

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Hearing and Meeting of June 14, 2019

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 Patrick E. Donovan, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Hon. Paul S. Berch, Hon. R. Laurence Cullen, John A. Curran, Esq., Hon. N. William Delker, Hon. Michael H. Garner, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq. (arriving late) , Derek D. Lick, Esq., Ari Richter, Patrick W. Ryan, Esq., Janet L. Spalding, CPA, Charles P.E. Stewart, and Hon. Patrick Donovan.

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

1. Public Hearing

Prior to opening the public hearing, Justice Donovan stated that the Committee would need to vote to accept comment on two items on the agenda. He reminded the Committee that it had voted by email to put out for public comment items (c) and (d) on the agenda, and that the Committee would need to ratify this vote. Upon motion made by attorney Curran and seconded by attorney Gordon, the Committee voted to accept comment on these two items.

Justice Donovan opened the public hearing. He inquired whether anyone from the public wished to offer comment on any of the items that had been put out for public hearing. After noting that no one wished to offer public comment, Justice Donovan closed the public hearing, and the Committee turned to discussing the items that had been put out for public hearing.

2. Discussion and Vote on Public Hearing Items

(a) 2019-001. Supreme Court Rules 12-D and 20. Non-Precedential Status of Orders.

Justice Donovan reminded the Committee that this proposed amendment would amend Supreme Court Rules 12-D(3) and 20(2) to make clear that orders issued in confidential cases should not be cited or referenced in pleadings or rulings. He noted that the Supreme Court had asked the Committee to consider an

amendment to the Supreme Court Rules to address the fact that some trial judges and attorneys who had received a final order in confidential cases might be citing those orders in the context of other cases involving different parties. He asked Committee members whether they had any concerns about the proposal that had been put out for public hearing.

Attorney Gordon inquired whether the amendments ban parties from citing confidential cases. He noted that he is aware that some first amendment arguments had been raised in the Sixth Circuit about the issue of bans like this. Justice Donovan stated that he believes that the proposed rule change simply informs the bar that it ought not cite confidential cases in pleadings.

Following some brief discussion, and upon motion made by Mr. Stewart and seconded by Attorney Curran, the Committee voted to recommend that the Court adopt the proposed amendments.

(b) 2017-018. Supreme Court Rule 37. Attorney Discipline System. Access to Confidential Records.

Justice Donovan reminded the Committee that this proposed amendment would add subsection (c) to Supreme Court Rule 37(8), setting out a new procedure detailing when, and in what manner, the Attorney Discipline Office may access confidential court files. He stated that a subcommittee had been formed to address concerns raised by attorney Mary Ann Dempsey about the fact that the existing rule is silent as to the Attorney Discipline Office's right to have access to confidential court records.

Attorney Ryan reminded the Committee that he and Judge Delker had raised some concerns at the December 2018 meeting about the first proposal the subcommittee had submitted to the Committee. He directed the Committee's attention to Carolyn Koegler's February 1, 2019 memorandum and revised proposal and stated that the concerns that he had raised about the rule in December were addressed in the new proposal that had been put out for public hearing.

Judge Delker reviewed section (F) of the proposed rule. He confirmed that it adequately addresses his concern that the rule make clear that the Court remain involved after providing the ADO with access to the records so that it can control to some degree to whom the records are made available and/or whether a protective order should be issued at the time the records are made available. It was noted that the proposed rule states that to the extent that confidential documents or confidential information are used during a disciplinary hearing, such hearing shall be closed to the public.

Following some further discussion and upon motion made by attorney Ryan and seconded by attorney Berch, the Committee voted to recommend the proposal to the Court.

(c) 2019-005. Supreme Court Rule 48-B. Family Mediator Fees.

Justice Donovan reminded the Committee that this proposed amendment would delete and replace Supreme Court Rule 48-B.

