NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Hearing and Meeting of June 6, 2014

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

The meeting was called to order at 12:34 pm by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Hon. R. Laurence Cullen, Hon. N. William Delker, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Emily G. Rice, Esq., Patrick W. Ryan, Esq., Frederick H. Stephens, Jr., Raymond W. Taylor, Esq., and Hon. Robert J. Lynn.

Also present were Secretary to the Committee, Carolyn Koegler, Esq., and Christine Damon and Claire MacKinaw, staff.

Justice Lynn welcomed two new members to the Committee, attorney Joshua Gordon and Mr. Frederick Stephens, and thanked them for their willingness to serve. He then opened the public hearing and explained that he would take each of the items set forth in the public hearing, in order.

1. Public Hearing

Members of the Committee received the views of the public, the bench and the Bar on the following proposed rules and rule amendments set forth in the April 23, 2014 Notice of Public Hearing:

(a) Depositions: Notice or Subpoena Directed to An Organization

This proposal would amend Rule 26 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions to include a provision which would allow a party to name as a deponent a public or private corporation, a partnership, an association, or a governmental agency, and require the named organization to designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf.

(1) Amend Rule 26 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions, as set forth in Appendix A.

Justice Lynn explained that this proposal had been made by Superior Court Judge McNamara to incorporate a provision which is in the federal rules of civil procedure, dealing with taking depositions of an organization. The rule

basically requires that if a litigant desires to take the deposition of an organization, it can so indicate and then the organization is required to designate someone who had knowledge of the matters about which the litigant seeks to inquire. He asked whether anyone wished to speak to this issue. No one indicated a desire to speak.

(b) Attorney Discipline: Supreme Court Rules 37 and 37-A

These proposals would amend the rules regarding attorney discipline.

(1) Amend Supreme Court Rule 37(16) to allow disciplinary counsel to participate separately in Supreme Court disciplinary proceedings if the PCC recommends greater than a six month suspension and disciplinary counsel believes that the PCC's decision is based on a clearly erroneous factual finding or is erroneous as a matter of law, as set forth in Appendix B.

Justice Lynn noted that this proposal was prompted by a case in which the attorney discipline office had a different view of what should happen in a case than the professional conduct committee. The question arose as to whether the Attorney Discipline Office (ADO) should have the ability to be represented by counsel different from the Professional Conduct Committee (PCC). Justice Lynn inquired whether anyone wished to speak to that issue.

David Rothstein, chair of the PCC, addressed the Committee. He explained that he had consulted with Attorney Greene, and that both recommended that the rules be changed to state that if the PCC recommends a sanction greater than a six month suspension, the case automatically comes up to the Supreme Court. The current rules require disciplinary counsel to file a petition to get the case to the Supreme Court. If this requirement were removed, and disciplinary counsel disagrees with the PCC recommendation, then disciplinary counsel would just advocate for its position on appeal, and the decision of the PCC would stand on its own. If the Committee were to adopt the proposal set forth by attorneys Rothstein and Greene, there are two ways in which a PCC decision would get to the Supreme Court: (1) the PCC orders a sanction of suspension of six months or less, which is final unless the respondent files a notice of appeal; or (2) the PCC orders a sanction of six months or more. In this situation, the recommendation would go directly to the Court (without the need for a petition, as is currently required under the rules).

(2) Adopt Supreme Court Rule 37(19-A) to authorize the Professional Conduct Committee or the Court to order a respondent attorney to forfeit legal fees or pay restitution as a sanction for misconduct, as set forth in Appendix C.

See notes at agenda item (3) below.

(3) Amend Supreme Court Rule 37A(I)(e) to authorize the Professional Conduct Committee or the Court to order a respondent attorney to forfeit legal fees or pay restitution as a sanction for misconduct, as set forth in Appendix D.

Attorney Rothstein spoke to this issue, and stated that it is the view of the subcommittee and everyone on the PCC and in the disciplinary counsel's office, that it is necessary to define what is meant by "restitution." Attorney DeVito spoke to this issue, and agreed with Attorney Rothstein that the term "restitution" needs to be more narrowly defined. She also stated that it should be made clear in the rules that it is the harmed person who collects the restitution or disgorgement of fees, not the Attorney Discipline Office.

Carolyn Koegler reminded the Committee that it had received two letters regarding the proposal to authorize the Professional Conduct Committee or the Court to order a respondent attorney to forfeit legal fees or pay restitution as a sanction for misconduct. The letters had been distributed to the members of the Committee prior to the public hearing. One letter, dated June 3, 2014 is from Attorney Russell Hilliard. The other, dated June 4, 2014 is from Attorney William Saturley. Both expressed concern about the proposal, and noted that it would be important to limit or, at least, define the meaning of "restitution."

(4) Amend Supreme Court Rule 37(8) to authorize attorneys in the Attorney Discipline Office to issue subpoenas during the investigative stage of a proceeding, as set forth in Appendix E.

