

ADVISORY COMMITTEE ON RULES
March 4, 2009

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

The meeting was called to order at 12:09 p.m.

The following Committee members were present:

Hon. Linda S. Dalianis
Gina B. Apicelli, Esquire
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
Jennifer L. Parent, Esquire
Emily G. Rice, Esquire
Raymond Taylor, Esquire

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

On motion duly made and seconded, the Committee approved the minutes of the December 10, 2008 meeting, as amended.

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

Relative to Supreme Court Rule 38 pertaining to the Code of Judicial Code, Judge Dalianis stated that while the Judicial Conduct Subcommittee reviewed the Model Code of Judicial Conduct and recommended that the Supreme Court adopt the newly revised code, there were several areas where the subcommittee could not reach a unanimous vote. The Committee then

considered each area and following discussion, on motion duly made and seconded, voted to further amend the Model Code of Judicial Conduct.

Relative to Judge John Coughlin's proposed amendment to Rule 3.10 of the Model Code of Judicial Conduct, following discussion, the Committee asked David Peck to ask Judge Coughlin to request an advisory opinion from the Advisory Committee on Judicial Ethics.

Relative to the Rules of Civil Procedure, the Committee reviewed the draft prepared by Raymond Taylor and David Peck and considered the questions raised in David Peck's February 23, 2009 memo. The probate and district courts will work on their section of the rules and report back to the Committee at its June meeting.

Relative to amendments to Rules of Professional Conduct Rule 8.5(c) pertaining to application of rules to non-lawyer representatives, this matter was deferred until the Committee's June meeting.

Relative to the Judicial Conduct Committee procedures, this matter was deferred until the Committee's June meeting.

Relative to amendments to Superior Court Rule 170 pertaining to alternative dispute resolution, this matter was deferred until the Committee's June meeting.

Relative to amending court rules to encourage submission of data CDs with filings, David Peck reported that a draft rule would be submitted to the Committee for consideration at its June meeting.

Relative to the Rule Amendment Process, Judge Dalianis will report back to the Committee following her meeting later this month with the Bar's Committee on Cooperation with the Courts.

The Committee further discussed rules that appeared on the Committee's December 2008 public hearing agenda, and the following action was taken:

Relative to a further amendment to Family Division Rule 1.2, David Peck reported that Judge Kelly agreed that the language in Family Division Rule 1.2 should be similar to that contained in the Preface of the superior court rules.

Relative to an amendment to Family Division Rule 1.14 and the comments made by Jeffrey Krah in his December 9, 2008 e-mail, the subcommittee will consider his request and report back to the Committee at its June meeting.

Relative to amendments to Supreme Court Rule 55 pertaining to the public protection fund, the subcommittee reported that the Public Protection Board and the NH Bar's Board of Governors wanted to leave the per claimant cap at \$150,000. Following a brief discussion, and on motion duly made and seconded, the Committee voted, 8 – 2, to leave the per claimant cap at \$250,000.

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

Relative to amendments to District Court Rules 4.8, 4.8-A, 4.8-B and 4.8-C pertaining to small claims, following a brief discussion, and on motion of Judge Cullen, seconded by Judge Hampe, the Committee voted to recommend

adoption of said amendments, as contained in Appendix A of these minutes, on a temporary basis to make the rules conform with the statutes and to send said proposed amendments to the Committee's next public hearing for consideration.

Relative to amendments to Probate Court Rule 78-B pertaining to duplication of audio tapes, following a brief discussion, and on motion duly made and seconded, the Committee voted to send amendments to Probate Court Rule 78-B, as contained in Appendix B of these minutes, to the Committee's next public hearing for consideration.

Relative to amendments to Superior Court Rules 170 and 170-B pertaining to alternative dispute resolution, following a brief discussion on the proposed amendments to said rules, Judge Dalianis agreed to report back to the Committee following her meeting with Karen Borgstrom.

Relative to Probate Court Procedures, Judge Hampe will discuss with Judge Kelly the suggestions made by HALT in its December 1, 2008 letter and report back to the Committee at its June meeting.

Relative to an amendment to Supreme Court Rule 51(A)(4)(a)(1), following discussion, and on motion by Judge Dalianis, seconded by Judge Cullen, the Committee voted to recommend to the Supreme Court that said amendment be adopted by technical amendment.

Relative to an amendment to Supreme Court Rule 12-A establishing an appellate mediation program, which was distributed to members during the meeting, following a brief discussion, the Committee voted to recommend to the

Supreme Court that said amendment, as contained in Appendix C of these minutes, be adopted on a temporary basis and be sent to the Committee's next public hearing.

