NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Hearing and Meeting of
June 16, 2017

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

The meeting was called to order at 12:37 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Hon. Paul S. Berch, Hon. R. Laurence Cullen, John Curran, Esq., Hon. N. William Delker, Hon. Daniel J. Feltes, Hon. Michael H. Garner, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Ari Richter, Pat W. Ryan, Esq., Frederick H. Stephens, Charles Stewart and Hon. Robert J. Lynn.

Also present was the Secretary to the Committee, Carolyn Koegler, Esq., Charlene Desrochers, staff and Claire MacKinaw, staff (for the public hearing only).

1. Public Hearing

Prior to opening the public hearing, Judge Lynn introduced two new members of the Committee. He noted that only one of the new members is present. He introduced Committee member Charles Stewart, who is an electronic discovery expert from the Sheehan, Bass and Green firm in Manchester. The new member who was unable to attend but who will be present at the meeting in September is Sean Gill, Assistant Attorney General at the Attorney General's office.

The public hearing items are listed below in the order in which testimony was taken on them. Because the public hearing was quite short, a summary of the testimony is provided below. A CD recording of the hearing is also available upon request at the Supreme Court.

(a) 2016-005. Superior Court (Civ) Rules. Defects in Filings.

These proposed amendments to Superior Court Rules 1 and 4 would: (1) require clerks to notify a party in writing why a filing is not being accepted; and (2) allow a party, for the purposes of complying with the statute of limitations or other analogous time limit, to file a motion to waive the filing fee in lieu of filing the fee.

One written comment was submitted. *See* 5/24/17 memo from attorney David Peck.

No one appeared at the public hearing to address this issue. Judge Lynn noted that a comment had been submitted by David Peck and that he and Judge Delker had both spoken with Chief Justice Nadeau about the comment.

(b) 2014-009. Superior Court (Civ) Rule 8. Relation-Back.

The Committee requested comment on two different proposed amendments to Superior Court Rule 8. Both proposals would amend the rule to address the effect of amendments to complaints in terms of relation back to the original filing. The proposal set forth in Appendix C is based upon Federal Rule of Civil Procedure 15(c). The proposal set forth in Appendix D would allow the judge greater discretion to determine when an amendment "relates back" to the date of the original filing than does Federal Rule of Civil Procedure 15(c).

Attorney Slawsky addressed the committee. He thanked the committee for allowing him to continue to be involved with the continued improvement of the Superior Court Rules, particularly in light of the federal rules. He reminded the Committee that some consideration had been given years ago to adopting the federal rules in New Hampshire, but that that proposal was rejected by the Court.

Attorney Slawsky explained that he was a member of the subcommittee Judge Delker chaired regarding the proposed amendments to Superior Court Rule 8. He reminded the Committee that two proposals had been submitted for the Committee's consideration, and stated that he believes that either proposal would be an improvement over the existing rule.

Under the current system, it is very unclear to superior court judges and practitioners how relation back issues should be dealt with. Attorney Slawsky stated that while there is nothing particularly wrong with the federal rule on relation-back, he finds it extremely difficult to understand. He stated that if one were to review some of the case law on Rule 15 in federal courts, it is very difficult to figure out when these relation back issues are going to be granted, and when they are going to be denied.

Attorney Slawsky stated he believes that his proposal is keeping with what New Hampshire has been trying to do, which is to take the best of the federal court rules and organization and use the best of New Hampshire traditions. The proposal that he has presented to the Committee is an alternative that he believes presents in a slightly clearer fashion the fact that there are two different types of relation-back issues. There is the relation back of amendments to claims, and there is relation-back of amendments to parties – that is, case in which new parties are brought in. Attorney Slawsky stated

that his proposal places in the superior court's discretion the opportunity to relate claims back and to relate new parties back in the beginning of new litigation unless there is significant prejudice. Attorney Slawksy believes that this proposal would allow a court to avoid the legal gymnastics involved in the the federal court decisions on these things and codifies what really happens here anyway. He noted that he clerked in the federal courts for a few years, and that the federal court was often trying to reach a result and then would work its way through the complicated rules and regulations that applied. Committee members had no questions for attorney Slawsky.

Clara Lyons, an attorney at Getman Schulthess in Concord, addressed the Committee next. She noted that her firm has some concerns about the proposed amendment to Superior Court (Civ.) Rule 8, particularly as it relates to the party. Those at her firm she has spoken with believe that the purpose of the rule is to clarify that in a situation in which there are two corporate entities with the same principal, and someone with actual knowledge of a lawsuit, that a plaintiff should be permitted to substitute the new defendant. However, her firm is concerned that the wording of the two proposed amendments is broad enough to lead to situations in which a party who did not have actual knowledge of the lawsuit could be substituted. For example, if an accident were to occur and three years pass and the plaintiff sues the wrong entity, and then the plaintiff comes back later and says "well, I know three and a half years have gone by since the accident, but you had knowledge of the accident so we should be able to name you. You had knowledge of the accident." Attorney Lyons stated that she is concerned about that breadth of the rule. She stated that in the cases in which new parties are substituted and the plaintiff seeks to relate the substitution back, the new party really should have received notice and know that there is an action. Attorney Lyons does not believe that the burden should be placed on the new defendant who was not sued within the statute of limitations to know that there was an action brought.

