

ADVISORY COMMITTEE ON RULES
March 12, 2008

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

The meeting was called to order at 12:20 p.m.

The following Committee members were present:

Hon. Linda S. Dalianis
William F.J. Ardinger, Esquire
Mr. Robert L. Chase
Hon. R. Laurence Cullen
Mrs. Edda Cantor
Mrs. Alice Guay
Hon. Richard A. Hampe
Martin P. Honigberg, Esquire
Hon. Diane Nicolosi
Jennifer L. Parent, Esquire
Raymond 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 lay member, Edda Cantor, to the meeting.

On motion of Judge Cullen, seconded by Judge Hampe, the Committee approved the minutes of the December 12, 2007 meeting, as submitted.

Relative to action taken by the Supreme Court since the Committee's last meeting, David Peck reported that the Supreme Court adopted the Committee's recommendation to amend Supreme Court Rules 37A and 42, which went into effect in January 2008.

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

Relative to the Report of the Committee on the Status of the Legal Profession, the Committee deferred action until its next meeting.

Judge Diane Nicolosi arrived and was welcomed as a new member.

Relative to the ABA Model court rule pertaining to provision of legal services following a determination of major disaster, following a brief discussion, and on motion of Judge Dalianis, seconded by Attorney Taylor, the Committee voted to send the proposed rule, as contained in Appendix A of these minutes, to its next public hearing.

Relative to Supreme Court Rule 55 pertaining to the public protection fund, Attorney Parent reported that she will have recommendations from the subcommittee at the next meeting.

Relative to Supreme Court Rule 38 pertaining to the Code of Judicial Conduct and to a specific suggestion to review the definition of the word “judge,” Judge Dalianis reported that the subcommittee finished its review of the ABA Model Code of Judicial Conduct and its report was distributed today to Committee members. Following discussion, it was agreed that the subcommittee’s report should be distributed to all judges and marital masters as well as to the Bar Association for their input and recommendations to the Committee by August 1, 2008.

Relative to the Rules of Civil Procedure and Rules of Probate Administration, Attorney Honigberg reported that Attorney Slawsky’s subcommittee is finishing its review of the public comments received on the rules and will forward its recommendations to David Peck next week. The Committee agreed that Attorneys Honigberg and Parent should review the subcommittee’s recommendations when available and report back to the Committee at its next meeting. With respect to the

Rules of Probate Administration, Judge Hampe will contact Administrative Judge David King to make sure he is aware of the proposed rules changes.

Relative to Superior Court Rule 98 pertaining to discovery in criminal cases, this matter was deferred until the Committee's next meeting.

Relative to the Family Division rules, Judge Dalianis reported that bar leaders, during their meeting with the Supreme Court, raised several issues concerning the Family Division rules. Judge Dalianis suggested that they should discuss their concerns with Judge Kelly and provide this Committee with suggested amendments by August 31, 2008. The Committee approved establishing a subcommittee of that group, and asking Jeannine McCoy to coordinate the providing of a report to the Committee by August 31. The Committee also instructed David Peck not to include the Family Division rules on the agenda for the June public hearing.

Relative to ratification of the email vote taken on January 7, 2008 approving the submission of the Committee's Report to the Supreme Court on its review of a proposed rule relating to a death penalty appellate procedure, Judge Dalianis appointed Judge Cullen to chair the discussion. Following a brief discussion, and on motion of Judge Hampe, seconded by Attorney Ardinger, the Committee voted to ratify the vote. Judge Dalianis did not participate.

Relative to system-wide guardian ad litem application, certification and practice rules, David Peck reported that he encountered several questions while preparing the GAL rules for inclusion on the next public hearing agenda. The Committee discussed each concern. With reference to the rule governing regulation of solicitation, on motion of Attorney Honigberg, seconded by Judge Dalianis, the Committee voted to further amend Rules 2.5. With reference to appeals, on motion of Judge Hampe,

seconded by Attorney Honigberg, the Committee voted to amend the rules to add Rule 3.1—appeals.

Relative to amendments to Supreme Court Rules 37 and 37A, David Peck stated that during its September 2007 meeting, the Committee voted to take no action on a proposal to make these temporary rules permanent, but asked the Attorney Discipline Office (ADO) to add language to its dismissal letter notifying individuals of their right to request reconsideration and to report its findings to this committee in six months. The ADO reported that during the six-month period, 19 cases had been dismissed and only two motions for reconsideration had been filed. Following a brief discussion, and on motion of Judge Dalianis, seconded by Mr. Chase, the Committee voted to recommend to the Supreme Court that Supreme Court Rules 37 and 37A be adopted on a permanent basis.

