NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of June 5, 2015

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, Esq., Karen Anderson (arriving at 12:45), Hon. Paul S. Berch, Hon. R. Laurence Cullen (arriving at 12:45), Hon. Will Delker, Joshua L. Gordon, Esq., Jeanne Herrick, Esq., Derek D. Lick, Esq., Maureen Raiche Manning, Esq., Patrick W. Ryan, Esq., Frederick H. Stephens, Jr., and Hon. Robert J. Lynn.

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

Justice Lynn began the meeting and welcomed new member Abigail Albee, Esq., the superior court clerk appointed to replace Attorney Ray Taylor. He also asked Committee members to introduce themselves to those present at the public hearing.

Justice Lynn began the meeting by noting that a number of items had been included in the public hearing notice that Committee members had not voted on at the last meeting, but were approved by Committee members who responded to an April 16, 2015 email from Carolyn Koegler. He asked Committee members if they would vote to take comment on the proposed rule changes set forth in Appendices A, F, J, and K of the public hearing notice dated April 24, 2015. Upon motion made by Representative Berch and seconded by Mr. Stephens, the Committee voted to take testimony on those proposals.

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 24, 2015 Notice of Public Hearing.

a. 2015-008. Supreme Court Rule 20. Copy of Opinion; Non-Precedential Status of Orders

These proposed amendments to Supreme Court Rule 20 would allow litigants to cite and discuss unpublished opinions, but also provide that they do not constitute binding precedent.

1. Amend Supreme Court Rule 20, Copy of Opinion; Non-precedential Status of Orders, as set forth in Appendix A of the public hearing notice.

Attorney Lawrence Edelman testified at the hearing in support of the proposed amendment. He noted that he had provided committee members with written comments in a letter dated June 3, 2015 that included research he did years ago in connection with a case he had in which another party had moved to strike one of the citations contained in a brief he had filed with the Supreme Court. The attorney on the other side wanted to strike the citation to a decision from a lower court in Washington state.

At the time, Attorney Edelman thought that the objection was extraordinary because even the highest courts of another state do not command what the courts of this state do. So, he objected and prevailed. But, attorney Edelman noted, the idea is that when attorneys or parties cite case law, except case law from the Supreme Court, they are citing cases from whatever court it is for its persuasive authority, not for its binding effect. Whether this is the Supreme Judicial Court of the Commonwealth of Massachusetts or any other New Hampshire Court, other than the New Hampshire Supreme Court, they are always citing those cases for their persuasive impact.

Attorney Edelman stated that he was glad to see that this new amendment had been proposed. The Supreme Court has issued more and more orders since appeals became mandatory 15 years ago. These are not "we have reviewed the record and find no error" sorts of orders. These are decisions that are thoughtful and contain an abundance of reasoning.

Attorney Edelman stated that years ago, he had a case before the New Hampshire Supreme Court titled *Smith v. Frisbee Memorial Hospital*. In a five page single spaced order (rather than an opinion), the Court presented its reasoning in support of a proposition that a conditional privilege or qualified privilege attached when someone in an employment relationship went to his or her employer to report sexual harassment. There was a qualified privilege against a defamation claim in the event that it was untrue. Attorney Edelman noted that the issue has not come before this Court or any other court in New Hampshire again, but some day it will, and that the idea that nobody is going to be able to refer to the order for any purpose, even for its persuasive authority, is mind-boggling. The fact that the New Hampshire Supreme Court

won't be able to look to it, much less cite it or acknowledge its existence, is really extraordinary. So, Attorney Edelman stated, this is a wonderful amendment that should be adopted as soon as possible. The courts in this state know when they are reading case law which cases are binding and which are to be considered only for their persuasive authority. All this amendment really does is open it up to a more public disclosure of what the reasoning really is. Attorney Edelman asked that the Committee to recommend the amendment to the Court for adoption.

In response to a question from attorney and Committee member Joshua Gordon, attorney Edelman stated that he believes there is an access gap, as far as attorneys' ability to find the orders. It is not clear that everyone has equal access to the case law. Right now, it is necessary to read through every order. However, he stated that he does not believe that it is necessary to wait for that to change before adopting the rule change.

b. 2015-004. Supreme Court Rule 28 - Parties' Designation

These proposed amendments to Supreme Court Rule 28 would make clear that in cases in which a statute or a rule of court requires that the name of a party be kept confidential, only the first letter of the forename and first letter of the surname of that party shall be listed.

1. Amend Supreme Court Rule 28, Parties' Designation, as set forth in Appendix B of the public hearing notice.

Justice Lynn explained that there has been some inconsistency in the way that the Supreme Court has designated parties in confidential cases and in other cases where they are talking about, for example, the victim of sexual abuse or something like that. In the past, sometimes the Court has used the first full name and the last initial, or sometimes just the initials. Some concern was expressed that in small communities or in matters that have gotten some attention in the media that even using the first name may make it too public, so the proposal is to use just the initials in any of those kinds of cases.

No comments on this proposal were submitted.

c. 2015-001. Supreme Court Rule 40(12) – Procedural Rules of the Committee on Judicial Conduct- Dispositions Following Hearing

These proposed amendments to Supreme Court Rule 40(12) would resolve an inconsistency in paragraph 12, which sets forth the procedure to be followed when the Judicial Conduct Committee determines that a judge has committed a serious violation of the Code of Judicial Conduct and would clarify two procedural issues.

1. Amend Supreme Court Rule 40(12), Procedural Rules of the Committee on Judicial Conduct – Dispositions Following Hearing, as set forth in Appendix C of the public hearing notice.

Justice Lynn explained that this proposal relates to dispositions following hearing before the JCC. He explained that at its meeting in March, the Committee had agreed to take comment on the proposed language set forth in the public hearing notice. Subsequently, the JCC submitted a comment on the proposed language and proposed new language to amend Supreme Court Rules 40(12) and 40(13), as set forth in a memo from Carolyn Koegler to the Committee dated May 25, 2015.

Dr. Robert Wilson, Chair of the Committee, explained that the JCC's proposed amendments to Supreme Court Rule 40(12)(c) and (d) and 40(13) make the sections of the rule consistent and help clarify the process for the JCC. There has been some thought that as currently written, there is some inconsistency about how the disposition should be completed. These amendments will remove the inconsistency.

Justice Lynn stated that he has reviewed the proposal and that it does seem to resolve any inconsistency. He inquired whether anyone had any questions for Dr. Wilson. No one had any questions.

d. 2015-005. Supreme Court Rule 42B - Character and Fitness Standards

One proposed amendment to Supreme Court Rule 42B would provide that an applicant for admission to the bar could be denied admission if he or she fails to sufficiently recognize the wrongfulness of his or her misconduct, even if the misconduct standing alone is not significant enough to be disqualifying. Additional proposed amendments would make technical and stylistic changes to the rule.

1. Amend Supreme Court Rule 42B, Character and Fitness Standards, as set forth in Appendix D of the public hearing notice.

Justice Lynn explained that the proposal is to amend the rule to add a provision that would say that the Character and Fitness Committee could recommend denial of admission of a candidate for the bar if the person had some prior instances of minor wrongful conduct that would not disqualify him or her, but the person failed to take responsibility for the misconduct.

