

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Meeting of June 9, 2010

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

The meeting was called to order at 11:15 a.m. by Justice Carol Ann Conboy, Committee Chair. The following committee members were present: Gina B. Apicelli, Esq.; William F.J. Ardinger, Esq.; Edda Cantor; Robert L. Chase; Hon. R. Laurence Cullen; Alice B. Guay; Hon. Richard A. Hampe; Jeanne P. Herrick, Esq.; Martin P. Honigberg, Esq.; Emily G. Rice, Esq.; Jennifer L. Parent, Esq.; Raymond W. Taylor, Esq.; and Hon. Carol Ann Conboy.

Also present were David S. Peck, Esq., Secretary to the Committee and Irene Dalbec, staff.

The Committee addressed the agenda items as follows:

1. Approval of Minutes

Upon motion made by Raymond Taylor and seconded by Edda Cantor, it was unanimously voted to approve the minutes of the Committee's April 7, 2010 meeting.

2. Status of Pending Items

(a) Rules Considered at March 2010 Public Hearing

(1) Code of Judicial Conduct. Upon motion made by Raymond Taylor and seconded by Edda Cantor, the Committee agreed by a 5-4 vote to amend Rule 2.2 by adding a new section (B) and revising comment 4. After further discussion, upon motion by Judge Conboy, and seconded by Raymond Taylor, the Committee unanimously voted to reconsider its previous vote. Upon motion made by Judge Conboy and seconded by Martin Honigberg, the Committee unanimously voted to further amend Rule 2.2(B), as set forth in Appendix A. Upon motion made by Judge Cullen and seconded by Raymond Taylor, the Committee unanimously voted to recommend to the Supreme Court that the

proposed Code of Judicial Conduct (Supreme Court Rule 38), as amended, be adopted.

(2) Audiotape Reproduction Rules. Upon motion made by Martin Honigberg and seconded by Raymond Taylor, the Committee unanimously voted to amend proposed Superior Court Rule 78-B and Probate Court Rule 78-B as set forth in Appendices B and C. Upon motion made by Judge Cullen and seconded by Raymond Taylor, the Committee unanimously voted to recommend to the Supreme Court that the proposed audiotape reproduction rules, as amended, be adopted.

(3) Remaining Rules Considered at March Public Hearing. Upon motion made by Judge Cullen and seconded by Jennifer Parent, the Committee unanimously voted to recommend to the Supreme Court that the remaining proposed rules considered at the March public hearing be adopted.

(b) Supreme Court Rule 51 – Adding a Representative from Committee on Cooperation of the Courts to the Advisory Rules Committee. Upon motion made by Jennifer Parent and seconded by Edda Cantor, the Committee agreed by a 5-2 vote to recommend to the Supreme Court that the amendment to Rule 51 adding a representative from the Committee on Cooperation of the Courts to the Advisory Rules Committee be made permanent. Jeanne Herrick and Raymond Taylor abstained.

(c) District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure and Probate Administration

This matter was deferred until the Committee's September meeting. The Committee determined that a public hearing would not be scheduled for September.

(d) AR-2007-25 Rules of Professional Conduct Rule 8.5(c) pertaining to application of rules to non-lawyer representatives

Upon motion made by Judge Hampe and seconded by Emily Rice, the Committee unanimously voted not to recommend any change to Rule 8.5(c), thereby ratifying a vote taken at the March 2010 meeting (at which no quorum was present). Judge Cullen will send Mr. Brauer a letter.

(e) 2008-013, Judicial Conduct Committee Procedures

The subcommittee chaired by Attorney Russell Hilliard is continuing its work on a review of the procedures. The Committee deferred action awaiting a report from the subcommittee.

(f) 2007-001 Superior Court Rule 170 pertaining to Alternative Dispute Resolution

The Committee deferred action awaiting a report from the subcommittee assessing the current temporary rules.

(g) 2008-023 Probate Court Procedures

Judge Hampe reported his recommendation that no action be taken by the Committee.

(h) 2009-012 Supreme Court Rule 24

Gina Apicelli agreed to replace Raymond Taylor on the subcommittee reviewing this matter. The subcommittee was asked to report its recommendations to the Rules Committee in September.

(i) Request for copies of Advisory Rules Committee Minutes

It was confirmed that all minutes are public.

