

ADVISORY COMMITTEE ON RULES
June 11, 2008

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

The meeting was called to order at 12:35 p.m.

The following Committee members were present:

Hon. Linda S. Dalianis
William F.J. Ardinger, Esquire
Mr. Robert L. Chase
Hon. R. Laurence Cullen
Mrs. Edda Cantor
Mrs. Alice Guay
Hon. Richard A. Hampe
Martin P. Honigberg, Esquire
Hon. Paul McEachern
Hon. Diane Nicolosi
Jennifer L. Parent, Esquire
Raymond 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 Mrs. Guay, the Committee approved the minutes of the March 12, 2008 meeting, as submitted.

In preparation for the public hearing, written comments from several individuals were distributed to members.

Also distributed was a recent letter from Chief Justice Lynn. Judge Dalianis explained that Judge Lynn's letter is in response to a request from the Supreme Court for input from superior court judges on the subject of juror orientation. She noted that this item would be on the Committee's next agenda.

Relative to action taken since the Committee's last meeting, David Peck reported that the Supreme Court has adopted a rule dealing with the new transcript process. The Committee also asked Mr. Peck to file its annual report with the Supreme Court.

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

Relative to the Report of the Committee on the Status of the Legal Profession, following discussion, and on motion of Judge Dalianis, seconded by Attorney Taylor, the Committee voted to take no action at this time and further to table the item indefinitely.

Relative to an amendment to Supreme Court Rule 55 pertaining to the public protection fund, Attorney Parent distributed proposed changes to said rule. She explained that various groups are in disagreement on several proposed changes to the rule. Before reviewing the suggested changes to the rule, 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, written comments were filed by several individuals on various rules changes. The Committee took no action during the public hearing.

When the meeting reconvened, the Committee continued its discussion on Supreme Court Rule 55, as follows:

With reference to an amendment to Section (2) of the rule, following a lengthy discussion, and on motion of Judge Dalianis, seconded by Attorney Taylor, the Committee voted unanimously not to approve the changes to said section recommended by the Public Protection Fund (PPF) Committee.

With reference to an amendment to Section (4) of the rule, following discussion, and on motion of Judge Dalianis, seconded by Attorney Ardinger, the Committee voted, 11 to 1, to adopt the changes to said section recommended by the PPF Committee, with the exception that the lawyer cap would be increased to \$250,000 rather than \$400,000.

With reference to an amendment to Section (5) of the rule, following discussion, and on motion of Judge Dalianis, seconded by Attorney McEachern, the Committee voted unanimously to adopt the changes to said section recommended by the PPF Committee. The Committee also agreed that Supreme Court Rule 55, as amended and contained in Appendix A of these minutes, be included on the Committee's December public hearing agenda.

Relative to an amendment to Supreme Court Rule 38 pertaining to the Code of Judicial Conduct, the Committee agreed to ask the administrative judges to request that their judges, clerks and masters review the proposed changes to said rule and send any comments to this Committee.

Relative to the Rules of Civil Procedure, following discussion, and on motion of Attorney Honigberg, seconded by Attorney Ardinger, the Committee voted to conditionally accept the work done by the subcommittee and to send their suggested changes to the rule to David Peck for a technical review. If

additional work is needed, the Committee suggested that the administrative judges act as a subcommittee for the purpose of making recommendations to this Committee before its December meeting.

Relative to an amendment to Superior Court Rule 98 pertaining to discovery in criminal cases, this matter was deferred until the Committee's next meeting.

Relative to Family Division Rules, this matter was deferred until the Committee's next meeting.

Relative to Rules of Professional Conduct Rule 8.5(c) pertaining to application of rules to non-lawyer representatives, this matter was deferred until the Committee's next meeting.

Relative to notice of issuance of subpoenas, this matter was deferred until the Committee's next meeting.

Relative to guardian ad litem fees, this matter was deferred until the Committee's next meeting.