Justice Lynn asked Attorney Lyons whether she has proposed language to address the concern she articulated. Attorney Lyons noted that the language set forth in appendix D of the public hearing language is worse. It is more overbroad, than the language set forth in appendix C. She believes that amending the language set forth in appendix C at (3)(a) to say something like "they had notice that the action had actually been filed" would address her concern. In other words, any language to clarify that the new defendant had notice that the lawsuit had been filed as opposed to just knowing there was an accident would address the concern. (3)(a) as it is written now gives enough wiggle room to be read broadly to say that someone had notice of an action just because someone said six months before they filed that they were going to file. She stated that her suggestion is to narrow the language to make it clear that the rules should not be read that way.

(c) 2016-010. Superior Court (Civ.) Rule 10. Permissive Counterclaims.

This proposal would amend Superior Court Rule 10 to address when it is appropriate for a party to file permissive counterclaims.

One written comment was submitted. *See* 6/15/17 letter from attorney Zachary R. Gates.

No one appeared at the public hearing to address this issue.

(d) 2016-013. Superior Court (Civ.) Rule 12(g). Motions for Summary Judgment.

This proposal would amend Superior Court Rule 12(g) to require both sides in the context of a motion for summary judgment to submit a single document identifying the undisputed facts and any disputed facts.

Three written comments were submitted. *See* 5/11/17 email from attorney Kara Cain emailed to members 5/19/17; 5/24/15 email from attorney Christopher Grant emailed to members 6/13/17; 6/15/17 letter from attorney Zachary R. Gates emailed to members 6/15/17.

No one appeared at the public hearing to address this issue.

(e) 2016-011. Superior Court (Civ.) Rule 17. Appearances.

This proposal would amend Superior Court Rule 17 to make clear that the filing of a complaint, answer or other responsive pleading will be adequate to constitute appearance by an attorney.

One written comment was submitted. *See* 6/15/17 letter from attorney Zachary R. Gates emailed to members 6/15/17..

No one appeared at the public hearing to address this issue.

(f) 2017-001. Superior Court (Civ.) Rule 28. Requests for Admissions.

This proposal would amend Superior Court Rule 28 to delete the requirement that requests for admissions and responses to requests for admissions be filed with the court.

One written comment was submitted. *See* 5/11/17 email from attorney Kara Cain emailed to members 5/19/17.

No one appeared at the public hearing to address this issue.

(g) 2016-015. Superior Court (Civ.) Rule 37. Life Expectancy Tables.

This proposal would amend Superior Court Rule 37 to state that the life expectancy tables published by the United States Center for Disease Control and Prevention, National Center for Health Statistics, are admissible as evidence to prove life expectancy.

One written comment was submitted. *See* 5/11/17 email from attorney Kara Cain emailed to members 5/19/17.

No one appeared at the public hearing to address this issue.

Justice Lynn closed the public hearing.

2. Discussion and Vote on Public Hearing Items.

(a) 2016-005. Superior Court (Civ) Rules. Defects in Filings.

Justice Lynn stated that he had spoken with Justice Nadeau about the comments David Peck made in his 5/24/17 memo to the Committee. The Superior Court's position is that it prefers the original proposal to amend the rule. The Superior Court believes that it is the most workable, and that it does not adversely impact litigants. The concern that prompted this proposal was a concern that under the existing rule, if a litigant comes to file an action on the last day of the statute of limitations but does not have a check, and comes back the next day with a check he or she could be found to have filed the action outside of the statute of limitations. The Superior Court believes that the proposals set forth in appendix A and appendix B of the public hearing notice address this concern.

Judge Delker stated that he had reviewed the concerns David Peck raised and that he is not entirely sure what attorney Peck is seeking to address in his proposal.

Attorney Gordon stated that he believes that the concern is that if there is some technical defect in the filing, it is the clerk's job to review the file to decide whether it is technically compliant, and if it is not, it is rejected. He believes the concern is perhaps that a judge should be part of this process.

Attorney Albee stated that the clerks do review the filing, but they do take it in and if there is a defect, the clerks give the file to the judge, and then the party is notified. The clerks do not reject filings themselves.

Justice Lynn reminded the Committee that this proposal came about in response to a case, *Cassidy v. NH Department of Health and Human Services*, that had been appealed to the New Hampshire Supreme Court. *See* May 24,

2016 memorandum from David Peck to the Advisory Rules Committee. Justice Lynn stated that he understands the concerns articulated by attorney Peck in his most recent memo to the Committee, *see* 5/24/17 email from David Peck, but that he is also concerned about the burden the new proposal might put on the clerk's offices, and he noted that what happened in *Cassidy* is something that happens extraordinarily rarely. In any event, Justice Lynn believes that the amendment to the rule that requires the filing of the fee or a motion to waive the filing fee is sufficient to address the concern. His inclination is to recommend that the Court adopt the proposal as set forth in the public hearing notice. He notes that if it becomes clear that there are additional problems that need to be addressed, they can be addressed later.

Representative Berch inquired how much time and effort is required for an individual to file a request for a waiver of the fee. Is a litigant able to do that standing there in the clerk's office? Attorney Albee stated that it is a very short form and that a litigant can fill it out while standing there. She noted that this probably happens 3-4 times per day. Judge Delker stated that this is typically brought to the attention of the judge while the person is there and is processed very quickly.

Upon motion made by Justice Lynn and seconded by attorney Gordon the Committee voted to recommend that that Court adopt the proposed amendments as set forth in appendix A and appendix B of the public hearing notice.

(b) 2014-009. Superior Court (Civ) Rule 8. Relation-Back.

