NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of March 16, 2012

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

The public hearing and meeting was called to order at 12:32 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen M. Anderson, William F.J. Ardinger; Robert L. Chase; Hon. Laurence Cullen; Ralph D. Gault, Hon. Richard A. Hampe, Jeanne P. Herrick, Esq.; Martin P. Honigberg, Esq.; Hon. Richard B. McNamara; Hon. William L. O'Brien (leaving early); Jennifer L. Parent, Esq. (arriving late); Patrick Ryan, Esq.; Raymond W. Taylor, Esq. (arriving late); and Hon. Robert J. Lynn.

Also present were Secretary to the Committee, Carolyn Koegler, Esq.; and Irene Dalbec, staff.

1. Approval of the Minutes

Upon motion made and duly seconded, the Committee unanimously voted to approve the minutes of the Committee's December 16, 2011 meeting, as amended. Ms. Anderson abstained from voting because she was not present at the December 16, 2011 meeting.

2. Status of Pending Items

(a) District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure and Probate Administration

There was brief discussion regarding the fact that because of the training occurring in the circuit court system, the adoption of new rules at this time would be a problem. Judge Cullen also noted that there is a concern about the fact that the new rules refer to "complaints," rather than "writs." It is important to consider what, if anything, might need to be done legislatively about this, before these rules go into effect. Justice Lynn noted that there has been some discussion at the Supreme Court about this, and it may be that the word "writ," can be read as a generic term.

Judge Cullen stated that he had produced what he considers to be a final draft of the rules, and that he has asked Judge Kelly to review the rules. After he

hears back from Judge Kelly, he will submit the draft rules to the Committee. He notes that there may be reason to hold an additional public hearing on the rules, as some changes have been made to certain sections, for example, the small claims rules and the landlord tenant rules.

It was agreed that the Committee would review the draft rules in June, and that the draft rules would likely be put out for public hearing in December.

(b) 2008-013, Judicial Conduct Committee Procedures

Justice Lynn has recused himself from participation in discussions regarding Supreme Court Rules 40(c)(5) and 40(12). He will participate in discussions related to 40(13).

Attorney Honigberg reminded the Committee that, at the Committee's direction, Carolyn had forwarded to the Judicial Conduct Committee ("JCC"): (1) copies of the letters from the JCC to the Supreme Court proposing changes to Supreme Court Rules 40(5)(c), 40(12) and 40(13); and (2) a copy of attorney Honigberg's memo. She also requested that the JCC: (1) consider the additional proposed amendments to the proposed amended rules made in attorney Honigberg's memo; and (2) if the JCC agrees with the subcommittee's proposed amendments, it incorporate them into final proposed rules and submit the final proposed rules to the Committee.

By letter dated February 23, 2012, the Vice Chair of the JCC explained that the JCC had a number of substantive concerns regarding the amendments to Supreme Court Rule 40 proposed by the Advisory Committee on Rules, and proposed a comprehensive set of amendments to be considered by the Advisory Committee on Rules.

The Committee requested that Carolyn Koegler review the amendments proposed by the JCC and: (1) incorporate those amendments into the existing rule, indicating additions in bold and brackets and deletions in strikethrough; and (2) identify what changes the JCC made to the ACR's recommendations and forward the materials to members of the Committee. It was noted that the Committee had hoped to put the proposed amendments out for public hearing in June, and some discussion ensued about the propriety of, and mechanics involved, in doing so.

Upon motion made by Attorney Honigberg and seconded by attorney Ardinger, the Committee voted unanimously to put the rule amendments the JCC has proposed out for public hearing in June. Prior to the public hearing in June, Committee members will review the materials provided by Carolyn Koegler and offer comments about the proposed JCC amendments. The Committee also directed Carolyn Koegler to write to the JCC and invite a member of the JCC to

attend the public hearing in June to discuss the proposed amendments and respond to any questions that might arise.