(j) 2010-002 Recent article in Bar News

After discussion of the Bar News article suggesting adoption of a rule requiring that jurors be instructed not to use a computer, cellular phone, or other electronic device to obtain information about cases, the Committee concluded that such a rule is not necessary. The Committee understands that a new juror video is being prepared that will address the issue.

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 on various rules changes. The Committee took no action during the public hearing.

After the meeting reconvened, the Committee addressed the remaining agenda items as follows:

3. New Items

(a) 2010-006 Supreme Court Rule 53.7

Upon motion made by Martin Honigberg and seconded by Judge Hampe, the Committee voted to put these temporary amendments on the next regular public hearing.

(b) 2010-007 Proposed Technical Amendment to Supreme Court Rule 53.1

After discussion of this suggestion to relieve per diem judges and part-time judges from certain continuing education requirements, the Committee voted to refer the proposal to the MCLE Board for its recommendation.

(c) 2010-008 Letter from Bronwyn Asplund-Walsh (complaints to ADO procedure)

After discussion of Attorney Asplund-Walsh's suggested changes to the Attorney Discipline rules, the Committee determined not to recommend any rule changes. David Peck will send letter so informing Attorney Asplund-Walsh. Jennifer Parent abstained.

(d) 2010-009 Drug Court Rules

The Committee voted to create a subcommittee to consider whether to recommend uniform specialty court rules. Edda Cantor will chair the subcommittee.

(e) Supreme Court Rule 48-B

The Committee voted to put the temporary rule amendments on the next regular public hearing.

(f) Superior Court PAD Rules – Pilot Program

Upon motion made by Martin Honigberg and seconded by Emily Rice, the Committee unanimously voted to put the temporary rule amendments on the next regular public hearing.

(g) Rules Considered at June 2010 Public Hearing

(1) Upon motion made by Martin Honigberg and seconded by Emily Rice, the Committee unanimously voted as follows: The appropriate subcommittees will review comments received regarding the Superior Court Rules (Raymond Taylor, Martin Honigberg and David

Peck), the Criminal Rules (Raymond Taylor and David Peck), and Family Division Rule 1.25-A (Gina Apicelli and David Peck). Changes will be emailed to all Committee members for review. Absent objection, these proposals will then be included in the 2010 Annual Report and recommended to the supreme court for adoption.

(2) IOLTA Rules. Upon motion made by Emily Rice and seconded by Judge Hampe, the Committee unanimously voted to conditionally recommend adoption of the proposed amendments to Supreme Court Rules 50 and 50-A. Unless, after consultation with Judge Duggan, David Peck reports to the Committee that further amendments regarding credit unions should be considered, the amendments to Rules 50 and 50-A will be included in the 2010 Annual Report and recommended to the supreme court for adoption.

(3) Supreme Court Rule 57-A. Upon motion made by Raymond Taylor and seconded by Judge Cullen, the Committee unanimously voted to recommend adoption of this proposal by the supreme court.

(4) Medical Malpractice Screening Panel Rules. Upon motion made by Judge Cullen and seconded by Judge Hampe, the Committee voted to recommend adoption of this proposal by the supreme court. Martin Honigberg recused himself and did not participate; Emily Rice abstained.

(5) Withdrawal of counsel in criminal cases. Upon motion made by Martin Honigberg and seconded by Emily Rice, the Committee unanimously voted to recommend adoption by the supreme court of this proposed rule and analogous rules for the District Court and Family Division.

(6) Temporary Rules. Upon motion made by Emily Rice and seconded by William Ardinger, the Committee unanimously voted to recommend adoption by the supreme court on a permanent basis of the temporary rules.

(7) Upon motion made by Emily Rice and seconded by Judge Cullen, the Committee voted to recommend to the supreme court that all court rules be made gender neutral and that the term “pro se” be replaced by “self-represented” or another similar term.

(h) 2010 Annual Report. Upon motion made by Edda Cantor and seconded by Emily Rice, the Committee voted to extend the due date for the 2010 Annual Report to September 1, 2010.

Alice Guay announced she is retiring from the Advisory Rules Committee.

4. Next Meeting

The next meeting is scheduled for Wednesday, September 29, 2010, at 12:00 p.m.

The meeting was thereafter adjourned.

APPENDIX A

Amend Supreme Court Rule 38, Rule 2.2, to state as follows:

RULE 2.2

Impartiality and Fairness

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

(B) A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard.

