

ADVISORY COMMITTEE ON RULES
June 6, 2007

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

The meeting was called to order at 12:22 p.m.

The following Committee members were present:

Hon. Linda S. Dalianis
Mr. Robert Chase
Hon. R. Laurence Cullen
Mrs. Alice Guay
Hon. Richard Hampe
Martin Honigberg, Esquire
Hon. Philip Mangones
Jennifer L. Parent, Esquire
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 Cullen, seconded by Mrs. Guay, the Committee approved the minutes of the June 21, 2006 meeting, as amended and the minutes of the March 14, 2007 meeting, as written.

In preparation for the public hearing, Judge Dalianis reported that, in addition to testimony expected during the public hearing, various individuals had filed written comments, which were distributed to all members.

With respect to action taken by the Supreme Court since the Committee's last meeting, David Peck reported that the Court adopted the Committee's recommendation to repeal subsection (e) of Professional Conduct Rule 5.5.

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

Relative to the Rules of Criminal Procedure, following a brief discussion, Judge Dalianis agreed to forward the Rules of Criminal Procedure to various groups including superior and district court judges, the attorney general's office, the public defender and county attorneys' offices and the Bar's Criminal Justice Committee asking that they review the proposed Rules of Criminal Procedure and send their comments to David Peck before the Committee's September 12th meeting.

Relative to system-wide guardian ad litem guidelines, Judge Hampe distributed draft System-wide Guardian ad Litem Application, Certification and Practice Guidelines. He suggested that discussion be deferred until the Committee's September meeting to give members enough time to review them. Following discussion, Judge Dalianis agreed to send letters to Chief Justice Lynn and Administrative Judges Kelly and King to ask that their judges and staff review the guidelines and forward their comments to David Peck before the Committee's September meeting. In addition, following Judge Hampe's inquiry, the Committee asked David Peck to review the "Guidelines for Guardians ad Litem," established in 1983 and located on the Judicial Branch's website, to see if they should remain in effect or be repealed.

Relative to Supreme Court Rule 38 pertaining to the Code of Judicial Conduct, because a separate subcommittee has been established to review the ABA revised Model Code of Judicial Conduct to see whether any of those changes should be adopted as part of New Hampshire's Code of Judicial Conduct, the Committee, on motion of Judge Mangones, seconded by Judge Hampe, voted to have said subcommittee also consider reviewing the definition of "judge."

Relative to an amendment to Supreme Court Rule 42 pertaining to admission/bar requirements for pro bono attorneys, David Peck reported that Attorney Ardinger would have a proposed rule for the Committee's review at its September meeting.

Relative to the Report of the Committee on the Status of the Legal Profession, David Peck will contact Attorney Rolf Goodwin to determine the status of his committee's review of the Report.

The Committee turned its attention to new items and the following action was taken:

Relative to contract attorneys, following discussion, and on motion of Judge Mangones, seconded by Judge Hampe, the Committee voted to take no action on this item. Attorney Rice arrived during this discussion.

Relative to an ABA model court rule pertaining to a provision of legal services following determination of major disaster, the Committee deferred action on this item until its September meeting to give members an opportunity to review the model rule, which was not distributed to members in its entirety.

Relative to an amendment to Supreme Court Rule 37A pertaining to grievances, following a discussion on the proposed amendment prepared by David Peck, the Committee, on motion duly made and seconded, voted to further amend Supreme Court Rule 37A, as contained in Appendix A of these minutes, and to send said proposed amendment to the Committee's next public hearing. Attorney Parent joined the meeting during this discussion.

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 from various individuals on proposed rules changes. In addition, it received written comments from several individuals on various rules changes. The Committee took no action during the public hearing.

When the meeting reconvened, the Committee considered what action it wished to take on the proposed rules changes discussed during the public hearing.

Relative to the new Rules of Probate Administration and repeal of Probate Court Rules 1-164 and the Preface to the Probate Court Rules, the Committee voted to defer action on these rules changes until a later date.

