

ADVISORY COMMITTEE ON RULES
June 2, 2004

Supreme Court Conference Room
Frank Rowe Kenison Supreme Court Building
Concord, New Hampshire

The meeting was called to order at 12:15 p.m.

The following Committee members were present:

Robert L. Chase
Hon. Linda S. Dalianis
Hon. Robert L. Cullinane
Hon. Richard Hampe
Hon. Philip Mangones
Emily G. Rice, Esquire
Raymond W. Taylor, Esquire

Also present were David S. Peck, Secretary to the Advisory Committee on Rules, and Margaret Haskett, staff.

On motion of Judge Hampe, seconded by Attorney Taylor, the Committee approved the minutes of the March 31, 2004 meeting, as amended.

David Peck reported that the Supreme Court had taken no action on proposed rules changes since the Committee's last meeting.

The Committee next discussed the status of items pending before it and the following action was taken:

Relative to administrative orders prepared by administrative judges and various guidelines, protocols and procedures, following a brief discussion of the subcommittee's report given during the March 31, 2004 meeting, the Committee, on motion of Attorney Rice, seconded by Judge Dalianis, voted to disband the subcommittee on administrative orders.

Relative to adoption of plain error rules – jury instructions, following discussion and on motion duly made and seconded, the Committee voted to send the proposed

amendments to Superior Court Rule 72, as contained in Appendix A of these minutes, to the Committee's next public hearing.

Relative to comments to the Professional Conduct Rules, David Peck reported that the N.H. Bar Association's Ethics Committee hopes to deliver proposed comments to this Committee by the end of the summer.

Relative to amendments to the Character and Fitness standards, following discussion and on motion duly made and seconded, the Committee voted to send the proposed amendments to the Character and Fitness standards, as contained in Appendix B of these minutes, to the Committee's next public hearing.

Relative to amendments to Supreme Court Rules 12-D and 16(11), following discussion and on motion of Attorney Rice, seconded by Attorney Taylor, the Committee voted to recommend to the Supreme Court that Supreme Court Rule 12-D be amended, as contained in Appendix C of these minutes, and further that it be considered as a technical amendment. The Committee further agreed not to recommend that Supreme Court Rule 16(11) be amended at this time.

Relative to amendments to court rules pertaining to entry of judgment and appeal bonds, following discussion, the Committee agreed to make no changes to said rules at this time but suggested the matter be brought up if and when the Rules of Civil Procedure are reviewed.

Relative to the ABA Report on Multijurisdictional Practice pertaining to the foreign consultants issue, the Committee agreed to defer action on this matter until its next meeting.

Relative to various rules pertaining to the delivery of motions to opposing counsel, following discussion, and on motion duly made and seconded, the Committee voted to recommend no changes to the rules at this time.

Relative to Rules of Civil Procedure, the Committee asked David Peck to contact the N.H. Bar Association to obtain copies of what was distributed when the Rules of Civil Procedure were last reviewed.

Relative to amendments to Professional Conduct Rule 1.6 pertaining to attorney/client privilege, the Committee agreed to defer action on this matter until its next meeting.

Relative to Committee members, Judge Cullinane indicated that he would be willing to attend another meeting, if needed.

Relative to limited scope of legal assistance, the Committee agreed to defer action on this item until it receives information from the N.H. Bar Association's Ethics Committee.

The Committee turned its discussion to new items for consideration and the following action was taken:

Relative to amendments to Probate Court Rule 49-A pertaining to continuances, following discussion and on motion of Judge Mangones, seconded by Judge Cullinane, the Committee voted to recommend to the Supreme Court that Probate Court Rule 49-A not be adopted on a permanent basis.

The Committee adjourned so that members could attend the public hearing, scheduled for 1:00 p.m. in the courtroom.

During the public hearing, the Committee heard testimony on proposed court rules changes. In addition, it received written comments on several proposed rules changes. The Committee took no action during the public hearing.

