ADVISORY COMMITTEE ON RULES
March 20, 2002

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

Honorable Linda S. Dalianis, Chairman, called the meeting to order at 12:15 p.m.

The following Committee members were present:
Robert L. Chase
Hon. Linda S. Dalianis
Hon. Robert L. Cullinane
Alice B. Guay
Senator Ned Gordon
Hon. Richard A. Hampe
Martin Honigberg, Esquire
Hon. Philip Mangones
Mrs. Amanda Merrill
Jack B. Middleton, Esquire
Emily G. Rice, Esquire
Raymond W. Taylor, Esquire

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

Judge Dalianis welcomed the Committee's newest members, Mr. Robert L. Chase and Martin Honigberg, Esquire. She briefly summarized the Committee's role.

David Peck then reported on action taken by the Supreme Court since the Committee's last meeting. He stated that the Supreme Court recently adopted the Committee's recommendations relating to several technical amendments. In addition, it adopted, on a temporary basis, amendments to Supreme Court Rule 12 D and Rules of Professional Conduct Rule 7.4 and referred them to this Committee for a determination of whether they should be adopted on a permanent basis.

After discussion, and on motion of Judge Cullinane, seconded by Attorney Rice, it was voted to approve the minutes of the December 12, 2001 meeting of the Committee as amended.

The Committee next reviewed the status of items still pending, and the following action was taken:

Relative to administrative orders prepared by administrative judges, Attorney Rice reported that she compiled all the administrative orders for the three court levels into a book for distribution to Committee members. She stated that recent changes in personnel have altered the practice of issuing administrative orders in the lower courts. She will be meeting with Judge Murphy and Judge Maher in mid-April and anticipates having a written recommendation for the Committee's consideration at its June meeting.

Relative to an amendment to Superior Court Administrative Rule 1-6 pertaining to the authority of clerks, this matter was deferred until the Committee's next meeting.

Relative to an amendment to the Supreme Court "Transcript Requisition" form, this matter was deferred until the Committee's next meeting.

Relative to a possible conflict between Superior Court Rule 105 and Supreme Court Rule 7(1) pertaining to the filing of appeals in criminal cases, following discussion, the Committee asked that a staff attorney prepare a memorandum analyzing the problem and making a recommendation for the Committee's consideration at its next meeting.

Senator Ned Gordon arrived and was introduced to Committee members.

Relative to a proposed amendment to Rules of Evidence Rule 512 pertaining to comments upon or inferences from claims of privilege, following discussion, and on motion duly made and seconded, the Committee voted to reconsider prior action taken by it on Rules of Evidence Rule 512, and further to send the proposed amendment to Rules of Evidence Rule 512, as set forth in Appendix A of these minutes, to the Committee's next public hearing.

Relative to the proposed comment to Supreme Court Rule 41 governing limited liability entities, following discussion, and on motion of Attorney Middleton, seconded by Judge Cullinane, the Committee voted to request that the Supreme Court publish the proposed comment to Supreme Court Rule 41, as set forth in Appendix B of these minutes, at the end of Supreme Court Rule 41.

Relative to an amendment to Superior Court Administrative Rule 12-9 pertaining to the authority of marital masters, following discussion, Judge Dalianis and David Peck agreed to convene a subcommittee to rework Superior Court Administrative Rule 12-9 to address concerns raised by Committee members.

Relative to an amendment to Rules of Professional Conduct Rule 1.17 pertaining to attorney malpractice insurance, following a lengthy discussion, and on motion of Judge Dalianis, seconded by Attorney Middleton, the Committee voted to send proposed Rule 1.17 of the Rules of Professional Conduct, as set forth in Appendix C of these minutes, to the Committee's next public hearing.

Relative to an amendment to Superior Court Rule 170 pertaining to alternative dispute resoultions, following discussion, and on motion of Judge Dalianis, seconded by Judge Cullinane, the Committee voted to send the proposed amendments to

Superior Court Rule 170, as set forth in Appendix D of these minutes, to the Committee's next public hearing.

Relative to Superior Court Rule 64B pertaining to questions to jurors, Attorney Taylor stated that he and Judge Murphy will have a report on the effects of permitting jurors to ask written questions for the Committee's consideration at its next meeting.