The Committee began discussing new items for consideration and the following action was taken:

Relative to amendments to Superior Court Rule 170-B pertaining to judge-conducted mediation in certain cases, following a brief discussion, and on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to send Superior Court Rule 170-B to the Committee's next public hearing to see whether it should be adopted on a permanent basis.

Relative to Rules of Professional Conduct Rule 8.5(C) pertaining to application of rules to non-lawyer representatives, the Committee considered Mr. Michael Brauer's comments contained in his December 22, 2007 letter to Mr. Peck. Following discussion, the Committee appointed a subcommittee to review Mr. Brauer's concerns and report back to the full Committee at a later date. Suggested

subcommittee members are: Judge Laurence Cullen, Chair; Judge Edwin Kelly; Attorney Ann Rice and Mr. Keith Lohman.

Relative to an amendment to Superior Court Rule 170-A pertaining to arbitration, following review of Attorney William Mulvey's suggestions contained in his January 2, 2008 letter, and on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to send Superior Court Rule 170-A, as contained in Appendix B of these minutes, and Superior Court Rule 170(D) to the Committee's next public hearing.

Relative to an amendment to Supreme Court Rule 40(5) pertaining to receipt of grievances, following a brief discussion, and on motion of Attorney Honigberg, seconded by Attorney Ardinger, the Committee voted to further amend Supreme Court Rule 40(5), as contained in Appendix C of these minutes, and to send amendments to the Committee's next public hearing to see if it should be adopted on a permanent basis.

Relative to an amendment to Supreme Court Rule 37A(IV)(a)(2)(E) pertaining to protective orders and confidentiality, following discussion, and on motion of Judge Cullen, seconded by Attorney Taylor, the Committee voted to amend Supreme Court Rule 37A(IV)(a)(2)(E), as contained in Appendix D of these minutes, and to send it to the Committee's next public hearing.

Relative to an amendment of Supreme Court Rule 10 pertaining to decisions by administrative agencies, following discussion, and on motion of Judge Dalianis, seconded by Attorney Taylor, the Committee voted to amend Supreme Court Rule 10, as contained in Appendix E of these minutes, and to send it to the Committee's next public hearing.

Relative to notice of issuance of subpoenas, following a brief discussion, the Committee appointed a subcommittee to consider whether a court rule should be adopted to require notice be given to other parties in a civil lawsuit before a subpoena is served, and to report back to the full Committee at a later date. The subcommittee members are: Judge Diane Nicolosi, Chair; Attorney Martin Honigberg; and Attorney Jennifer Parent.

Relative to Supreme Court Rule 42(5)(b) pertaining to membership on the Character and Fitness Committee, the Committee considered whether the current rule requiring that attorneys on the Character and Fitness Committee be members of the New Hampshire Bar Association should be amended. Following discussion, and on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to recommend that the rule not be amended.

Relative to Guardian ad Litem fees pertaining to marital cases, David Peck referred Committee members to a recent email from Judge Edwin Kelly in which he notes the lack of a rule setting a cap on GAL fees in the marital area. Following discussion, the Committee agreed that Nina Gardner should be asked for her recommendation as to whether the rules should be amended.

Relative to an amendment to Supreme Court Rule 51 pertaining to membership on the Advisory Committee on Rules, following discussion, and on motion duly made and seconded, the Committee voted to send the proposed amendment of Supreme Court Rule 51 to increase its membership to include a judge or master from the Family Division to the Committee's next public hearing.

Relative to an amendment to Supreme Court Rule 19 pertaining to media access to court proceedings, following a brief discussion, and on motion of Judge

Dalianis, seconded by Attorney Taylor, the Committee voted send the amendment to Supreme Court Rule 19, as contained in Appendix F of these minutes to the Committee's next public hearing.

The next meeting of the Committee is scheduled for June 11, 2008 at 12:00 p.m. with the public hearing beginning at 1:00 p.m. Judge Dalianis summarized for new members the process followed during its public hearing.

No further business to come before the Committee, the meeting adjourned at 1:50 p.m.

APPENDIX A

Adopt new Supreme Court Rule 59 as follows (the ABA Model Code Comment that follows the text of Rule 59 is not being adopted as part of the rule – it is intended to be interpretive, not mandatory):

Rule 59. Provision of Legal Services Following Determination of Major Disaster

(a) *Determination of existence of major disaster.* Solely for purposes of this Rule, the Supreme Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

- (1) this jurisdiction and whether the emergency caused by the major disaster affects the entirety or only a part of this jurisdiction, or
- (2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) *Temporary practice in this jurisdiction following major disaster.* Following the determination of an emergency affecting the justice system in this jurisdiction pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of *pro bono* services and the assistance of lawyers from outside of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a *pro bono* basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, *pro bono* program or legal services program or through such organization(s) specifically designated by the this Court.