Carolyn Koegler reminded the Committee that in March it had considered a submission from ADR Coordinator attorney Heather Scheiwe Kulp designed to update the rule regarding family division mediation. Attorneys Gordon and Herrick had raised some concerns about the proposal. Carolyn Koegler worked with attorney Kulp to address these concerns, and had circulated a revised draft of the new rule to Committee members, and Committee members had voted to put the new proposal out for public hearing.

Following some brief discussion, and upon motion made and seconded, the Committee voted to recommend that the Court adopt the new rule.

(d) 2018-012. Supreme Court Rule 57-A. Custody and Return of Documents Filed in Camera in Trial Courts.

Justice Donovan reminded the Committee that this proposed amendment would provide that in cases in which a defendant has not been convicted on any charge, a person with interest may request that records filed in camera be destroyed. He explained that this proposal was designed to address a concern that had arisen in a recent case.

Mr. Stewart noted that in a February 10 memo to the Committee, Carolyn Koegler had indicated that the Court had also asked the Committee to consider the purpose of retaining the records for ten years, and whether the implementation of e-filing requires any amendment to the rule.

There was some brief discussion about why the records are retained for ten years. It was explained that appeals in criminal cases can often go on for years, and that ten years is generally understood to be the length of time needed to ensure that records would continue to be available in those appeals. Regarding the implementation of e-filing, attorney Albee stated that no change is needed to the rule due to e-filing. She stated that the Courts are continuing to maintain these records in the same way they had prior to the implementation of electronic filing. They continue to maintain paper copies of these records.

Upon motion made by Mr. Stewart, and seconded, the Committee voted to recommend that the Court adopt the proposed change.

(e) 2018-010. New Hampshire Rule of Criminal Procedure 50. Confidential Documents and Confidential Information.

Justice Donovan reminded the Committee that this proposed amendment would adopt on a permanent basis rules applicable to criminal cases filed in Superior Court delineating the procedure for filing documents which are confidential in their entirety or contain confidential information, and for seeking access to documents or information that have been determined to be confidential.

Attorney Gordon noted that requiring parties to redact can be very burdensome, and that this does not seem like a very practical approach. He stated that it took him quite some time working with another attorney to agree on what needed to be redacted.

Judge Delker noted that the rule does not require that the parties agree on what to redact. He noted that a concern about the rule is how to enforce it if a redacted version is not filed. He explained that the reason for the provision is that it is the least restrictive approach – that is, requiring parties to redact small portions. If this provision did not exist, then documents containing any confidential information at all would have to be filed under seal. This approach attempts to strike a balance between protecting an individual's confidential information and the fact that the Constitution and the case law make very clear that except for some very narrow exceptions, everything filed with the courts should be available to the public. Another approach to this issue could be to require any documents containing confidential information to be filed under seal, but such a rule would result in the filing of more motions to seal.

Representative Berch stated that he believes that this approach is about as workable as it is going to get for the time being.

Regarding enforcement when someone does not file a redacted version of a document, Justice Donovan noted that the trial courts have the discretion to fine a party for not complying with the rules.

It was noted that there is a typo on page 18, where subsection (d) should be subsection (c). Carolyn Kogler agreed to note this in the report to the Court. She also agreed to check the civil rules to be sure that the same correction is made to the lettering there, if necessary.

Upon motion made by Judge Delker and seconded by attorney Gordon, the Committee voted to recommend the proposal, as amended to reletter subsection (d) on page 18.

Upon motion made by Representative Berch, and seconded, the Committee voted to recommend that the Court make the same technical change to the civil rule.

(f) 2018-011. New Hampshire Rule of Criminal Procedure 50. Confidential Documents and Confidential Information.

This proposed amendment would further amend New Hampshire Rule of Criminal Procedure 50 to make applicable to criminal cases in Circuit Court the rules delineating the procedure for filing documents which are confidential in their entirety or contain confidential information, and for seeking access to documents or information that have been determined to be confidential.

Attorney Ryan noted that the Circuit Court had expressed some reservations about adopting these rules in the civil context, due to the impending implementation of e-filing, but that since this proposal applies only to criminal cases, the Circuit Court is comfortable with the proposal.