Attorney Rothstein spoke to this issue, and explained that it is his understanding that this is more duces tecum as to documents, rather than the authority to compel people to come to the ADO.

(5) Amend Supreme Court Rule 37A(III)(b) to make pre-hearing conferences mandatory, add details regarding exhibits and change the timing in two provisions, as set forth in Appendix F.

No comments were offered on agenda item (5).

(6) Amend Supreme Court Rule 37(20) to make available for public review all final decisions of the PCC on docketed matters, to keep all non-docketed matters confidential, and to make all "non-disciplinary decisions with warning" confidential but retained for review by the Attorney Discipline Office and the Professional Conduct Committee, as set forth in Appendix G.

Attorney Rothstein spoke to the issue of warnings, and explained that it is the subcommittee's recommendation that warnings be made confidential. He stated that warnings in attorney discipline cases exist in other states, but are privately issued. He explained that the subcommittee felt that, balancing the probative value of the information against the prejudicial effect on the

lawyer, it does more harm than it does good to make the warnings public. One Committee member suggested that there might be a problem in the warning system itself. Attorney Rothstein stated that this may be the case, and noted that in about a month, the heads of the attorney discipline committees are going to meet to talk about warnings.

Attorney DeVito also spoke to the issue of warnings and stated that she believes that if warnings are going to be part of the attorney discipline system, she does not see any reason that they should be any less public than everything else. She stated that the Court would be moving away from the idea of a transparent discipline system if it were to say that all of the sudden, one of the ways a case can end is going to be private. If the issue is whether warnings are a good idea, that is a separate issue, but while they still exist, Attorney DeVito does not endorse the idea that they should be any less public than any other kinds of files maintained by the ADO. She also explained why she believed that warnings should continue to be made available on the ADO website.

Attorney DeVito also addressed the issue of whether the Attorney Discipline Office should be required to maintain files of grievances it did not docket if a change is made to the rules, as has been proposed, to make the non-docketed grievances confidential. She stated that if the Committee and the Court want the ADO to continue to make these available to the public in the manner they are (i.e., available at the ADO), then the ADO is happy to oblige. However, if the Court does not want them to be available to the public, then it does not seem to make sense to keep them for two years.

Carolyn Koegler noted that in a letter dated June 4, 2014, Attorney Saturley wrote in support of the proposed change to Rule 37(20), concerning non-disciplinary decisions with a warning.

(7) Amend Supreme Court Rule 37A(IV) to make all grievances not docketed as a complaint confidential, and to require that non-disciplinary decisions with warning be retained for a period of five years and non-disciplinary decisions without warning be retained for a period of one year, as set forth in Appendix H.

Attorney DeVito stated that she does not have a strong feeling about whether findings of no professional misconduct should be kept in the public file for a year or three years, but noted that the rules should be consistent throughout.

Attorney DeVito inquired about the proposal that says that final disciplinary decisions of the PCC or the Court will go on the ADO website, and what this means. Does this include PCC recommendations of greater than six months suspension?

Attorney DeVito inquired whether the language stating that "paper records may be destroyed after three years . . . " could be changed to "paper and electronic records."

(8) Amend Supreme Court Rule 37(20)(a) to eliminate the requirement that the Attorney Discipline Office retain and make available to the public letters sent to grievants who file complaints against individuals who are not subject to the rules, as set forth in Appendix I.

No comments were offered on agenda item (8).

(9) Amend Supreme Court Rule 37A(IV) to eliminate the requirement that the Attorney Discipline Office make available to the public letters sent to grievants who file complaints against individuals who are not subject to the rules, as set forth in Appendix J.

No comments were offered on agenda item (9).

(10) Amend Supreme Court Rule 37(20) and delete Supreme Court Rules 37(21) and 37(23) to reorganize the "pre-2000" and the "post-2000" confidentiality and public access rules into a single, unified rule, create retention rules and add a provision to make clear that upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the PCC, as set forth in Appendix K.

No comments were offered on agenda item (10). Justice Lynn noted that this was essentially a grandfathering provision that is no longer necessary.

(11) Amend Supreme Court Rule 37A(IV) as part of the reorganization of the confidentiality and public access rules into a single, unified rule, as set forth in Appendix L.

No comments were offered on agenda item (11).

(12) Amend Supreme Court Rule 37(9) to make clear that suspension pending final disciplinary proceedings when a certified copy of a court record is filed that indicates that the attorney has been convicted of a serious crime is immediate and summary, as set forth in Appendix M.

No comments were offered on agenda item (12).

(13) Amend Supreme Court Rule 37A(II)(d) to delete the provision relating to "Conviction of Crime; Determination of Serious Crime," as set forth in Appendix N.

No comments were offered on agenda item (13).

(14) Amend Supreme Court Rule 37 to adopt a new subsection (9-A) to provide that the Attorney Discipline office may file a petition for interim suspension alleging that an attorney has engaged in conduct that poses a substantial threat of serious harm to the public, and sets out the process to be followed when such a petition is filed, as set forth in Appendix O.