Judge Delker reminded the Committee that what is at issue here is what happens when a plaintiff seeks to amend a complaint to add a party or a claim after the statute of limitations has expired. The question is, under what circumstances does the amendment "relate-back" to the original filing? He notes that the proposal to adopt the federal rule is set forth in appendix C of the public hearing notice. Attorney Slawsky's proposal is set forth in appendix D of the public hearing notice. Attorney Slawsky's proposal is in keeping with the traditional New Hampshire approach of not barring cases from being heard on the merits due to technical problems. The proposed federal rule is more consistent with blackletter statute of limitations law.

Attorney Lick noted that the advantage of adopting the federal rule is that the federal case law provides a great deal of guidance about how to interpret the rule. Judge Delker stated that while he understands attorney Slawsky's proposal is designed to be in keeping with the traditional New Hampshire approach of reaching the merits of a case whenever possible, Judge Delker notes that one area in which this has not been the case is in the area of statute of limitations. The New Hampshire Supreme Court cases relating to the statute of limitations issues is very strict.

Justice Lynn stated that he agrees with Judge Delker and Attorney Lick. He believes that both proposals are reasonable, but believes that the federal court rule would provide more guidance. There are factors set out in the proposed rule for the courts to consider, and litigants and judges will also have the benefit of federal case law in interpreting the rule.

Upon motion made by Judge Delker and seconded by Representative Berch, the Committee voted to recommend that the Court adopt the proposal set forth in appendix C. Attorney Gordon voted against recommending the adoption of appendix C.

(c) 2016-010. Superior Court (Civ.) Rule 10. Permissive Counterclaims.

Judge Delker reminded the Committee that this proposal would amend Superior Court Rule 10 to address when it is appropriate for a party to file permissive counterclaims. He notes that a written comment has been submitted by attorney Gates, *see* 6/15/17 letter from Gates Law Office, suggesting that the Committee strike the language, "so long as a right of action existed thereon at the time of the filing of the complaint," so that the proposed rule would read as does the federal rule on permissive counterclaims.

Judge Delker stated that the language attorney Gates objects to was added to the proposal by the subcommittee because RSA 515:8 states, "No debt or demand shall be set off as aforesaid unless a right of action existed thereon at the beginning of the plaintiff's action." The New Hampshire Supreme Court held in *Phinney v. Levine*, 117 N.H. 968, 971 (1977) that the statute applies to counterclaims. Judge Delker stated that given the existence of the statute, he is not sure that the outcome of the *Gallagher* decision attorney Gates cites in his June 15 letter would have been the same if the case had been brought in state court.

Justice Lynn stated that he believes that the Court could change the *Phinney* decision by rule, if it wanted to do so. Judge Delker stated that this might not be possible because *Phinney* involved a question of statutory interpretation.

Attorney Herrick believes that striking the language attorney Gates proposes be striken, thereby changing the *Phinney* decision, would allow litigation within litigation, which could be messy. She believes that this is another reason not to make the change attorney Gates suggests.

Upon motion made by Justice Lynn and seconded by Judge Delker the Committee voted to recommend that the Court adopt the proposal set forth in appendix E, without making the change suggested by attorney Gates.

(d) 2016-013. Superior Court (Civ.) Rule 12(g). Motions for Summary Judgment.

This proposal would amend Superior Court Rule 12(g) to require both sides in the context of a motion for summary judgment to submit a single document identifying any undisputed facts and any disputed facts.

Attorney Lick stated that he was involved in a case filed in Massachusetts in which the parties were required to follow a similar procedure. He described the experience as a "logistical nightmare" that resulted in the submission of a brief on a choice of law question that included 52 pages of facts. The challenge of trying to get parties to agree on a set of facts is incredibly difficult and was magnified by the fact that there were multiple parties involved – three plaintiffs and six defendants, all of whom wanted to have their say in a single document to be presented to the court.

Attorney Curran stated that he agrees with attorney Lick that being able to get parties to agree to a concise statement of facts is the exception rather than the rule. What the court will likely end up with in many cases is very few undisputed facts and pages of disputed facts. This proposed rule is simply not workable.

Judge Delker stated that from the trial court's perspective, it is very challenging to evaluate whether there is a genuine issue of material fact when parties on each side submit advocacy pieces which list the facts in different order. Often, what is submitted includes a mess of facts that do not correlate, making it very difficult for the judge to determine: (1) what are the facts at issue; (2) where are the disputes; and (3) are they material? Judges McNamara and Anderson worked on this proposed rule. The Massachusetts version of this rule is the one they opted to recommend.

Justice Lynn stated that the concern seems to be that if there is a requirement that the parties submit a single document, this encourages the parties to nickel and dime every minor thing to get to one document. Whereas, if each side submits his or her own there is less of a delay. But perhaps there is a compromise position. Perhaps it would be possible to not require parties to submit a single document. Each side would submit its own document which includes a separate recitation of the facts, but perhaps the parties should be required to note where the facts are supported. Judge Delker suggested that perhaps parties could be required to at least list the facts in the same order. For example, the plaintiff's version has facts 1-5 and the defendant's version has the same 1-5 facts, and if additional facts are necessary, then the party adds facts 7-8-9, for example.

Attorney Gordon stated that the concern about this is that where you start the story is important. If the approach Judge Delker suggests is taken,

then the party filing the motion for summary judgment is in charge of the storytelling, If you are the opposing party, maybe you don't want to start there. This is a big change – forcing a party to tell the story another person's way. Attorney Lick agreed, stating that you are forcing the other side to play on your ball field.

Judge Delker disagreed. He stated that if the defendant, for example, is framing the issue in the motion for summary judgment, then it is incumbent upon the plaintiff to show that there is a genuine issue of fact and to demonstrate the issue to be litigated. Judge Delker is not sure why this is not fair.