Relative to amendments to Supreme Court Rules 37 and 37A, the Committee discussed at length several concerns expressed during the public hearing relating to the application of a “clear and convincing” standard. Following discussion, the Committee asked Judge Dalianis to invite Attorney James DeHart from the Attorneys Discipline Office and Attorneys Van Oot and McCafferty to attend its September meeting.

Relative to amendments to Superior Court Rules 170 and 170-A pertaining to alternative dispute resolution, on motion of Judge Cullen, seconded by Attorney Taylor, the Committee voted to conditionally recommend approval of these rules, subject to any concerns that Chief Justice Lynn may raise during his upcoming meeting with Justice Dalianis and passage of related legislation.

Relative to amendments to the Rules of Civil Procedure, following discussion, the Committee requested that its Subcommittee on the Rules of Civil Procedure review all oral and written comments received on the rules and report its recommendations to the full Committee at a future meeting. The Committee agreed

that an acknowledgement letter should be sent to everyone who filed written comments on the Rules of Civil Procedure.

Relative to the remaining rules changes before the public hearing, on motion of Judge Hampe, seconded by Judge Cullen, the Committee voted that amendments to (or adoption of) the following rules should be recommended to the Supreme Court: Supreme Court Rules 3 and 33; Superior Court Rules 19, 61-B, 169-A and 185; District Court Rules 1.25, 1.26 and 1.3C; Probate Court Rules 19, 61-B and 169-A; Family Division Rules 12 and 13 and Rules of Evidence Rule 609.

The Committee continued its discussion on new items and the following action was taken:

Relative to an amendment to Supreme Court Rule 37A(IV) pertaining to retention of papers by the Professional Conduct Committee, following discussion and on motion of Attorney Rice, seconded by Attorney Parent, the Committee voted to further amend Supreme Court Rule 37A(IV), as contained in Appendix B of these minutes, and to send said rule to the Committee's next public hearing.

Relative to Supreme Court Rule 55 pertaining to the public protection fund, following discussion, a subcommittee was established consisting of Attorneys Parent and Taylor. The subcommittee will review the proposal submitted by Attorney David Jordan, Chair of the N.H. Public Protection Fund and report back to the full Committee at its September meeting.

Relative to Supreme Court Rule 38 pertaining to the Code of Judicial Conduct, Judge Dalianis reported that a separate subcommittee has been established to review and make recommendations to the full Committee. The subcommittee is comprised of judges from the various court levels, but it was noted that any Committee member

wishing to serve on the subcommittee could do so. Judge Dalianis will contact the Chair of the Judicial Conduct Committee to ask him to designate one of his committee members to serve as well.

Relative to amendments to Supreme Court Rule 42 pertaining to admission requirements relating to bachelor degrees, following discussion, and on motion of Judge Hampe, seconded by Attorney Rice, the Committee voted to recommend that Supreme Court Rule 42 be amended as discussed and that said amendment be sent to the Committee's next public hearing. With respect to an amendment to Supreme Court Rule 42 suggested by Mr. Timothy Chevalier, the Committee agreed to send an amended version of his proposed amendment to the Board of Bar Examiners for its comments prior to the Committee's September 12th meeting.

No further business to come before the Committee, the meeting adjourned at 2:31 p.m.

APPENDIX A

Amend Supreme Court Rule 37A(II)(a)(3) by deleting said section and replacing it with the following [deletions in strikeout mode; additions in bold]:

(3) Procedure after Receipt of Grievance

(A) *Initial Screening of Grievance.* General counsel shall review each grievance upon receipt to determine whether the grievance is within the jurisdiction of the attorney discipline system and whether the grievance meets the requirements for docketing as a complaint.

[When necessary, general counsel may request additional information or documents from the grievant. Except for good cause shown, failure of a grievant to provide such additional information and/or documents within twenty (20) days may result in general counsel processing the grievance based on the then existing file, or dismissing the complaint without prejudice.]

Upon receipt of the above information, general counsel may allow a respondent thirty (30) days to file a voluntary response if it is deemed necessary to assist in the evaluation process.

Extensions of time are not favored.]