Sherry Hieber, General Counsel, Office of Bar Admission testified on behalf of the Character and Fitness Committee. She provided a background of the Character and Fitness process. She stated that admission to the New Hampshire Bar is governed by New Hampshire Supreme Court Rule 42. Under

that rule, the Supreme Court Committee on Character and Fitness is charged with the duty to investigate the character and fitness of all applicants to the bar and to make recommendations to the Court on their character and fitness. The Committee is made up of 9 people – a representative of the Supreme Court, a member of the professional conduct committee, someone from the attorney general's office, a member of the board of bar examiners, three attorneys in private practice and two lay members. All applicants to the bar provide very detailed background information about themselves relating to many different issues - their financial responsibility, their criminal background and their litigation background, for example. They are asked a series of questions, and the Office of Bar Admissions follows up and obtains more information from those who have something problematic in their background.

The Character and Fitness Committee considers the people that have a problem in their background. Some of those people are called before the Committee for an informal interview and after that interview, the Committee can vote to make a negative recommendation, a positive recommendation, or a deferral. Many times people are deferred to show, for example, a period of sobriety. The standards that govern the Committee's review of the applicants are contained in Supreme Court Rule 42B, the character and fitness standards. These have been in existence since 2006. A great deal of work went into developing the standards. Attorney Hieber stated that the Character and Fitness Committee is quite proud of the standards on a national level. They are well-respected within the field of bar admissions.

Attorney Hieber stated that her office had had a couple of incidents which are outlined in her letter to Justice Lynn that prompted the Character and Fitness Committee to look at the New Hampshire standards again. That reexamination resulted in this proposed amendment. There was also a case from Ohio that raised concern, and a couple of other cases that have come up. In addition, the Character and Fitness Committee had a particularly troubling applicant who came before the Committee recently. As a result, the Committee felt that it should have a standard that would allow it to use an applicant's lack of insight into the wrongfulness of his or her conduct as a basis to recommend against his or her admission to the bar, even if the underlying conduct itself would not provide a basis for denying the applicant admission to the bar. Attorney Hieber noted that this would be an extremely rare occurrence involving conduct that shocks. She told Committee members that she is not able to share the details of cases, as they are confidential, but if she were able to do so, Committee members would be shocked by the facts of the case that recently came before the Character and Fitness Committee. Attorney Hieber stated that the Committee would like to be able to look at a person and see whether he or she has any comprehension that what he or she did was wrong. She stated that some people simply do not get what is wrong with what they have done, and the Character and Fitness Committee needs to be able to have

a dialogue with the Court about that lack of insight in an applicant. That is the basis of the proposed rule.

Attorney Hieber stated that Attorney Manning and Attorney Feltes had come to the Office of Bar Admissions a couple of weeks ago. They talked about the language of the rule the Character and Fitness Committee had proposed initially, discussed possible changes and pulled some of the language out of another part of the rule and altered it. She noted that she had emailed the new proposed language to Carolyn Koegler on June 1 and stated that the language is acceptable to the Character and Fitness Committee, and, hopefully, acceptable to the Advisory Committee on Rules.

Attorney Berch stated that he has a broad observation and question, and a very specific question. Regarding the broader question, Representative Berch asked whether attorney Hieber or the Character and Fitness Committee had put thought into the entire concept of adopting a subjective standard to decide whether someone is fit to practice law. He noted that he is able to understand objective standards – for example, situations in which an applicant has committed a felony or failed to file income tax – in these situations, these acts would form the basis for denying an application. But he has some concerns about using subjective standards which change over time and change from place to place. He stated that it might make sense to get away from entire concept of judging people on a moral basis. He asked whether there are jurisdictions in the United States that are more objective in what criteria there are to be admitted to the bar.

Attorney Hieber stated that there are jurisdictions with standards that say, for example, if you have committed a felony, you cannot be admitted to the bar. There are jurisdictions with those kinds of standards. However, she believes that the New Hampshire standards of reflecting on what the person has done and when he or she did it are better. She noted that the Character and Fitness Committee has considered a lot of applicants who have in their records what the Character and Fitness Committee believes to be bad behavior – criminal behavior. The question for the Character and Fitnesss Committee, however, is what is the applicant's *current* character and fitness. The Character and Fitness Committee is considering an applicant's *current* character and fitness, and there is an issue about what the applicant did 20 years ago, the only option before the Committee is to try to evaluate who is this person before the Committee now.

Attorney Berch stated that he was questioning the whole concept of having the group decide whether an applicant is good enough morally or not. If someone committed trespass in a stalking context, that is one thing. If the person committed a trespass because he was protesting the Vietnam war and he goes before a Character Committee of the bar and a dozen people on the Character and Fitness Committee think trespassing to protest the war is the

worst thing you can do on earth, but another Committee in a different state sees it differently, this is the concern. That is, the subjective nature of determining whether someone can practice. Attorney Berch inquired whether the Committee had wrestled with this issue.

Attorney Hieber replied that the Character and Fitness Committee wrestles with every applicant over those kinds of issues. It is an incredibly professional committee with great judgment. Only a very small number of people who are interviewed are turned down for admission. Because the Character and Fitness Committee understands that someone who was convicted of trespass as a political protest is not the same as someone who is flagrantly violating the law or causing harm. The Committee makes those kinds of judgments all the time. This is a process of judgment, and if the Committee was to move away from judgments and just go to objective facts, then the rules would be "if you do X, Y or Z, then you are not going to be admitted."

Mr. Stephens inquired how the Character and Fitness Committee would handle a situation in which an applicant comes before the Character and Fitness Committee and says I did something wrong quite explicitly. Attorney Hieber stated that candor is probably the greatest attribute that the Character and Fitness Committee wants to see in an applicant to the bar. It is the most important thing. So, the Character and Fitness Committee views it as a positive when someone says "I did this, this is why I did it, I understand why you are worried, and here is why you don't need to worry anymore."

Mr. Stephens inquired whether it would be correct to conclude in such a scenario that the person would move forward and hopefully be recommended for admission to the bar. Attorney Hieber said that most people are recommended.

Attorney Manning stated that RSA 311:2 says, "any citizen of the age of 18 years, of good moral character and suitable qualifications, on application to the supreme court shall be admitted to practice as an attorney." She inquired whether the Committee Attorney Hieber works for was created to implement this law. Attorney Hieber replied that, yes, the Character and Fitness Committee has been charged by the Court to make this determination – that is, whether someone is of "good moral character." She agreed that it is the statute, not a Court rule, that gives the Court the responsibility of making a decision about an applicant's moral character.

Judge Delker stated that his concern about the proposed rule amendment relates to its appealability and asked attorney Hieber to consider a case in which someone does not admit that certain conduct was wrong, but that the conduct itself is not conduct that would otherwise disqualify. He asks how, in these circumstances, the Character and Fitness Committee determines

whether or not the person "sufficiently recognizes the wrongfulness of his or her conduct." For example, suppose someone said, "Judge Delker is the biggest buffoon in the world," and acknowledges that he says that, but refuses to apologize. In these circumstances, this is not an event that would disqualify the applicant, and the person is not remorseful, so how does the Character and Fitness Committee deal with that?