Relative to the Criminal Rules of Procedure, following discussion, and on motion duly made and seconded, the Committee voted to send the revised draft of said rules prepared by the subcommittee to the administrative judges of the superior and district courts requesting that they submit their comments and suggestions to this Committee by August 1, 2008.

The Committee next discussed new items before it and the following action was taken:

Relative to an amendment to Supreme Court Rule 57 pertaining to custody and disposal of exhibits, on motion of Attorney Taylor, seconded by Judge Hampe, the Committee voted to send said amendment, as contained in Appendix B of these minutes, to the Committee's December public hearing to determine whether it should be adopted on a permanent basis.

Relative to the title of the probate court rules, following discussion, and on motion of Judge Hampe, seconded by Judge Dalianis, the Committee voted to recommend to the Supreme Court that Judge David King's suggestion to amend the title of the probate court rules be adopted by technical amendment.

Relative to the Committee's letterhead, following a brief discussion, and on motion of Attorney McEachern, seconded by Attorney Taylor, the Committee voted to use computer-produced letterhead.

Relative to an amendment to District Court Rule 1.3E pertaining to including an attorney's NH Bar ID number on all pleadings, on motion duly made and seconded, the Committee voted to recommend to the Supreme Court that said rule, as contained in Appendix C of these minutes, be adopted on a permanent basis by technical amendment.

Relative to an amendment to Supreme Court Rule 13(1) pertaining to the record on appeal, on motion of Judge Dalianis, seconded by Judge Hampe, the Committee voted to recommend to the Supreme Court that said rule, as contained in Appendix D of these minutes, be adopted by technical amendment.

Relative to Superior, Probate and Family Division Rules pertaining to addresses, telephone numbers and NH Bar ID numbers, on motion of Judge Hampe, seconded by Judge Cullen, the Committee voted to recommend to the Supreme Court that Superior Court Rule 15(a), Probate Court Rules 14 and 15(A), and Family Division Rule 1.24(A), as contained in Appendices E - H of these minutes, be adopted on a permanent basis by technical amendment.

Relative to the Judicial Conduct Committee procedures, following a brief discussion, the Committee voted to create a subcommittee to review Supreme Court Rules 39 and 40 and to make recommendations to the full Committee. The Committee appointed Attorney Russell Hilliard to chair the subcommittee. Judge Diane Nicolosi agreed to serve as the superior court representative. The administrative judges will be asked to appoint a representative to the subcommittee as well.

The Committee then considered what action it wished to take on the proposed rules changes discussed during the public hearing. Following discussion, and on motion duly made and seconded, the Committee agreed that the following rules, upon which no comments were received, should be recommended to the Supreme Court for adoption: Supreme Court Rules 10, 19, 37(20)(f), 37(21)(c), 37A(II)(d)(2)(D), 37A(III)(c)(9), 37A(IV)(a)(2)(E), 40(3)(f), 40(5), 40(11)(j), 51B and 59; Superior Court Rules 45-A, 62(I), 170-A and 170B, and ABA Model Rules Comment [14] to Rule of Professional Conduct 5.5 and also to repeal the System-wide Guardian Ad Litem Application, Certification and Practice Guidelines and Superior Court Rule 212.

With reference to Superior Court Rule 170, following discussion, and on motion duly made and seconded, the Committee voted to recommend to the Supreme Court that further amendments suggested by Karen Borgstrom should be incorporated into the current rule; that the rule remain in effect on a temporary basis for six months; and that a subcommittee, hereby created by this Committee, will review all comments received, including those contained in Chief Justice Lynn's June 7, 2008 letter, and report its recommendations to the full Committee. Members of the subcommittee are: Judge Diane Nicolosi, Attorney Raymond Taylor and Karen Borgstrom.

No further business to come before the Committee, the meeting adjourned at 2:35 p.m.