Following the public hearing, the Committee reconvened to discuss, after hearing comments at the public hearing, what action it wished to take on the proposed rules changes. Following discussion, and on Judge Dalianis' suggestion, the Committee agreed to recommend to the Supreme Court that the following rules be adopted as submitted to the public hearing: Supreme Court Rules 13, 33(1), 37(1)(b), 37(3)(a), 37(14)(f), 37(16)(g), 37(23), 37A (III)(d)(4), 37A (VIII), 38 re: code of Judicial Code (terminology – definitions), 38 Canon 1 commentary, 38 Canon 2A commentary, 38 Canon 3B, 38 Canon 3E(1), 38 Canon 5, 42(3)(b), 42(10)(a)(iv), 42(10)(c), 45, 50-A(2), and 54(4); Superior Court Rules 19 and 102-A; Superior Court Administrative Rule 12-8; District and Municipal Court Rules 1.3 C and 2.10-A; Probate Court Rules 19 and 91; Family Division Pilot Program Rules regarding adoption, termination of parental rights, and guardianship of minors relating to fees; and Rules of Evidence Rule 103(f). In addition, the Committee agreed to recommend the repeal of guidelines 1 – 52 of the Statutory Requirements and Guidelines for the Processing and Disposition of Abuse and Neglect Cases in the District Court.

Relative to Supreme Court Rule 42(5)(e) relating to filing deadlines and late filing fees for the N.H. Bar examination, the Committee agreed not to recommend that said rule be amended at this time.

Relative to Supreme Court Rules 47, 48 and 48-A relating to fees and expenses, the Committee agreed to defer action on these rules until its next meeting.

Relative to Supreme Court Rule 51-A, the Committee asked David Peck to discuss the concerns raised in Judge Maher's May 28, 2004 letter with him.

Relative to Superior Court Rule 169 (III), District and Municipal Court Rule 3.3, and Professional Conduct Rules 5.5 and 8.5, the Committee made the change to Professional Conduct Rule 8.5 suggested in Attorney DeHart's May 4, 2004 letter, but agreed to defer any further action on these rules until its next meeting.

Relative to an amendment to Probate Court Rule 49-A, the Committee agreed to re-consider its recommendation that said rule not be adopted on a permanent basis. Following discussion, the Committee agreed to defer deciding whether to recommend adoption of the rule on a permanent basis until members had an opportunity to further review it and a similar rule in the district court.

Judge Dalianis reported that the Supreme Court might be forwarding to the Committee amendments to several Supreme Court rules for consideration at its next meeting. The court requested, however, that the Committee consider whether to recommend repealing Supreme Court Rule 12-D(4), on a temporary basis, today. Following discussion, and on motion of Attorney Rice, seconded by Judge Hampe, the Committee voted to recommend to the Supreme Court that Supreme Court Rule 12-D(4) be repealed, on a temporary basis.

The next meeting of the Committee is scheduled for September 22, 2004 at 12:00 p.m. in the N.H. Supreme Court building.

No further business to come before the Committee, the meeting adjourned at 3:12 p.m.

APPENDIX A

Amend Superior Court Rule 72 so that said rule as amended shall state as follows:

72. In non-jury cases, unless otherwise ordered for good cause shown, all requests for findings and rulings and written memoranda of law must be submitted to the Presiding Justice no later than the close of the evidence. In jury cases, all requests for instructions must be submitted in accordance with Rule 62 H. In criminal cases, where the defendant has moved that certain evidence be suppressed and has requested the court to make certain findings of fact and rulings of law, the Presiding Justice will make sufficient findings and rulings to permit meaningful appellate review. All objections to the charge shall be considered as waived unless taken on the record before the jury retires; provided, however, that a court may consider a plain error in the jury instructions affecting substantial rights that has not been preserved as required by this rule.

APPENDIX B

Amend the Character and Fitness Standards so that said standards as amended shall state as follows:

**NEW HAMPSHIRE
CHARACTER AND FITNESS STANDARDS**

A. **Admission a privilege, not a right.**

The right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business. It is a peculiar privilege granted and continued only to those who demonstrate special fitness in intellectual attainment and in moral character.

B. **Requirement to establish character and fitness.**

All persons who desire to be admitted to practice law shall be required to establish their moral character and fitness to the satisfaction of the Standing Committee on Character and Fitness of the Supreme Court of New Hampshire in advance of such admission.