No comments were offered on agenda item (14).

(15) Amend Supreme Court Rule 37A(II)(a)(7) to allow for the waiver of formal proceedings and the filing of stipulations as to facts, rule violations and/or sanction, as set forth in Appendix P.

No comments were offered on agenda item (15).

(16) Amend Supreme Court Rule 37A(III) to expand upon the rules governing the use and effect of both dispositive and partial stipulations in attorney discipline proceedings, as set forth in Appendix Q.

No comments were offered on agenda item (16).

(17) Amend Supreme Court Rule 37A(I) to add a new subsection (j) to make clear that complainants are not parties to disciplinary matters, as set forth in Appendix R.

Attorney DeVito spoke to this issue and noted that that the proposal specifically says that the complainant is not a party. Under the rules, the grievant is renamed the complainant once the grievance is docketed. This proposal clarifies that a grievant does not acquire rights similar to a plaintiff in a lawsuit by becoming the complainant in a docketed case.

(18) Amend Supreme Court Rule 37A(III)(b) to eliminate the requirement that disciplinary counsel forward a copy of the entire file to the panel, and to add the requirement that disciplinary counsel provide the respondent with bates-stamped copies of all relevant documents at the time of filing of the notice of charges, as set forth in Appendix S.

No comments were offered on agenda item (18).

(19) Amend Supreme Court Rule 37A(I)(i) to require that a grievance be filed within one year of the conclusion of a civil proceeding involving the same conduct, as set forth in Appendix T.

No comments were offered on agenda item (19)

(20) Amend Supreme Court Rule 37(9), to require that any attorney who has been convicted of a crime shall notify the court within ten days of sentencing on the conviction as set forth in Appendix U.

No comments were offered on agenda item (20)

(c) Supreme Court Rule 50 – Trust Accounts

(1) Amend Supreme Court Rule 50(1)(C) to require lawyers to direct a depository institution to provide the New Hampshire Attorney Discipline Office with a notice whenever a trust account contains insufficient funds or shows a negative balance, as set forth in Appendix V.

Attorney John Funk spoke on behalf of the New Hampshire Banker's Association. Christiana Thornton, President and Tom Fahey, Vice President of the New Hampshire Bankers' Association were also present at the public hearing. Attorney Funk stated that the Bankers' Association is concerned that if through some inadvertence or error a notice were not timely given, then there could be some potential liability, i.e., that the clients of a law firm could assert that, had the bank given the notice in a timely manner, all of the harm that followed from that point would not have occurred. So, he put together some language to be considered by the Committee.

The Banker's Association proposal begins with the standard language set forth in the public hearing notice, and reads as follows (the amendment to the proposal put out for public hearing that is proposed by the Banker's Association is in **[bold and in brackets]**):

> (iv) to provide the New Hampshire Attorney Discipline Office with a notice whenever a trust account contains insufficient funds or shows a negative balance. Such notice shall be a duplicate of the standard depository institution notice provided to the customer. The Attorney Discipline office will determine what investigation and further action may be appropriate. **[The direction to a depository institution to provide a copy of the notice to the Attorney Discipline Office is between the depository institution and the lawyer, law firm or other acting on its behalf only. This requirement is for the sole purpose of alerting the Attorney Discipline Office that there has been an overdraft of the trust account. It is not the intention of this requirement to create any direct or third party beneficiary rights.]**

Attorney Funk explained that the idea of the proposal is to express an intent that this was really a mechanism to allow the attorney discipline office to discover that there is an overdraft and then engage in any investigation it

thinks is appropriate in the matter. This additional language makes it clear that this is a narrow rule and is not intended to create any rights beyond that.

Attorney DeVito spoke to this issue and stated that she supports this proposal. She stated that the ADO has found in some of its audits that had it known that some lawyers were getting NSF notices on their client trust checks earlier, the ADO might have been able to stop the attorneys from taking money from more people. Attorney DeVito is comfortable with the New Hampshire Banker's association proposed amendment to the proposal.

Justice Lynn closed the public hearing. He noted that while the public hearing was closed, the meeting would also be public, and that people were welcome to stay and observe the meeting.

2. Discussion and Vote on Public Hearing Items

(a) 2013-019. Depositions: Notice or Subpoena Directed to An Organization

Following brief discussion, and upon motion made by Attorney Rice and seconded by Judge Cullen, the Committee voted to recommend that the Supreme Court adopt the proposed amendments to Rule 26 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions.

(b) 2013-003. Attorney Discipline: Supreme Court Rules 37 and 37A

Attorney Rice noted that there are a number of items relating to Attorney Discipline that the Committee would probably be inclined to vote to recommend that the Supreme Court adopt, but that there were several items that would warrant further discussion and/or that the Committee would likely not be inclined to recommend at this time. She stated that for efficiency sake, it might make sense for the Committee to identify those items it is prepared to vote on and to move to vote to recommend those items, and then to consider the remaining items not voted upon, in turn. Committee members agreed that this approach made sense.