Relative to amendments to Supreme Court Rule 3 pertaining to the definition of "clerk" and Supreme Court Rule 21 pertaining to the authority of clerks and single justices, following discussion, and on motion of Attorney Middleton, seconded by Judge Cullinane, the Committee voted to send the proposed amendments to Supreme Court Rules 3 and 21, as set forth in Appendix E and F respectively of these minutes, to the Committee's next public hearing.

Relative to a proposed amendment to Supreme Court Rule 42 pertaining to bar applicants with disabilities, following discussion, and on motion of Judge Hampe, seconded by Attorney Taylor, the Committee voted to include the proposed amendments to Supreme Court Rule 42, as well as the forms pertaining to bar applicants with disabilities, on the Committee's next public hearing.

Relative to whether the Committee's meetings and minutes should be public, following discussion, Committee members agreed that the minutes of the meetings will be made public following approval, beginning with the minutes of the March 20, 2002 meeting. Further action was deferred until the Committee's next meeting.

Mrs. Merrill left the meeting.

Relative to amendments to Supreme Court Rules 7 and 10 and the notice of appeal form, the Committee deferred action on these amendments until a later date.

Relative to an amendment to Supreme Court Rule 32-A pertaining to guardianship and involuntary admission cases that was on the December 12, 2001 public hearing agenda, following discussion, and on motion of Attorney Rice, seconded by Attorney Middleton, the Committee voted to recommend that the Supreme Court adopt Supreme Court Rule 32-A, as set forth in Appendix G of these minutes.

Relative to Supreme Court Rule 56 pertaining to performance evaluation of judges, the Committee deferred action on this new rule until its next meeting.

The Committee next turned its discussion to new items for consideration and the following action was taken:

Relative to amendments to District Court Rule 5.10 pertaining to landlord/tenant cases, following discussion, and on motion of Judge Cullinane, seconded by Attorney Middleton, the Committee voted to recommend that District Court Rule 5.10 be amended to conform to RSA 540:25, I-a, as set forth in Appendix H of these minutes, and further to forward said amendments to the Supreme Court for consideration as a technical amendment.

Relative to an amendment to Supreme Court Rule 12-D pertaining to summary procedures in appeals, following discussion, and on motion of Judge Cullinane, seconded by Judge Hampe, the Committee voted to include Supreme Court Rule 12-D on the Committee's next public hearing agenda.

Relative to an amendment to Supreme Court Rule 42 relating to admission to the bar on motion, following discussion, and on motion of Attorney Rice, seconded by Judge Cullinane, the Committee voted to include said amendment to Supreme Court Rule 42 on the Committee's next public hearing agenda.

Relative to the guidelines for guardians ad litem, the Committee discussed the status of the guidelines and whether they should be enacted as rules. Some Committee members were concerned because guidelines are not published in the same manner as rules. This makes them inaccessible to the public, who may remain unaware of their existence. Following discussion, Attorney Rice agreed to discuss this matter with the administrative judges when she meets with them to discuss administrative orders, and to report back to the Committee at its next meeting.

The remaining items on the agenda were deferred to the Committee's next meeting.

The Committee scheduled its next meeting for June 26, 2002 at 12:00 p.m., to be followed by a public hearing at 1:00 p.m.

No further business to come before the Committee, the meeting adjourned at 2:38 p.m.

/pah

APPENDIX A

Amend Rule 512 of the Rules of Evidence by adding a new section (d) so that said rule, as amended, shall read as follows:

Rule 512. Comment Upon or Inference From Claim of Privilege: Instruction

(a) *Comment or Inference Not Permitted*. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) *Claiming Privilege Without Knowledge of Jury*. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) *Jury Instruction*. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(d) *Application -- Self-Incrimination*. Subsections (a) to (c) do not apply in a non-criminal case with respect to the privilege against self-incrimination.

APPENDIX B

ADVISORY RULES COMMITTEE COMMENT

This rule does not authorize a limited liability entity to practice law in New Hampshire if said practice is prohibited by New Hampshire statute. It appears to be an unsettled question under New Hampshire law whether a foreign professional corporation is prohibited from practicing law in New Hampshire. See RSA 311:11, :11-a; RSA ch. 294-A.