Attorney Lick stated that he believes that the Committee needs to rework what has been submitted, as reflected in appendix F of the public hearing notice. Attorney Herrick stated that she believes that this is a matter that should be addressed. She experienced a rule like the one being proposed when she was involved in litigation in Vermont. It was very difficult.

Justice Lynn stated that what troubles him about this proposal is the mechanics of it. He understands what the proposal aims to do, but he is concerned that determining, "where does it go," and "what comes first" could be very challenging and could cause gamesmanship. He wonders whether it might work to require the movant to set out numbered paragraphs and have the opposing side admit or deny those facts, and then put in additional facts if necessary.

Following some further discussion, the Committee agreed that this matter should be referred to a subcommittee comprised of members of the plaintiff's bar, the defendant's bar and some judges, perhaps Judges Anderson and McNamara, for further consideration.

Upon motion made and seconded the Committee voted to take no action on this item and to refer it to a subcommittee chaired by a Superior Court judge.

(e) 2016-011. Superior Court (Civ.) Rule 17. Appearances.

This proposal would amend Superior Court Rule 17 to make clear that the filing of a complaint, answer or other responsive pleading will be adequate to constitute an appearance by an attorney.

Judge Delker reminded the Committee that the purpose of this amendment is to do away with an unnecessary filing. He called the Committee's attention to the comment submitted by Mr. Gates, in which Mr. Gates expresses the view that this amendment would set a tone of preferential treatment of parties represented by counsel.

Following some discussion, the Committee concluded that that there is a good reason to make a distinction between self-represented parties and attorneys. Upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed amendments to Superior Court (Civ) Rule 17, as set forth in appendix G.

(f) 2017-001. Superior Court (Civ.) Rule 28. Requests for Admissions.

This proposal would amend Superior Court Rule 28 to delete the requirement that requests for admissions and responses to requests for admissions be filed with the court.

Judge Delker noted that attorney Kara Cain had submitted comments on the proposal recommending two amendments. She recommends that the proposal to amend Rule 28 be further amended and that Rule 37(c) also be amended to include the words "serve notice" rather than "file a notice."

Following some brief discussion, the Committee agreed that the changes suggested by attorney Cain should be made. Upon motion made and seconded, the committee voted to recommend that: (1) the Court adopt proposal to amend Rule 28 as set forth in appendix H with the changes recommended by attorney Cain and set forth on page 2 of her email; and (2) the Court adopt the changes to Rule 37(c) suggested by attorney Cain on page 1 of her email.

(g) 2016-015. Superior Court (Civ.) Rule 37. Life Expectancy Tables.

This proposal would amend Superior Court Rule 37 to state that the life expectancy tables published by the United States Center for Disease Control and Prevention, National Center for Health Statistics are admissible as evidence to prove life expectancy.

Following some brief discussion and upon motion made and seconded the Committee voted to recommend that the Court adopt the changes to Rule 37 set forth in appendix I of the public hearing notice.

3. Approval of Minutes of March 17, 2017.

Upon motion made and seconded the Committee voted to adopt the March 17, 2017 minutes. Representative Berch and attorneys Curran and Ryan abstained from voting, as they were not present at the March 17 meeting.

4. Status of Items Still Pending Before the Committee

a. 2015-011. Supreme Court Rules 37 and 37A.

Carolyn Koegler reported that the subcommittee had met to resume its work and that it would submit proposed changes to the rules prior to the September meeting.

b. 2016-006. Motions to Seal.

Judge Delker reminded the Committee that he had agreed to chair a subcommittee to address the issues raised by attorney William Chapman, identified in a May 31, 2016 memo from Carolyn Koegler to the Committee. He noted that he had submitted for the Committee's consideration a May 9, 2017 memo and attachment in which the subcommittee recommends the adoption of uniform rules on motions to seal and unseal confidential pleadings and documents. Judge Delker explained that this rule will require litigants to focus on identifying which documents should be treated as confidential.

Judge Delker noted that the subcommittee had considered whether the rule should allow parties to withdraw a case record if the motion to seal was denied, and that this issue was very controversial. The subcommittee concluded that the better approach is to leave this to current practice. Under current practice, judges address a request to withdraw a pleading or exhibit on a case-by-case basis.

There was some discussion of whether the rule should include a provision allowing a party to withdraw a document, and also some discussion about the nature of the documents at issue in motions to seal. A recommendation was made to add competency evaluations and presentence investigation reports to Rule II(c)(I).

Mr. Richter stated that as he understands it, the proposal is designed to cure: (1) the overuse of parties filing documents "under seal;" and (2) the fact that attorneys file "under seal" without articulating why something should be treated as confidential. Regarding the privacy concern, it is clear that the parties are aware of this and can presumably make arguments to protect their own private information, but what about third parties?

Judge Delker explained that proposed Rule IV(g) allows a party with standing to move to seal or redact confidential documents or information that is contained in a filing. Mr. Richter inquired whether this means that the documents will be in public view for a period of time. Judge Delker explained that Rule VI, relating to sanctions, is designed to encourage parties to be careful about what they are filing so that confidential information of third parties is not subject to public view. Mr. Richter stated that he understands

this, and that this seems reasonable, but notes that the rule reflects a policy that presumes openness rather than protects privacy. Given the advances in technology, he wonders whether this is appropriate.

Mr. Richter also inquired about the relationship between proposed Rule III(d), relating to how a party is to identify a confidential document in a caption of a pleading or a cover letter and the *Vaughn* issue in the *in camera* context.