Upon motion made by Judge Delker and seconded by attorney Ryan, the Committee voted to recommend that the Court adopt the proposal, with the same technical change discussed regarding the need to change subsection (d) to subsection (c) on page 18.

(g) 2019-002. Circuit Court Rules. Civil Process Amendments Designed to Facilitate Electronic Filing.

Justice Donovan reminded the Committee that this proposal would amend Circuit Court Rules to make the Circuit Court civil filing process consistent with the Superior Court civil filing process in order to facilitate the implementation of electronic filing in civil cases filed in the Circuit Court.

Attorney Gordon noted that attorney Ryan had stated that the Circuit Court rules are very similar to the existing Superior Court Rules, but that there are some differences. Attorney Gordon inquired how many differences there were, and asked attorney Ryan to highlight some. There was a brief discussion on this topic.

Attorney Gordon then inquired whether, given the fact that there are few differences between the two sets of rules, it might not make sense to have one set of civil rules applicable in both Superior Court and Circuit Court. He stated that where the rules are different, there could be a note indicating such differences.

Justice Donovan stated that a great deal of work had been put into drafting the rules, and that the suggested changes would be required in order for the Circuit Court to move ahead with electronic filing in civil cases. He also noted that making the kinds of changes attorney Gordon suggested would require a great deal of work. He stated that he believed that the Committee should vote to recommend that the Court adopt these rules. If someone thereafter wished to propose a consolidation of the rules, as suggested by attorney Gordon, they would be welcome to do so.

Upon motion made by attorney Curran and seconded by Judge Garner, the Committee voted to recommend that the Court adopt the proposal. Judge Cullen abstained from the vote.

3. Approval of the March 15, 2019 Meeting Minutes

Justice Donovan inquired whether any Committee members had questions or concerns about the draft minutes. No one expressed any concerns.

Upon motion made by attorney Curran and seconded by attorney Gordon, the Committee voted to adopt the minutes. Representative Berch, Judge Delker, Judge Garner, Ms. Spalding and Justice Donovan abstained from voting, as they were not present at the March meeting.

4. NEW SUBMISSIONS

(a) 2019-006. New Hampshire Rule of Criminal Procedure 12.

Judge Delker explained that he had submitted this proposal to amend the rule relating to expert witness disclosure deadlines. He explained that it is very difficult to come up with a rule applicable in all cases because expert reports come in many different formats and contexts. He believes that it makes more sense to put the burden on the parties to set expert disclosure deadlines at the dispositional conference, so that is what this proposal is designed to do. He noted that the timeframes set forth in the existing rule are not practical, so they should be deleted and replaced with Rule 12(b)(3)(F). He stated that Chief Judge Nadeau is comfortable with this proposal.

Representative Berch stated that he is not opposed to this proposal, but he noted that when Felonies First was enacted, it was understood that the “tradeoff” for eliminating the probable cause hearing was to expedite the production of discovery. So, to the extent that this rule says that the expert disclosure is to happen “as fast as possible,” rather than within certain deadlines set forth in the rule, this proposal works against the goal of the expediting the production of discovery. He is

particularly concerned about the language in proposed (b)(1)(B), which reads, “and to the extent the state is in possession of such materials.”

Following some brief discussion about Representative Berch’s concerns, including the timing of lab testing (*i.e.*, not until indictment) and the fact that processing DNA takes a great deal of time, upon motion made by Judge Delker and seconded by attorney Ryan, the Committee voted to put this proposal out for public hearing in December.

(b) 2019-007. New Hampshire Rule of Criminal Procedure 8.

Judge Delker explained that he had submitted a proposal to the Committee to address a situation relating to arraignments, and the 90 day deadline for indictments. He referred the Committee to his April 18 email, which explains that the Superior Court is requesting this rule change to increase efficiency in cases in which a defendant fails to appear at arraignment or the court dismisses a felony complaint but misdemeanors remaining pending. The Superior Court is requesting that Rule 8 be amended to toll the indictment deadline while the defendant remains at large. This change would keep the warrant active, and would eliminate a great deal of work for the staff.