Attorney Hieber replied that if that were the issue before the Character and Fitness Committee, the incident would lead to a conversation with that person to get more information about this person and their interaction with the court in general. One statement would not necessarily result in a negative recommendation, but would open the door to further inquiry. Attorney Hieber does not believe that anyone on the Character and Fitness Committee would make a negative recommendation based on one statement. In the case of concern that prompted this proposal, there were numerous instances of bad behavior that continued after the application was filed that were related to the troublesome behavior and showed a pattern of impropriety. Judge Delker stated that he is having trouble understanding what that conduct might be. He noted that he understands that Attorney Hieber cannot disclose confidential cases, but asked whether Attorney Hieber might be able to describe, hypothetically, what kind of behavior by an applicant would raise a concern where the underlying conduct is not itself disqualifying. Judge Delker stated that he is having difficulty thinking of what kind of repeated bad behavior would not fall under the existing rules to itself disqualify the applicant.

Attorney Hieber stated that she is reluctant to get into the details of the particular case, but noted that the applicant's counsel was present at the meeting and might answer questions about the case.

A Committee member asked what the conduct in *Birch* was that was so concerning. Attorney Hieber stated that at issue in *Birch* was that the applicant failed to comply with law school course requirements, made comments in open court that were critical of the court, omitted relevant information about coursework in a conversation with the dean, and signed an instructor's name to a court document without authorization. She noted that those types of incidents standing alone wouldn't fit into the New Hampshire standards, but it is clear that the applicant in *Birch* was someone whose attitude was that the rules did not apply to her. The applicant would not accept responsibility for her actions and she had difficulty being forthright when asked direct questions. Attorney Hieber stated that there are just people, very rarely, who come before the Character and Fitness Committee, who have a serious lack of understanding of why their behavior is not acceptable. She noted that the Committee's ultimate goal is to protect the public, and that the Committee would never make a negative recommendation if it did not feel there was some threat to the public. This is not going to be a frivolous or casual situation where a negative recommendation is made. The Committee has not

given a negative recommendation since 2010. There have been circumstances in which some applicants are told that if the Committee had to vote that day, there would be a negative recommendation, and those applicants are given a period of time to perform some rehabilitative tasks to see if they can overcome the issues. But to make a negative recommendation is very rare.

Attorney Herrick asked how the process works if there is likely to be a negative recommendation. Attorney Hieber stated that the applicant is first told that the Character and Fitness Committee is intending to make a negative recommendation. If a report is made, it outlines all of the factors at issue and the applicant can then request a full due process hearing before the Committee. The applicant may be represented by counsel. All of the issues of concern to the Committee in the interview process are addressed. The person can put on all the evidence he or she wants to meet his or her burden to prove good character.

Attorney Gordon noted that one of the standards is conviction for drug problems. He asks whether if someone says I was arrested for smoking marijuana, and I do still smoke marijuana, this rule would cause an applicant to be denied. Attorney Hieber stated that the Committee would be concerned about someone who says not only did I break the law when I was young, but I am still breaking the law and I really don't care. This would be of concern to the Committee as officers of the court trying to protect the integrity of the system. Whether that alone would result in a negative recommendation, it is not clear what the Committee would do. But sometimes with someone like that there is more than just that.

Attorney Gordon noted that a member of the attorney general's office is present during the interview. In the context of an admission to a crime, that may raise a fifth amendment issue. It may be an applicant who is in an uncomfortable situation. Attorney Hieber noted that if someone comes in for an interview, that person is entitled to counsel. So anyone who has that kind of concern should bring counsel. She stated that that has not happened in her experience.

One Committee member inquired whether there is any concern that disclosure by an applicant in these circumstances could lead to some kind of criminal prosecution. Attorney Hieber stated that the process is confidential, but she is not sure whether this would mean that someone could not be prosecuted for something they admit to in the interview process.

Mr. Stephens inquired what the process is when, following the interview process, a negative recommendation is made. Can an applicant appeal? Attorney Hieber stated yes and explained that in these circumstances, the next step would be a full due process hearing with the Character and Fitness Committee. The Character and Fitness Committee would then make a second

recommendation. If they recommend to deny, the Court can accept the recommendation or issue an order to show cause why it shouldn't be accepted, in which case there would be a proceeding before the Court.

Mr. Stephens inquired whether, if the Character and Fitness Committee makes a negative recommendation, that is the last time a candidate can come before the Character and Fitness Committee, or can a candidate go through the process two or three years later. Attorney Hieber stated that that would depend on how the order is issued. The Character and Fitness Committee has the discretion to say "come back." Attorney Hieber stated that she has not dealt with that situation and so is not absolutely sure of the answer.

Attorney Manning noted that Attorney Hieber has served as General Counsel at the Office of Bar Admissions for four years. She asked whether Attorney Hieber has any sense of how many applications have been denied. Attorney Hieber stated that she was not sure but guessed perhaps one or two. She noted that some people have been deferred - typically those are people who have had a DUI arrest. She stated that the Committee likes to see a year of sobriety before approving an applicant. The application remains pending for a year. Sometimes the Committee requires other things.

One Committee member noted that while imagining possible scenarios that may not rise to the level of being disqualifying under the rules he thought of the example of an habitual speeder. Might an example of a situation in which this proposed rule would apply be one in which someone who receives 5-6 speeding tickets in short period of time expresses no concern about it because he or she "doesn't believe in the speed limit." Is this the type of person this rule might apply to? Attorney Hieber stated that many applicants are speeders, but that no one has ever been denied admission to the bar for speeding. The speeding issue would be considered along with the rest of the applicant. A person who has 20 speeding convictions combined with other things, *i.e.,* an OUI would perhaps be of concern. The Character and Fitness Committee would be concerned about an applicant who said something like, "I speed all the time, and I don't think the law applies to me." The Character and Fitness Committee might ask the applicant whether he or she can understand why the Committee might be concerned that the applicant does not seem to think that the law applies to him or her. It would be used as the way to begin a conversation with this applicant.

Attorney Gordon asked attorney Hieber whether the applicant's behavior in *Birch* - relating to the law school requirements, the comments in court, the fact that she omitted relevant information about her coursework and signed an instructor's name to a court document – would disqualify her under the current New Hampshire rules, regardless of the applicant's attitude. Attorney Hieber stated that when the Character and Fitness Committee looked at the facts in *Birch* and the rules, the Character and Fitness Committee did not think

the New Hampshire Rules captured the behavior in that case. She noted that the situation is fuzzy because, for example, the applicant wasn't formally convicted of forgery. Judge Delker inquired whether the rule regarding, "Acts involving fraud, dishonesty, deceit" would apply or whether the rule requiring the "ability to act diligently and reliably in fulfilling acts for others" would apply. Attorney Hieber agreed that there is no question that the behavior in *Birch* reflects negatively on the applicant, but in looking at the *Birch* facts, it did not appear to fit into any one of the New Hampshire categories.

Attorney Gordon inquired whether the use of the word "shall" in the RSA leads the Character and Fitness Committee to feel that most people have a right to be approved. Attorney Hieber noted that the rule says that the applicant has the burden to demonstrate good character and fitness.