(c) *Temporary practice in this jurisdiction following major disaster in another jurisdiction.* Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) *Duration of authority for temporary practice.* The authority to practice law in this jurisdiction granted by paragraph (b) of this Rule shall end when the this Court determines that the conditions caused by the major disaster in this jurisdiction have ended except that a lawyer then representing clients in this jurisdiction pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the lawyer shall not thereafter accept new clients. The authority to practice law in this jurisdiction granted by paragraph (c) of this Rule shall end [60] days after the this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) *Court appearances.* The authority granted by this Rule does not include appearances in court except:

- (1) pursuant to that court's *pro hac vice* admission rule and, if such authority is granted, any fees for such admission shall be waived; or
- (2) if this Court, in any determination made under paragraph (a), grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included, any *pro hac vice* admission fees shall be waived.

(f) *Disciplinary authority and registration requirement.* Lawyers providing legal services in this jurisdiction pursuant to paragraphs (b) or (c) are subject to this Court's disciplinary authority and the Rules of Professional Conduct of this jurisdiction as provided in Rule 8.5 of the Rules of Professional Conduct. Lawyers providing legal services in this jurisdiction under paragraphs (b) or (c) shall, within 30 days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to this Rule shall not be considered to be engaged in the unlawful practice of law in this jurisdiction.

(g) *Notification to clients.* Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

ABA Model Code Comment

[1] A major disaster in this or another jurisdiction may cause an emergency affecting the justice system with respect to the provision of legal services for a sustained period of time interfering with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or, though independent of the disaster, whose legal needs temporarily are unmet because of disruption to the practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a *pro bono* basis through an authorized not-for-profit entity or such other organization(s) specifically designated by this Court. A major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war.

[2] Under paragraph (a)(1), this Court shall determine whether a major disaster causing an emergency affecting the justice system has occurred in this jurisdiction, or in a part of this jurisdiction, for purposes of triggering paragraph (b) of this Rule. This Court may, for example, determine that the entirety of this jurisdiction has suffered a disruption in the provision of legal services or that only certain areas have suffered such an event. The authority granted by paragraph (b) shall extend only to lawyers authorized to practice law and not disbarred, suspended from practice or otherwise restricted from practice in any other manner in any other jurisdiction.

[3] Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide *pro bono* legal services to residents of the affected jurisdiction following determination of an emergency caused by a major disaster; notwithstanding that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services pursuant to this Rule include, but are not limited to, probation, inactive status, disability inactive status or a non-disciplinary administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good standing," and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of these lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services pursuant to this Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. Alternatively, this court may instead designate other specific organization(s) through which these legal services may

be rendered. Under paragraph (b), an emeritus lawyer from another United State jurisdiction may provide *pro bono* legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide *pro bono* legal services in that jurisdiction pursuant to that jurisdiction's emeritus or *pro bono* practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under Rule 5.5(c) of the Rules of Professional Conduct.

[4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the area of such other jurisdiction determined by this Court to have suffered a major disaster, and whose practices are disrupted by a major disaster there, and who are not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, are authorized under paragraph (c) to provide legal services on a temporary basis in this jurisdiction. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction. For the meaning of "arise out of and reasonably related to," see Rule 5.5 Comment [14], Rules of Professional Conduct.

[5] Emergency conditions created by major disasters end, and when they do, the authority created by paragraphs (b) and (c) also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), this Court determines when those conditions end only for purposes of this Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of this jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end [60] days after this Court makes such a determination with regard to an affected jurisdiction.

[6] Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of this jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular court. This Court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in this jurisdiction under paragraph (b) to appear in all or designated courts of this jurisdiction without need for such *pro hac vice* admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived. A lawyer who has appeared in the courts of this jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the Rules of Professional Conduct.

[7] Authorization to practice law as a foreign legal consultant or in-house counsel in a United States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that person's ability to provide legal services under this Rule.

[8] The ABA National Lawyer Regulatory Data Bank is available to help determine whether any lawyer seeking to practice in this jurisdiction pursuant to paragraphs (b) or (c) of this Rule is disbarred, suspended from practice or otherwise subject to a public disciplinary sanction that would restrict the lawyer's ability to practice law in any other jurisdiction.