Relative to an amendment to Family Division Rule 1.26E, distributed to members during the meeting, following a brief discussion, and on motion of Attorney Apicelli, seconded by Attorney Rice, the Committee voted to recommend to the Supreme Court that said amendment, as contained in Appendix D of these minutes, be adopted by technical amendment.

The next meeting of the Committee is scheduled for June 3, 2009.

No further business to come before the Committee, the meeting adjourned at 1:55 p.m.

APPENDIX A

Amend District Court Rules 4.8, 4.8-A, 4.8-B and 4.8-C so that they read as follows:

4.8 (a) The clerk shall send a copy of the claim to the defendant by first class mail addressed to the defendant's last known post office address. The defendant will be required to indicate in writing within 30 days of the date the notice is mailed whether the defendant wants to be heard and shall be notified that failure to respond in writing shall result in service of the claim on the defendant by the sheriff at the defendant's expense.

(b) If the notice is returned as undelivered or the defendant does not respond in writing within 30 days, then the court shall direct the plaintiff to complete service on the defendant, at the expense of the plaintiff, as in all other actions at law (See RSA 510). The defendant will be required to indicate in writing the defendant's desire to be heard on or before the return date selected by the court, which shall be at least 30 days from the date of filing. If, upon proof of proper service, the defendant fails to respond on or before the return date, judgment shall be entered for the plaintiff.

(c) If the defendant responds to the notice indicating a desire to be heard, the case shall be scheduled for hearing shortly thereafter. Both parties shall be notified by mail of the date and time of the hearing at least 14 days in advance of the hearing.

4.8-A Pre-Judgment Attachment Procedure- If the plaintiff seeks a prejudgment attachment prior to or after the filing of the small claim complaint and with or without notice to the defendant, the process and procedure set forth in RSA 511-A and District Court Rule 3.4 shall be followed, except that the words "Writ" and "Writ of Summons" shall refer to the Small Claim Complaint. Service upon the defendant in such cases may not be accomplished by first class mail and shall be completed as in all other actions at law at the expense of the plaintiff, but service in a small claims matter must take place after filing with the court.

4.8-B Post-Judgment Attachment Procedure – Upon motion, a judgment creditor may obtain a writ of attachment to secure payment of a final judgment for money damages. The writ shall

state the name of the court rendering the judgment, the docket number of the case in which judgment has been issued, the date of entry of judgment, the amount thereof, including interest and costs. Attachments made pursuant to this Rule may be served and recorded in the same manner and shall have the same effect as a pre-judgment attachment and shall remain in effect until the judgment is satisfied or until the attachment expires by operation of law.

A judgment entered in a small claims matter may also be secured by real estate by recording, or re-recording at any time during the duration of the judgment, a certified copy of the judgment with the registry of deeds of the county in which the real estate is located.

4.8-C Discharge of Attachments- When a small claims judgment secured by real estate is satisfied, the plaintiff shall deliver a discharge directly to the defendant within 30 days. It shall be the responsibility of the defendant to record said discharge.

If the plaintiff fails to deliver a discharge within 30 days of a request to do so, or if exigent circumstances require an immediate discharge, the defendant may petition the court in which the judgment was issued for a court ordered discharge. The burden shall be on the defendant to establish that the judgment has been satisfied pursuant to RSA 503:12.

APPENDIX B

Rule 78-B. DUPLICATION OF AUDIO TAPES.

(a) Upon receipt of a Motion to the Court for a duplicate audio tape of a recorded probate court proceeding, the probate judge or probate master who presided over the proceeding shall either (1) direct the Register to release a copy of the audio tape to the Person, or (2) deny the Motion. Any denial of a Motion for a duplicate audiotape shall include a statement of reason(s) supporting the denial. **Any person may request a copy of the audio recording of a hearing except when a case or proceeding is confidential by statute, court rule or order. The recording will be provided on CD or audiotape for a fee of \$25.00 per case. A copy of the recording of a court proceeding shall not be deemed to be the official record of the proceeding.**

(b) In the case of any probate court proceeding made CONFIDENTIAL by New Hampshire statute, case law, or court order, no duplicate audio tape shall be released, except to a Party to the proceeding or to an Attorney for a Party to the proceeding. In such cases, the Party or Attorney shall sign a "Receipt for Duplicate Audio Tape of Confidential Probate Proceeding."

STATE OF NEW HAMPSHIRE

COUNTY _____

PROBATE COURT

IN RE: CASE NAME _____

DOCKET CASE NUMBER: _____

RECEIPT for DUPLICATE AUDIO TAPE or CD of
CONFIDENTIAL PROBATE PROCEEDING

I acknowledge receipt of a duplicate audiotape or CD of a CONFIDENTIAL probate proceeding in this case.

