

ADVISORY COMMITTEE ON RULES
June 3, 2009

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

The meeting was called to order at 12:25 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
Hon. Richard A. Hampe
Martin P. Honigberg, Esquire
Jennifer L. Parent, Esquire
Emily G. Rice, Esquire
Raymond Taylor, Esquire

Also present were David S. Peck, Secretary to the Advisory Committee on Rules, and Margaret Haskett, staff.

On motion duly made and seconded, the minutes of the March 4, 2009 meeting were approved, as written.

David Peck reported that the Supreme Court recently amended Supreme Court Rule 51 to expand membership on the Committee to include an additional member appointed by the N.H. Bar President. Following discussion, the Committee agreed to recommend to the Supreme Court that this amendment to Supreme Court Rule 51 be put into effect on a temporary basis and to send said amendment to the Committee's December 2009 public hearing.

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

Relative to Supreme Court Rule 38 pertaining to the Code of Judicial Conduct and to Judge John Coughlin's inquiry contained in his February 20, 2009 e-mail, David Peck reported that Judge Coughlin is requesting an opinion from the Advisory Committee on Ethics. The Committee took no further action at this time.

With reference to an amendment to Supreme Court Rule 38, Comment [3] of the Application section, following discussion, and on motion of Attorney Taylor, seconded by Judge Cullen, the Committee voted to further amend said Comment, as contained in Appendix A of these minutes, and to send said amendment to the Committee's December 2009 public hearing.

Relative to the Rules of Civil Procedure, Criminal Procedure and Probate Administration, David Peck reported that the subcommittee that reviewed and compiled the recent draft of the Rules of Criminal Procedure objected to their incorporation into the rules for each court level. Instead, they felt they should be a separate document. Following discussion, the Committee agreed to defer acting on this matter until after its September meeting, when the rules for all court levels will be completed and discussed. Ms. Cantor will suggest to Commissioner Wrenn that he contact the Attorney General's office about any rules changes he might have.

Relative to Professional Conduct Rule 8.5(c) pertaining to application of rules to nonlawyer representatives, this matter was deferred until the Committee's September 2009 meeting.

Relative to Judicial Conduct Committee Procedures, this matter was deferred until the Committee's September 2009 meeting.

Relative to Superior Court Rule 170 pertaining to alternative dispute resolution, the Committee addressed several items. Judge Dalianis reported that because Superior Court Rule 170 did not require individuals who go to private mediators/arbitrators to report back to the court on a case's outcome, the Supreme Court temporarily adopted an amendment to the rule and sent it to the Committee to see whether it should be adopted on a permanent basis. Following discussion, the Committee agreed to defer acting on whether the amendment should become permanent until its September 2009 meeting.

Relative to further amendments to Superior Court Rules 170 and 170-A pertaining to a neutral's disclosure concerning potential conflicts of interest, following discussion, and on motion of Judge Dalianis, seconded by Attorney Rice, the Committee voted to recommend to the Supreme Court that the amendments to Superior Court Rules 170 and 170-A, as contained in Appendix B of these minutes, be adopted on a temporary basis. During a brief discussion on whether a survey should be conducted to discover ways to improve the mediation program, the Committee recommended that the survey be put on hold to give the program time to see how it is working.

Relative to amending court rules to encourage submission of data CDs with filings, on motion of Judge Dalianis, seconded by Attorney Ardinger, the Committee voted to take no action at this time.

Relative to the rules amendment process, Judge Dalianis reported that although the Committee agreed to hold one public hearing a year, it was suggested that it would be better to hold the hearing in June. Since no public hearing was held this June, it will be necessary to hold a public hearing in December to get on to the correct timeline.

Relative to rules that appeared on the Committee's December 10, 2008 public hearing, the following action was taken:

Amendments to Family Division Rules including an amendment to Family Division Rule 1.2, on motion of Judge Hampe, seconded by Attorney Taylor, the Committee voted to recommend to the Supreme Court that the Family Division Rules, including Family Division Rule 1.2, be adopted on a permanent basis as submitted to the December 2008 public hearing. With reference to a further amendment to Family Division Rule 1.14, this matter was deferred until the Committee's September 2009 meeting.