APPENDIX C

Amend the Rules of Professional Conduct by adding the following new Rule 1.17:

Rule 1.17. Disclosure of Information to the Client

(a) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement of the lawyer if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(b) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(c) The notice required by paragraph (a) of this rule shall not apply to a lawyer who is engaged in either of the following:

(1) Rendering legal services to a governmental entity that employs the lawyer;

(2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.17 of the New Hampshire Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
(Attorney's signature)

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.17 of the New Hampshire Rules of Professional Conduct that **[insert attorney's name]** does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____

(Client's signature)

Date: _____

APPENDIX D

Amend Superior Court Rule 170 by deleting it and replacing it with the following:

ALTERNATIVE DISPUTE RESOLUTION (ADR)

170. ALTERNATIVE DISPUTE RESOLUTION (ADR)

(A) *Cases for Alternative Dispute Resolution Procedures.*

All Writs of Summons and transfers of actions from the District Court, with the exception of cases submitted by the parties to private dispute resolution, shall be assigned to ADR.

(B) *Election of Specific Alternative Dispute Resolution Procedure.*

At the structuring conference, held pursuant to Rule 62, the Court shall assign the case to mediation unless, by agreement of the parties, the case is scheduled for either a Nonbinding Evaluation or a Binding Arbitration.

A party seeking an assignment to Nonbinding Evaluation without assent may file a motion for such an assignment and the Court may schedule the case for Nonbinding Evaluation rather than mediation upon a showing of good cause to do so by the party requesting said assignment. If the parties have elected to submit the case to private dispute resolution, the Structuring Conference Order should so note and the case will not be assigned to a Rule 170 ADR proceeding.

(C) *Court Order for Alternative Dispute Resolution.*

The order referring the case to the specific ADR procedure will be issued by the Court at least thirty days in advance of the assignment date. Proceedings shall be scheduled in accordance with the availability of court resources. ADR proceedings shall not stay, alter, suspend, or delay pretrial discovery, motions, hearings, or conferences nor the requirements and time deadlines of New Hampshire Superior Court Rules 62 and 63.

(D) *Neutrals.*

(1) All neutrals (neutral evaluators, mediators, arbitrators) shall be attorneys approved by the Court. In approving neutrals, the Court may consider length of practice, trial experience, and alternative dispute resolution experience.

Mediators - All mediators must have at least 20 hours of court sponsored training in civil mediation.

Neutral Evaluators - All neutral evaluators must have at least 20 hours of training in alternative dispute resolution, including at least 4 hours of training in neutral evaluation under this Rule. Neutral evaluators must have a minimum of 10 years experience in litigation in the subject matter areas to which they may be assigned as neutral evaluators.

(2) Upon receipt of notice of appointment in a case, the neutral shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If the neutral withdraws, has a conflict of interest, or is otherwise unavailable, another shall be appointed by the Court

(E) *Role of the Neutral.*

The litigants and counsel must recognize that the neutrals will not be acting as legal advisors or legal representatives. They must further recognize that, because the neutrals are performing quasi-judicial functions and are performing under the auspices of the Court, each such neutral has immunity from suit, and shall not be called as a witness in any subsequent proceeding relating to the parties' negotiations and/or his/her participation, except as set forth in Rule 170(I).

(F) *Inadmissibility of Alternative Dispute Resolution Proceedings.*

(1) ADR proceedings under this rule, with the exception of binding arbitration, are nonbinding and shall not impair the litigants' trial rights. ADR proceedings and information relating to those proceedings shall be confidential. Information, evidence, or the admission of any party or the valuation placed on the case by any neutral shall not be disclosed or used in any subsequent proceeding. Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. All nonbinding ADR proceedings are deemed settlement conferences consistent with the Superior Court Rules and Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding the fact that there was an ADR proceeding or any other matter concerning the conduct of the ADR proceedings, except as set forth in Rule 170(I).

(2) There shall be no record made of any proceedings under these ADR procedures, and the mediator/evaluator shall destroy all of his/her notes immediately after the proceedings.

(3) Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its use in an ADR proceeding.

(G) *Specific ADR Election.*

(1) Mediation. Mediation shall consist of and be limited to a session or sessions with the parties and their counsel to facilitate a settlement acceptable to the parties. The mediator does not have the authority to render a decision or impose a settlement on the parties. If mediation is selected, the court order for ADR shall provide the parties with the mediator's name and address and the time and date for the session. The session shall be conducted at a courthouse.

(a) Not later than ten (10) days prior to the session the parties shall submit to the mediator and exchange a summary of the significant aspects of their case. The parties may attach to the summary copies of pertinent documents. Such summaries shall be not more than four (4) pages.