APPENDIX B

Adopt Superior Court Rule 170-A, which was amended on a temporary basis by Supreme Court order dated January 15, 2008, on a permanent basis as follows (no changes are being proposed to the temporary rule now in effect):

170-A. ARBITRATION

(A) *Cases for Arbitration.* Subject to RSA 542, non-criminal disputes will be assigned to arbitration upon agreement of the parties or as mandated by a written contractual provision.

(B) *Submission of Dispute to Arbitration.*

(1) Prior to the commencement of any lawsuit, if all parties to the arbitration consent, a written request for arbitration may be made to the Administrator of the Office of Mediation and Arbitration. The administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 170-A, unless the parties agree otherwise. In all cases, the parties should utilize the Office of Mediation and Arbitration and the list of approved arbitrators. The parties shall be subject to an administrative fee of \$250.00 per party, which shall be paid to the Office of Mediation and Arbitration. Parties who are indigent may petition the superior court for waiver of the administrative fee.

In cases submitted under subsection (B)(1) of this rule in which administration of the Arbitration Hearing is conducted pursuant to Rule 170-A, all references in Rule 170-A(C) through 170-A(S) to the superior court shall be deemed to refer to the Office of Mediation and Arbitration.

(2) After commencement of any lawsuit, a written request for arbitration shall be made to the Superior Court. In the event that the dispute is pending in a New Hampshire Court, a copy of the written submission shall be sent to the clerk for the appropriate court; and all proceedings in that court will cease. The administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 170-A.

(C) *Qualifications of and Approval Process for Arbitrators.*

The provisions of Superior Court Rule 170(G) shall apply to arbitrators.

(D) *Immunity for Arbitrators.*

An arbitrator selected to serve and serving under New Hampshire Superior Court Rule 170-A shall have immunity consistent with RSA 490-E.

(E) *Neutrality.*

All arbitrators, whether selected by a party, selected by all parties, selected by the court or the Office of Mediation and Arbitration, or selected by arbitrators, shall be neutral and shall serve with impartiality.

(F) *Communication with Arbitrator.*

No party and no one acting on behalf of any party shall communicate ex-parte with an arbitrator or a candidate for arbitrator concerning the arbitration.

(G) *Arbitrator's Disclosure.*

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

(H) *Arbitration Panel.*

In all cases so assigned, the parties shall select arbitrator(s) from the court list of approved arbitrators. The parties may choose either a single or three-person panel. In the event the parties cannot agree upon the panel number, a three-person panel will be utilized for all cases involving claims or counterclaims exceeding \$100,000 or cases involving three or more parties. In the event the parties cannot agree upon the panel number, a single member panel will be utilized for all cases involving claims or counterclaims of \$100,000 or less.

(1) When the parties choose arbitrator(s) from the list of approved paid arbitrators, the parties shall notify the arbitrator(s) and request that the arbitrator(s) provide the parties with a schedule of fees and expenses.

(2) Unless the court orders or the parties otherwise agree, arbitrators who are chosen from the list of approved paid arbitrators shall be compensated as follows. In the event a single arbitrator is selected, the parties shall equally share the costs of the arbitrator. When there are two parties and they select a three-person panel, each party shall pay for the arbitrator selected by the party and share the fees of the third panel member. When there are three parties and they select a three-person

panel, each party shall be responsible for the arbitrator selected by the party. In the event there are more than three parties, the parties shall pay a pro rata share of the entire arbitration panel's fees.

(3) Parties may select arbitrator(s) who are not on the court's list of approved arbitrators if the parties agree on the choice of the arbitrator(s).

(4) If the parties cannot agree on the selection of arbitrator(s), they shall so indicate in the Stipulation required to be filed pursuant to Superior Court Rule 170(C)(1). In the event the parties cannot agree on an arbitrator for single-person panels, the court shall designate an arbitrator at the structuring conference. For three-person panels, if the parties cannot unanimously agree upon the arbitrators and there are two parties, each will select an arbitrator and the two arbitrators will select the third. In the event there are three parties, each will select an arbitrator. The three selected arbitrators will serve as the panel. In the event there are more than three parties and they cannot unanimously agree upon the panel, each party will submit one name to the court and the court shall select three individuals from the names submitted to serve as the arbitration panel.

(I) *Preliminary Hearing.*

(1) At the request of any party, the panel will schedule within 14 days of the request a preliminary hearing with counsel and/or the parties. The preliminary hearing may be conducted by telephone at the panel's discretion.

(2) During the preliminary hearing, the parties and the panel shall discuss and establish a schedule for the hearings, any outstanding discovery issues, any outstanding procedural issues, and to the extent possible a clarification of the issues.

(3) Ex parte communications between a party's counsel and arbitrator are prohibited.