(c) 2010-015 Model Rules for Client Trust Account Records

Carolyn Koegler reminded the Committee that she had sent a letter dated July 5 to attorney Rolf Goodwin, informing him that the Committee had agreed with his proposal that the Ethics Committee and the Attorney Discipline Office work together to provide a joint recommendation regarding the ABA Model Rules for Client Trust Account Records, PCC Rule 1.15(a) and Supreme Court Rule 50. She also reported that she had recently been in contact with attorney Goodwin, and read to Committee members an email update provided by attorney Goodwin, which stated, in relevant part:

> The Ethics Committee designated a subcommittee consisting of myself, Tracy Bernson, Peter Imse and Mitch Simon to work with designees of the ADO on this matter. We had a first joint meeting in August. The Ethics Committee subcommittee has drafted and sent a proposed draft of Rules 1.15(a) and Rule 50 to the ADO working group, which draft is intended to meet the enforcement wishes expressed by the ADO. The ADO working group indicated that the press of other business would prohibit it from meeting with us for some time. We have a next meeting scheduled for May 9.

The Committee noted that no action would be taken at this time because the Committee is still awaiting the joint recommendation.

(d) 2011-002 Supreme Court Request to Review the Provisions of Supreme Court Rule 42 Related to the Admission to the Bar of Foreign Law School Graduates

Carolyn Koegler reported that, at the Committee's request, she drafted a proposed amendment to Supreme Court Rule 42(4)(c). However, she noted that the Supreme Court is also in the process of restructuring Supreme Court Rule 42 with respect to the bar admissions process. Therefore, she spoke about the foreign law school graduate provision in the context of these changes (see item 3i, below).

Carolyn Koegler summarized for the Committee members, the changes that are being proposed to Supreme Court Rule 42. The changes being proposed are also summarized in her March 14, 2012 memorandum to the Committee, as follows:

The New Hampshire Supreme Court is in the process of restructuring Supreme Court Rule 42 with respect to the bar admissions process. The changes to the rule have not yet been finalized, but the Court intends to finalize and adopt the changes related to the bar admissions restructuring on a temporary basis in April or May (with an effective date of September 2012), and will refer the temporary rule to the Advisory Committee on Rules at that time.

In the process of restructuring Rule 42, it became clear that a substantive change should be made to the rule relating to foreign law school graduates (FLSG). In addition, the Supreme Court proposes to make New Hampshire a Uniform Bar Examination (UBE) jurisdiction. The Court requests that the Advisory Committee on Rules review the proposed changes to revised Rule 42, set forth in the attached document, and make a recommendation about whether: (1) the proposed amendment should be made to the provision of the rule relating to FLSGs; and (2) whether the proposed amendment should be made to make New Hampshire a UBE jurisdiction.

Please note that if the Committee votes to put the proposed foreign law school graduate provision amendment and/or the UBE issue out for public hearing in June, it is likely that the temporary rule will have been adopted at the time the Notice of Public Hearing goes out. Accordingly, the proposed amendments set forth in the attached document are in the context of the draft of the revised Rule 42, not the existing rule. If the Committee votes to put the proposed amendments out for public hearing, I will need further instruction as to whether the entire temporary rule, with the substantive changes to the FLSG provision and the adoption of the UBE, should be put out for public hearing at that time.

1. Foreign Law School Graduates Provision (Supreme Court Rule 42(4)(c)

Carolyn Koegler reminded the Committee that in March 2011, the Committee had requested that she draft a proposed amendment to the foreign law school graduates provision of Supreme Court Rule 42. The Committee's request was prompted by a 2/17/11 letter from Eileen Fox to the Committee, requesting that the Committee consider amending the rule to make it easier to administer, and to ensure that the foreign law school graduates have the necessary background and training in the American legal system.