Attorney Simon testified next. He is a professor emeritus at the University of New Hampshire School of Law and is of counsel at the Devine Millimet law firm. He stated that he was involved in one of the cases that prompted this proposal. However, that case has been resolved, so he is not testifying in a representational capacity. For the last 25 years he has been counseling law students who come in with many different kinds of misconduct, who are trying to figure out the Character and Fitness process. And because of that he has become fascinated by it. He urges the Advisory Committee on Rules not to recommend adoption of paragraph XII. His opposition to the proposal is based on three points: (1) the proposal is based on the faulty premise that a person's asserting his or her innocence will automatically impact on his or her fitness to practice law; (2) the current rules provide everything the Character and Fitness Committee needs to deal with an applicant whose refusal to acknowledge his or her wrongdoing says something about their character, as opposed to just their protestation of innocence; and (3) adoption of the rule would create a moral dilemma for bar admission applicants. It would send the message to bar applicants that if you tell the truth, that is, that you did not do what you pled to, then you might not be admitted to the bar.

Regarding the first issue, Attorney Simon stated that it is important to note that if an applicant commits any significant crime, there would be no need to consider proposed XII. What is at issue in proposed XII is minor offenses – for example, underage drinking. Attorney Simon stated that anyone who has or has had teenagers knows that young people that age may find themselves in groups that interface with police. For example, a person might attend a party with a bonfire at which some people are drinking, and some are not. If the police arrive, some of the kids might get swept up by the police, even if they have not been drinking. In these circumstances, oftentimes, the preferable resolution is to cut a deal early on. That is, to put the child in diversion because it is not worth spending money on a criminal lawyer, and there may be allegations of resisting arrest when the kids run off. Attorney Simon stated

that this is what he has seen in the 100 to 125 situations in which he has counseled law students. He noted that when people are in these circumstances, many of them will plead. They may be able to plead in a way that does not require them to say, "yes I did the crime," but they are saying, it is not worth defending, and then the person goes on. This is a really common occurrence.

Attorney Simon stated that this proposed rule says that if instead of saying, "yes, I was drinking underage" an applicant stands up and tells the truth which is, "I was there, I was arrested, but I really wasn't drinking," this rule then gives the Committee a basis for disqualification. In and of itself, telling the truth becomes a basis for disqualification. Attorney Simon believes that that is a real mistake. He noted that he has clients who have had cases that have gone forward where people have had delays, not denials, of their applications for admission to the bar. Any delay is significant for a student with $200,000 in loans who has a job waiting. Anytime the Character and Fitness Committee asks an applicant to come in for an interview, this is of great significance.

Regarding his second point - Attorney Simon stated that he believes that the current rules provide a tremendous amount of opportunity to deal with someone who really does not recognize that what he or she did was wrong. If the Character and Fitness Committee believes that somebody is saying "I didn't do this crime" when all the facts are suggesting they did, then this is going to be a candor violation. Attorney Simon reminded the Advisory Committee on Rules that attorney Manning had distributed an article to them that he had written. He noted that he reviewed 20 years of cases and was astounded to find how many character and fitness committees across the country have found candor violations when they are confronted with people denying those allegations. Possibly all true. But that is a candor violation. That is the worst thing you can do – that is, to go before a character and fitness committee and lie about something that happened. That is a *current* wrong. That is not an eight year old possession of underage alcohol when you are 17 wrong.

Attorney Simon noted that the important thing to recognize is that the applicant has the burden of proving the positive characteristics – set forth in Rule 42B(VI) - by clear and convincing evidence –the second highest standard there is in law. The applicant has to prove that he or she can use good judgment on behalf of future clients. The applicant has to prove that he or she will not disregard the rights of others. The failure to prove that is the first basis for disqualification. If an applicant has inadequate positives, he or she is disqualified. Attorney Simon believes that that is what happened in *Birch* – it is clear that there were inadequate positives. There were enough bad things going on, so that the applicant could not prove that she would be a good lawyer. The Character and Fitness Committee has ample opportunity in the existing New Hampshire rules to deal with these kinds of cases. In every case

Attorney Simon has seen, the Committee has had ample opportunity. He notes that the Committee should be given a lot of credit for writing Supreme Court Rule 42B. Many states in this country have no standards whatsoever. Attorney Simon stated that New Hampshire does have standards, but that the standards are broad and allow for all sorts of inferences.

Regarding his third point, Attorney Simon noted that this rule says to applicants that if you assert that you are innocent, despite the fact that you took an Alford plea or nolo plea, if you maintain your innocence, even if it is true you are innocent, then that is a basis for disqualification. Attorney Simon believes that this sends the wrong message to young people coming out of law school at the most formative ethical time of their lives. He noted that when he represents someone who spent 200K on a law school education and is looking at not being admitted to the bar, those applicants hang on his every word, and read the rules with a care that is amazing. An applicant who reads this rule would understand it to mean "if I deny, even if I know I did not do anything wrong, I may not be admitted to the bar." A smart law student is going to be incredibly tempted to say, "yes, I had the alcohol at 17 years old, I am sorry." The student knows that if she or he says something different, this is going to be of concern, and the Committee will now have a specific basis for disqualification. Attorney Simon believes that this confronts applicants with a hard dilemma. Even if they make the right decision in these circumstances, it can cost them six months of delay, if not disqualification.

Attorney Simon noted next that this also creates an impossible dilemma for those who represent students. If the proposal is adopted, and an attorney is competently representing a student who starts to explain that he did not do the crime, what is the attorney's responsibility at that moment? If the attorney permits the applicant to continue and tell him that he is innocent, then the attorney cannot let him testify. He cannot perjure himself.

To illustrate the point about the dilemma for the attorney representing someone seeking admission to the bar, Attorney Simon stated that two years ago he was invited to speak by the American Bar Association on this topic at the national conference in San Antonio. He chaired a panel, and with him on the panel was a woman named Marian Robinson – a legendary prosecutor with the Illinois discipline system. As a part of the panel's presentation, attorney Simon and Attorney Robinson participated in a mock interview in which Attorney Simon was a person insisting on his innocence in a childish crime. Attorney Robinson was trying to convince him how he could try to explain this. The mock interview went on for 35 minutes, after which the panel discussed whether what Attorney Robinson did was ethical or not. She pushed, led, prodded, and tried to get Attorney Simon to be remorseful. His goal was to not be remorseful. It is questionable whether what Attorney Robinson did was ethical.

In closing, Attorney Simon stated that he believes that the Committee runs an open and effective process. He stated that attorney Hieber is as helpful as she could be, and he believes that the Character and Fitness Committee will continue to protect the public with the rules they have and do it adequately. This proposed rule change is a change that in fact would only bring about mischief and problems and he urges that Advisory Committee on Rules to reject the proposal.

Justice Lynn stated that Attorney Simon has made some good points and that perhaps the rule is not even necessary. But, he asked if Attorney Simon's concern about how to counsel clients exists even without this new rule. He notes that even without the proposed new rule, if a client says "I wasn't drinking," doesn't this present the same problem under the existing rules, because if the Character and Fitness Committee believes the person is lying, this will provide a basis to say, "we don't think you were candid about this," since there is all this evidence that the person was involved. Justice Lynn stated that he questions whether this rule is necessary, but he is not sure that it does anything more than make explicit what appears to be implicit in what the Character and Fitness Committee could do anyway.

