

NEW HAMPSHIRE SUPREME COURT  
ADVISORY COMMITTEE ON RULES

Minutes of Public Hearing of June 1, 2018

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: Abigail Albee, Hon. Paul S. Berch, Hon. R. Laurence Cullen, John A. Curran, Esq., Hon. N. William Delker, Hon. Daniel J. Feltes, Hon. Michael H. Garner, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Ari Richter, Patrick W. Ryan, Esq., Janet L. Spalding, CPA, Charles P.E. Stewart, and Hon. Robert J. Lynn and Hon. Patrick Donovan.

Also present were the Secretary to the Committee, Carolyn Koegler, Esq., and Charlene Desrochers and Claire Mackinaw, Staff.

Justice Lynn began the meeting by introducing Justice Donovan to the public. Justice Donovan will soon replace Justice Lynn as Chair of the Advisory Committee on Rules.

1. Public Hearing

Justice Lynn noted that there are many people present at the public hearing. The public hearing items are listed below in the order in which testimony was taken on them. The names of the speakers who testified are listed beneath the public hearing item title. Due to the length of the public hearing, few details are provided regarding the testimony offered. A CD recording of the hearing is available upon request at the Supreme Court.

(a) 2017-007. Supreme Court Rule 41. Limited Liability Entities.

This proposed amendment would delete Supreme Court Rule 41.

Attorney Rolf Goodwin, a member of the Ethics Committee, noted that a question had been raised about whether to retain paragraph (3) of Supreme Court Rule 41. The Ethics Committee does not believe that this is a concern and recommends that the entire rule be deleted.

(b) 2017-009. Supreme Court Rules. Identification of Crime Victims.

Attorney William Chapman addressed the Committee and noted that he had submitted written comments. Attorney Chapman stated that his comments do not speak to the wisdom of the rule, but raise issues the Committee may wish to consider if it adopts this rule. He raised additional concerns about the proposal that he did not include in his written comments.

Nancy West, New Hampshire Center for Public Interest Journalism, stated that she does not support the adoption of the rule.

Jessica Eskeland, public policy specialist, New Hampshire Coalition Against Domestic and Sexual Violence, submitted a letter to the Committee and stated that the Coalition wholeheartedly supports the adoption of the rule.

(c) 2017-013. Superior Court (Civ.) Rule 36. Standing Trial Orders.

This proposed amendment would clearly establish when a party is required to notify the opposing party that he or she intends to subpoena the opposing party's lawyer as a witness.

No one asked to speak about this issue.

(d) 2017-017. Superior Court (Civ.) Rules. Appeals – Municipal Actions.

The proposed rule would require a party who submits, in an appeal to the superior court from the action of a state or municipal government body, an audio or video recording of the proceedings below, to provide the court with a transcript of the relevant portion of the proceedings.

No one asked to speak about this issue.

(e) 2016-006. Superior Court (Civ.) Rules. Motions to Seal.

The proposed rules would amend trial court rules to delineate the procedure for the filing of case records which contain confidential information or are confidential in their entirety and to provide the procedure for seeking access to case records that have been determined to be confidential.

No one asked to speak about this issue.

(f) 2016-009. Rule of Professional Conduct 8.4. Harassment and Discrimination.

The Committee requested comment on three different proposed amendments to Rule of Professional Conduct 8.4. The public hearing notice

stated that the Committee would consider all three proposals at the public hearing on June 1, along with any other language that is suggested at the public hearing.

Peter Imse, an attorney at Sulloway and Hollis and a member of Bar Association Ethics Committee, addressed the Committee. He stated that he was very involved in the subcommittee that worked on this proposal. He noted that the proposal set forth at Appendix K of the public hearing notice is the proposal made by the Bar Association, endorsed by the Ethics Committee and the Board of Governors. They support its adoption.

Rolf Goodwin, an attorney at the McLane firm and a member of the Bar Association Ethics Committee, addressed the Committee. He stated that he was on the Ethics Committee retreat in Concord in 2001 to review new Model Rules of Professional Conduct adopted by ABA and provided some background about how the New Hampshire Rules of Professional Conduct differ from the ABA's Model Rules of Professional Conduct. He spoke in support of the proposal.

Maureen Smith, who served on a subcommittee of the Ethics Committee relating to the proposal to adopt Rule 8.4(g), addressed the Committee. She emphasized that the purpose of the attorney discipline system is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession and prevent similar conduct in the future. She spoke in support of the proposal.