(J) *Hearings: When and Where Held; Notice.*

(1) Hearings shall be held at a place designated by the panel. The hearing date shall be established at the preliminary hearing or by the panel after consultation with counsel and/or the parties. Counsel and/or the parties shall respond to requests for hearing dates within seven (7) days of the request. Counsel or the parties shall be notified in writing at least thirty (30) days before the hearing of the time and place of the hearing. No hearing shall be assigned for Saturdays, Sundays, legal holidays, or evenings unless by the unanimous agreement of all counsel or parties.

(2) Unless excused by the panel, all parties shall be in attendance at the hearing, and each party shall have at least one person present who has authority to authorize settlement.

(K) *Postponement of Arbitration.*

In the event that counsel or any party for good cause shown is unable to proceed, the panel may reschedule the case in their discretion. The postponement shall be for no more than 30 days absent extraordinary circumstances.

(L) *Default and Sanctions.*

Upon failure of a party to appear at a scheduled arbitration hearing or to participate in good faith in the proceedings, a default judgment may be entered and reasonable costs and attorneys fees may be assessed against the party. Default judgments may be contested only by the filing of a Motion to Strike Default setting forth specific grounds therefor within ten (10) days of the mailing of the Notice of Default. The panel shall have discretion as to appropriate sanction, including assessing costs, attorneys' fees, or entering default.

(M) *Prehearing Submissions.*

(1) Unless otherwise agreed to at the preliminary hearing, the parties shall exchange a list of witnesses they intend to call, including experts, a short description of the anticipated testimony of each witness, an estimate of the length of direct testimony of each witness, and all exhibits at least thirty (30) calendar days before the arbitration hearing. The parties shall attempt to resolve any disputes regarding the admissibility of exhibits. The exhibits must be premarked and a list of the exhibits submitted, indicating those exhibits that are to be admitted without objection and those exhibits that are objected to.

(2) If the parties intend to offer expert witnesses at the time of the hearing, at least sixty (60) calendar days before the arbitration hearing an expert disclosure consistent with the then existing Superior Court Rule 35 shall be made. Failure to make such a disclosure will result in the exclusion of the expert as a witness at the hearing. Any objection to the sufficiency of the disclosure and, therefore, the admissibility of the expert's testimony will be ruled upon by the panel.

(N) *Case Summary.*

(1) All parties shall submit and exchange no later than ten (10) days prior to the arbitration hearing a double-spaced typewritten summary

of not more four (4) pages upon 8½" x 11" paper of the significant portions of their case.

(2) All such summaries shall contain a written stipulation, or, if counsel cannot agree to file a stipulation, a separate statement by each party, setting forth the following information:

- (i) All uncontested facts;
- (ii) All contested facts;
- (iii) Pertinent applicable law;
- (iv) Disputed issues of law;
- (v) Specific claims of liability by each party making such claims;
- (vi) Specific defenses to liability by each party asserting such defenses;
- (vii) An itemized statement of special damages by each party claiming such damages;

(3) All such summaries shall contain a statement of compliance with the exchange requirement.

(4) The purpose of the case summary submission is to apprise the panel of the issues in dispute.

(O) *Securing Witnesses and Documents for the Arbitration Hearing.*

(1) The panel may issue subpoenas for the attendance of witnesses or the production of documents. All parties shall produce for the Arbitration Hearing all witnesses requested in writing by another party that are in their employ or under their control. This shall be done without the need of subpoena.

(2) The testimony of witnesses shall be given under oath.

(3) The plaintiff shall present all of his/her evidence. In the event of multiple plaintiffs, each plaintiff shall present all of his/her evidence. The defendant will then present evidence to support its defenses and any counterclaims. In the event of multiple defendants, one defendant will complete his evidence and then the remaining defendants will proceed.

(4) Witnesses will be subject to cross-examination by other counsel (or the opposing party where a party is unrepresented) and the panel. The panel has the discretion to vary this procedure provided the parties are treated fairly, justly, and equally and that each party is given an adequate opportunity to present his/her case.

(5) The panel exercising its discretion shall conduct the proceedings with a view to expediting the hearing and expediting the resolution of the dispute. Therefore, strict conformity to New Hampshire Rules of Evidence is not required, with the exception that the panel shall apply applicable New Hampshire law relating to privileges and work product. The panel shall consider evidence that is relevant and material to the dispute, giving the evidence such weight as is appropriate. The panel may limit testimony to exclude evidence that would be unduly repetitive.

(6) Openings and closing will be allowed and may be made orally or in writing.

(P) *Hearing Closure.*

If post-hearing memoranda are to be submitted or closing arguments are to be made in writing, the hearing shall be deemed closed upon receipt by the panel of the written submissions. The date for the written submissions shall be established; otherwise, the hearing will be closed at the conclusion of the presentation of the evidence and oral arguments.