Carolyn Koegler explained that she had researched the rules in place in other jurisdictions. She noted that approximately half of the jurisdictions in the United States do not admit foreign law school graduates to the bar under any circumstances. She explained that she and Sherry Hieber, the Bar Admissions Coordinator, had briefly discussed recommending that the Committee recommend to the Court that the provision be deleted from Rule 42, but decided not to make that recommendation because: (1) New Hampshire already has a rule allowing for the admission of foreign law school graduates; and (2) perhaps given the increasingly global economy, the trend in this country seems to be toward allowing the admission of foreign law school graduates. For example, the ABA section of Legal Education and Admissions to the Bar recently released a report setting forth a draft proposed Model Rule on Admission of Foreign Educated Lawyers which would allow a foreign lawyer from a civil or common law jurisdiction to complete an LLM program meeting certain criteria set forth in a model rule and thereby qualify to take the bar examination. Both New York and Massachusetts have rules in place which allow for the admission of a foreign lawyer from a civil or common law jurisdictions, as long as the foreign lawyer has met certain criteria, including completing additional coursework at an ABA-accredited law school.

Carolyn Koegler noted that her goal in drafting the proposed rule was not to liberalize the rule, but to make it easier to administer, and to ensure that an applicant has had the necessary background and training in the American legal system. Therefore, the rule that she drafted requires that the applicant have completed his or her legal studies in a common law jurisdiction and that in the course of completing that coursework and/or completing coursework at an ABA accredited law school, he or she has taken coursework in US law in particular areas. The draft rule does not allow graduates of foreign law schools in countries with civil law traditions to sit for the bar exam or qualify for admission on motion. Carolyn Koegler explained that the proposed rule is quite restrictive, and that even those graduates of law schools in countries with common law traditions would likely have to complete additional coursework at an ABA-accredited law school before qualifying to sit for the bar examination. However, she did note that the fourth provision of the rule allows the board some discretion to permit applicants to sit for the bar even if they have not met the strict requirements of section three of the rule.

Discussion ensued regarding the proposed FLSG amendment. Judge McNamara noted that he recalls discussion some years ago about whether there is a GATT concern here. He suggested that Attorney Parent contact someone at the American Bar Association to inquire whether it is necessary to have a provision allowing for the admission of foreign law school graduates in order to comply with GATT. Attorney Parent agreed to contact someone at the ABA about this issue.

Speaker O'Brien raised a concern about allowing foreign law school graduates to sit for the bar examination, but not allowing graduate of non-ABA-accredited law schools in the United States to sit for the bar examination. He stated that he believes there is a fairness concern at issue here. Justice Lynn suggested that one arguable reason for the distinction is that foreign law school graduates had no opportunity to attend an ABA law school, but people residing in the United States do. One Committee member suggested that the reason for the rule requiring applicants to have attended an ABA accredited law school is to ensure that applicants are competent. ABA accreditation reflects that a law school is providing a certain standard of legal education. Ms. Anderson noted that the current draft FLSG rule attempts to extend the ABA standard beyond the United States. The ABA has no jurisdiction in other countries, but this draft rule attempts to apply the same standard beyond the United States to accomplish the same goal, that is, to ensure that applicants to the bar have received a certain standard of legal education before they can sit for the bar or apply for admission on motion.

Justice Lynn suggested that someone inquire of the ABA how the ABA would feel about expanding the same sort of alternative way to qualify to sit for the bar or apply for admission on motion to graduates set forth in the FLSG rule to graduates of non-ABA accredited law schools. Judge McNamara stated that he understood the fairness concern raised by Speaker O'Brien, but that the issue here is about how to ensure competence, and requiring applicants to have attended an ABA accredited law school is one way of doing that. Attorney Honigberg suggested that Carolyn Koegler look at the rules in New York and California to see how they address the issue of applicants who have attended law schools that are not ABA-accredited.

Attorney Parent noted that the reason that the Court has required that an applicant attend an ABA accredited law school is that it sets a certain standard which means that the Court does not have to look at every single application that is filed to determine whether a particular applicant has received an adequate legal education. Justice Lynn stated that allowing individuals who did not attend an ABA accredited law school to sit for the bar would result in large increase in the number of applications. His sense is that most jurisdictions require an applicant to have attended an ABA-accredited law school.