Attorney Simon acknowledged that Justice Lynn has made a good point. He agrees that there is a dilemma already. It is always easier to say "I did it" than "I did not do it." The difference is that this rule says simply saying "I did not do it" is enough of a basis for disqualification. Attorney Simon believes that character and fitness committees are wrong to use candor as they do, but there is nothing to be done about that. If the character and fitness committee does not believe you, it can disqualify for lack of candor. But, this proposed new rule says you don't have to link this to something else. Attorney Simon stated that in the rules he has cited, the Committee has to look to the statement the person was making and say that in fact there was a finding of fact that shows that they don't have respect for the rights of others. He believes that it is that link, rather than the simple statement that you don't admit you did something wrong, that makes a fundamental difference.

Representative Berch asked a question similar to the one he asked attorney Hieber. He inquired whether if someone were to admit to an offense, for example, to trespass to protest the Vietnam War and says, "yes, I did it. I paid my fine and I am otherwise a totally law abiding person, but I don't think I did anything wrong." Would this proposed new rule form the basis to deny the applicant admission to the bar? Attorney Simon stated that it would. However, he noted that the Character and Fitness Committee might also be able to deny admission under Rule 42B(VII)(7) which states that the fact that an applicant "demonstrates a disrespect, unwillingness to obey the law" may provide a ground to deny admission. However, attorney Simon stated that 42B(VII) allows the applicant to argue that the reason that they broke the law was due to a deeply felt political belief. That is, that the applicant is someone

who can obey the law but in this limited circumstance chose not to, in the interest of first amendment expression. This new proposed rule unbundles that, which is troubling. The message of this proposed rule is that the simple statement, the simple act of not recognizing what you did – does not leave room for moral protest. Attorney Simon stated that he believes that the rules as they are currently written leave room for a factual application of that.

Justice Lynn inquired how many other states do or do not have a rule similar to the one proposed. Attorney Simon stated that he believes that Attorney Hieber is correct – that few states that have rules at this level of specificity. That is why the cases have the same kind of generality the *Birch* case does. All the facts are put into the hopper and then lead to a finding– not fit to practice law. There are not many states that are doing what New Hampshire is doing.

Judge Delker asked whether this would be an argument to support the view that this proposed rule is necessary. That is, the rules in other states give character and fitness committees greater flexibility, but the rules in New Hampshire provide a great deal of specificity, so perhaps a catch-all is necessary. Given the specificity of the New Hampshire rules, it may be that the Character and Fitness Committee does not have the flexibility that character and fitness committees in other jurisdictions do. Perhaps there are cases that come before the Character and Fitness Committee and the Committee cannot apply one of the New Hampshire rules, but members of the Committee see before them someone who really does not get it, and who could potentially do some damage if he or she is permitted to practice law.

Attorney Simon responded that the burden of proof is on the applicant by clear and convincing evidence. The person who comes forward has to demonstrate that he or she has the capacity. The rules exist to allow denials for people in those situations. Attorney Simon noted that in the case that prompted this proposal, his client withdrew before going back for a second hearing. Attorney Simon believes that had there been another hearing, the Character and Fitness Committee would have resolved it one way or the other. The Committee would have believed what his client asserted or it would have disbelieved the client and resolved the case on a candor issue.

In response to a question about the impact of deferrals, Attorney Simon stated that he recalled that the bar examination result is "good" for only two years. He does not recall whether the Court is able to extend that or not. He recently had a case in which he and his client waited the entire two years, and then came back in to make a rehabilitative case. If the Character and Fitness Committee had found against his client at that time, he would not have been allowed back in. There are some timelines and urgency to the decisions by the Character and Fitness Committee.

A Committee member inquired whether these hearings get to be a bit of a case within a case to determine what the actual conduct was. Attorney Simon agreed that this will sometimes be the case. He noted that he had a case about a year ago in which there was a significant question about the nature of the arrest. As the case turned out, it was not necessary to go into that particular arrest.

Attorney Hieber addressed the Committee again. She noted that what attorney Simon seems to be saying is that what he does not like about this proposal relates to situations in which people pled guilty to crimes. However, this issue comes before the Character and Fitness Committee on a regular basis now, under the current rules, and the Character and Fitness Committee deals with it under the rule about criminal activity and rehabilitation. This proposed new rule echoes the rehabilitation rule. Attorney Hieber then noted that the Character and Fitness Committee wrestles now with applicants who pled guilty and later said "I didn't do it," and then Character and Fitness Committee has to make a judgment about whether the person is being honest. That situation has not resulted in a negative recommendation. That is not the behavior that this new rule is trying to address. The Character and Fitness Committee is trying to address instances that would be recognized as misconduct by you. These are situations in which a person has continued a course of misconduct up to the present day and does not recognize that what he or she has done is wrong. There are just people that are not dealing in the same world we are in.

Judge Lynn asked Attorney Hieber whether she is talking about situations like the ones Judge Delker talked about. That is, for example, someone who has a series of speeding tickets who says to the Committee, yes I have a series of speeding tickets, but so what - the speed limit is too low, and I don't think this is a problem." Attorney Hieber noted that there are other circumstances, such as inappropriate sexual behavior that is not criminal. She says that the Committee's concern, and what prompted this proposal, is the fact that there may be people who come before the Character and Fitness Committee who do not seem to understand that there is something wrong with their non-criminal behavior. The Character and Fitness Committee has to make a decision about whether to recommend such an applicant or not. She noted that many states do not have any standards at all. The standard is simply "does the applicant have good moral character and fitness," and it is wide open. By contrast, the New Hampshire Character and Fitness Committee strives to tie its decisions to specific standards.

Judge Delker stated that he still is unable to see why it is necessary to amend the rule to add the proposed provision. He is having difficulty seeing why the existing rules do not apply to the examples that have been discussed. It seems to him that the speeding case is covered by the existing rules, and the that the sexual harassment example that Attorney Hieber pointed to would be

be covered by the rule relating to the applicant's need to show "the ability to avoid acts which exhibit disregard for the rights and welfare of others." Attorney Hieber stated that to address the situation, the Character and Fitness Committee would indeed go through the existing rules and tie a denial to any rule it felt was appropriate, but the Character and Fitness Committee would like to have a rule that allows it more flexibility.

Attorney Simon stated that he does not believe that there should be greater flexibility. He believes that there should be a tie to a particular rule. The rule that Judge Delker cited was the basis for a Supreme Court case, *Application of Appell*. In that case, the New Hampshire Supreme Court "denied admission to an applicant and upheld the findings of a single justice who had determined that the applicant's 'violations of various statutes and regulations indicate at best a careless failure to determine the legality of his actions and at worst an arrogant disregard of the law.'" Thus, when the Character and Fitness Committee finds that an applicant has committed acts, which, while not criminal, are unlawful and demonstrate disrespect of the law, the Character and Fitness Committee may determine that the applicant does not possess the necessary moral character for admission to the bar. The concern about this proposal is that it is a broad rule to address an issue that is going to come up, as Attorney Hieber pointed out, in very few cases. But it changes the analysis so significantly in those few cases. Attorney Simon stated that there is nothing about what he has seen or that is reflected in the research that he has done that suggests that this is a good idea. He believes that it stretches the discretion beyond where it should be. This particular rule is one that attorney Simon hopes the Committee does not recommend for adoption.

Attorney Gordon stated that he believes that the statute seems to create the presumption that someone can become an attorney. The statute says, "shall be allowed," yet the rule imposes the burden of proof on the applicant to demonstrate "by clear and convincing evidence" his or her good moral character. Attorney Gordon believes that this whole rule seems to undercut the statutory presumption. Insofar as promulgating rules is only pursuant to the statute, he is concerned about this and wonders whether he is not understanding something.