(B) *Requirements for Docketing Grievance as a Complaint.* A grievance shall be docketed as a complaint if it is within the jurisdiction of the attorney discipline system and it meets the following requirements:

(i) *Violation Alleged.* ~~It contains a statement of facts which, if true, would establish a violation of a disciplinary rule.~~ **[contains: (a) a brief description of the legal matter that gave rise to the grievance; (b) a detailed factual description of the respondent's conduct; (c) the relevant documents that illustrate the conduct of the respondent, or, if the grievant is unable to provide such documents, an explanation as to why the grievant is unable to do so; and (d) whatever proof is to be provided, including the name and addresses of witnesses to establish a violation of a disciplinary rule.]**

(ii) *Standing.* With the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, it ~~was~~ **[must be]**

filed by a person who is directly affected by the conduct complained of or who was present when the conduct complained of occurred, and contains a statement establishing these facts.

(iii) *Oath or Affirmation.* It is typed or in legible handwriting and, with the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, signed by the grievant under oath or affirmation, administered by a notary public or a justice of the peace. The following language, or language that is substantially equivalent, must appear above the grievant's signature: "I hereby swear or affirm under the pains and penalties of perjury that the information contained in this grievance is true to the best knowledge."

(iv) *Limitation Period.* It was filed with the attorney discipline office within the period of limitation set forth in section (I)(i).

(C) *Treatment of Grievance Not Within Jurisdiction of Attorney Discipline System or Failing to Meet Complaint Requirements.* A grievance that is not within the jurisdiction of the attorney discipline system or that does not meet the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B) shall not be docketed and shall be ~~disposed of~~ **[dismissed]** in accordance with section (II)(a)(4).

APPENDIX B

Amend Supreme Court Rule 37A(IV) by deleting said section and replacing it with the following [deletions in strikeout mode; additions in bold]:

(IV) **Confidentiality and Public Access**

(a) *Confidentiality of and Public Access to Proceedings and Records.*

(1) *General Rule.* The confidentiality of and public access to records, files and proceedings shall be governed by Supreme Court Rule 37.

(2) *Public Access to Files.*

(A) *Grievance against Person Not Subject to Rules of Professional Conduct.* Correspondence to the grievant relating to a grievance against a person who is not subject to the rules of professional conduct shall be available for public inspection for a period of two years. After this two-year period, the correspondence shall be sealed **[destroyed]**.

(B) *Grievance Not Docketed as a Complaint.* All records (other than work product, internal memoranda and deliberations) relating to a grievance filed against a person who is subject to the rules of professional conduct but which is not docketed as a complaint, shall be maintained at the attorney discipline office for two (2) years from the date of original filing, and it shall be available for public inspection during this period. After this two-year period, the records shall be sealed **[destroyed]**.

(C) *Complaints.* All records (other than work product, internal memoranda and deliberations) relating to a complaint that is docketed shall be maintained at the attorney discipline office and shall be available for public inspection in accordance with the provisions of Supreme Court Rule 37, ~~unless the complaint has been annulled in accordance with section (V) of this rule.~~ **[Paper records may be destroyed after:**

(i) three years of the date of notice of dismissal without a caution; or

(ii) three years of the date of an annulment in accordance with section (V) of this rule; or

(iii) five years after the death of the attorney-respondent.]

(D) *Index of Complaints.* The attorney discipline office shall maintain an index of complaints docketed against each attorney, which shall contain pertinent information, including the outcome of the complaint. No index of grievances that are not docketed as complaints shall be maintained.

(E) *Protective Order.* Any person or entity, at any point in the processing of a complaint, may request a protective order from the professional conduct committee, or the committee may issue on its own initiative, a protective order prohibiting the disclosure of confidential, malicious, personal, or privileged information or material submitted in bad faith, and directing that the proceedings be so conducted as to implement the order. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the professional conduct committee. The professional conduct committee shall act upon the request within a reasonable time. Within thirty (30) days of the committee's decision on a request for protective order, or of the committee's issuance of one on its own initiative, an aggrieved person or entity may request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the supreme court has acted, or the period for seeking supreme court review has expired. A motion for review of the professional conduct committee's decision about issuance of a protective order shall be filed as a confidential matter in the supreme court.