Following some brief discussion, and upon motion made by Representative Berch and seconded by attorney Ryan, the Committee voted to put the proposal out for public hearing in December.

(c) 2019-008. Rules relating to the Administration of Animal Cruelty Cases.

Justice Donovan referred Committee members to the April 19, 2019 letter from the Governor’s Commission on the Humane Treatment of Animals. He explained that the Commission is asking that the Advisory Committee on Rules draft administrative rules in New Hampshire to address the administration of animal cruelty cases. The letter notes that RSA 644:8, IV(a) states that “courts shall give cases in which animals have been confiscated by an arresting officer priority on the court calendar.” According to the letter “there have been many instances of late in New Hampshire where charges have been filed for animal cruelty, involving live animals, which are not being given priority by the courts.”

Attorney Albee stated that she understands the concerns expressed in the letter – that there is great expense associated with these kinds of cases, because the cost of care of the animals can be quite high. However, she notes that at least one of the cases referenced in the letter, the perceived delays resulted from the defendant’s *de novo* appeal to the superior court following her conviction in the Circuit Court. Consequently, although the case did not resolve quickly, the “delay” was based on

the fact that the defendant received two separate trials and not on a failure to expedite the matter.

Representative Berch noted that the letter was sent in April. Since then, the legislative efforts relating to these kinds of cases was tabled. He noted that what is holding up the legislation is unrelated to the issue raised here – that is the issue of the courts expediting the cases. What is at issue is who pays for the animals, and what happens to the animals in cases of acquittal.

There was some discussion about the Committee's role here. It was noted that it is not the Committee's role to draft a proposal, because the Committee is not familiar with where the problems lie. It was suggested that Justice Donovan write a letter to Governor's Commission on the Humane Treatment of Animals, explaining that the Committee would be happy to consider a proposal to amend the rules, but that the Committee is not clear on what the Commission is asking it to do, because it is not familiar with the particular problems the Commission seeks to address through a rule.

Following some further discussion, it was agreed that Justice Donovan would draft a letter to the Commission, and that Judge Delker would review the letter. The Committee therefore agreed that discussion of the issue should be tabled.

(d) 2019-009. Notification when forms are updated.

Justice Donovan explained that attorney Gordon had raised an issue relating to forms in a June 4, 2019 email. Attorney Gordon explained that there has been some discussion among members of the bar that it would be helpful to receive some kind of notification from the court system when forms are updated.

Pat Ryan stated that he had spoken with some of his colleagues at the Circuit Court, and they agreed that it would be a simple enough matter to add something to the court's website alerting people to the fact that forms have been updated. It may also be possible to put a notice in the Bar News, and potentially notify people by posting something to the listservice.

Following some further discussion about how forms are updated at the Superior and Circuit Courts, and upon motion made and seconded, the Committee agreed that this issue should be referred to the Circuit Court and Superior Court Administrators.

Attorney Ryan informed the Committee, regarding the issue discussed in March about Domestic Violence Order of Protection (#2019-004), that he had raised

the issue with his colleagues at the Circuit Court, and had learned that the form order used by the Judges already includes an expiration date.

(e) Miscellaneous

Attorney Gordon noted that he had read recently that the electronic filing system in Philadelphia had recently shut down, and inquired whether there is a rule that explains what a practitioner is supposed to do if this were to happen in New Hampshire. For example, should there be a way to date stamp a pleading somewhere?

It was noted that the electronic filing rules include a provision explaining what a practitioner is to do if the electronic filing system is not working.

There was some discussion about the new summary judgment rule. Attorney Lick reported that he had heard some concerns expressed about it by those who have practiced in Massachusetts, which has a similar rule. Judge Delker noted that the New Hampshire rule is different from the Massachusetts rule in that it does not require the parties to agree to a statement of facts.

Upon motion made and seconded, the meeting adjourned at 1:30 p.m.

5. REMAINING 2019 MEETING DATES

Friday, September 6

Friday, December 6