As a condition of the receipt of this duplicate audiotape or CD, I shall take all reasonable actions to ensure that the CONFIDENTIALITY of the proceeding, including the CONFIDENTIALITY of this audiotape or CD, is preserved. Those actions shall include the following:

I shall not reproduce this audiotape or CD in any form.

I shall not release this audiotape or CD, or a copy of this audiotape or CD, to anyone, **except to a party in this proceeding.**

I shall not allow anyone to listen to this audiotape **or CD**, except for a **P**party to this proceeding, **A**ttorney for a **P**arty to this proceeding, or a **P**erson with a court order **granting** authorization to listen to this audiotape **or CD**.

DATE: _____

SIGNATURE _____

(e) ~~The fee for each duplicate audiotape shall be \$25.00, payable to the Register.~~

APPENDIX C

Repeal Supreme Court Rule 12-A and replace it with the following:

- (1) Cases pending at the supreme court may be referred to the Office of Mediation and Arbitration (OMA) for mediation as set forth in this rule. All mediation will be conducted by a retired Supreme Court or Superior Court justice.
- (2) With the exception of a mandatory appeal listed in the following paragraph, a Rule 7 mandatory appeal that has been accepted by the court may be referred to the Office of Mediation and Arbitration (OMA) for mediation upon the agreement of all parties.

The following mandatory appeals are not eligible for mediation: criminal cases; domestic violence cases; election cases; guardianship appeals; involuntary commitment cases; juvenile cases, including abuse and neglect, CHINS, delinquency, and termination of parental rights cases; cases brought by a prisoner in the custody of a correctional institution; and stalking cases.

- (3) When an acceptance order is issued in a mandatory appeal that appears to be eligible for mediation under this rule, the clerk shall provide the moving party with a mediation agreement form. If all parties agree to mediation, the moving party shall submit the completed mediation agreement form to the court within 15 days of the date of the acceptance order, and shall send a copy of the completed form to all parties. In a case in which more than one appeal has been filed, the order shall indicate who will be considered the moving party for the purpose of submitting the mediation agreement form.
- (4) Upon receipt of a completed mediation agreement form in a mandatory appeal eligible for mediation, an order will be issued by the clerk referring the case to the OMA for mediation.
- (5) In any other case, the court may refer a case to the OMA for mediation on its own initiative or upon granting a motion for mediation filed by a party.
- (6) Unless the order referring a case for mediation provides otherwise, when a case is referred to the OMA for mediation, further processing of the appeal by the court will be suspended for a period of 90 days. If the director of the OMA or the mediator believes that

additional time is needed to complete the mediation, the director or mediator may file a notice with the court of an automatic extension of no more than 30 days. Upon filing of the notice, further processing of the appeal shall be suspended for the additional time without further order of the court. Extensions of time of more than 30 days may be requested only by motion to the court and are not favored.

- (7) After a case has been referred to the OMA for mediation, the OMA shall be responsible for selecting a mediator and scheduling a mediation session. The parties shall comply with the OMA rules for mediation of appeals. All communications and filings of the parties related to the mediation session shall be sent to the OMA and shall not be filed with the court, with the exception of filings relating to whether the case should be remanded to the court to resume processing of the appeal or requesting an extension of time to complete mediation.
- (8) If the director of the OMA determines at any time after a case has been referred that the case should not be mediated, the director shall notify the clerk in writing. Thereafter, an order will be issued indicating that processing of the appeal will resume in accordance with Supreme Court rules.
- (9) Within 15 days after the conclusion of a mediation, the mediator or the director of the OMA shall file a written report with the court of the results of the mediation. The report shall state whether a full or partial settlement was reached and describe the effect of the settlement on the pending appeal. The report shall not disclose the mediator's assessment of any aspect of the case or confidential matters discussed during the session or sessions.
- (10) If the director of the OMA reports that there has not been a full settlement of a case referred for mediation, or the period during which the court ordered the appellate process to be suspended for mediation has expired, the court ordinarily will resume processing the case in accordance with Supreme Court rules unless circumstances would make this inappropriate.
- (11) Mediation proceedings and information relating to those proceedings shall be confidential. Information submitted or discussed during mediation 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. Mediation proceedings under this rule are deemed settlement conferences consistent with the Rules of Evidence. Parties shall not introduce into evidence, in any subsequent proceeding, the fact that there was a mediation or any other material concerning the conduct of the mediation except as required by the Rules of Professional Conduct or the Mediator Standards of Conduct. Evidence that would otherwise be admissible in another proceeding shall not be rendered inadmissible as a result of its use in mediation.

- (12) The OMA may adopt procedural rules to govern the appellate mediation process.

APPENDIX D

Amend Family Division Rule 1.26E so that it reads as follows:

1.26E Motions that are not assented to will be held for 10 days from the filing date of the motion to allow other parties time to respond, unless justice requires an earlier Court ruling.