The Committee determined that the FLSG issue would not be put out for public hearing in June. The Committee requested that Carolyn Koegler: (1) contact the ABA to get its reaction to a proposal to expand the same sort of alternative way to qualify to sit for the bar or apply for admission on motion to graduates set forth in the FLSG rule to graduates of non-ABA accredited law schools; and (2) look at the rules in New York and California to see how they address the issue of applicants who have attended law schools that are not ABA-accredited.

2. The Uniform Bar Examination (UBE)

Justice Lynn explained that the Court supports making New Hampshire a Uniform Bar Examination jurisdiction. He stated that the format of the exam would remain the same. If the change is made to make New Hampshire a UBE jurisdiction, the only difference from the current practice will be that New Hampshire joins other jurisdictions to say that someone can qualify to be admitted in New Hampshire if he or she sits, for example, in Minnesota. In other words, the exam taken in another state would qualify an individual in New Hampshire if that person gets a certain score. The exam would be graded in whatever jurisdiction the individual took the exam in, but the score would be transferrable.

Attorney Ardinger noted that he sits on the New Hampshire Board of Bar Examiners. While his responsibility on the board is to assess Franklin Pierce scholars, and therefore, he is not directly involved in issues relating to the bar examination, he knows that Gordon McDonald, the Chair of the Board of Bar Examiners recommends this change.

Ms. Anderson inquired whether the term "board" used in the proposed rule amendment refers to the New Hampshire Board of Bar Examiners. Carolyn Koegler stated that it did. Judge Hampe inquired whether, if the rule change is made, it might mean that an applicant who did not achieve a passing score in another jurisdiction might nevertheless pass in New Hampshire. Justice Lynn stated that this is possible, but noted that New Hampshire is about mid-range, in terms of rigor.

Attorney Parent inquired about the effect of section X(2)(B) of the proposed amended Supreme Court Rule 42. Section X reads, in pertinent part, as follows:

X. Admission by Transferred Uniform Bar Examination Score

(a) An applicant who meets the Eligibility Requirements set forth in paragraphs 42 (IV), (V), and (VI), and the following additional requirements may, upon motion to the board, be admitted by transferred UBE score. The applicant shall:

(1) Have earned a UBE score that meets or exceeds the minimum score required by the board on the date that the motion is filed; and

(2) Have either:

(A) earned the UBE score in an administration of the UBE which occurred within three years immediately preceded the date on which

the motion for admission by transferred UBE score was filed; or

(B) earned the UBE score more than three years but less than five years prior to the date of filing of the motion for admission by transferred UBE score, and establish that he or she has been primarily engaged in the active practice of law, as defined by Rule 42 (XI)(d), for at least two years in another state, territory, or the District of Columbia in which the applicant was a member in good standing and authorized to practice law throughout the entire two-year period.

. . . .

Justice Lynn explained that section 2(B) is designed to "fill a hole," to account for applicants who have gone beyond the three years during which they are allowed to use their score to apply for admission by examination in New Hampshire but do not yet meet the requirements of another provision of Supreme Court Rule 42, which would allow them to apply for admission on motion, if they have been engaged in the active practice of law for five out of the last seven years. Attorney Ardinger noted that the rule regarding what it means to be in the "active practice of law" is not very stringent, because it states that the "active practice of law" includes "representation of one or more clients in the private practice of law."

Upon motion made by Judge Hampe and seconded by Attorney Ardinger, the Committee voted that the proposed amendment to make New Hampshire a Uniform Bar Examination jurisdiction be put out for public hearing in June. The proposed amendment will he put out for public hearing in the context of the new temporary Supreme Court Rule 42 which is likely to be adopted by the Court in April or May.