(b) Upon receipt of a party's submission, any party may send additional information responding to that submission. All such responsive submissions shall be exchanged with opposing counsel and shall contain a statement of compliance with the exchange requirement.

(c) Except as provided above, parties shall not communicate with the mediator concerning their case.

(d) At the mediation session, all parties and counsel and, in the event that there is insurance involved, an insurance representative shall be present and those present shall have authority to authorize settlement. The presence of the insured defendant may be excused by agreement of the parties or by motion filed not later than 30 days prior to the scheduled date of the mediation for good cause.

Comments Regarding Excusal of an Insured Defendant:

In considering any motion to excuse an insured defendant, the Court may take into consideration: (1) The issues to be mediated; (2) whether depositions of the parties have been taken; (3) representation by counsel for the defendant that the presence of the defendant will not materially advance the objectives of the mediation; and (4) The reason for the insured defendant’s desire to be excused.

(e) The parties, their counsel and their representatives, [hereinafter sometimes "participants"] shall conduct themselves in good faith at all times while participating in mediation under this Rule. Good faith does not necessarily require the making of an offer or the lowering of a demand; neither does good faith necessarily require a change in a party's position during the course of mediation

Comments to the Requirement of Good Faith:

Good faith requires but is not necessarily limited to the following:

1. Personal appearance by the parties, unless excused by court order;
2. Appearance by counsel, if the party(s) is/are represented;
3. Appearance by an insurance representative with working knowledge of the case and authority to settle the case, if insurance is involved;
4. Preparation by participants for the mediation, and willingness to listen to and consider statements of other participants and the neutral;
5. Ability to articulate the basis for an unwillingness to change position during the mediation;
6. Compliance with the format set out by the neutral; and
7. Compliance with the procedures set forth in Rule 170 and any court orders relating to the mediation.

(f) To ensure that parties openly, freely, and candidly discuss the strengths and weaknesses of their positions with the mediator, information provided to the mediator in private discussion shall be confidential and shall not be divulged to the opposing side unless specifically authorized.

(g) If resolution cannot be achieved on the date assigned, the mediator is authorized to continue the mediation process, upon agreement of the parties on such terms the mediator shall establish, including reasonable compensation to the mediator. Within thirty (30) days of the initial mediation session, the mediator shall advise the Court that the case has been settled, that mediation is ongoing, or that mediation failed to resolve the dispute. If mediation is ongoing, the mediator shall file a final report within three (3) days of the final mediation session. Upon notification to the mediator that the action has been settled, the parties shall file docket markings pursuant to Rule 51.

(2) Nonbinding Evaluation.

(a) Nonbinding Evaluation shall consist of a process whereby the neutral assigned to the case helps facilitate resolution by evaluating the strengths and weaknesses of the case for the parties and, when appropriate, assigns a dollar value or dollar value range to the case. Any evaluation by the neutral is nonbinding and may be accepted or rejected by the parties.

(b) When Nonbinding Evaluation is scheduled, the court order for ADR shall provide the parties with the Neutral Evaluator's name and address, the time, date, and place of the evaluation conference, and the date by which the parties shall furnish the neutral evaluator with the required information and documentation.

(c) By the date specified, the parties shall submit to the neutral evaluator and exchange among themselves, a summary of the significant aspects of their case. Such summaries shall not be longer than five pages. The parties may attach to the summary copies of pertinent documents on which they will rely in making their presentation.

(d) Upon receipt of a party's submission, any party may send additional information responding to that submission. All such responsive submissions shall be exchanged with opposing counsel, and shall contain a statement of compliance with the exchange requirement.

(e) Except as provided above, parties shall not communicate with the neutral evaluator concerning their case.

(f) At the nonbinding evaluation, all parties and counsel and, in the event that there is insurance involved, an insurance representative shall be present and those present shall have authority to authorize settlement. The presence of the insured defendant may be excused by agreement of the parties or by motion filed not later than 30 days prior to the scheduled date of the mediation for good cause.

Comments Regarding Excusal of Insured Defendant:

In considering any motion to excuse an insured defendant, the Court may take into consideration: (1) The issues to be evaluated; (2) whether depositions of the parties have been taken; (3) representation by counsel for the defendant that the presence of the defendant will not materially advance the objectives of the evaluation; and (4) The reason for the insured defendant's desire to be excused.