(Q) *Transcript of the Testimony.*

Any party may arrange for a stenographic or other record to be made of the hearing and shall inform the other parties in advance. The requesting party shall bear the cost of the stenographic record. A copy of the stenographic record shall be made available to all other parties upon request.

(R) *Report of Award.*

(1) Within twenty (20) days after the hearing closure date, the panel shall file a Report of Award. Originals of the Award shall be mailed to all counsel or parties. If there is a dissent, it shall be signed separately; but, the Award shall be binding if signed by the majority of a three-member panel.

(2) The decision need not be in a particular form but must include sufficient findings of fact and conclusions of law to establish a basis for the decision.

(S) *Legal Effect of Report and Award; Entry of Judgment.*

The Report of Award, unless appealed consistent with provisions of New Hampshire RSA 542:8, shall be final and shall have the attributes and legal effect of a verdict. If no appeal is taken within the time and in the manner specified in New Hampshire RSA 542:8, any party may move for confirmation and entry of judgment in accordance with New Hampshire RSA 542:8. After entry of such judgment, execution process may be issued as in the case of other judgments.

APPENDIX C

Amend Supreme Court Rule 40(5), which was amended on a temporary basis by Supreme Court order dated January 15, 2008, and adopt said rule as amended on a permanent basis as follows (new material is in **[bold and in brackets]**; deleted material is in ~~striketrough~~ format):

(5) *Committee Procedure After Receipt of Grievance.*

(a) The executive secretary of the committee shall acknowledge receipt of a grievance in a timely fashion.

(b) A copy of the grievance shall be sent to each member of the committee. The committee shall review each grievance at a meeting of the committee to determine whether the grievance is against a judge and whether the grievance meets the requirements for docketing as a complaint.

(c) **[Subject to subsection (5)(c)(5) below, a]** A grievance shall be docketed as a complaint if it is against a judge and it satisfies the following requirements:

(1) It contains a concise statement of the facts which, if true, would establish a violation of the Code of Judicial Conduct.

(a) A grievance that relates to a judge's findings, rulings or decision, which, in effect, is a substitute for an appeal, will not be considered by the committee.

(b) A grievance which is repetitive of a prior grievance or complaint, whether from the same or a different source, shall not be docketed as a complaint.

(2) It was filed by a person who is or was directly affected by the conduct complained of or who was present when the conduct complained of occurred, and it contains a concise statement establishing these facts.

(3) It is typed or in legible handwriting and signed by the grievant under oath or affirmation. The following language, or language that is substantially equivalent, must appear above the grievant's signature: "I hereby swear or affirm under the pains and penalties of perjury that the information contained in this grievance is true to the best of my knowledge."

(4) It was filed with the committee within the period of limitation set forth in section (4)(c).

(5) Provided, however, that upon the vote of seven or more of its members, the committee may authorize a review of the court record to include the file and any recordings of proceedings to determine whether the court record supports the allegations in the grievance. After review, the committee may dismiss the grievance if it finds that in light of the court record, there is no reasonable likelihood of a finding of judicial misconduct. If the grievance is not dismissed, the committee shall direct that it be docketed as a complaint.

(d) A grievance that is filed against a person who is not a judge or that fails to satisfy the requirements for docketing as a complaint as set forth in section (5)(c) shall be dismissed. The committee shall notify the grievant in writing of the reason for the committee's action. In addition, the committee shall take the following action:

(1) If the committee determines that the person who is the subject of the grievance is not subject to the Code of Judicial Conduct, it shall return the grievance to the grievant with a letter explaining the reason for the dismissal. No file on the grievance will be maintained; however, the committee shall retain a copy of the letter to the grievant returning the grievance, which shall be available for public inspection in accordance with section (16)(a). The committee may bring such matter to the attention of the authorities of the appropriate jurisdiction, or to any other duly constituted body which may provide a forum for the consideration of the grievance and shall advise the grievant of such referral.

(2) If the committee determines that the grievance does not allege conduct that violates the Code of Judicial Conduct, that the grievant lacks standing, or that the grievance was not filed within the period of limitation, or that in light of the court record there is no reasonable likelihood of a finding of judicial misconduct, the judge who is the subject of the grievance shall be provided with a copy of the grievance and the decision of the committee and will be given an opportunity to submit a reply within 30 days from the date of the notification or such further time as may be ordered by the committee. The reply shall be available for public inspection in accordance with section (16)(b).