(1) Items Committee Voted To Recommend Without Amendment

Upon motion made by Attorney Rice and seconded, the Committee voted to recommend that the Supreme Court:

- amend Supreme Court Rule 37A(III)(b) to make prehearing conferences mandatory, add details regarding exhibits, and change the timing in two provisions, as set forth in Appendix F of the public hearing notice (agenda item 1(b)(5));

- amend 37(20) and delete Supreme Court Rules 37(21) and 37(23) to reorganize the "pre-2000" and the "post-2000" confidentiality and public access rules into a single, unified rule, create retention rules and add a provision to make clear that upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the PCC, as set forth in Appendix K of the public hearing notice (agenda item 1(b)(10));
- Amend Supreme Court Rule 37A(IV) as part of the reorganization of the confidentiality and public access rules into a single, unified rule, as set forth in Appendix L of the public hearing notice (agenda item 1(b)(11));.
- Amend Supreme Court Rule 37(9) to make clear that suspension pending final disciplinary proceedings when a certified copy of a court record is filed that indicates that the attorney has been convicted of a serious crime is immediate and summary, as set forth in Appendix M of the public hearing notice (agenda item 1(b)(12));.
- Amend Supreme Court Rule 37A(II)(d) to delete the provision relating to "Conviction of Crime; Determination of Serious Crime," as set forth in Appendix N of the public hearing notice (agenda item 1(b)(13));
- Amend Supreme Court Rule 37 to adopt a new subsection (9-A) to provide that the Attorney Discipline Office may file a petition for interim suspension alleging that an attorney has engaged in conduct that poses a substantial threat of serious harm to the public, and sets out the process to be followed when such a petition is filed, as set forth in Appendix O of the public hearing notice (agenda item 1(b)(14));.
- Amend Supreme Court Rule 37A(II)(a)(7) to allow for the waiver of formal proceedings and the filing of stipulations as to facts, rule violations and/or sanction, as set forth in Appendix P of the public hearing notice (agenda item 1(b)(15));.
- Amend Supreme Court Rule 37A(III) to expand upon the rules governing the use and effect of both dispositive and partial stipulations in attorney discipline proceedings, as set forth in Appendix Q of the public hearing notice (agenda item 1(b)(16));.
- Amend Supreme Court Rule 37A(I) to add a new subsection (j) to make clear that complainants are not parties to disciplinary matters, as set forth in Appendix R of the public hearing notice (agenda item 1(b)(17));.
- Amend Supreme Court Rule 37A(III)(b) to eliminate the requirement that disciplinary counsel forward a copy of the entire file to the panel, and to add the requirement that disciplinary counsel provide the respondent with bates-stamped copies of all relevant documents at the time of filing of the notice of charges, as set forth in Appendix S of the public hearing notice (agenda item 1(b)(18)).
- Amend Supreme Court Rule 37A(I)(i) to require that a grievance

be filed within one year of the conclusion of a civil proceeding involving the same conduct, as set forth in Appendix T of the public hearing notice (agenda item 1(b)(19)).

- Amend Supreme Court Rule 37(9), to require that any attorney who has been convicted of a crime shall notify the court within ten days of sentencing on the conviction as set forth in Appendix U of the public hearing notice (agenda item 1(b)(20)).

The Committee turned next to discussion about the remaining items.

(2) Agenda Item 1(b)(1) (Rule 37(16)).

Justice Lynn reminded the Committee that item 1(b)(1) is a proposal to amend Rule 37(16) to allow disciplinary counsel to participate separately in Supreme Court disciplinary proceedings if the PCC recommends greater than a six month suspension and disciplinary counsel believes that the PCC's decision is based on a clearly erroneous factual finding or is erroneous as a matter of law. Justice Lynn reminded the Committee that there had been some discussion at the March meeting about the propriety of the PCC and the ADO being separate parties in the appeal, and some questions about whether PCC is an adjudicatory body.

Judge Delker stated that one way to address the concern would be to eliminate the PCC as a party with an obligation to file. He suggested that the proposal be amended to say that when the PCC makes a recommendation to impose discipline of greater than six months, it shall file the record and the underlying pleadings with the Supreme Court. The Supreme Court would then issue orders of notice and a briefing schedule.

Following some discussion of the proposed amendment, and upon motion made by Justice Lynn and seconded by Attorney Rice, the Committee voted to recommend that the Supreme Court adopt the proposed amendment to Supreme Court Rule 37(16), as amended.

(3) Agenda Items 1(b)(2) and (3) (Rules 37(19-A) and 37A(I)(e))

The Committee next considered the proposal to amend the attorney discipline rules to authorize the Professional Conduct Committee or the Court to order a respondent attorney to forfeit legal fees or pay restitution as a sanction for misconduct.

Justice Lynn noted the proposed amendment currently allows the PCC to order not just disgorgement of fees, but also restitution. He stated that he agrees with Attorney Rothstein, who spoke at the public hearing, that he would be comfortable authorizing the PCC to require a respondent to disgorge fees

and return money wrongfully obtained from a client, but does not feel comfortable authorizing the collection of other kinds of damages.