(e) <u>2011-011 Supreme Court Request to Review Individual Superior Court Rules and Rules of Criminal Procedure In Light of Comments Received When New Superior Court Rules and New Rules of Criminal Procedure Were Put Out for Public Comment</u>

The Committee turned next to the one outstanding issue (juror questionnaires) raised in a May 24, 2011 letter from David Peck to Carolyn Koegler regarding public comments received when the proposed Superior Court rules and new Rules of Criminal Procedure were put out for public comment. At its December meeting, the Committee determined that the issues related to juror questionnaires are larger than can be resolved by a subcommittee, and determined that a larger committee should be formed to address the issue. Justice Lynn agreed to speak with Attorney Taylor, and that they would together generate a list of people to serve on the committee. The committee will be

charged with considering: (1) what information should be requested from jurors; (2) how that information should be treated, with respect to confidentiality; and (3) what the mechanics will be regarding the dissemination and collection of that information. The committee will also consider whether the committee's proposal will require legislation. The goal will be for the committee to present a proposal to the Advisory Committee on Rules by its Friday, September 14, 2012 meeting.

Attorney Taylor reported that he is still in the process of putting together the committee. He noted that he is still waiting for some people to designate members of the committee.

(f) 2011-014 Counsel Fees and Guardians Ad Litem Fees Rules

There was discussion regarding the amendments to Supreme Court Rules 48(2) and 48-A(2) which were adopted on a temporary basis by Supreme Court Order dated July 12, 2011, and referred back to the Committee for its recommendation as to whether they should be adopted on a permanent basis. At the December meeting, the Committee directed Carolyn Koegler to write to Judges Kelly, King and Nadeau, to request their input regarding the temporary amendments to Supreme Court rules 48(2) and 48-A(2), and their opinion as to whether the amendments should be adopted on a permanent basis.

Justice Lynn reminded the Committee that the major substantive change made by the temporary amendments was to require that an attorney receive approval from the administrative judge of the circuit court or the chief justice of the superior court, as the case may be, before exceeding fee limits. He stated that he had requested a status report from Judges Nadeau, Kelly and King, but had not yet heard back.

Judge Hampe suggested that it may be necessary to wait a bit longer to see if the rule is working. He noted that the rule also applies to attorneys in involuntary admission cases. He says that it is not feasible to get the approvals in these cases because of the tight scheduling time frame for hearings in those cases (hearings must be held within 15 days of the filing of the petition). He also noted that the fees are not paid by the Court, but paid by the Department of Health and Human Services, and queries whether these kinds of cases should be eliminated from the requirement. Justice Lynn stated that he would raise the issue with the Supreme Court as to whether these kinds of cases should be excluded because of the short time frame involved, and the fact that the fees are paid out of the Department of Health and Human Services Budget, and not the Court's budget. Judge Hampe noted that there are very few requests to exceed the maximum fees in these kinds of cases, and that he would contact Judge Kelly about this issue.

(g) 2011-015, E-Filing, Supreme Court Rule 7, Supreme Court Rule 3

The Committee turned briefly to the issues raised in an August 3, 2011 letter from attorney Joshua Gordon to Carolyn Koegler. In the letter, Mr. Gordon had raised three issues: (1) whether it might be possible to implement some kind of system to allow attorneys to share pleadings and documents electronically, even before e-filing comes to New Hampshire; (2) whether Supreme Court Rule 7(1)(B) & (C), should be amended; and (3) the constitutionality of Supreme Court Rule 3. At the September meeting of the Committee, a subcommittee comprised of Attorney Honigberg, Attorney Gordon and Attorney Ardinger, was formed to address issues (1) and (2). Attorney Gordon provided the Committee with memoranda summarizing the recommendations of the subcommittee regarding these issues at the December meeting. The Committee requested that the subcommittee to do some further work and report back to the Committee regarding issues (1) and (2). Regarding issue (3), the Committee requested that Attorney Gordon do some further work and report back to the Committee.

Attorneys Honigberg and Ardinger reported that the subcommittee had not been able to meet to complete its work, but that it would do so by the June meeting of the Committee.