(e) Notification to Administrative Judge. Whenever the executive secretary provides a judge with a copy of a grievance against such judge which has been dismissed, the executive secretary shall at the same time send a copy of the grievance to the chief justice or administrative judge of the court in which such person serves. In such instances, the chief justice or administrative judge shall send a copy of the grievance to the presiding justice of the particular court in which such person serves.

APPENDIX D

Amend Supreme Court Rule 37(IV)(a)(2)(E), regarding protective orders, as follows (deleted material is in ~~strikethrough~~ format):

(E) *Protective Order.* Any person or entity, at any point in the processing of a complaint, may request a protective order from the professional conduct committee, or the committee may issue on its own initiative, a protective order prohibiting the disclosure of confidential, malicious, personal, or privileged information or material submitted in bad faith, and directing that the proceedings be so conducted as to implement the order. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the professional conduct committee. The professional conduct committee shall act upon the request within a reasonable time. Within thirty (30) days of the committee's decision on a request for protective order, or of the committee's issuance of one on its own initiative, an aggrieved person or entity may request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the supreme court has acted, or the period for seeking supreme court review has expired. ~~A motion for review of the professional conduct committee's decision about issuance of a protective order shall be filed as a confidential matter in the supreme court.~~

APPENDIX E

Amend Supreme Court Rule 10 as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

RULE 10. Appeal from Administrative Agency

(1) The supreme court may, in its discretion, decline to accept an appeal, or any question raised therein, from an order of an administrative agency, or may summarily dispose of such an appeal, or any question raised therein, as provided in Rule 25. Review of an order of an administrative agency, when authorized by law, shall be obtained by filing the original and 8 copies of (a) an appeal under RSA 541; (b) in the case of an appeal from the department of employment security, an appeal under RSA 282-A:67; or (c) a petition for writ of certiorari if otherwise, accompanied by the required entry fee within the time prescribed by law. No entry fee will be required for an appeal filed by an individual claiming benefits under the unemployment compensation statute in accordance with RSA 282-A:158.

NOTE: To appeal to the supreme court from an administrative agency under RSA 541, the appealing party must have timely filed for a rehearing with the administrative agency. See RSA 541:4 and *Appeal of White Mountains Education Association*, 125 N.H. 771 (1984). The time period for the appeal does not begin to run until the administrative agency has acted upon the motion.

The appeal or petition, including any appeal from the department of employment security filed pursuant to RSA 282-A:67, shall as far as possible and in the order listed below:

(a) Specify the names of the parties seeking review of the order, the names of all other parties of record, the names of all counsel, and the addresses of all parties and counsel.

(b) Contain, or have annexed to it, a copy of the administrative agency's findings and rulings, a copy of the order sought to be reviewed, a copy of the motion for rehearing and all objections thereto, and a copy of the order on the motion for rehearing. The appeal or petition, and any appendix that may be filed, shall contain a table of contents.

(c) Specify the questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The statement of a question presented will be deemed to include every

subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

(d) Specify the provisions of the constitutions, statutes, ordinances, rules, or regulations involved in the case, setting them out verbatim, and giving their citation. If the provisions to be set out verbatim are lengthy, their citation alone will suffice at that point and their pertinent text shall be annexed to the petition. If the provisions aggregate more than 5 pages, their text may be filed as a separate appendix, including a table of contents referring to numbered pages, and 8 copies shall be filed.

(e) Specify the provisions of insurance policies, contracts, or other documents involved in the case, setting them out verbatim. If the provisions to be set out verbatim are lengthy, their pertinent text shall be annexed to the petition. If the provisions aggregate more than 5 pages, their text may be filed as a separate appendix, including a table of contents referring to numbered pages, and 8 copies shall be filed.

(f) Set forth a concise statement of the case containing the facts material to the consideration of the questions presented, with appropriate references to the transcript, if any.

(g) State the jurisdictional basis for the appeal, citing the relevant statutes or cases.

(h) A direct and concise statement of the reasons why a substantial basis exists for a difference of opinion on the question and why the acceptance of the appeal would protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice.

(i) A statement that every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

(2) The order sought to be reviewed or enforced, the findings and rulings, or the report on which the order is based, and the pleadings, evidence, and proceedings before the agency shall constitute the record on appeal.

[NOTE: The moving party in any appeal brought pursuant to RSA chapter 541 is required initially to bear the full, reasonable cost of preparing a transcript for inclusion in the record. *Appeal of City of Manchester*, 149 N.H. 283, 290 (1999). To request that a transcript be prepared and included in the record on appeal, the moving party should consult the administrative agency's regulations and/or RSA 541-A:31. Unless the moving party requests that a transcript be prepared, in compliance with the administrative agency's regulations

and/or RSA 541-A:31, no transcript will be prepared for inclusion in the record.