Following some discussion of the issue, Attorney Rice noted that it appeared that most members of the Committee agreed the types of damages awarded in a tort case should not be permitted in the attorney discipline context, but that the PCC should be authorized to require a respondent attorney to return client funds or property and to disgorge fees.

Attorney Gordon stated that he does not agree that money should be involved in the attorney discipline system at all. He believes that it creates perverse incentives and he notes that the distinction between tort damages and mere disgorgement of fees is not always clear. He stated that he represented Tim O'Meara in O'Meara's Case, 164 N.H. 170 (2012) and noted that in that case, disgorgement of fees is a "can of worms," because how to measure the fee in that case is "anyone's guess." Identifying what pieces of property are client property creating an obligation to return would require fact finding. Attorney Gordon finds this troubling, and notes that he has a general opposition to mixing up fees and attorney regulation. Derek Lick stated that he agreed with Attorney Gordon.

Justice Lynn noted that the rule would not require the PCC to order disgorgement of fees or return of client property, it would just grant the PCC the authority to do so. He notes that most states do allow some sort of disgorgement.

Further discussion ensued regarding whether this kind of an amendment creates an expectation that the PCC might not be able to deliver on and what the mechanism would be to enforce such awards. Attorney Rice stated that the issue is further complicated by the fact that the recipient of the disgorged funds is not a party to the proceeding, and also that this creates a potential insurance nightmare, as noted in the letters submitted by Attorneys Hilliard and Saturley. She believes that the Committee simply does not have enough information to analyze this issue.

Attorney Herrick stated that her subcommittee had tried to draft a rule to allow for the disgorgement of fees and were aware that the PCC would have to be involved in the collection. The PCC was not thrilled about the prospect of having to enforce payment to third parties. In other states, as Attorney DeVito stated during the public hearing, disgorgement is often tied to reinstatement.

Justice Lynn stated that it did not appear that the Committee is prepared to vote to recommend the proposal. He asked Carolyn Koegler to draft some language that would allow for the disgorgement of fees and other client property, but would not allow for other kinds of restitution, to assign this matter a new docket number, and to add the matter to the September agenda.

(4) Agenda Item 1(b)(4) (Rule 37(8))

Committee members next discussed the proposal to amend Rule 37(8) to authorize attorneys in the attorney discipline office to issue subpoenas during the investigative stage of a proceeding. Judge Delker noted that this power is not limited to subpoenaing documents. Justice Lynn reminded the Committee that, as the proposal is currently drafted, only the ADO has the authority to issue subpoenas during the investigative stage, but that both the ADO and the respondent have that authority after the Notice of Charges has been issued.

Judge Delker noted that Rule 37(8)(a) language allows the ADO to subpoena someone to appear at the ADO office (as opposed to the power to subpoena someone to appear before the hearing panel). He noted that this is because they may need to subpoena a third party. He is not concerned about how the ADO might use this power, but he is concerned about giving this kind of power to non-public employees, due to concerns about potential abuse of the power.

Jeanne Herrick noted that this power already exists under the rules. She proposed that one way to address the concern Judge Delker raises is to require notice to all other parties that the subpoena has been issued. Judge Delker agreed that this would satisfy the concern.

Upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt the proposed amendment to Supreme Court Rule 37(8), as amended to include as the last sentence of section (b), "Notice of the issuance of any subpoena shall be served on the opposing party".

(5) Agenda Items 1(b)(6) and (7)(Rules 37(2) and 37A(IV)

Committee members next addressed the questions of whether the Supreme Court Rules should be amended to: (1) make available for public inspection all final decisions of the PCC on docketed matters, to keep all non-docketed matters confidential, and to make all "non-disciplinary decisions with warning" confidential but retained for review by the Attorney Discipline Office and the Professional Conduct Committee; and (2) make all grievances not docketed as a complaint confidential, and to require that non-disciplinary decisions with warning be retained for a period of one year.

Judge Delker stated that he is opposed to retrenching on the confidentiality rules. He noted that the issue with respect to warnings is really about whether it is appropriate to use them at all, not whether they should be public or not. Judge Lynn stated that the issue does really seem to be whether there should be "warnings" at all. There is some concern that the warnings provide the board with an easy "out." That is, a way to say, "we don't think you

did anything wrong, but . . . ." Attorney Rice stated that what is also troubling about the warnings is that there is no redress for the respondent attorney. She is also concerned that if these warnings are made confidential, there might be an increase in the number of warnings given.

Justice Lynn suggested that warnings should only be given if the matter is heard by the PCC. Attorney Herrick noted that this would call for a change to the definition of "warning," which could be done.

Attorney Lick stated that he shares Attorney Rice's concerns about warnings and stated that they are particularly problematic because they are posted on the Attorney Discipline Office website. He opined that members of the public are likely to believe that since the warnings are posted on the website, then the attorney has been disciplined.