(h) 2011-021. Superior Court Pilot Rules – PAD

Committee members noted that at its December 16, 2011 meeting, the Committee agreed revisit this issue at the June 2012 meeting.

(i) 2007-001. Superior Court Rule 170-ADR

Judge McNamara submitted to the Committee a draft amended Superior Court Rule 170 on behalf of the ADR subcommittee. He reminded the Committee that at the December 2011 meeting, it was decided that the ADR subcommittee, comprised of judges, court clerks, practitioners and mediators would revisit the rule to see whether it should be made permanent in its current form, or whether changes should be made to the rule. The subcommittee concluded that changes should be made and drafted a revised rule reflecting those changes. Judge McNamara explained that the draft rule streamlines the current rule, creates more flexibility, and aims to make the process more formal by requiring that mediations be held in the courthouse.

Attorney Taylor called the Committee's attention to the following language of the draft rule:

(F) SURCHARGE (to be considered)

> The sum of $10.00 shall be added to each entry fee collected in the Superior Court for and shall be deposited in the mediation and arbitration fund under RSA 490-E:4.

Attorney Taylor noted that the subcommittee is still considering this proposed change, and also noted that the provision might require a statutory change. Justice Lynn inquired whether, with respect to the fee, when the legislature approved the ADR program the understanding was that the program would be self-funded. Judge McNamara stated that there have been some procedural problems related to collecting the fee, and Attorney Parent noted there is also a problem in that many parties opt out of the mediation program. Speaker O'Brien inquired whether the idea of section (f) is that the fee would be added onto all civil filings. Judge McNamara stated that that is the case, and that what is at issue is only the question of how to collect the money.

After some discussion, it was concluded that the proposed rule is not yet ready for public hearing. Judge McNamara agreed that he would circulate working drafts of Rule 170 to the members of the Committee, and that he would use strikethroughs and bold to show where changes to existing temporary Superior Court Rule 170 are being proposed.

Justice Lynn stated that he believes it a good idea to bring mediation back to the courthouse. Attorney Parent noted that most lawyers are opting out of this and are going to private mediation, and that the number of mediations through the court process are going down. Attorney Honigberg inquired whether it is really true that mediation works better at the courthouse, and whether there are statistics to support this conclusion. Judge McNamara stated that the courthouse impresses upon parties the seriousness of the matter. Attorney Parent inquired whether there are any records reflecting how mediations inside v mediations outside the courthouse compare in terms of effectiveness. Attorney Taylor stated that the recordkeeping would not reflect this data.

(j) Superior Court Rule 78. Photographing, Recording and Broadcasting

Justice Lynn reminded the Committee that following the December public hearing on the proposed rule amendments, the Committee unanimously voted to recommend that: (1) the Supreme Court repeal the existing trial court rules regarding photographing, recording and broadcasting and adopt new Superior Court Rule 78, new Circuit Court-District Division Rule 1.4, new Circuit Court-Probate Division, Rule 78, and new Circuit Court Family Division Rule 1.29 on a temporary basis; and (2) the Court refer the issue back to the Advisory Committee on Rules to appoint a Committee to continue to study the issue of whether further amendments to the new rules are necessary.

By order dated January 25, 2012, the Supreme Court adopted the proposed rule changes and referred the matter back to the Advisory Committee

on Rules. Justice Lynn stated that he believes the issues for the Committee to consider going forward are: (1) whether or not public access should be expanded; and (2) whether the rule should apply in parts of the courthouse other than the courtroom. He noted that the New Hampshire Committee on the Judiciary and the Media met last Friday and appointed a subcommittee to work on these issues. He noted that there are many different views on this, and that even members of the traditional media are not necessarily in agreement about whether it makes sense to have more or less stringent rules. He also noted that the members of the subcommittee include: Judges Nadeau and Kelly, representatives of the media, a Sheriff's representative, and (he believes), a court clerk. He inquired whether it would make sense to have someone from the Advisory Committee on Rules work on the subcommittee. Attorney Herrick agreed to work on the Committee.