Mr. Stewart inquired about the language at V(b), relating to the procedure for seeking access to case records that have been determined to be confidential. Rule V(b) states, "Upon receipt of the motion, an order of notice shall be issued to all parties and other persons with standing in the case." Mr. Stewart wonders whether there should be some burden on the party seeking to unseal confidential records to let the person whose record it is know that the motion has been filed. He notes that an order of notice requires formal service, if not actual service.

Attorney Herrick stated that there are statutes that create the right to confidentiality that require notice prior to disclosure. This is what the reference in V and VI is to – violation of rules or of law protecting the records. It might make sense to require that the party seeking access to the records provide some sort of certification – or perhaps to require order of notice with service by the sheriff?

Judge Delker noted that Attorney Herrick is correct, that in the context of subpoenas, for example, there is a process of notification regarding the records that are sought. A person has a right to move to quash.

Attorney Gordon stated that how to address this issue is challenging, especially if what is at issue is old records, from say, ten years prior. What is to be done if the party cannot be found? Attorney Richter inquired whether judges take into consideration the fact that a party cannot be found when determining whether to unseal case records. Judge Delker noted that under the federal rules, documents are categorized according to different levels of confidentiality.

Attorney Richter suggested that "the court may issue additional orders as necessary to preserve . . . ." in proposed Rule IV(h) should read, "the court shall . . . ." He also suggested that a phrase be added to Rule V(d), but the decision was made not to add the phrase.

Judge Delker agreed to discuss the notice issue raised with regard to proposed Rule V with the motions to seal subcommittee.

c. 2016-008. Rules of Professional Conduct and Medical Marijuana.

Judith Bomster, former chair of the Ethics Committee, Richard Samdperil and Peter Beeson were present at the meeting to represent the view of the New Hampshire Bar Association Ethics Committee regarding the proposed changes to Rule of Professional Conduct 1.2.

It was explained that the proposal to amend Professional Conduct Rule 1.2 intends to address the application of Rule 1.2(d) of the New Hampshire Rules of Professional Conduct to RSA Chapter 126-X, which makes lawful the manufacturing, sale, possession and use of marijuana for certain medical or therapeutic cannabis dispensaries and businesses operating in this area.

New Hampshire Rule of Professional Conduct 1.2(d) contains the following prohibition:

> (d) a lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The Ethics Committee believes that the language "a lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal" severely restricts a New Hampshire lawyer's ability to advise or assist clients that are engaged in the use, distribution and sale of medical marijuana authorized by state law because those same activities would violate federal criminal law. A plurality of the Ethics Committee proposes the following amendment to Rule 1.2 (as set forth in attachment A of the March 30, 2016 letter to Chief Justice Dalianis):

> (d) a lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent **[except as stated in paragraph (e)]**, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
>
> **[(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by New Hampshire law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequences of the client's proposed course of conduct under applicable federal law.]**

Attorney Samdperil stated that this is a field that is developing rapidly and that recently both Maine and Pennsylvania adopted new rules to address this. The trend in state professional conduct rules is to move in the direction of allowing counsel to advise clients and assist with compliance and things related to the business – banking, regulations, etc. This is a matter of public safety and interest and is a positive for the public, not just a safe harbor for lawyers.

Attorney Beeson noted that one other element of the landscape is different today than it was a year ago when the Ethics Committee letter was drafted. That is, there was protection given to lawyers from the federal Department of Justice memorandum (the "Cole Memorandum"). However, recently, Attorney General Sessions made it clear that he would like to see a more aggressive prosecutorial approach toward marijuana violations. This underscores that any protection by the Department of Justice is only as good as long as it remains the policy of the Administration. He urged the Committee to adopt the amendment to Rule 1.2(d) that is recommended by a plurality of the Committee.

Judge Delker inquired why the recommendation is of a plurality of the committee, and not the entire committee. Attorney Beeson clarified that the recommendation is of a majority of the voting members of the committee. A number of the members of the Ethics Committee were recused.

Mr. Richter noted that there is no reference to marijuana in the proposal, and inquired whether this is deliberate.

Attorney Beeson stated that some states are referring narrowly to marijuana. Other states, such as Maine and Pennsylvania, more generally refer to the state v. federal law conflict, and the Ethics Committee concluded that this is the better approach.

Justice Lynn inquired how this would apply in other contexts. For example, suppose a city in New Hampshire refused to cooperate with ICE. Attorney Beeson explained that the obligation to advise a client always includes the obligation to counsel the client regarding federal law. If an attorney has a client who wishes to comply with a sanctuary city ordinance, the attorney can tell them to comply with the ordinance even knowing that this violates federal law, as long as the attorney advises them that they will be in violation of federal law. The Ethics Committee deals only with the ethical responsibilities of a lawyer.

Mr. Stewart inquired whether, in light of this, the reference in the proposed amendment should be limited to New Hampshire law. There

was some discussion regarding whether the reference should be to state or local law.

Judge Delker noted that in his view this is not a controversial proposal, if it is taken out of the controversial context. It allows attorneys to advise their clients.

Following some brief discussion and upon motion made and seconded, the Committee voted to put the proposal set forth in appendix A of the Ethics Committee's August 30, 2016 letter out for public hearing, as amended to replace "New Hampshire law" with "state or local law."

d. 2016-009. Rule of Professional Conduct 8.4. Harassment and Discrimination.