Attorney Taylor stated that the Committee had recently recommended the JCC's proposal to amend Supreme Court Rule 40 to the Supreme Court. One of the changes made to Supreme Court Rule 40 involved changing the term "warning" to "caution." This change was prompted, in part, by the belief that the word "warning" has a negative connotation.

Attorney Herrick stated that many other professional boards in the state, such as the Board of Medicine, use confidential letters of warnings. She stated that the Board of Medicine issues letters that state, essentially, "this is not misconduct, but if you continue this practice, this could become a problem." She noted that it appears that every other professional in the state who receives a warning is protected by rules requiring the warning to remain confidential. She stated that this is not true for judges who receive letters of caution (which are not confidential), but that this is appropriate in light of the public trust of judges. However, it is not clear that this should be true for attorneys.

Judge Delker noted that following the crisis in 2000, a number of changes were made in the court system to make more things public, in order to address the very real perception that in policing itself, the court was protecting itself. Making warnings confidential goes against this public policy decision and undermines the goal of instilling public confidence in attorneys and the judicial system.

Attorney Rice noted that there does not appear to be a consensus in the group about whether warnings should be kept confidential, but there does appear to be a consensus that the warning system is a problem.

Attorney Lick stated that he believes that it would be ok for the system to include warnings, but that if they are included, they should be kept

confidential. He noted that members of the Bar are very concerned about the posting of a select set of non-docketed matters (i.e., warnings).

Justice Lynn noted that it appeared from the comments that Attorneys DeVito and Rothstein offered at the public hearing, that they see problems with the warnings issue. He inquired whether it might make sense for the rules to allow for warnings, but only to be issued by the PCC. Attorney Herrick stated that there would be no need for the PCC to issue a separate warning as such, as it would be included in the PCC decision.

Attorney Rice noted that it appeared from the comments made by Attorneys Devito and Rothstein that the ADO and the PCC might be reexamining the warning process.

Upon motion made by Judge Delker and seconded, the Committee voted to recommend that the Court: (1) not amend the confidentiality rules as proposed in appendices G and H of the public hearing notice; but (2) consider eliminating the warning process.

Attorney Gordon voted against this recommendation.

(5) Agenda Items 1(b)(8) and (9)(Rules 37(20)(a) and 37A(IV)

Committee members briefly discussed the proposal to amend the rules to eliminate the requirement that the Attorney Discipline Office make available to the public letters sent to grievants who file complaints against individuals who are not subject to the rules.

Upon motion made and seconded, the Committtee voted to recommend that the Supreme Court amend rules 37(20)(a) and 37A(IV) as set forth in appendices I and J of the public hearing notice.

(c) 2013-003. Supreme Court Rule 50 – Trust Accounts

The Committee next discussed the proposal to amend Supreme Court Rule 50(1)(c) to require lawyers to direct a depository institution to provide the New Hampshire Attorney Discipline Office with a notice whenever a trust account contains insufficient funds or shows a negative balance.

It was noted that the Committee had received a comment about the proposal from the New Hampshire Bankers Association. A May 30, 2014 letter from the Bankers Association expressed concern about exposing banks to liability of they are negligent in providing the notice and setting forth an alternative proposal. The Bankers Association submitted a second alternative proposal to the Committee at the meeting, as follows (proposed language to be added to the proposal is in **[bold and in brackets]**):

(iv) to provide the New Hampshire Attorney Discipline Office with a notice whenever a trust account contains insufficient funds or shows a negative balance. Such notice shall be a duplicate of the standard depository institution notice provided to the customer. The Attorney Discipline office will determine what investigation and further action may be appropriate. **[The direction to a depository institution to provide a copy of the notice to the Attorney Discipline Office is between the depository institution and the lawyer, law firm or other acting on its behalf only. This requirement is for the sole purpose of alerting the Attorney Discipline Office that there has been an overdraft of the trust account. It is not the intention of this requirement to create any direct or third party beneficiary rights.]**

Following brief discussion of the issue, the Committee voted to recommend that the Supreme Court adopt the proposal, as amended.

3. Approval of Minutes of March 14, 2014 Meeting

Upon motion made by Judge Cullen and seconded, the Committee voted to approve the March 14, 2014 minutes.

4. Status of Pending Items

a. District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure and Probate Administration

Judge Cullen noted that this project is currently on hold.

b. 2012-010(1) and (2). District Court Rules. Need for procedure to ensure that counsel is available for indigent defendants at arraignments in the district court.

At the March meeting, the Committee agreed that it makes sense for the rules adopted on a temporary basis by Order dated February 20, 2014, effective April 1, 2014, to remain in place for a period of time before they are put out for public hearing.

Justice Lynn noted that the Committee had received a letter dated March 19, 2014 from the Office of the Plymouth Area Prosecutor "offering the following comments on the proposed changes to Circuit Court Rules 2.20 Pre-Arraignment Notice Regarding Availability of Counsel at Arraignment, Rule 2.21, Scheduling of Arraignments, Rule 2.22, Filing of Complaints, and Rule 2.23, Appointment and Presence of Counsel at Arraignment."