C. **Burden of proof on the applicant.**

Any person who seeks admission to practice law in the State of New Hampshire shall at all times have the burden of proving his or her good moral character and fitness before the Committee on Character and Fitness of the Supreme Court of New Hampshire. This burden requires both the production of evidence and the persuasion of the Committee and Court as to the applicant's good moral character and fitness.

D. **Proof by clear and convincing evidence.**

The applicant must prove his or her good moral character and fitness by clear and convincing evidence.

E. **Doubts resolved in favor of protecting the public.**

Any doubt concerning an applicant's character and fitness shall be resolved in favor of protecting the public by denying admission to the applicant.

F. **Positive Characteristics To Be Considered**

The Committee will consider positive characteristics in evaluating an applicant's character and fitness to practice law including:

1. The ability to reason, recall complex factual information and integrate that information with complex legal theories;
2. The ability to communicate with clients, attorneys, courts, and others with a high degree of organization and clarity;
3. The ability to use good judgment on behalf of clients and in conducting one's professional business;
4. The ability to avoid acts which exhibit disregard for the rights or welfare of others;
5. The ability to act diligently and reliably in fulfilling one's obligations to clients, attorneys, courts, and others;
6. The ability to use good judgment in financial dealings on behalf of oneself, clients, and others; and
7. The ability to comply with deadlines and time constraints.

G. **Grounds to deny admission.**

Any of the following may be grounds for the Committee to recommend denial of admission for lack of character or fitness:

1. **Insufficient positive characteristics set forth in section F above.**
2. **Acts Involving Dishonesty, Fraud, Deceit or Misrepresentation.**

Character and Fitness Committee Comment

"In order to maintain public confidence in the bar and trust among members of the bar, attorneys must be honest in their dealings." Application of T.J.S., 141 N.H. 697, 702 (1997). An applicant's record of conduct should demonstrate the honesty which future clients, adversaries, courts and others have a right to expect of a lawyer.

It is irrelevant whether the applicant has been charged with and/or convicted of a crime as result of such an act. It is also irrelevant whether the act was committed in the applicant's personal life or in the course of an occupation or employment.

3. False or Misleading Statements or Omissions in the Application Process.

Character and Fitness Committee Comment

Much of the information that the Committee uses in assessing an applicant's character and fitness is contained in the Petition and Questionnaire for Admission to the Bar of New Hampshire. The information in the Petition and Questionnaire is also one of the sources of information used for requesting further information from the applicant and in conducting further investigation. As such, it is crucial that applicants be absolutely candid and complete in disclosing the information requested in the form or in response to further inquiries by the Committee.

4. Lack of Candor in Dealing with the Committee or Staff.

Character and Fitness Committee Comment

As with false and misleading statements or omissions during the application process, the failure of an applicant to deal with the Committee or its staff in a candid manner may result in recommendation of denial of admission.

5. Failure to Cooperate with or to Provide Information to the Committee or its Staff.

Character and Fitness Committee Comment

Because the burden of proving good moral character and fitness is on the applicant, the Committee and its staff often require applicants to provide further information and/or documentation concerning matters of concern to them. Failure to provide such information and/or to cooperate with the Committee and its staff in their efforts to fully investigate matters may make it impossible for the Committee to complete its task of assessing the applicant's character and fitness and may thereby result in a recommendation to deny admission.

6. Criminal Acts.

Character and Fitness Committee Comment

Conduct which is criminal in nature which the Committee finds to have occurred may be grounds for recommending denial of admission whether or not the conduct results in a prosecution and conviction and even though the arrest and/or conviction for the conduct have been annulled.

7. Other Unlawful Conduct which Demonstrates a Disrespect for or Unwillingness to Obey the Law.

Character and Fitness Committee Comment

The New Hampshire Supreme Court in Application of Appell, 116 N.H. 400 (1976), denied admission to an applicant and upheld the findings of a single justice who had determined that the applicant's "violations of various statutes and regulations indicate at best a careless failure to determine the legality of his actions and at worst an arrogant disregard of the law." Thus, when the Committee finds that an applicant has committed acts, which are not criminal, but which are unlawful and demonstrate disrespect for the law, the Committee may determine that the applicant does not possess the necessary moral character for admission to the bar.