The Committee considered the proposal, set forth in a March 23, 2017 letter from attorney Rolf Goodwin, to amend New Hampshire Rule of Professional Conduct 8.4 to add a new subsection (g) to make it professional misconduct for a lawyer to:

> (g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation or marital status. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

Attorney Peter Imse addressed the Committee on behalf of the New Hampshire Bar Association Ethics Committee. Attorneys Rolf Goodwin and Lauren Smith were present to answer questions.

Attorney Imse noted that all learned professions include in their Codes language regarding discrimination and harassment. Attorneys stand alone in not having a rule prohibiting discrimination and harassment, and the Ethics Committee does not see that there is any reason to continue to exclude such a provision from the Code of Professional Conduct.

The 1986 ABA Model Rules of Professional Conduct contained a rule prohibiting action prejudicial to the administration of justice. That phrase over time came to include harassment and discrimination in the context of court proceedings and litigation. When New Hampshire adopted the model rules in 1986 the language "prejudicial to the administration of justice" was not included. New Hampshire currently has no ethical rule regarding attorney behavior that could be classified as harassment. When the ABA amended its rule to add subsection (g) to Rule 8.4 it became clear to the Ethics Committee

that it is time to correct this oversight in the New Hampshire Rules. Procedurally, this is similar to what has happened regarding the marijuana rule. This provision has been adopted by a majority of states across the country.

Regarding the concern about free speech that has been raised by the Montana legislature and by the Attorney General of Texas, this provision is not intended to limit the right of attorneys to represent clients or limit the right to free speech. Enforcement of this rule will be through the attorney discipline process, to discipline lawyers engaging in the prohibited behavior.

Attorney Imse noted that there are several issues to highlight regarding the New Hampshire Rule:

(1) *Scope of Behavior*

The behavior being regulated is behavior "related to the practice of law." While the Ethics Committee believes that it is not acceptable for an attorney to engage in this kind of behavior generally, the Committee thought it best to approach this issue in an incremental way. The ABA comment makes it clear that the Mode Rule language "conduct related to the practice of law" includes representing clients, interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law . . . ." Thus, the rule does not regulate the actions an attorney takes in his or her private life.

(2) *Protected Class Issue*

A question has been raised about why the rule does not simply make it attorney misconduct to engage in behavior that is a violation of federal law. The reason the rule does not do so is because federal law applies only to businesses of a certain size, so the exceptions to the rule would swallow the rule. Incorporating substantive law simply did not make sense, so the Ethics Committee retained the list but included a comment to the rule to make it clear that while federal and state law guide the application of subsection (g) exemptions such as those based upon the number of people in a law office does not relieve the lawyer of the responsibility of complying with the rule.

(3)*Regarding the composition of the list of protected classes*

The list of protected classes in the proposed New Hampshire rule differs slightly from the list in the ABA model rule. The New Hampshire list is based upon New Hampshire anti-discrimination laws. Socioeconomic class is not included because that does not exist in New Hampshire as a protected class. Gender identity is not on the New Hampshire list, but it is included in the

comment. The proposed rule is narrowly tailored to be in sync with New Hampshire law.

The Montana legislature has taken a strong position against the ABA proposal. The concern seems to be framed in terms of: (1) free speech; and (2) the belief that it will hamper the ability of lawyers to represent clients involved in this kind of behavior. Mr. Imse stated that he believes that the Montana legislature is wrong about the speech issue and regarding the representation of clients issue. He notes that this is only a risk if the regulatory authority believes that the behavior warrants disciplinary action. The Ethics Committee comment clearly states, "[t]his Rule is not intended to infringe on a lawyer's rights of free speech or a lawyer's right to advocate for a client in a manner that is otherwise consistent with these rules." He stated that "free speech right" could be changed to "constitutional right" in the comment.

Justice Lynn inquired whether Mr. Imse would be able to provide the Committee with copies of the rules that have been adopted in the other professions – medicine, accounting, etc. He also asked whether Mr. Imse is aware of any other states that have declined to adopt the model rule in some form. Mr. Imse replied that he is aware of only two states that have declined to adopt some form of the rule. The Montana legislature passed a joint resolution stating that the model rule infringes on the First Amendment rights of people licensed to practice law in Montana. The Texas Attorney General has similarly taken the position that the rule violates free speech rights. He noted that there could be others that he is not aware of. He offered to provide the Committee with this information.

Representative Berch stated that it would be helpful to know whether there are jurisdictions in which this was determined to be a legislative matter.

Justice Lynn stated that he has concerns about the proposal. He noted that in Illinois, the rule is that this can be professional misconduct, but only after there has been a finding by a court or administrative agency that the lawyer has violated an anti-discrimination law. In addition, he understands that a number of states have adopted a specific exemption relating to *Batson* challenges in jury selection. Justice Lynn noted that unlike other professions, lawyers are inherently involved in conflict. He is concerned that, for example, a lawyer who has a disgruntled client might now find himself facing a claim that he did not do a good job for his client because his client is a member of a protected class.

Attorney Imse stated that the Ethics Committee had considered the Illinois rule, but decided not to recommend it because there are many who would not be covered by the rule, for example a secretary at a small firm. Regarding the *Batson* issue, Attorney Imse noted that the ABA Model Rules include a comment that a "trial judge's finding that peremptory challenges were

exercised on a discriminatory basis does not alone establish a violation of paragraph (g)."

In response to a question, attorney Imse stated that while there might be more complaints filed at the Attorney Discipline Office if this rule is adopted, he is confident that unmeritorious claims will be weeded out. He would prefer to inconvenience an attorney rather than have someone to be discriminated against and have no avenue for relief.