(g) At the evaluation conference no formal rules of evidence or procedure shall apply. The parties shall have the opportunity to present their cases by offers of proof, with documentation, or in any manner deemed appropriate by the neutral evaluator. The neutral evaluator may ask questions of the parties upon the completion of the respective presentations to clarify matters presented. If appropriate, after hearing from all parties, the evaluator may identify areas of agreement and attempt to resolve those matters on which the parties disagree.

(3) Binding Arbitration. Arbitration hearings shall be conducted as administrative adjudications governed by New Hampshire RSA Chapter 541-A. The arbitration encompassed within this rule shall be subject to the provisions of New Hampshire RSA Chapter 542. The arbitrator(s) shall be vested with all the powers and shall assume all the duties granted and imposed upon the arbitrator(s) by New Hampshire RSA Chapter 542.

The proceeding shall follow a trial format with opening and closing arguments and direct and cross-examination of witnesses. The arbitrator(s) may

also ask questions. Each party's presentation shall be limited to two (2) hours for the case in chief and one (1) hour for cross-examination and rebuttal, provided however, for good cause shown the time may be enlarged for either party. Any person that possesses relevant and material information may testify subject to the time limitations imposed. If there is one arbitrator, that arbitrator shall be the judge of the relevancy, materiality, and general admissibility of the evidence, and of all questions of procedure. The chair of a three (3) member arbitration panel shall preside at the hearing and shall be the judge of the relevancy, materiality, and general admissibility of evidence, and of all questions of procedure.

If binding arbitration is selected, the parties may elect a single or three (3) person panel. If a single arbitrator is requested, the Court will issue to each party a list of five (5) arbitrators. Each party will strike one name from the list and rank the remaining four, with 1 being the first choice, 2 the second, etc. The person receiving the lowest total score shall be the arbitrator. In the event of a tie score, the Clerk shall choose the arbitrator from those whose scores are tied. In the event the parties cannot agree on the panel's size, the panel shall be comprised of three (3) arbitrators. A three (3) member arbitration panel shall be selected by each party selecting a neutral approved by the Court. The two (2) members so selected shall jointly select the third member from the pool of neutrals approved by the Court, or absent agreement, the third member shall be chosen by the Clerk. The third member so selected shall be chair of the panel. In the event that both sides select the same neutral, the binding arbitration shall be conducted with the person so selected as a single arbitrator. In extraordinary and unusual circumstances and upon application of both parties and approval of the Chief Justice of the Superior Court, a Justice of the Superior Court may be assigned to conduct a binding arbitration. The hearing shall be conducted at a Courthouse.

Not later than ten (10) days prior to the hearing the parties shall submit to the arbitrator or arbitrators and exchange a summary of the significant aspects of their case. The summary shall be not more than four (4) pages. Parties shall attach copies of all documents on which they rely. All such summaries shall include a stipulation or, if counsel cannot agree, a separate statement by each party setting forth the following information:

i. Uncontested facts;
ii. Contested facts;
iii. Applicable law;
iv. Disputed issues of law;
v. Specific claims of liability by each party making such claim;
vi. Specific defenses to liability by each party asserting such defenses;
vii. An itemized statement of special damages by each party claiming such damages;
viii. Specific claims of injuries by each party claiming such injuries, with a statement as to which, if any, are claimed to be permanent;

ix. Deposition transcripts of all experts;
x. If all parties agree, the most recent demand and offer.

Without agreement, information about the final offer and demand shall not be communicated in writing or during any oral presentation.

Upon receipt of a party's submission, any party may send additional information responding to that submission. All such responsive submissions shall be exchanged with opposing counsel and shall contain a statement of compliance with the exchange requirement.

Within five (5) days after the hearing, the arbitrator or arbitrators shall file with the Court a Report of Award which shall include a brief explanation of the reasons therefor. Two members of a three (3) member arbitration panel must agree upon the final Report of Award in order for the award to be valid and binding. The Report of Award shall be signed by the arbitrator or the agreeing arbitrators. If there is a dissent, it shall be signed separately.

If the parties have elected binding arbitration, the Report of Award shall be final and binding on the parties and shall have the attributes and legal effect of a verdict. The Court shall enter judgment in accordance therewith.

(H) *Memorializing Agreements*. After reaching agreement, the parties shall reduce their agreements to a written memorandum on the point(s) on which agreement has been reached, and the memorandum shall be reviewed and signed by all parties before the mediation ends.