Attorney Simon agreed with Attorney Gordon that this is an issue, but that, to his recollection, this may turn on the inherent powers doctrine of the Court. There are some court cases which suggest that the court has plenary and inherent power to regulate the practice of law. That is the only explanation attorney Simon has, and he stated that he would defer to the judges and others who know about that doctrine.

Attorney Herrick inquired about sexual assault cases on campus, and why that would not be covered under the existing rules. It seems like there are some rules that fit. She noted that she still has not come up with an example

of where one of the existing rules would not fit. Attorney Hieber agreed that anything that happens in the context of an educational institution is covered by the rules.

Mr. Stephens asked Attorney Simon whether it is his practice to talk with students about candor and maybe to preclude some men and women from going to law school in the first place. Attorney Simon stated that on the second day of orientation at the University of New Hampshire School of Law, he conducts a half hour session with the incoming first year class. He explains about candor, and informs them that if they have had alcohol problems in the past, now is the time to go clean. Attorney Hieber also comes to the school to speak. In addition, these issues are raised in the law school's professional responsibility class. To leave law school with $180,000 in student loans and then have a job delayed by the character and fitness proceeding is devastating to people. So, anything that Attorney Simon is able to do to assist these people, he does.

Carolyn Koegler distributed comments that were collected by Dan Feltes about this proposal. *See* 5/13/15 email from Attorney Russ Hilliard to Senator Feltes and 5/16/15 email from Attorney David Rothstein to Senator Feltes.

e. 2014-016. Supreme Court Rule 51 – Rulemaking Procedures

This proposed amendment would delete Supreme Court Rule 51 and replace it with a new rule. The new rule would make significant substantive changes to the rulemaking process.

1. Amend Supreme Court Rule 51, Rulemaking Procedures, as set forth in Appendix E of the Public Hearing Notice.

No comments on this proposal were submitted.

f. 2015-006. Circuit Court – District Division Rule 2.18 - Petition to Annul Record of Conviction and Sentence

These proposed amendments to Circuit Court – District Division Rule 2.18 are designed to facilitate electronic filing and make other substantive changes to the rule.

1. Amend Circuit Court – District Division Rule 2.18, Application to annul record of conviction and sentence, as set forth in Appendix F.

No comments on this proposal were submitted.

g. Temporary Amendments

These proposals would adopt on a permanent basis amendments which have been in effect on a temporary basis.

1. Amend on a permanent basis Supreme Court Rule 42(IV), which was amended on a temporary basis by Supreme Court Order dated December 29, 2014, as set forth in Appendix G.

2. Adopt on a permanent basis Circuit Court – Probate Division Rule 96-A, which was adopted on a temporary basis by Supreme Court Order dated December 29, 2014, as set forth in Appendix H.

3. Adopt on a permanent basis Circuit Court – Probate Division Rule 94, which was adopted on a temporary basis by Supreme Court Order dated December 29, 2014, as set forth in Appendix I.

4. Adopt on a permanent basis Supreme Court Rule 40(11)(j), which was adopted on a temporary basis by Supreme Court Order dated April 4, 2014, as set forth in Appendix J.

5. Adopt on a permanent basis Rule 98 of the Rules of the Superior Court of the State of New Hampshire Applicable in Criminal Cases Filed in Superior Court, which was adopted on a temporary basis by Supreme Court order dated February 20, 2014, as set forth in Appendix K.

No comments on these temporary rules were submitted.

2. Discussion and Vote on Public Hearing Items

a. 2015-008. Supreme Court Rule 20 – Non-Precedential Status of Orders

Following some brief discussion, and upon motion made by Representative Berch and seconded by attorney Lick, the Committee voted to recommend that the Court adopt the proposed changes to Supreme Court Rule 20 as set forth in Appendix A, as amended to: add the language "Citation Format" to the title, number the last two paragraphs of the proposal section (3), and add the language, "except as provided in (2) above" after "may be to the New Hampshire Reports only" in the first sentence of the last paragraph. The Committee also voted to recommend that the language being added as the last two paragraphs of Rule 20 be deleted from Supreme Court Rule 16.

b. 2015-004. Supreme Court Rule 28. Parties' Designation.

Following some brief discussion, and upon motion made by Justice Lynn and seconded by attorney Gordon, the Committee voted to recommend that the Court amend Supreme Court Rule 28, as set forth in Appendix B of the public hearing notice.

c. 2015-001. Supreme Court Rule 40(12). Procedural Rules of the Committee on Judicial Conduct – Dispositions Following Hearing.

Carolyn Koegler reminded the Committee that the JCC had expressed some concerns about the proposal to amend supreme Court Rule 40(12) set forth in appendix C of the public hearing notice. The JCC has asked the Committee to consider recommending to the Court the proposed amendments to Supreme Court Rules (12)&(13) set forth in her May 25, 2015 memorandum to the Committee.

Following some brief discussion and upon motion made and seconded, the Committee voted to recommend the amendments to Supreme Court Rules (12) and (13) recommended by the JCC, as set forth in Carolyn Koegler's May 25, 2015 memorandum.

d. 2015-005. Supreme Court Rule 42B. Character and Fitness Standards.

Justice Lynn stated that the proposed rule essentially seems to confirm what the Committee on Character and Fitness could do anyway – that is make a negative recommendation regarding an applicant who showed a lack of appreciation for, and unwillingness to conform his or her conduct to the law. The proposal seems to just make explicit what is implicit.

Justice Delker noted that he has struggled to find an example of when this rule would apply that is not otherwise covered by the rules, and inquired whether this is a solution trying to find a problem. He expressed concern that adopting this rule would swallow up the rest of the rules to make this a standardless process, which would allow the applicant a good case on appeal. The proposal seems to be rather vague and standardless, which raises some fairness concerns.

Representative Berch believes that what this rule seeks to accomplish can still be accomplished under the current rules. He stated that he will vote against this proposal because it doesn't seem to add anything.

Attorney Manning stated that this proposal would create a grey area and is not necessary because what this rule seeks to accomplish can still be accomplished under the current rules. She will vote against the proposal.

Attorney Albee noted that she has concerns about what message this might send to applicants - they might begin to inquire "what do I have to say" to get through this process, and feel pressure to say, "yes, I did it," even when that is not true.

Ms. Anderson stated that she has considered why this proposal is so valuable to attorney Hieber. She understands that it would give the Committee the ability to decline to recommend based not just upon what happened, but also based upon how the applicant perceived what happened. However, she believes that the current rules are broad enough to cover cases in which there was bad behavior long ago which the applicant does not now appreciate.

Attorney Herrick stated that the proposal seeks to give the Character and Fitness Committee the authority to decline to recommend an applicant due to the applicant's failure to recognize that the behavior was bad. However, she notes that Supreme Court Rule 42B places the burden on the applicant to prove, by clear and convincing evidence, his or her "good moral character and fitness." Among the positive characteristics the Committee considers is an applicant's "ability to avoid acts which exhibit disregard for the rights or welfare of others." It appears that there are other categories in the rule which would allow the Character and Fitness Committee to do what the Character and Fitness Committee suggests this proposal would allow it to do.