Supreme Court Rule 55 pertaining to public protection fund, following review of Mr. Krah's December 9, 2009 e-mail and a response from the Public Protection Fund Committee, and on motion of Judge Dalianis, seconded by Judge Hampe, the Committee voted to recommend that no further changes be made to the proposed amendments to Supreme Court Rule 55 at this time, and further voted to recommend to the Supreme Court that the proposed

amendments to Rule 55 be adopted. Mr. Peck will notify Mr. Krah of the Committee's decision. With reference to Mr. Krah's observations on malpractice insurance and the N.H. Bar's website, the Committee agreed to refer those items to the N.H. Bar Association President for consideration.

Relative to Probate Court Procedures, this matter was deferred until the Committee's September 2009 meeting.

The Committee next considered new items pending, and the following action was taken:

Relative to an amendment to Supreme Court Rule 37(3)(b) pertaining to committee quorums, following a review of Attorney Margaret Nelson's March 26, 2009 letter and attachment, and on motion of Judge Hampe, seconded by Attorney Ardinger, the Committee voted to recommend no changes to Supreme Court Rule 37(3)(b) at this time. Attorney Honigberg abstained.

Relative to an amendment to Supreme Court Rule 12-A pertaining to voluntary mediation, following discussion, and on motion duly made and seconded, the Committee voted to send said amendment to Supreme Court Rule 12-A, as contained in Appendix C of these minutes, to the Committee's December 2009 public hearing.

Relative to an amendment to Superior Court Rule 170-A(G) pertaining to alternative dispute resolution, following discussion, and on motion duly made and seconded, the Committee voted to send said amendment to Superior Court Rule 170-A(G), as contained in Appendix D of these minutes, to the Committee's December 2009 public hearing.

The next meeting of the Committee is scheduled for September 9, 2009 at 12:00 p.m. in the Souter Judicial Conference Room.

Committee members requested that Mr. Peck file the Committee's Annual Report with the Supreme Court as soon as it is prepared.

There was a brief discussion about Senate Bill 33. No action was taken.

No further business to come before the Committee, the meeting adjourned at 2:00 p.m.

APPENDIX A

Amend Supreme Court Rule 38, Comment [3] of the Application section to read as follows (additions are in bold):

[3] In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on “problem solving” courts shall comply with this Code except to the extent local **protocols and practices** provide and permit otherwise.

APPENDIX B

Amend Superior Court Rules 170 and 170-A as follows:

Amend Superior Court Rule 170(C)(3) as follows (additions are in bold; deletions are in strike-thru format):

(3) (i) Disclosure in Mediation or Neutral Case Evaluation cases:

Upon contact by either the parties or counsel requesting the neutral's services, or upon ~~Upon~~ receipt of notice of appointment in a case, the neutral shall disclose, **in writing**, any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If the neutral withdraws, has a conflict of interest or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

(ii) Disclosure in Arbitration cases: Disclosing a potential conflict in Arbitration cases shall be handled as follows: All disclosures must be made in writing. The responsibility of disclosing potential conflict is ongoing therefore disclosure must be made even after appointment if a conflict arises. Once the conflict is disclosed, all sides to the dispute shall comment on the disclosure either requesting removal or confirmation of the arbitrator. If the parties and/or counsel cannot agree on whether to remove or confirm the arbitrator, then the matter shall be referred back to the Court for a decision about whether the arbitrator may serve or whether the conflict will necessitate removal of the arbitrator and the appointment of an alternate arbitrator. The Court will assess the issue of the arbitrator's potential conflict based upon the comments of the parties and counsel, and it shall notify the parties, counsel, and the arbitrator of the decision. If the court elects to remove the arbitrator, then the court shall name an alternate arbitrator in its notice of decision.