APPENDIX A

Amend Supreme Court Rule 55 as follows (new material is in ***bold and italics***, deleted material is in ~~strikethrough~~ format):

RULE 55. Public Protection Fund

(1) ***Purpose.*** The purposes of the Public Protection Fund are to provide a public service and to promote public confidence in the administration of justice and the integrity of the legal profession by providing some measure of reimbursement to victims who have lost money or property caused by the defalcation of lawyers admitted to practice law in this jurisdiction occurring in New Hampshire and in the course of the client-lawyer or fiduciary relationship between the lawyer and the claimant.

(2) ***Establishment of the Fund.*** The New Hampshire Bar Association shall provide a Public Protection Fund establishing a reimbursement mechanism for proven losses resulting from embezzlement, conversion, or theft of client funds by lawyers, and for this purpose, the court shall annually assess a sum to be paid by all dues-paying members of the New Hampshire Bar Association, except those members exempted by order of the court. The Public Protection Fund shall be administered by the New Hampshire Bar Association. Subject to the review and approval of the court, the committee established pursuant to paragraph (5) shall determine the terms, conditions, claims procedures, scope of coverage, cost, and funding mechanisms for such Public Protection Fund, consistent with this rule. The Public Protection Fund is provided as a public service to persons utilizing legal services; the establishment, administration and operation of the Public Protection Fund shall not impose or create any obligation on, expectation of recovery from, or liability of the New Hampshire Bar Association, its officers, governors, members, staff, or members of the Public Protection Fund committee. No claimant shall have a legal interest in the fund nor have a right to receive any portion except as awarded pursuant to this rule.

(3) ***Claims Against the Fund.*** Claims for payment from the fund shall be submitted in writing, under oath, and shall explain specifically the defalcations which led to the losses in question. Such claims must be submitted within three years of the time when the victim discovered or first reasonably should have discovered the defalcations and the resulting losses, but in no event later than one year after the lawyer in question has been suspended or disbarred from practice, or has died or been judged mentally incompetent before the suspension or disbarment proceedings have been commenced or concluded.

(4) ***Payments from the Fund.*** Payments from the fund will be made only

after the lawyer in question has been suspended or disbarred from practice; or if the lawyer has died or been judged mentally incompetent before the suspension or disbarment proceedings have been commenced or concluded. As a condition of payment from the fund, the claimant shall execute a subrogation agreement in favor of the fund against the offending lawyer and the offending lawyer's law firm and against third parties to the extent of the amount recovered by claimant from the fund. Payments from the fund shall be made only after exhaustion of all available assets, insurance, and sureties of the offending lawyer and the offending lawyer's law firm. Payments from the fund shall be made only to victims who have lost money or property as the result of the defalcation of the lawyer, and no payments shall be made to any assignee, subrogee, or successor of such victim. The heirs or legatees of deceased victims may be eligible for payment from the fund. **[Except with respect to claims where the amount determined by the committee to be due the claimant is less than \$2,500, payments]** Payments from the fund shall be made only at the end of each fund year. **[Except with respect to claims where the amount determined by the committee to be due the claimant is less than \$2,500, payments]** Payments from the fund with respect to an individual lawyer shall not be made until all claims have been finalized with respect to that lawyer. The maximum amount of reimbursement to all claimants against the fund in respect to all conduct of any one lawyer shall be **[\$250,000]** \$150,000 in the aggregate. **[In determining whether the maximum reimbursement described in the immediately preceding sentence (but not the sentence immediately following this sentence) has been reached, claims where the amount determined by the committee to be due the claimant is less than \$2,500 shall be excluded from the calculation.]** The maximum amount of reimbursement to any one claimant, or all claimants, against the fund in any fund year as defined in paragraph (6) shall be \$150,000 and \$1,000,000, respectively, in the aggregate. The maximum amount which may be paid on a claim shall be the dollar value of the money or property lost by lawyer defalcation and shall not include interest on the amount lost or money spent attempting to collect the loss. If payable claims against a lawyer exceed **[\$250,000]** \$150,000, then all payable claims against that lawyer**[, except claims where the amount determined by the committee to be due the claimant is less than \$2,500,]** shall be reduced in proportion to their relative value in order to reduce total payments as a result of that lawyer's conduct to **[\$250,000]** \$150,000. If payable claims in a single fund year exceed \$1,000,000, then all payable claims for that fund year shall be reduced in proportion to their relative value in order to reduce total payments for that year to \$1,000,000. **[That portion of payable claims excluded from payment by reason of the dollar limitations described in this section shall not be paid in any subsequent fund year.]**