3. New Items for Committee Consideration

(a) 2012-001. Supreme Court Rule 12-A

The Committee discussed briefly a 2/9/12 memorandum from Eileen Fox requesting that the Committee consider whether Rule 12-A should be amended to allow retired full-time marital masters to serve as appellate mediators. Upon motion made by Attorney Parent and seconded by Justice Lynn the Committee unanimously voted to put the proposed amendment out for public hearing in June.

(b) 2012-002. Supreme Court Rule 16(3)(i)(Briefs)

The Committee next considered a 2/21/12 memorandum from Carolyn Koegler to the Advisory Committee on Rules requesting that the Committee consider whether Supreme Court Rule 16(3)(i) should be amended to clarify that an appealing party must include a copy of the decision being appealed in the brief, and not in a separate appendix. There was some discussion regarding whether the proposed change is technical, and that, therefore, a public hearing is unnecessary. Upon motion made by Judge Hampe and seconded by Attorney Parent, the Committee voted to recommend that the Supreme Court adopt the amendment as a technical amendment.

(c) 2012-003. Parental Notification Rules

Attorneys Honigberg and Ardinger recused themselves from discussion about this issue because they have clients who are impacted by the rule.

Justice Lynn explained that on December 30, 2011 the Court had adopted rules pursuant to RSA 132:32-36. The statute, which became effective on January 1, 2012, requires parental notification before abortions can be

performed on unemancipated minors. The rule amendments adopted by the Supreme Court on a temporary basis relate to the filing of a petition for waiver of parental notice prior to abortion in superior court, and for the filing of an appeal if the petition is denied. The Court's order referred the rule amendments to the Advisory Committee on Rules for consideration of whether they should be adopted on a permanent basis. Justice Lynn noted that he understands that the legislature is considering statutory changes. For example, currently, petitions for waivers may only be filed in Superior Court. The legislature may be considering a change which would allow the petitions to be filed in the other trial courts.

After some discussion, and upon motion made by Attorney Taylor and seconded by Ms. Anderson, the Committee unanimously voted to put the parental notification rules out for public hearing in June.

Carolyn Koegler agreed to contact Barbara Sweet, Superior Court Coordinator, to inform her that this item will be going out for public hearing in June, and requesting her input as to whether the rules should be made permanent.

(d) 2012-004. IOLTA

The Committee next considered an issue raised in a 12/22/11 letter from Attorney Middleton to Chief Justice Dalianis, in which attorney Middleton proposes that the Annual Trust Accounting Compliance Certificate be amended to include questions relative to whether the attorney completing the form has any interest in a title or closing company that handles real estate closings. Justice Lynn explained that he had asked staff attorneys to research whether title companies are "practicing law." The results of the research reflect that the issue is quite complicated. Therefore, Justice Lynn suggested that a subcommittee be formed to consider this issue in greater detail, and that attorney Middleton be contacted to see whether he would like to serve on the subcommittee.

Upon motion made by Judge Hampe and seconded by attorney Parent, the committee unanimously voted that a subcommittee be formed to further research this issue. Justice Lynn will contact attorney Middleton to see if he would like to serve on the subcommittee, or designate someone to serve. Justice Lynn will appoint members to the subcommittee.

(e) 2012-005. Superior Court Rule 59-A.

The Committee next considered an issue raised in a 3/5/12 memorandum from Carolyn Koegler to the Committee. The memo stated that a member of the Court has requested that the Committee consider adopting changes to Superior Court Rule 59-A (and the corresponding rules in the district, probate and family divisions of the Circuit Court) to include the requirement, set forth in New Hampshire Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002), that in

order to preserve issues for appeal, any issues which could not have been presented to the trial court prior to its decision must be presented to the trial court in a motion for reconsideration.

Justice Lynn explained that the proposed language set forth in the memorandum simply codifies Butland. He stated that the proposed amendment provides notice to practitioners that, in a situation in which a judge makes a decision based on an issue that had not been raised by either party, the losing party must identify any alleged errors in a motion to reconsider in order to preserve those issue for appeal to the Supreme Court.