Amend Superior Court Rule 170(D)(4) as follows (additions are in bold; deletions are in strike-thru format):

(4) **(i) Report of results when Mediation or Neutral Case Evaluation is used:** Within 15 days after the conclusion of an ADR proceeding, ~~other than binding arbitration,~~ the neutral must report the results of the process to the court in writing. The report may not disclose the neutral's assessment of any aspect of the case or substantive matters discussed during the session or sessions except as is required to report the information required by this paragraph. The report must contain the following items:

- (a) The date on which the session or sessions were held including the starting and finishing times;
- (b) The names and addresses of all persons attending, showing their role in the session and specifically identifying the representative of each party who had decision-making authority;
- (c) A summary of any substitute arrangement made regarding attendance at the session;
- (d) The results of the session, stating whether full or partial settlement was reached and appending any agreement of the parties;

(ii) Report of results when Binding Arbitration is used: Within 30 days of the arbitration, the Arbitrator or Arbitration panel will issue a written decision. At the discretion of the parties and/or counsel, and at their request, the Arbitrator shall either issue a "simple award" or a "reasoned award". A simple award shall not include an analysis. It shall only include the results of the decision. A reasoned award shall include an analysis by the arbitrator of how the decision was reached. If the parties and/or counsel do not request a specific type of written award, the arbitrator or arbitration panel shall have the discretion to issue the type of decision it deems appropriate for the case.

Amend Superior Court Rule 170-A(G) as follows (additions are in bold; deletions are in strike-thru format):

(G) *Arbitrator's Disclosure.*

Upon receipt of notice of appointment in a case, an arbitrator shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. **All disclosures must be made in writing. The responsibility of disclosing potential conflict is ongoing therefore disclosure must be made even after appointment if a conflict arises. Once the conflict is disclosed, all sides to the dispute shall comment on the disclosure either requesting removal or confirmation of the arbitrator. If the parties and/or counsel cannot agree on whether to remove or confirm the arbitrator, then the matter shall be referred back to the Court for a decision about whether the arbitrator may serve or whether the conflict will necessitate removal of the arbitrator and the appointment of an alternate arbitrator. The Court will assess the issue of the arbitrator's potential conflict based upon the comments of the parties and counsel, and it shall notify the parties, counsel, and the arbitrator of the decision. If the court elects to remove the arbitrator, then the court shall name an alternate arbitrator in its notice of decision.**

If an arbitrator withdraws, ~~has a conflict of interest,~~ or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

Amend Superior Court Rule 170-A(R)(2) as follows (additions are in bold; deletions are in strike-thru format):

(2) ~~The decision need not be in a particular form but must include sufficient findings of fact and conclusions of law to establish a basis for the decision.~~ **Within 30 days of the arbitration, the Arbitrator or Arbitration panel will issue a written decision. At the discretion of the parties and/or counsel, and at their request, the Arbitrator shall either issue a "simple award" or a "reasoned award". A simple award shall not include an analysis. It shall only include the results of the decision. A reasoned award shall include an analysis by the**

arbitrator of how the decision was reached. If the parties and/or counsel do not request a specific type of written award, the arbitrator or arbitration panel shall have the discretion to issue the type of decision it deems appropriate for the case.

APPENDIX C

Amend Supreme Court Rule 12-A, on a temporary basis, as follows:

RULE 12-A. Mediation

(1) Cases pending at the supreme court may be referred to the Office of Mediation and Arbitration (OMA) for mediation as set forth in this rule. All mediation will be conducted by a retired full-time judge.

(2) With the exception of cases listed in the following paragraph, cases accepted by the court may be referred to the Office of Mediation and Arbitration (OMA) for mediation upon the agreement of all parties.

The following cases are not eligible for mediation: criminal cases; domestic violence cases; election cases; guardianship cases; involuntary commitment cases; juvenile cases, including abuse and neglect, CHINS, delinquency, and termination of parental rights cases; cases brought by a prisoner in the custody of a correctional institution; and stalking cases.

(3) When an acceptance order is issued in a case that appears to be eligible for mediation under this rule, the clerk shall provide the moving party with a mediation agreement form. If all parties agree to mediation, the moving party shall submit the completed mediation agreement form to the court within 15 days of the date of the acceptance order, and shall send a copy of the completed form to all parties. In a case in which more than one appeal has been filed, the order shall indicate who will be considered the moving party for the purpose of submitting the mediation agreement form.