Mr. Stewart noted that he had reviewed some comments suggesting that investigating these complaints will be burdensome to the Attorney Discipline Office. Mr. Imse stated that he does not believe that this is likely to be any different than any other attorney discipline matter.

Attorney Gordon inquired whether there is any record at the Attorney Discipline Office to suggest that the ADO was unable to prosecute a matter because this rule did not exist. In other words, he stated that he is wondering whether this is a solution in search of a problem. Attorney Imse is not aware of whether this has been an issue at the ADO. In response to a follow-up inquiry from attorney Gordon, attorney Imse stated that he is not aware whether the adoption of this rule in other jurisdictions has led to an increased number of filings with the disciplinary authority in those states.

Attorney Gordon asked, relating to the *Batson* issue, whether this rule would present similar problems in a rape trial for example, in which an attorney determines that it is in the client's interest to strike women from the jury. This would fall squarely within the rule. Also, often in a rape trial, the defense strategy is to go after the victim, demean the victim. Attorney Imse stated that in his view zealous advocacy on behalf of a client is not unlimited.

Mr. Richter inquired whether a broad "don't behave like a jerk" rule might accomplish the same thing. Attorney Imse responded that Professional Rules of Conduct 1.1 and 1.2 aim to do this. But this rule is special because it addresses the issue of protected classes. He noted that the Ethics Committee is happy to work with the Rules Committee on amending the proposal to address the Committee's concerns.

Attorney Albee stated that she has two concerns about the proposal: (1) we have criminal laws against harassment in New Hampshire. Under this proposal, lawyers would be subject to a lesser standard of proof than they would be in the criminal court; and (2) NH rules of professional conduct address the issue if you are convicted of harassment.

Attorney Gordon stated that the trouble with this proposal is that it is possible to be a terrible human being in many ways and still be an effective

and ethical lawyer. Why should this behavior make someone ineligible to be a lawyer?

Attorney Imse stated that the question is – are you being a terrible human while acting as a lawyer or not as a lawyer. Under this proposal, there is a distinction. Also, this behavior is bad, and this is about professional standards.

Justice Lynn stated that his concern is that unlike fraud, deceit or misrepresentation, discrimination and harassment is close to being – what are my views on certain things? This is a great deal more amorphous than the other categories.

Attorney Lauren Smith spoke to address some of the concerns raised by the Committee. Regarding the question raised by Attorney Albee about the interplay with criminal cases involving sexual harassment, Attorney Smith noted that the language of the rule has a knowing standard, which is quite high. She states that she believes that lawyers need to regulate lawyers and hold them to a high standard about how to treat one another and about how to treat clients.

Attorney Smith stated that she would be happy to have the Ethics Committee do more research to address the concerns raised by the Committee and to consider the possibility of addressing some of the concerns in comments.

Regarding the concern about a potential explosion in filings at the ADO, attorney Smith states that this has not happened in other jurisdictions. Furthermore, as was made clear in the *Sanjeev v. Lath* case, the ADO can decide whether a matter warrants prosecution.

Attorney Smith stated that she does not want to see this proposal die on the vine. She believes that the jury selection question is a good one. She believes that more work can be done on the proposal.

Following some discussion, the Committee concluded that the harassment and discrimination proposal is in need of more work. Justice Lynn believes that the Illinois rule might be better than what has been proposed. Attorney Gordon and Jeanne Herrick agreed to work with the Ethics Committee on the proposal.

e. <u>2016-014. New Hampshire Rules of Criminal Procedure. In Camera Review of Documents</u>

Justice Lynn reminded the Committee that a proposal to amend the Rules of Criminal Procedure relating to the procedure used by trial courts when

conducting the *in camera* review of confidential records was submitted by attorney Christopher Johnson in December 2016. *See* December 5, 2016 letter from Attorney Johnson. A subcommittee was convened to consider the proposal. The results of the subcommittee's work are summarized in a March 6, 2017 letter from attorney Johnson. At the March 17, 2017 meeting Justice Lynn expressed concern about the fact that the subcommittee's proposal did not include involving counsel in a phase of *in camera* review. He suggested that the issue be left open and that Attorney Johnson be asked to provide the Committee with more information about the approaches that have been taken in other states.

Attorney Johnson submitted an April 3, 2017 letter to the Committee providing some information about the approaches taken in other states, and the extent to which any have adopted procedures that involve the lawyers in a phase of the *in camera* review. The letter notes that attorney Johnson's sense is that a majority of states employ a procedure similar to the one presently used in New Hampshire, but that in at least two states – Iowa and Massachusetts - courts have adopted a procedure that involves counsel in a phase of the *in camera* review of records.

Justice Lynn stated that he believes that involving an attorney in the process is key. But Representative Berch noted that this then presents the difficult question about what a lawyer can say to his or her client.

Judge Delker stated that it is important to have openness in doctor/patient relationships. To know that an attorney might be looking at the records would inhibit that openness. Therefore, that doctor/patient confidentiality should be breached *only* when necessary to preserve the due process rights of the defendant. That is, only when the records at issue are "essentially and reasonably necessary" – those records that go to the core of the credibility of the allegations of the case. This is supported by the fact that there are state statutes that recognize the importance of not breaching the doctor/patient confidentiality. Permitting the defendant's attorney to see the file is an invasion of the well being of a person seeking, for example, mental health treatment.