Judge Cullen stated that he believes that Judge Kelly needs some time to address the issues that are raised in the letter, and notes that, if some minor changes need to be made, they should be made.

Justice Lynn stated that he agrees that it is important to leave the rules in place for awhile before making any changes. He stated that his principal concern about the issues raised in the March 19 letter related to Attorney Nizetic's suggestion that because the rules now require that lawyers be appointed earlier in the process, this creates a risk that a lot of lawyers will be appointed, even in cases in which the State does not elect to proceed with a Class A misdemeanor. However, Justice Lynn stated that he had contacted Attorney Randy Hawkes to inquire whether he believes that this has become a problem. Attorney Hawkes stated that this is not a big problem.

Attorney Gordon stated that another concern set forth in the letter was that "the provisions in Rule 2.20 requiring a bail commissioner to provide financial affidavits to arrestees and have them complete them can present logistical problems for small agencies." He asked whether this was a concern. Judge Cullen stated that Judge Kelly has received no complaints about this. Pat Ryan stated that the rule requires the bail commissioner to request that the defendant complete the financial affidavit. It does not require the bail commissioner to make sure that the defendant completes one.

The Committee generally agreed that the issues raised in the letter are not pressing, and that Judge Kelly is aware of the issues, and will look into them.

c. 2012-021. Superior Court Administrative Rules. "Rules Clean-up."

Attorney Taylor recommended that the Committee repeal Administrative Rules 11-1, et. seq. He explained that the rules were set up under an entirely different statutory scheme, and now no longer apply.

Upon motion made and seconded, the Committee voted to recommend that the Court repeal Superior Court Administrative Rules 11-1 et. seq.

d. 2013-003. Interlocutory Appeals.

The Committee was reminded that the Court has asked the Committee to consider whether a rule amendment should be adopted that provides a mechanism for the trial court to certify (either on its own, or on motion, or both) that an order that would otherwise be interlocutory is final and immediately appealable. According to the January 8, 2013 memorandum from

David Peck to Carolyn Koegler, the Court's request was prompted by a recent appeal.

Because Attorney Ardinger was not present at the meeting, the Committee took no action on this item.

e. 2013-010. ABA Commission on Ethics

Carolyn Koegler reported that at the Committee's request, she had forwarded Attorney Goodwin's October 23, 2013 letter to the Professional Conduct Committee, requesting comment on the Ethic's Committee's recommendation with respect to each revision made to the ABA Model Rules. She stated that Attorney Rothstein had responded to the request by letter dated May 22, 2014. Attorney Rothstein reported that the PCC had only one concern about the Ethics Committee's proposal.

For the reasons set forth in the May 22 letter, the PCC recommends not adding a sentence proposed by the Ethics Committee to Comment [4] of Rule 1.4 of the ABA model. Comment [4] states that a "lawyer should promptly respond to or acknowledge client communications." The Ethics Committee recommends adding the sentence "A lawyer need not necessarily respond to or acknowledge client communications where such response or acknowledgement is impractical, unreasonable, or inappropriate." The Professional Conduct Committee believes that this sentence "undercuts the clarity of the ABA's statement of a lawyer's basic obligations with regard to client communications," and should therefore be removed from the Ethics Committee proposal.

Following brief discussion, and upon motion made and seconded, the Committee voted to put the Ethics Committee's recommendations to amend the New Hampshire Rules of Professional Conduct, set forth in the October 23, 2013 letter from Attorney Rolf Goodwin, out for public hearing, as amended to remove the sentence, "A lawyer need not necessarily respond to or acknowledge client communications where such response or acknowledgement is impractical, unreasonable, or inappropriate."

f. 2013-013. Deadlines for Filing Motions to Suppress

Justice Lynn reminded the Committee that the Court had asked it to consider whether the Court should adopt a rule creating a deadline for motions to suppress in delinquency cases, and that he had agreed at the September meeting to draft a proposed rule. He reported that he had drafted a proposed rule, and that he had engaged in some email discussions with a number of people about it. These exchanges prompted discussion about the large number of changes underway at the Circuit Court.

Justice Lynn noted that Judge Kelly is currently in the process of implementing e-filing at certain Circuit Court locations, and that the Supreme Court had approved new Rules of Criminal Procedure for all courts, but that they have not yet been adopted. He also stated that the Superior Court is in the process of making a number of changes to how criminal cases are handled in the Superior Court. In light of all of this, Justice Lynn stated that it would be important for the Court to: (1) set a firm date for when the new criminal rules would be adopted; and (2) ask the members of the Committee that drafted the new criminal rules (Richard Guerriero, etc.) to update the proposed new rules to incorporate the changes that had been made to the existing criminal rules into the new rules.