8. Violation of a Court Order.

Character and Fitness Committee Comment

Respect for the law and obedience of court orders and directives are crucial to the operation of the judicial system. Violations of court orders and/or directives, either in the applicant's professional or personal life, may be grounds for a recommendation of the denial of admission.

9. Abuse of the Judicial Process.

Character and Fitness Committee Comment

Applicants are asked to disclose on their applications all judicial and administrative proceedings to which they have been a party. The Committee quite often requests applicants to provide detailed information concerning those proceedings. Applicants who abuse the judicial process

in either their personal affairs or in professional matters may be deemed to put the public at risk of continuing such behavior if they are admitted. It is irrelevant whether the courts in those matters have made judicial determinations that such abuse has occurred, or whether sanctions have been imposed for such abuse.

10. Academic Misconduct - Plagiarism and Cheating.

Character and Fitness Committee Comment

As part of the approval process, the Committee requests law school deans to complete a questionnaire concerning each applicant. The Committee also requires applicants to disclose whether they have been dropped, suspended, placed on probation, expelled or requested to resign from any school, college, university or law school, or requested or advised by any such school or institution to discontinue their studies therein. If plagiarism and/or cheating is disclosed, the Committee conducts a further inquiry to determine the seriousness of the matter.

11. Financial Irresponsibility.

Character and Fitness Committee Comment

An applicant must demonstrate that he/she is acting responsibly with respect to his or her financial obligations. Being in debt or unable to stay current with debts is not in itself disqualifying. However, the Committee expects an applicant with debt to keep each creditor informed of a current address, to make payment when the applicant is able to, and when unable to pay debts, to make reasonable efforts to work out settlements and/or repayment plans.

A declaration of bankruptcy is not a ground for recommending denial of admission. However, bankruptcy petition are generally scrutinized by the Committee. Any false statements, admissions or acts involving dishonesty, fraud, deceit or misrepresentation in connection with the filing of bankruptcy may be grounds for a recommendation of denial of admission. Further, the facts and circumstances surrounding a bankruptcy may also bear on the issue of whether the applicant is able to handle his or her affairs.

12 Mental Disorders which Impair the Ability to Practice Law.

Character and Fitness Committee Comment

A mental disorder that impairs an applicant's ability to practice law may be disqualifying. Should the Committee become aware of a mental disorder which has the potential to impair an applicant's ability to practice law, it will ask for details of any treatment, and may ask treating or independent professionals for reports as to whether the disorder will impair the applicant's ability to practice law in a competent and professional manner.

13. Alcohol or Drug Addiction or Abuse.

Character and Fitness Committee Comment

An applicant who has become addicted to alcohol or other drugs or is using illegal drugs, will not be approved by the Committee if he/she is still currently using the substance or if the Committee believes that there is an undue risk that the applicant will begin using the substance after admission to the bar. Applicants who have been addicted to alcohol or other drugs are expected to demonstrate a meaningful period of non-use and to have developed support and/or coping mechanisms, either external or internal, which make it unlikely that the applicant will again use the addictive substance.

Applicants who have been addicted to or abused alcohol or drugs are generally expected to be free of alcohol use or drug abuse for at least 1 year in order to be approved.

14. Inability to Handle One's Own Affairs.

Character and Fitness Committee Comment

The practice of law often involves being entrusted with the affairs of clients. The inability of an applicant to handle his/her own affairs in a responsible manner may be grounds for finding that such an applicant does not possess the requisite fitness to engage in the practice of law.

H. Causes for further inquiry.

In addition to any of the above, any of the following are cause for further inquiry (but not in themselves disqualifying) before the Character and Fitness Committee decides whether the applicant possesses the character and fitness to practice law:

1. Denial of admission to the bar in another jurisdiction on character and fitness grounds;

2. Disciplinary action by a lawyer disciplinary agency or other professional disciplinary agencies of any jurisdiction;
3. Employment termination due to alleged misconduct;
4. Receipt of negative references;
5. Complaints of domestic violence against the applicant;
6. Other than honorable military discharge;
7. Bankruptcy;
8. Debt obligations in default.

I. **Determination of disqualification.**

The Character and Fitness Committee must first determine whether any conduct or condition of the applicant is disqualifying.

J. **When is conduct or condition disqualifying.**

The misconduct or condition is disqualifying when it is so serious or significant that denying admission is necessary to protect the public and maintain public confidence in the bar.