Meredith Cook, Director of Public Policy and Vice Chancellor of the Roman Catholic Dioceses of Manchester, addressed the Committee. She stated that she was appearing in her own capacity, and stated that when she was in private practice she was an employment attorney and in that role worked to prevent unlawful harassment and discrimination. She noted several concerns she had with all three versions of the rule, and submitted a letter urging the Committee not to adopt any of the three versions of the proposed rule. She stated that she would be happy to assist the Committee if the Committee is going to continue to work on a proposal.

Christina Ferrari, an attorney at Bernstein Shur and a representative of the New Hampshire Women's Bar Association, addressed the Committee. She stated that the New Hampshire Women's Bar Association supports the adoption of Appendix K. She also submitted written comments.

Fred Potter, an attorney at JustLawNH.com, PLLC, addressed the Committee. He stated that he has practiced law since 1975, is a past president of the New Hampshire Bar Association, and former CEO and Executive Director of the Christian Legal Society. He expressed concern about all three proposals and stated that his biggest concern is the inclusion of speech in the rule. He is

concerned that a single inappropriate comment could result in disciplinary action taken against an attorney.

Michael Tierney, an attorney Wadleigh, Starr & Peters, addressed the Committee. He stated that he was appearing personally to offer comment on the proposal based on his 14 years of practice representing religious organizations and litigating free speech cases. He expressed concern about all three versions of the rule.

Bob Dunn, an attorney at Devine Millimet, stated that he was appearing on his own behalf and on behalf of himself and ten other members of the New Hampshire Catholic Lawyers Guild, and not as a member of his firm. He stated that he understands the impetus behind the rule, but is concerned about unintended consequences. He expressed concern about what impact the adoption of a rule might have on lawyers participating in matters of public policy.

Janet DeVito, General Counsel at the Attorney Discipline Office, addressed the Committee. She stated that the lawyers at the Attorney Discipline Office are concerned about having to enforce anti-discrimination and anti-harassment rules. She also noted that she believes that there are rules of professional conduct that already exist that will address many behaviors that would be considered harassment or discrimination. She also noted that there are state and federal laws regarding harassment and discrimination that are subjects of “hugely complex litigation,” and that for the ADO to determine those same issues that courts are struggling with all over the country would be really challenging.

Mark Attori, an attorney at Devine Millimet, addressed the Committee and noted that he was speaking on his own behalf. He expressed concern that the adoption of a rule might keep lawyers from speaking out about issues at legislative hearings, and in debates like this one. He inquired whether the benefits of this rule outweigh the detrimental effects on speech.

Attorney Imse addressed the Committee again. He stated that he believes that the amendment the Ethics Committee introduced today at the hearing addresses many of the concerns that were raised by the speakers at the hearing. He also noted that while many of the speakers agreed that harassment and discrimination are not acceptable, but criticized the proposed rule, have not offered an alternative proposal to address the problematic behavior.

James Q. Shirley, an attorney at Sheehan, Phinney Bass & Green addressed the Committee. He expressed a number of concerns about the proposals. He noted that there are remedies within the rules for this kind of behavior. He is concerned about opening the floodgates and asking the

Attorney Discipline Office to engage in an analysis of federal statutory and constitutional law.

Maureen Smith addressed the Committee again. She stated that the subcommittee of the Ethics Committee had looked throughout the country to see whether the floodgates have opened in other states. She stated that they did not see any rash of complaints being filed as a result of the adoption of rules like the ones proposed.

Following the close of the public hearing, Justice Lynn noted the late hour and proposed that the Committee meet again. Senator Feltes agreed, but suggested that it might make sense for members of the Ethics Committee and some of the people who spoke at the hearing to meet and try to come up with a compromise proposal. Senator Feltes and attorney Herrick agreed to work with the group as part of a subcommittee.

It was noted that it would be helpful for the subcommittee to have some feedback from the Committee about its thoughts on the proposal to amend Rule of Professional Conduct 8.4. Following some brief discussion, it was agreed that because some members of the Committee would need to leave, that the Committee would not discuss the proposal to amend Rule of Professional Conduct 8.4.

The Committee agreed to meet again on June 8 to consider and vote on the other items that had been put out for public hearing, and to address the remaining items on the June 1 agenda.

Carolyn Koegler distributed the materials that were submitted during the public hearing.

The public hearing and meeting adjourned at 3:55pm.