present at the meeting. Carolyn Koegler agreed to amend the minutes to reflect that attorney Manning was not present.

Upon motion made and seconded, the Committee voted to approve the March 11, 2016 meeting minutes, as amended.

At 3:30 pm, upon motion made and seconded, the Committee voted to adjourn the meeting.