APPENDIX B

Amend Superior Court Rule 78-B to state as follows:

Rule 78-B. Duplication Of Audio Tapes.

(a) Any person may request a copy of the audio recording of a hearing except when a case or proceeding is confidential by statute, court rule or order. The recording will be provided on CD or audiotape for a fee of \$25.00 per audiotape or CD. A copy of the recording of a court proceeding shall not be deemed to be the official record of the proceeding.

(b) In the case of any superior court proceeding made CONFIDENTIAL by New Hampshire statute, case law, or court order, no duplicate audio tape shall be released, except to a party to the proceeding granted access by the court or to an attorney for a party to the proceeding. In such cases, the party or attorney shall sign a "Receipt for Duplicate Audio Tape of Confidential Superior Court Proceeding."

STATE OF NEW HAMPSHIRE

_____ COUNTY

SUPERIOR COURT

CASE NAME _____

CASE NUMBER: _____

RECEIPT for DUPLICATE AUDIO TAPE or CD of
CONFIDENTIAL SUPERIOR COURT PROCEEDING

I acknowledge receipt of a duplicate audiotape or CD of a CONFIDENTIAL superior court proceeding in this case.

As a condition of the receipt of this duplicate audiotape or CD, I shall take all reasonable actions to ensure that the CONFIDENTIALITY of the proceeding, including the CONFIDENTIALITY of this audiotape or CD, is preserved. Those actions shall include the following:

I shall not reproduce this audiotape or CD in any form.

I shall not release this audiotape or CD, or a copy of this audiotape or CD, to anyone, except to a party in this proceeding.

I shall not allow anyone to listen to this audiotape or CD, except for a party to this proceeding, attorney for a party to this proceeding, or a person with a court order granting authorization to listen to this audiotape or CD.

DATE: _____ SIGNATURE _____

APPENDIX C

Amend Probate Court Rule 78-B as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strike through~~ format):

Rule 78-B. DUPLICATION OF AUDIO TAPES.

(a) ~~Upon receipt of a Motion to the Court for a duplicate audio tape of a recorded probate court proceeding, the probate judge or probate master who presided over the proceeding shall either (1) direct the Register to release a copy of the audio tape to the Person, or (2) deny the Motion. Any denial of a Motion for a duplicate audiotape shall include a statement of reason(s) supporting the denial.~~ Any person may request a copy of the audio recording of a hearing except when a case or proceeding is confidential by statute, court rule or order. The recording will be provided on CD or audiotape for a fee of \$25.00 per ~~case~~ **[audiotape or CD]**. A copy of the recording of a court proceeding shall not be deemed to be the official record of the proceeding.

(b) In the case of any probate court proceeding made CONFIDENTIAL by New Hampshire statute, case law, or court order, no duplicate audio tape shall be released, except to a Party to the proceeding **[granted access by the court]** or to an Attorney for a Party to the proceeding. In such cases, the Party or Attorney shall sign a "Receipt for Duplicate Audio Tape of Confidential Probate Proceeding."

STATE OF NEW HAMPSHIRE

_____ COUNTY

PROBATE COURT

~~IN RE:~~ CASE NAME _____

~~DOCKET~~ CASE NUMBER: _____

RECEIPT for DUPLICATE AUDIO TAPE or CD of
CONFIDENTIAL PROBATE PROCEEDING

I acknowledge receipt of a duplicate audiotape or CD of a
CONFIDENTIAL probate proceeding in this case.

As a condition of the receipt of this duplicate audiotape or CD, I
shall take all reasonable actions to ensure that the
CONFIDENTIALITY of the proceeding, including the
CONFIDENTIALITY of this audiotape or CD, is preserved. Those
actions shall include the following:

I shall not reproduce this audiotape or CD in any form.

I shall not release this audiotape or CD, or a copy of this audiotape
or CD, to anyone, except to a party in this proceeding.

I shall not allow anyone to listen to this audiotape or CD, except
for a **P[p]**arty to this proceeding, **A[a]**ttorney for a **P[p]**arty to this
proceeding, or a **P[p]**erson with a court order granting
authorization to listen to this audiotape or CD.

DATE: _____ SIGNATURE _____

~~(c) The fee for each duplicate audiotape shall be \$25.00, payable to the Register.~~