(5) **Administration of the Fund.** The Public Protection Fund shall be administered by a nine member committee, appointed by the President of the

New Hampshire Bar Association with the approval of the association's Board of Governors, which committee shall include at least two public members. Five members shall constitute a quorum. All decisions of the committee shall be made by a majority of the members present and voting. The committee shall have the power to propose regulations to clarify the intent of this rule, which regulations shall become effective after review and approval by the court. Decisions of the committee as to whether or not to pay claims and the amount of payments shall be within the committee's discretion, subject to the annual limits stated above, and will be reviewable only for unsustainable exercise of discretion. **[The committee shall give the offending lawyer notice of the claim and an opportunity to be heard regarding the claim, and the findings of fact and rulings of law made by the committee on the claim shall be binding upon the offending lawyer in all subsequent proceedings to which the Public Protection Fund is a party, including, but not limited to, proceedings against the offending lawyer to recover monies paid by the fund to the claimant.]** Review of a decision of the committee shall be filed with the New Hampshire Supreme Court within thirty days of the date of the committee's decision, by filing a written appeal in accordance with Rule 10, unless otherwise ordered by the court. The appeal shall not be a mandatory appeal. In the event that a claimant seeks review of a decision of the committee **[is sought]**, ~~the claimant shall mail or hand-deliver~~ a copy of his or her **[the]** appeal **[shall be mailed or hand-delivered]** to the New Hampshire Bar Association at the same time as ~~the claimant files~~ the appeal **[is filed]** with the supreme court. If the New Hampshire Bar Association wishes to participate in the review of the decision, it shall file an appearance in the matter within thirty (30) days of receipt of the appeal. Decisions of the New Hampshire Supreme Court shall be final. Within 120 days after the end of each fund year, the New Hampshire Bar Association shall report to the court about the claims made, approved and paid, assessments received, income earned, and expenses incurred in the preceding fund year. Reasonable expenses incurred by the New Hampshire Bar Association in administering the fund, including overhead, staff time, and professional fees, shall be reimbursed by the fund as a cost of operation, subject to the review and approval of the court.

(6) **Effective Date.** This rule shall take effect on June 1, 1998, and payments from the fund shall be made only for defalcations occurring on or after that date. Fund years shall run from June 1 to May 31. **[Provided, however, that the provisions increasing the maximum amount to \$250,000 and the provisions regarding claims of less than \$2,500, shall apply only for defalcations occurring on or after _____, 2009.]**

APPENDIX B

Amend Supreme Court Rule 57 on a permanent basis as follows:

RULE 57. Custody and Disposal of Exhibits in Trial Courts

During the time a case is pending in the trial court, all exhibits submitted at trial, hearing or other proceeding shall be maintained by the court, except that the court may order exhibits requiring special security handling (firearms, drugs, other contraband, etc.) be maintained in the custody of a law enforcement agency or other appropriate custodian.

Upon the final conclusion of a case in the trial court, exhibits will be held at the court until such time as the appeal period has expired. At that time, the clerk shall notify the parties in writing that they have thirty (30) days from the date of said notice to retrieve the exhibits from the court. The notice shall indicate that if the exhibits are not retrieved within that time, the clerk will dispose of them in such manner as the clerk deems appropriate, which may include destruction of same. If the exhibits are not retrieved by the time specified in the notice, the clerk shall dispose of the exhibits by destruction or in some other appropriate manner.

If an appeal is filed, the exhibits shall remain in the custody of the trial court pending resolution of the appeal unless the supreme court orders that the exhibits be transferred for purpose of the appeal. Upon receipt of the mandate from the supreme court, and if no further proceedings are required, the trial court clerk shall follow the procedure set forth in the preceding paragraph to notify the parties that exhibits may be disposed of if they are not retrieved within thirty (30) days.