Character and Fitness Committee Comment

In the character and fitness review process, the need to protect the public and maintain public confidence in the bar always overrides any concern that denying admission to an applicant who has successfully completed law school and passed the bar examination may seem unfair.

K. **Cumulative effect of events of misconduct.**

The Committee may find the cumulative effect of two or more events of misconduct disqualifying even though no one of the events alone would be disqualifying.

L. **Determination of current character and fitness.**

If the Character and Fitness Committee finds any conduct or condition to be disqualifying, it must then determine whether the current character and fitness of the applicant qualifies the applicant for admission. It is the Committee's task to determine whether the applicant is sufficiently rehabilitated to remove the serious taint of the applicant's prior unfitness.

M. **Factors considered.**

The following factors, although not inclusive, may be considered when determining whether an applicant has demonstrated sufficient rehabilitation:

1. The nature of the act of misconduct, including whether it involved moral turpitude, whether there were aggravating or mitigating circumstances, and whether the activity was an isolated event or part of a pattern.
2. The age and education of the applicant at the time of the act of misconduct and the age and education of the applicant at the present time.
3. The length of time that has passed between the act of misconduct and the present, absent any involvement in any further acts of moral turpitude. The amount of time and the extent of rehabilitation will be dependent upon the nature and seriousness of the act of misconduct under consideration.
4. Restitution to any person who has suffered monetary losses through related acts or omissions of the applicant.
5. Expungement of a conviction.
6. Successful completion or early discharge from probation or parole.
7. Abstinance from the use of controlled substances or alcohol if the specific act of misconduct was attributable in part to the use of a controlled substance or alcohol. Abstinance may be demonstrated by, but is not necessarily limited to, enrolling in and complying with a self-help or professional treatment program.
8. Evidence of remission if the specific act of misconduct was attributable in part to a medically recognized mental disease, disorder or illness. Evidence of remission may include, but is not limited to, seeking professional assistance and complying with the treatment program prescribed by the professional and submission of letters from the psychiatrist/psychologist verifying that the medically recognized mental disease, disorder or illness is in remission.
9. Payment of the fine imposed in connection with any criminal conviction.
10. Correction of behavior responsible in some degree for the act of misconduct.

11. Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.
12. Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.
13. Change in attitude from that which existed at the time of the act of misconduct in question as evidenced by any or all of the following:
 - a. Statements of the applicant.
 - b. Statements from family members, friends, or other persons familiar with the applicant's previous conduct and with subsequent attitudes and behavioral patterns.
 - c. Statements from probation or parole officers or law enforcement officials as to the applicant's social adjustments.
 - d. Statements from persons competent to testify with regard to neuropsychiatric or emotional disturbances.

N. **Degree of rehabilitation.**

The more serious the misconduct, the greater the showing of rehabilitation that will be required.

Character and Fitness Committee Comment

For applicants who have committed a criminal offense that would disqualify them from holding a license or certificate to practice another profession in this state, the burden of proving sufficient rehabilitation is extraordinarily difficult.

O. **Period of time of rehabilitation.**

An applicant who has engaged in disqualifying misconduct in the past needs to show that he or she is no longer the same person who behaved so poorly in the past and needs to behave in an exemplary fashion for a meaningful period of time.

P. **Recognition of disqualifying conduct.**

Establishing sufficient rehabilitation will usually require the applicant to recognize, appreciate, show insight into, and have genuine remorse for the

seriousness of his or her disqualifying conduct. Attempts to deny, rationalize, minimize or explain away disqualifying past behavior will usually result in the Committee finding insufficient rehabilitation.

Q. **When is rehabilitation sufficient.**

Rehabilitation is sufficient when the applicant has established from all the facts that the public interest will not be jeopardized by his or her admission.

APPENDIX C

Amend Supreme Court Rule 12-D, so that said rule as amended shall state as follows:

(6) Briefing, Argument, etc.

(a) In all cases selected for oral argument before a 3JX panel, briefs shall be limited to 35 pages, exclusive of the table of contents, tables of citations and any addendum containing pertinent texts of constitutions, statutes, rules, regulations and other such matters. Reply briefs shall be limited to 10 pages.