Absent a transcript of the proceedings below, the supreme court generally will assume that the evidence was sufficient to support the result reached by the administrative agency. If the appealing party fails to ensure that a transcript is prepared, the supreme court may not review issues that the appealing party has raised. Cf. *Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248 (2004).]

(3) The administrative agency, complying with the provisions of Rule 6(2) as to form, shall file the record with the clerk of the supreme court as early as possible within 60 days after it has received the supreme court's order of notice. The original papers in the agency proceeding or certified copies may be filed. At the beginning of the record there shall be inserted a table of contents with references to the page of the record at which each item listed in the table of contents begins.

(4) The parties may designate by stipulation filed with the clerk of the supreme court that no part, or that only certain parts, of the record shall be filed with the court.

(5) If anything material to any party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation may provide, or the supreme court on motion or on its own initiative may direct, that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

~~(6) The entire record of the agency proceeding, whether filed with the supreme court or not, shall be a part of the record on appeal.~~

(7 **[6]**) In lieu of the record as defined in section (2) of this rule, the parties may prepare and sign a statement of the case showing how the questions of law transferred arose and were decided, and setting forth only so many of the facts as are essential to a decision of the questions presented.

(8 **[7]**) Notice by serving, delivering or mailing a copy of the appeal or petition upon all parties or opponents below as well as the agency involved and the attorney general is the responsibility of the moving party, and a certificate of compliance stating their names and addresses must be filed with the petition.

(9 **[8]**) If a timely appeal or petition is filed by a party appealing from an administrative agency, any other party may file a cross-appeal or cross-petition within 10 days from the date on which the appeal or petition was docketed with this court, and shall pay a filing fee therewith, provided that the party filing the cross-appeal or cross-petition must have timely filed any required motion for rehearing with the administrative agency.

APPENDIX F

Amend Supreme Court Rule 19 as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 19. Media Access to Court Proceedings

~~With prior notice to the clerk, and the consent of the court, any~~ **[Any]** person may record and photograph, or broadcast by radio or television, ~~the oral~~ proceedings of the supreme court **[that are open to the public]**, provided that the orderly procedures of the court are not impaired or interrupted.

(1) *Prior Notice.* Members of the broadcast media who wish to cover a proceeding **[shall notify]** ~~are required to give reasonable notice to the court information officer~~ **[as far]** in advance **[as is practicable.]** ~~of the court session. The court information officer will notify the court clerk and court security of media coverage.~~

(a) No more than one still photographer and one videographer may be in the courtroom at one time. Video equipment must remain stationary during the entire court session. Rotation of still photographers will be under the direction of the court information officer who will minimize movement while court is in session.

(b) No person or organization will have exclusive access to a proceeding in the courtroom. The court information officer will advise media outlets if pool coverage is necessary.

(2) *Equipment.* Broadcast media should arrive at least thirty (30) minutes prior to oral argument to begin setting up equipment. All equipment must be in place and tested fifteen (15) minutes in advance of the time scheduled for the court session. Equipment may not be adjusted or dismantled during the proceedings.

(a) Exact locations for all video and still cameras, and audio equipment within the courtroom will be determined by the court information officer. Movement in the courtroom is prohibited, unless specifically approved by the court information officer.

(b) Video and photographic equipment must be of professional quality with minimal noise so as not to disrupt the proceedings; flash equipment and other supplemental lighting or sound equipment is prohibited unless specifically approved by the court.

(c) Handheld tape recording devices may be used but shall not be placed on the bar to the well of the courtroom.

(d) Cellular telephones should be turned off or muted at all times.

(3) *Courtroom Conduct.* Broadcast or print interviews will not be permitted inside the courtroom or anywhere in the supreme court building either before or after oral argument unless specifically approved by the court information officer. Exceptions may be made in case of inclement weather.

(a) Distribution of printed material, including pamphlets and flyers of any kind, is prohibited both in the courtroom and in the supreme court building.

(b) Photographers, videographers and technical support staff covering a proceeding shall avoid activity that might distract participants or impair the dignity of the proceedings.

(c) All media personnel shall observe the customs of the court.

(d) Appropriate dress is required.

Comment

Supreme Court Rule 19 provides generally that, with prior notice to the clerk, oral proceedings before the court may be broadcast, recorded and photographed by members of the media; but the rule requires that such activities not impair or interrupt the orderly procedures of the court. The purpose of the amended rule is to define that conduct which the court considers appropriate to avoid disruption of proceedings. The rule is subject to orders of the court in particular cases.