In light of all of this, Justice Lynn recommended that the Committee take no action on the following items: 4(f) (2013-013 "Deadlines for Filing Motions to Suppress"), 4(h) (2014-002 "Superior Court (Crim.) Rule 98"), and 5(b)(2014-002 "Superior Court (Crim.) Rule 98"). The Committee agreed to take no action on these items.

g. 2014-001. Supreme Court Rule 7. References to "the clerk's written notice of the decision on the merits."

Justice Lynn reminded the Committee that it had received a February 18, 2014 memorandum from Carolyn Koegler to the Committee stating that a staff attorney at the Court had requested that the Committee consider whether an amendment should be made to Supreme Court Rule 7 to address a concern about references to the "clerk's written notice of the decision on the merits." According to the memorandum, the staff attorney identified the issue as follows:

> . . . . in a sentencing order, there may not be a "clerk's written notice." Nor is there often a "clerk's written notice" in circuit court cases. Although Rule 7(1)(C) makes clear that "the time for filing a notice of appeal" in a criminal case "shall be within 30 days from the date of sentencing or the date of the clerk's written notice of disposition of post-trial motions, whichever is later," unless the post-trial motion is filed more than 10 days after sentencing, and although Rule 3 defines a "[d]ecision on the merits" to include a criminal sentence, the references in Rules 7(1)(A), (B), and 7(2) to "the clerk's written notice of the decision on the merits" may create some confusion for defendants who may think that they can wait until the clerk actually signs the mittimus before filing their criminal appeal.

Justice Lynn proposed that the language, "or, in the case of a

sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is imposed" be added to the last sentence of Supreme Court Rule 7(1)(B) and at the end of Rule 7(2).

Upon motion made and seconded, the Committee voted to put the proposal out for public hearing.

h. 2014-002. Superior Court (Crim.) Rule 98

See discussion at (f).

5. New Submissions

a. 2014-003. Supreme Court Rule 56 (Judicial Performance Evaluations).

Carolyn Koegler reminded the Committee that it had received an April 14, 2014 memorandum from Justice Conboy to Justice Lynn, advising him that RSA 490:32, regarding judicial performance evaluations, had been amended to eliminate the requirement that the Supreme Court's annual report include a summary of the overall evaluation results for each judge evaluated. She noted that, given the amendment, Supreme Court Rule 56 should also be amended. She stated that given the statutory change, she believes that the changes in the rule are simply "technical changes" that may be made as soon as possible.

Following brief discussion, the Committee concluded that the proposed changes to Supreme Court Rule 56 are simply technical changes, and that no public hearing was required. Upon motion made and seconded, the Committee voted to recommend that the Court make these technical changes immediately.

b. 2014-004. Superior Court Rules (Crim.). Initial Appearance Pilot Project Rules for Strafford and Cheshire County Superior Courts.

See discussion at (f).

c. 2014-005. Electronic Filing Pilot Rules

Carolyn Koegler explained that by Order dated June 2, 2014, the Supreme Court adopted the Electronic Filing Pilot Rules, Circuit Court – District Division Small Claims Action Pilot Rules, and amended Circuit Court – District Division General rules, on a temporary basis. She reminded the Committee that these were the same rules and rule amendments that had been the subject of the March public information session. After receiving comment in March, the group that had drafted the rules and rule amendments made some changes to the draft rules and rule amendments, and submitted them to

the Court for approval. The draft electronic filing pilot rules and rule amendments will become applicable in the district divisions in Concord and Plymouth upon the issuance of an administrative order from the circuit court administrative judge.

One Committee member noted that, given the fact that the rules will be in place on a pilot basis, it does not appear that any action is required by the Committee at this time. Other Committee members agreed, and the Committee took no action on this item.

d. 2014-006 through 2014-010. Superior Court Rules (Civ).

Carolyn Koegler reminded the Committee that she and Attorney Honigberg had submitted to the Committee in March a memorandum identifying a number of proposed amendments to be made to the Superior Court Civil Rules immediately. The Committee agreed in March that most of the proposed amendments were technical and voted to recommend them to the Supreme Court immediately, to ensure that the changes would be included in the next edition of the Lexis rule book. However, the Committee disagreed with the recommendation to delete Rule 31 ("Summary Jury Trials"). At the March meeting, the Committee directed Carolyn Koegler to assign new docket numbers to the proposed substantive amendments set forth in the August 15, 2013 memorandum and the proposal to delete Rule 31.

Carolyn Koegler explained that she had, as the Committee directed her to do, confirmed that the Superior Court agrees that the technical changes should be made now. Therefore, she submitted the proposals to the Court. The remaining substantive issues relating to the new superior court civil rules which are pending before the Committee are set forth in a June 4, 2014 memorandum to the Committee.

Following some discussion, Emily Rice agreed to chair a new subcommittee to address the issues set forth in the June 4, 2014 memorandum. She agreed to contact Carolyn Koegler prior to the September meeting to discuss the issues.

6. Meeting Dates

Following some discussion, the Committee agreed to change the date of the September 19, 2014 to September 12, 2014. The remaining 2014 meeting dates are:

September 12, 2014
December 12, 2014