The court, in its discretion, may refrain from disposing of an exhibit if it is deemed to have some intrinsic, historical or other value of significance.

In criminal cases, the State and the defense will be notified to retrieve the exhibits in the manner described above. If the exhibits are not retrieved within the period specified in the notice, a show cause hearing shall be scheduled to determine why the exhibits have not been retrieved. Following the show cause hearing, the court may order the exhibits destroyed or disposed of in some other appropriate manner.

Nothing in this rule shall be construed to conflict with the procedures established in RSA 595-A:6 or any other general or special law

providing for the preservation, disposal, forfeiture or destruction of particular types of property.

APPENDIX C

Amend District Court Rule 1.3 E.(1) on a permanent basis as follows

(additions in **[bold and brackets]**):

E.(1) All pleadings and the appearance and withdrawal of counsel shall be signed by the attorney of record or an associate or by a pro se party. Names, addresses, **[New Hampshire Bar identification numbers]** and telephone numbers shall be typed or stamped beneath all signatures on papers to be filed or served. No attorney or pro se party will be heard until an appearance is so entered.

The signature of an attorney to a pleading constitutes a certificate that the pleading has been read by the attorney; that to the best of the attorney's knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

If a pleading is not signed, or is signed with an intent to defeat this rule, it may be stricken and the action may proceed as though the pleading had not been filed.

APPENDIX D

Amend the first paragraph of Supreme Court Rule 13 as follows

(deleted material is in ~~striketrough~~ format):

(1) The papers and exhibits filed and considered in the proceedings in the trial court or administrative agency, the transcript of proceedings, if any, and ~~a certified copy of the docket entries prepared by the clerk~~ of the trial court or administrative agency shall be the record in all cases entered in the supreme court.

APPENDIX E

Amend Superior Court Rule 15(a) on a temporary basis as follows

(additions in **[bold and brackets]**; deletions are in ~~striketrough~~ format):

(a) All pleadings and the appearance and withdrawal of counsel shall be signed by the attorney of record or his associate or by a pro se party. Names, addresses**[, New Hampshire Bar identification numbers]** and telephone numbers shall be typed or stamped beneath all signatures ~~or~~ **[on]** papers to be filed or served. No attorney or pro se party will be heard until his appearance is so entered.

APPENDIX F

Amend the fourth paragraph of Probate Court Rule 14 on a temporary basis as follows (additions in **[bold and brackets]**):

The Appearance Form shall identify the Attorney, or Pro Se Party's name, address **[and telephone number]**, the matter in which the Person appears and the name and address of the Party or Parties for whom the Person appears. **[In addition, the Appearance Form shall identify the Attorney's New Hampshire Bar identification number.]**

APPENDIX G

Amend the first paragraph of Probate Court Rule 15(A) on a temporary basis as follows (additions in **[bold and brackets]**):

(A) All Petitions shall be signed by the Petitioner, except that Petitions requesting equitable relief may be signed by the Petitioner or the Petitioner's Attorney. All bonds, inventories and accounts shall be signed by the Fiduciary. Motions and other Pleadings may be signed by the Party, the Party's Attorney or the attorney's associate. Names[, **addresses, New Hampshire Bar identification numbers and telephone numbers**] shall be typed, stamped or printed beneath all signatures on papers to be filed or served.

APPENDIX H

Amend Family Division Rule 1.24(A) on a temporary basis as follows
(additions in **[bold and brackets]**; deletions are in ~~strikethrough~~ format):

1.24 PLEADING REQUIREMENTS:

A. All pleadings and the appearance and withdrawal of counsel shall be signed by the attorney of record or an associate or by a pro se party. Names, addresses, New Hampshire Bar identification numbers, **[and]** telephone numbers, ~~and to the extent available electronic mail addresses,~~ shall be typed or stamped beneath all signatures on papers to be filed or served. No attorney or pro se party will be heard until an appearance is properly filed.