(I) *Default and Sanctions*. If a participant fails to appear at a proceeding under this Rule, fails to participate in a proceeding in compliance with this Rule, or fails to participate in good faith under this Rule, then the neutral may report such failure to the Court. The Court, in its discretion, may, after hearing, assess reasonable costs and/or attorneys fees and/or impose other sanctions on account of such failure.

(J) *Guidelines for Rule 170 Mediators*

The Guidelines for Rule 170 mediators have three major purposes: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The guidelines draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice.

Mediation is a process in which an impartial third party - a mediator - facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests,

and seeks creative problem solving to enable the parties to reach their own agreement. These guidelines give meaning to this definition of mediation.

(1) Self-Determination: A Mediator shall recognize that mediation is based on the principle of self-determination by the parties.

(a) Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The mediator shall assist the parties in reaching an informed and voluntary settlement.

(b) A mediator shall not coerce or unfairly influence a party to enter into a settlement agreement and shall not make a substantive decision for any party to a mediation process.

(c) A mediator shall not intentionally or knowingly misrepresent material facts or circumstances in the course of conducting a mediation.

(d) The mediator shall promote mutual respect among the parties throughout the mediation process.

COMMENTS:

The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.

A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

(2) Impartiality: A mediator shall conduct the mediation in an impartial manner.

Mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of the proposed options for settlement.

COMMENTS:

A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

(3) Conflicts of Interest: A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. The need to protect against conflicts of interest also governs conduct that occurs during and after them mediation.

A conflict of interest is anything that might create an impression of bias. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of potential conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest issue casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of a conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with a party to the mediation in the same or related matter, particularly a matter affecting the interest of any other party to the mediation.

COMMENTS:

A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations, which maintain rosters of qualified professionals.

Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressures from outside the mediation process should never influence the mediator to pressure parties to settle.

(4) Confidentiality: A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.

(a) A mediator shall preserve and maintain the confidentiality of all mediation proceedings except where disclosure is required by law. Any communication made during the mediation, which relates to the controversy

mediated, whether made to the mediator or a party, or to any other person present at the mediation, is confidential.

(b). A mediator shall keep confidential from the other parties any information obtained in an individual caucus unless the party to the caucus permits disclosure.

(c) Confidential materials and communications are not subject to disclosure in any judicial or administrative proceedings except:

1. Where the parties to the mediation agree in writing to waive confidentially;
2. Where there are threat(s) of violence or harm to self or others;
3. Where disclosure is required by law or the Code of Professional Responsibility.

(5) Professional Advice: A mediator shall not provide information the mediator is not qualified by training or experience to provide and shall not give legal advice. When a mediator believes a non-represented party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.

While a mediator may point out a possible outcome of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case is filed will resolve the dispute.

A lawyer-mediator shall conduct the mediation in a manner that is consistent with the parties' choices and expectations. If agreed by the parties, a lawyer-mediator may offer evaluation of strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement provided such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or self-determination of the parties.

COMMENTS:

A lawyer-mediator shall not offer any of the parties legal advice that is the function of the lawyer who is representing a client.

If the parties request an evaluative approach, the lawyer-mediator shall discuss the risk that the evaluation might interfere with mediator impartiality and party self-determination.

(6) Quality of the Process: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

COMMENTS:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

A mediator shall withdraw from mediation when incapable of serving or when unable to remain impartial

A mediator shall withdraw from the mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

(7) Obligations to the Mediation Process: Mediators have a duty to improve the practice of mediation.

COMMENTS:

Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

APPENDIX E

Amend Supreme Court Rule 3, by adopting on a permanent basis the following definition of "Clerk," which was adopted on a temporary basis by order dated December 5, 2001:

"Clerk": Where the context refers to the clerk of a lower court, "clerk" includes a clerk of a lower court, a register of probate, or the administrative agency official who is the equivalent of a clerk of court or who is charged with performing the duties associated with a clerk of court, and their respective assistants and deputies; where the context refers to the clerk of the supreme court, "clerk" includes his or her assistants and deputies.