(4) Upon receipt of a completed mediation agreement form, an order will be issued by the clerk referring the case to the OMA for mediation.

(5) Any order referring a case to the OMA for mediation shall impose a fee of \$200.00 per party to be paid to the OMA. This fee will be used by the OMA to pay mediator compensation, and is not refundable. On its own motion, or upon motion of the parties, the court may order an individual \$200.00 fee to apply to multiple plaintiffs or defendants, if under the circumstances of the case, the

court determines that the per party fee would cause undue hardship if it were applied to individual parties, or if one fee for multiple parties on the same side is deemed equitable by the court. Parties who are indigent may petition the court for waiver of the \$200.00 fee.

(6) Unless the order referring a case for mediation provides otherwise, when a case is referred to the OMA for mediation, further processing of the case by the court will be suspended for a period of 90 days. If the director of the OMA or the mediator believes that additional time is needed to complete the mediation, the director or mediator may file a notice with the court of an automatic extension of no more than 30 days. Upon filing of the notice, further processing of the case shall be suspended for the additional time without further order of the court. Extensions of time of more than 30 days may be requested only by motion to the court and are not favored.

(7) After a case has been referred to the OMA for mediation, the OMA shall be responsible for selecting a mediator and scheduling a mediation session. The parties shall comply with the OMA rules for appellate mediation. All communications and filings of the parties related to the mediation session shall be sent to the OMA and shall not be filed with the court, with the exception of filings relating to whether the case should be remanded to the court to resume processing of the case or requesting an extension of time to complete mediation.

(8) If the director of the OMA determines at any time after a case has been referred that the case should not be mediated, the director shall notify the clerk in writing. Thereafter, an order will be issued indicating that processing of the case will resume in accordance with Supreme Court rules.

(9) Within 15 days after the conclusion of a mediation, the mediator or the director of the OMA shall file a written report with the court of the results of the mediation. The report shall state whether a full or partial settlement was reached and describe the effect of the settlement on the pending case. The report shall not disclose the mediator's assessment of any aspect of the case or confidential matters discussed during the session or sessions.

(10) If the director of the OMA reports that there has not been a full settlement of a case referred for mediation, or upon expiration of the period during which processing of the case was

suspended, the court ordinarily will resume processing the case in accordance with Supreme Court rules unless circumstances would make this inappropriate.

(11) Mediation proceedings and information relating to those proceedings shall be confidential. Information submitted or discussed during mediation shall not be disclosed or used in any subsequent proceeding. Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. Mediation proceedings under this rule are deemed settlement conferences consistent with the Rules of Evidence. Parties shall not introduce into evidence, in any subsequent proceeding, the fact that there was a mediation or any other material concerning the conduct of the mediation except as required by the Rules of Professional Conduct or the Mediator Standards of Conduct. Evidence that would otherwise be admissible in another proceeding shall not be rendered inadmissible as a result of its use in mediation.

(12) The OMA may adopt procedural rules to govern the appellate mediation process.

APPENDIX D

Amend Superior Court Rule 170-A(G), on a temporary basis, with the following (additions are in bold; deletions are in strike thru format):

(G) Arbitrator's Disclosure.

Upon receipt of notice of appointment in a case, an arbitrator shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. ~~If an arbitrator withdraws, has a conflict of interest, or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.~~

In cases where arbitration is selected after suit is filed, if an arbitrator withdraws, has a conflict of interest and there is an unresolved issue concerning recusal or if the arbitrator is otherwise unavailable, another shall be agreed to by the parties or the issue shall be referred to the Court if the issue of recusal cannot be resolved by the parties and the arbitrator.

In cases where arbitration is selected pre-suit, if an arbitrator withdraws, has a conflict of interest and there is an unresolved issue concerning recusal or if the arbitrator is otherwise unavailable, another shall be agreed to by the parties or the issue shall be referred to the Office of Mediation and Arbitration if the issue of recusal cannot be resolved by the parties and the arbitrator.