Representative Berch expressed the belief that the view Judge Delker just articulated is a narrow view of what is "essential and reasonably necessary." However, assuming that the judge makes a guess as to the materiality of a record and then goes further and asks for the participation of the lawyer, how can a defendant's lawyer participate in that process without the participation of his or her client? There are downstream ramifications. Representative Berch does not believe that it is possible to create a wall on information that is this important.

Justice Lynn proposed the following procedure, aimed at balancing the liberty and privacy interests at stake: (1) an initial determination by the judge; (2) participation by defense counsel (with a protective order issued prohibiting counsel from sharing information with anyone, including his or her client); and (3) a determination as to whether the records are "essentially and reasonably necessary," such that they can be introduced at trial.

Attorney Gordon stated that if this is the rule in the civil context, he can imagine strategic disclosures being made in family law cases.

Representative Berch stated that this approach would totally change the structure of the litigation. This is the *client's* case. It is hard for a client to make decisions without being privy to all of the relevant information.

In response to an inquiry from Mr. Richter, the Committee was reminded that this proposal came from the Court. The judges would like to involve counsel.

Attorney Herrick inquired about *ex parte* meetings between the defense team and the judge. Judge Delker identified *Richie v. PA* and *Gagne*.

It was noted that Judges are currently barred by *State v. McDonald* from having lawyers involved in the *in camera* review.

Mr. Richter inquired whether it is acceptable to change the holding in *McDonald* by rule.

There was additional discussion about the involvement of counsel piece and how to craft a rule. It was agreed that the Committee would consider two documents at the meeting in September: (1) the rule set forth in the attachment to Attorney Johnson's March 6 letter (which does not include a participation by counsel piece); and (2) a proposal Justice Lynn will submit for consideration, which does include a participation by counsel piece.

f. <u>2017-002. New Hampshire Rule of Evidence 801(d)(1)(B)</u>

Justice Lynn reminded the Committee that at issue is whether the change made to Federal Rule of Evidence 801(d)(1)(B) in 2014 should be made to New Hampshire Rule of Evidence 801(d)(1)(B). He referred the Committee to his May 10, 2017 email to the subcommittee that had met to discuss this issue. The email states that it is the subcommittee's recommendation that the Committee take no action on this proposal for at least one year.

The Committee agreed to take no action on this item. As is indicated in Justice Lynn's May 10 email, the item will be raised again at the September 2018 meeting.

g. 2017-003. Sup. Ct. R. 37(A(II)(a)(3)(a)-(b). Procedure after Receipt of a Grievance.

The Committee was reminded that this proposal to amend Rule 37A was submitted by Attorney Brian Moushegian at the request of the Committee. The Committee had asked the Attorney Discipline Office to submit language to the Committee that would give the ADO discretion not to docket a grievance if the ADO concludes that a hearing panel would be unlikely to find clear and convincing evidence that the respondent attorney violated the Rules of Professional Conduct.

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

h. 2017-005. Sup. Ct. R. 37(12). Reciprocal Discipline.

Carolyn reported that she will submit something to the Committee on this soon for consideration at the September meeting.

5. New Submissions

(a) 2017-006. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

The Committee next considered a proposal made by Mr. Steven Karels in a March 29, 2017 email to Carolyn Koegler. Mr. Karels proposes an amendment to Supreme Court Rule 36 which would allow students at non-ABA accredited law schools to intern and to be able, under the supervision of a New Hampshire attorney, to appear before the court system.

Committee members discussed the proposal and some expressed the view that the Committee should not recommend the adoption of the proposed rule change. The Committee asked Carolyn Koegler to forward the proposal to the New Hampshire Office of Bar Admissions and to request comment on it.

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

Justice Lynn directed the Committee's attention to the April 5, 2017 memorandum from Eileen Fox. The New Hampshire Supreme Court has asked that the Committee review Supreme Court Rule 41 ("Limited Liability

Companies") to determine whether the rule continues to serve the purpose for which it was adopted.

Some Committee members expressed the view that the rule should be changed, and that only attorneys who practice in New Hampshire need to be listed.

It was agreed that the Committee should seek input from the Ethics Committee and Attorney Discipline Office. Attorney Curran agreed to seek input from the New Hampshire Bar Association Board of Governors.

(c) 2017-008. Supreme Court Rule 37A(IV). Index of Complaints.

The Committee next considered the proposal, set forth in a June 2, 2017 letter from Attorney Discipline Office General Counsel Janet DeVito, that Rule 37(2)(a)(3) be amended to include language that had been included in the former rule requiring the indexing of docketed claims and prohibits indexing non-docketed grievances. It is attorney DeVito's position that not including this provision when amendments to Rule 37A were made in 2015 was an inadvertent oversight.

Following brief discussion, the Committee voted to recommend this change to the Supreme Court, without holding a hearing on the matter.

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

The Committee next considered a June 8, 2017 memo from Eileen Fox in which she states that the Supreme Court requests that the Advisory Committee on Rules consider whether a Supreme Court Rule should be adopted relating to identifying crime victims in documents filed in appellate cases.

The Committee took no action on this item.

(e) 2017-010. New Hampshire Rules of Criminal Procedure (Felonies First Counties).

The Committee briefly considered a June 15, 2017 order from the Court extending the deadline for filing indictments to 90 days after the complaint is filed in Superior Court and permitting judges to exercise discretion to grant or deny requests for extensions of time for filing indictments. The Court adopted the rule changes on a temporary basis and referred them to the Committee for its recommendation as to whether they should be adopted on a permanent basis.

The Committee took no action on this item.

6. Meeting Dates

The remaining 2017 meeting dates are:

- Friday, September 15
- Friday, December 8