APPENDIX F

Amend Supreme Court Rule 21, by adopting on a permanent basis the following paragraphs 7, 8 and 9, which were adopted on a temporary basis by order dated December 5, 2001:

(7) A single justice may rule on all non-dispositive motions and may issue any non-dispositive order. A single justice may rule upon requests to withdraw or dismiss an appeal filed by the appellant, may dismiss an appeal pursuant to Rule 5(4), and may dismiss an appeal without prejudice upon procedural grounds. Any order of a single justice shall state which justice so ruled.

(8) The clerk of the supreme court may rule on all motions relating to scheduling except for motions for expedited consideration, and may issue briefing and other scheduling orders. The clerk may grant or refer to the court dispositive motions to which all parties consent and non-dispositive motions to which no objection is filed or all parties consent. With respect to other motions filed between the issuance of the scheduling order pursuant to Rule 12-B and the date of oral argument, the clerk may refer such motions to the court or issue an order to the effect that no ruling will be made on the motion prior to oral argument but that the parties may address the motion during their allotted oral

argument time. Any order of the clerk shall state that it is issued pursuant to this rule.

9) Any motion to reconsider an order issued by a single justice or the clerk shall be filed within ten days from the date of the issuance of the order. A motion to reconsider an order issued by the clerk shall be decided by a single justice or by the court.

Adopt new Supreme Court Rule 32-A as follows:

RULE 32-A. COUNSEL IN GUARDIANSHIP AND INVOLUNTARY ADMISSION CASES

(1) Whether retained by the defendant or appointed by a lower court, trial counsel in a guardianship case commenced by the filing of a petition pursuant to RSA 464-A:4 or RSA 464-A:12 or in an involuntary admission case commenced by the filing of a petition pursuant to RSA 135-C:36 shall be responsible for representing the defendant in the supreme court unless the supreme court relieves counsel from this responsibility for good cause shown. When the defendant clearly indicates to counsel a desire to appeal, counsel shall be responsible for the filing of a notice of appeal. Provided, however, that if counsel concludes that the appeal is frivolous, counsel must first attempt to persuade the defendant not to appeal. If, however, the defendant insists on appealing, counsel shall file the notice of appeal. To avoid violating Professional Conduct Rule 3.1, the notice of appeal should be accompanied by a motion to withdraw indicating that counsel has forwarded a copy of the notice of appeal to the client and has advised the client of the right to file a supplement to the notice of appeal raising any additional issues. See In re Richard A., 146 N.H. 295 (2001).

(2) A motion to withdraw as counsel on appeal in a guardianship case commenced by the filing of a petition pursuant to RSA 464-A:4 or RSA 464-A:12 or in an involuntary admission case commenced by the filing of a petition pursuant to RSA 135-C:36 must state reasons that would warrant the grant of leave to withdraw.

(3) Trial counsel shall continue to participate until and unless the motion to withdraw is approved by the supreme court.

(4) Indigent cases appealed to the supreme court must be accompanied by petitions for either initial assignment or continued assignment of counsel together with a current financial affidavit or a photocopy of same.

(5) Maximum counsel fee for appeals to the supreme court in assigned counsel cases shall be $1,500.00.

Amend District and Municipal Court Rule 5.10 by deleting paragraph C and replacing it with the following new paragraph C, so that said Rule 5.10 shall read as follows:

5.10. Post Trial Motions and Appeals

A. Post trial motions in all cases shall be filed within seven days after the date of the Clerk's Notice of Judgment.

B. Appeals are initiated by filing a Notice of Intent to Appeal with the Clerk within seven days after the date of the Clerk's Notice of Judgment. If the possessory action was based on nonpayment of rent and the defendant files a Notice of Intent to Appeal, the defendant must, at the time the defendant files the Notice of Intent to Appeal, pay into Court one week's rent as determined by the Court. The appeal shall otherwise be filed in accordance with Supreme Court rules.

C. At any time during the pendency of the appeal, the landlord may file a motion to the district court for recovery of the rent money that has been paid into court pursuant to RSA 540:25, I. The court may grant such motion unless the tenant objects and the court rules that the landlord is not lawfully entitled to the full amount of rent. If the court rules that the landlord is not entitled to the full amount of the rent, it shall release such portion of the rent to which the court deems the landlord is lawfully entitled, if any, and make specific findings in support of its decision to deny or partially deny the landlord's motion. The rent money retained by the court shall be apportioned between the landlord and the tenant upon final disposition of the appeal.

D. The filing of a post trial motion does not stay the running of the seven day period for filing a Notice of Intent to Appeal.