One Committee member noted that in addition to the proposal to amend the rule to provide that an applicant for admission to the bar could be denied admission if he or she fails to sufficiently recognize the wrongfulness of his or her misconduct, even if the misconduct standing alone is not significant enough to be disqualifying, the proposal also makes technical and stylistic changes to the rule.

Upon motion made and seconded, the Committee voted to approve the technical and stylistic changes contained in the proposal, but not the proposed change that would add as roman numeral 12 language providing that an applicant for admission to the bar could be denied admission if he or she fails to sufficiently recognize the wrongfulness of his or her misconduct, even if the misconduct standing alone is not significant enough to be disqualifying. Justice Lynn agreed that the language changes voted on by the Committee should be made, but abstained from voting on whether the language at proposed roman numeral 12 (set forth on page 14 of the public hearing notice) should be recommended as well.

e. 2014-006. Supreme Court Rule 51. Rulemaking.

In response to an inquiry by Justice Lynn, Carolyn Koegler explained that the proposal to amend Supreme Court Rule 51 as set forth in Appendix E of the public hearing notice includes the changes the Committee made to the original proposal at the March meeting.

Following brief discussion and upon motion made and seconded, the Committee voted to recommend that the Court amend Supreme Court Rule 51 as set forth in Appendix E of the public hearing notice.

f. 2015-006. Circuit Court – District Division Rule 2.18. Application to annul record of conviction and sentence.

Attorney Ryan explained that in response to concerns raised by committee members about the original proposal at the meeting in March, he had amended the proposal, and that the amended language is set forth in Appendix F of the public hearing notice.

Upon motion made by Representative Berch and seconded by attorney Gordon, the Committee voted to recommend that the Court amend Circuit Court-District Division Rule 2.18 as set forth in Appendix F of the public hearing notice.

Judge Delker inquired whether there should be a corresponding rule in the superior court. Justice Lynn stated that he would speak with Judge Delker and with his colleagues. He noted that this proposal is designed to streamline the annulment process in the district division and that it may be appropriate to do something similar in the Superior Court. He will check on this.

g. Temporary Amendments

Justice Lynn explained that the Court had adopted a number of temporary amendments, as set forth in Appendices G, H, I, J, and K and that the Committee is now being asked to consider whether to recommend that the Court adopt them on a permanent basis.

Attorney Manning inquired how and why the Court adopts temporary amendments, rather than goes through the process set forth in Supreme Court Rule 51. Attorney Lick explained how the process currently works under the existing rules. He also explained that under the proposed new Rule 51, there will be a procedure the Court will follow if the Court concludes that exceptional circumstances justify expedited consideration of the request. The new procedure would require the Court to afford such notice and opportunity to comment and hearing as may be practicable.

Upon motion made by Justice Lynn and seconded by Judge Cullen, the Committee voted to recommend that the Court adopt the temporary amendments as set forth in appendices G, H, I, J, and K of the public hearing notice.

3. Approval of Minutes of March 13, 2015 Meeting

Upon motion made by Representative Berch and seconded by attorney Manning, the Committee voted to approve the March 13, 2015 meeting minutes.

4. Status of Items Still Pending Before the Committee

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

Justice Cullen stated that this project is currently on hold, and that the rules he submitted long ago will need to be rewritten, in light of the changes to the rules required by e-filing.

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

Justice Lynn explained that the counsel at arraignment rules are still in place in the district division.

c. 2013-003. Interlocutory Appeals.

Attorney Gordon noted that he had worked with a subcommittee on this issue. He reminded the Committee that this issue relates to what happens when a trial court grants a motion to dismiss some, but not all, of the defendants in a case. Under New Hampshire case law, when some but not all defendants are dismissed from a case, the dismissed defendants must wait for a final decision to be done with the litigation unless the *plaintiff* both chooses to request an interlocutory appeal under Rule 8 and has his or her request granted at both the trial court and supreme court levels. The Court had 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. The Committee asked Attorney Gordon to chair a subcommittee to address this issue.

Attorney Gordon stated that he had worked with a subcommittee consisting of Judge Delker, Bill Glahn, David Slawsky and Karen Anderson.

He submitted a memo dated May 15, 2015 to the Committee on behalf of the subcommittee.

Attorney Gordon explained that the subcommittee had looked at Federal Rule of Civil Procedure 54(b) to see whether it would provide a good model for the adoption of an interlocutory appeal rule in New Hampshire. After doing some research, the group found *Elliott v. Archdiocese of New York,* 682 F.3d 213 (3d Cir. 2012), which construes the language of Federal Rule of Civil Procedure 54(b). The subcommittee concluded that the language of Rule 54(b) – that a certificate of finality may be had "only if the court expressly determines that there is no just reason for delay" is insufficiently clear without the explicitness expressed in *Elliott*. Therefore, the rule that the subcommittee recommends uses Rule 54(b) as a guide, and then incorporates some of the language used by the Third Circuit in *Elliott*. Thus, the group proposes that the Committee consider recommending that the Supreme Court adopt, perhaps as a part of Superior Court Rule 46, the following language (language deleted from Rule 54(b) is indicated in ~~strikethrough~~, the additional *Elliott* language is set forth in **bold**):

> Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim or third-party claim – or when multiple parties are involved the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court ~~expressly determines that there is no just reason for delay~~: **explicitly refers to this rule; specifies what order is to be considered effective and appealable; specifies which party, claim or issue is to be severed; articulates the reasons and factors justifying its decision; and finds that there is an absence of any just reason to delay as to the party, claim, or issue that is to be severed.**

Attorney Gordon notes that if this rule were adopted, it would make a significant policy shift and would probably supplant the New Hampshire Supreme Court's decision in *Guardianship of Phi*, 157 N.H. 429 (2008).

Justice Lynn inquired what would happen, procedurally, after the trial court issues such an order. Judge Delker stated that he assumed that this would be a mandatory appeal. Justice Lynn agreed that the trial court could do this, but believes that the Supreme Court should ultimately decide whether the order is, in fact, appealable. Judge Delker disagreed, noting that his view is that an order of this nature is akin to a final order. He stated that this proposal would correct the injustice in *Phi,* where the party learned too late that an order during the course of the litigation was a "decision on the merits" that should have been appealed long before. Judge Lynn noted that this view

is not inconsistent with the Supreme Court's disagreeing with a trial court's decision that there are sufficient reasons to make this order final. Judge Delker stated that it would be up to the party opposing the Rule 54 appeal to argue that the Rule 7 appeal should be denied.

Attorney Herrick noted that *Phi* was a probate case, and that the timing issues there may have been statutory because there are many statutes that govern the timing of things in probate cases. Both Judge Delker and Attorney Gordon disagreed that *Phi* was statutorily driven.

Justice Lynn stated that perhaps these kinds of appeals should be treated like appeals from decisions regarding personal jurisdiction, as set forth in Superior Court Rule 9(e). This would protect the parties, but also allow the Supreme Court to decide whether to take the appeal. Judge Delker agreed that this approach makes sense.

Attorney Gordon stated that an interlocutory appeal statement is very expensive, as is the discretionary appeal. He notes that once a party gets a Rule 54 order, if it then has to also persuade the Supreme Court to take the case, these are two relatively expensive documents to prepare only for a party to learn that the appeal has not been accepted.

Judge Delker inquired how this works in personal jurisdiction cases. Justice Lynn explained that a party must immediately appeal a decision by the trial court that it does have personal jurisdiction over the defendant. But, the Supreme Court may decline to decide the issue.

Attorney Lick offered two examples from his practice that demonstrate that interlocutory appeals should be mandatory appeals. One of the cases involved an appeal from a planning board decision. Justice Lynn noted that a statute was passed last year which addresses what should happen procedurally when a planning or zoning decision does not resolve all of the issues. The statute says that the party does not need to appeal the issues until all of the issues are resolved.

Attorney Gordon stated that he would take a look at Superior Court (Civ.) Rule 9 for guidance in drafting language to address what happens procedurally after a trial court issues an interlocutory appeal order. Attorney Herrick suggested that attorney Gordon also take a look at RSA 567-A:1. Attorney Gordon will present the language to the Committee at the September meeting.

d. 2014-005. Electronic Filing Pilot Rules

Carolyn Koegler explained that the Electronic Filing has implemented in small claims cases in all district division locations and will soon be rolled out to guardianship cases. Attorney Gordon stated that this will provide a true test of the confidentiality rules.

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

Justice Lynn explained that Attorney Rice had agreed to chair a subcommittee to address issues related to the new Superior Court Civil Rules. Attorney Rice was not present at the meeting.

f. 2015-007. Circuit Court – Family Division Rule 2.29

Committee members turned next to the issue first raised in a March 11, 2015 email from Joshua Gordon to Carolyn Koegler, regarding Family Division Rule 2.29. Attorney Gordon noted that he had really raised two issues at the last meeting about Family Division Rule 2.29 and that perhaps the issues should not be assigned the same docket number. One is really a technical issue that can probably be resolved right away, and the other issue is more complicated.

Regarding the first issue, Attorney Gordon stated that, as currently written, Rule 2.29(A) leaves unclear, in cases in which family law cases are heard by a judge only, with no master, what the effective date of an uncontested judge - only decree would be. Rule 2.29(A) currently states that "[d]ecrees in uncontested cases . . . . shall become final on the date signed by the judge PURSUANT to RSA 490-D:9." However, RSA 490-D:9 seems to assume the presence of a master and then a judge. When that is the case, there is no problem. However, today, many or most family law cases are heard by a judge only, with no master. Attorney Gordon had suggested in his email of March 11, 2015 that one solution to the problem would be to replace the words "pursuant to" with a comma and a *see* cite.

At the March meeting, attorney Ryan stated that he would explore the issue with the circuit court administration and would propose a solution. In an email dated April 2, 2015, attorney Ryan proposed that Family Division Rule 2.29(A) be amended as follows (deletions are in ~~strikethrough~~, additions are in **[bold and in brackets]**):

2.29 Effective Dates:

A. *Uncontested Matters.* Decrees in uncontested cases where the parties have filed a permanent agreement shall become final on the date signed by

the judge**[, or countersigned by a judge]** pursuant to RSA 490-D:9, unless otherwise specified by the Court.

Attorney Gordon stated that the solution Attorney Ryan proposes resolves the problem, and that he believes that the proposed amendment is technical. Following some discussion and upon motion made by attorney Gordon and seconded by representative Berch, the Committee voted to recommend that the Court adopt the proposed amendment to Family Division Rule 2.29(A) set forth in attorney Ryan's April 2 email.

Attorney Gordon stated that the second issue relating to the Family Division Rules is much more complicated. He noted that he explained the problem in his May 30, 2015 memorandum to the Committee. Essentially, his concern is that the use of the word "final" in New Hampshire jurisprudence is "highly ambiguous." He notes that the word is used throughout the rules for all courts, and can refer to two different concepts, sometimes in the same rule. "Final" can mean both: (1) the earliest date an order becomes *effective*, and (2) the latest date an order is *appealable.*

Attorney Gordon noted that while this problem exists throughout the rules applying in all courts and should probably be comprehensively addressed, it seems to be most problematic in family division cases. On page 5 of his memo of May 30, attorney Gordon proposes a simple technical fix – that is, to change the word "final" in Family Division Rule 2.29B to "effective" each time it appears, as follows:

> B. *Contested and Defaulted Matters.* In contested cases or upon the default of either party, where no post-decree motion has been filed, the decree will not become ~~final~~ **[effective]** until the thirty-first (31st) day from the date of the Clerk's notice of decision. If a timely appeal is filed, the decree will not become ~~final~~ **[effective]** until the expiration of the appeal period pursuant to Supreme Court Rule 7. If a timely post-decree motion is filed, and there is no appeal taken, the decree becomes ~~final~~ **[effective]** thirty (30) days from the Court's action on the post-decree motion.

Attorney Gordon stated that he believes that this would provide a straightforward technical solution to address the problem, but notes that there is a lot of confusion about the use of the word "final" throughout the rules.

Justice Lynn stated that he had considered this issue in anticipation of the meeting and wondered whether one solution to the problem in family division cases could be to ask judges to state explicitly in their orders which aspects of the orders are final as of that moment, and which are stayed

pending appeal. In a temporary order in a divorce case, for example, it might make sense for the court to say, "the decision on child support is effective today, but not the decision on the house sale," for example. In other words, the orders could explicitly state what is effective now, and what is effective later.

Attorney Manning stated that the Department of Labor issues orders like this with some frequency – that is the orders make clear what part of an order is effective now, and what is not.

Attorney Ryan stated that any proposal to change the word "final" causes him particular concern with respect to domestic violence cases, where the use of the word "final" has more meaning than it does in other cases. Also, he is concerned about the interplay with federal law. Attorney Herrick stated that she also has concerns about tinkering with the word "final," for reasons similar to Attorney Ryan's. One Committee member noted that *Looney* has already tinkered with the definition of the word "final."

Justice Lynn suggested that it might make sense to have a rule stating that in all domestic relations cases, the court's order will say what aspects of the order are in effect now, and what is stayed pending appeal. Pat Ryan volunteered to work on this. Attorney Gordon stated that he is also willing to work on this.

5. New Submissions

a. 2015-009. New Hampshire Rules of Civil Procedure

Justice Lynn explained that in a letter dated March 23, 2015, attorney David Slawsky had proposed restructuring the Court Rules to create a core of common procedural rules called the New Hampshire Rules of Civil Procedure.

Following some discussion, Committee members directed Carolyn Koegler to write to Attorney Slawsky let him know that the Committee agrees that his idea is a good one, but to let him know that, given all of the changes to court rules necessitated by the move to e-filing and the adoption of the criminal procedure rules and the felonies first program, it is not possible to undertake a project of this magnitude at this time. The Committee will likely consider this issue at a later date.

b. 2015-010. Supreme Court Rules 1 and 3.

The Committee considered next a June 3, 2015 memorandum from Carolyn Koegler to the Committee proposing that references to "registers of probate" be deleted from Supreme Court Rules 1 and 3.

Following a brief discussion, Committee members agreed that this change is technical and, upon motion made by Justice Lynn and seconded by Judge Cullen, voted to recommend that the Court adopt the proposed changes set forth in the June 3, 2015 memo.

6. 2015 Meeting Dates

The remaining 2015 meeting dates are:

Friday, September 11, 2015
Friday, December 4, 2015