Attorney Honigberg noted that the issue underlying the proposed amendment is related to an issue the subcommittee comprised of Attorneys Honigberg, Ardinger and Gordon is addressing with respect to Supreme Court Rule 7. Therefore, he suggested that this issue be referred to the subcommittee. Speaker O'Brien stated that in this view, it might make sense to put the rule out for public hearing in June. Judge McNamara stated that the substance of Butland and the rule amendment seem to make a great deal of sense. That is, requiring parties to brief an issue for the trial court judge makes sense from an efficiency standpoint, as it would help parties to avoid an unnecessary appeal.

After some further discussion, upon motion made by Speaker O'Brien and seconded by Judge Hampe, the Committee voted unanimously to put the proposed rule amendment out for public hearing in June and to refer the issue to the subcommittee comprised of Attorneys Honigberg, Ardinger and Gordon. It is anticipated that the subcommittee will present its views on the proposed amendment at the public hearing and meeting in June.

(f) 2012-007. Supreme Court Rule 32-A

The Committee next considered an issue raised in a 3/7/12 memorandum from Carolyn Koegler to the Committee. According to the memo, two staff attorneys at the Supreme Court have referred an issue to the Committee that arose in connection with their review of a brief in a case that is currently pending before the Supreme Court. The staff attorneys believe that Supreme Court Rule 32-A, which governs the appointment of appellate counsel to represent indigent persons in certain non-criminal cases involving the deprivation of fundamental interests, may need to be amended to include involuntary admission cases filed under RSA 135-E and 137-B.

After some discussion, it was agreed that the rule should be amended as proposed. Upon motion made by Judge Hampe and seconded by Ms. Anderson, the Committee voted unanimously to put the proposed rule amendment out for public hearing in June.

(g) 2012-006. Supreme Court Rule 37(9)(b)

The Committee next considered an issue raised in a 3/7/12 memorandum from Carolyn Koegler to the Committee. The memo states, in relevant part:

> The definition of "serious crime" contained in section (9) of Supreme Court Rule 37 (Attorney Discipline) differs from the ABA Model Rules for Lawyer Disciplinary Enforcement's definition of "serious crime." The Court requests that the Committee consider whether it would be appropriate to amend Supreme Court Rule 37(9) to include the language from the ABA Rule. When considering this issue, the Committee may wish to compare Supreme Court Rule 37 with the ABA Model Rules for Disciplinary Enforcement, which can be found at http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.

After some discussion, the Committee requested that Carolyn Koegler further research this issue and report back to the Committee in June with a recommendation about whether Supreme Court Rule 37(9)(b) should be amended as proposed.

(h) 2012-008. Protocol for In Camera Review of Documents

The Committee next considered an issue raised in a 3/14/12 memorandum from Carolyn Koegler to the Committee. According to the memo, the Superior Court has drafted a protocol for in camera review of documents. Because the protocol establishes procedures that would be applicable to parties and counsel in civil and criminal cases, the Supreme Court feels that the protocol should probably be adopted, in some form, as one or more court rules. The Court also feels that it would be helpful to have some input from practitioners about the protocol before it is formally adopted. In addition, because the issue of in camera review could also arise in the Circuit Court, the Court believes that the Committee should consider seeking input from the Circuit Court as part of the Committee's review process.

Discussion ensued regarding the need for a protocol to address, in particular, the issue of retention and destruction of documents submitted for in camera review, particularly given the increased number of cases in which documents are submitted for in camera review.

Justice Lynn suggested that it probably makes some sense to send advance notice to the Attorney General's Office, the Office of the Public Defender and the Department of Health and Human Services before the protocol is put out for public hearing. Attorney Honigberg noted that some of the items contained in

the protocol relate to internal procedures which will not be of interest to practitioners. Justice Lynn stated that he generally agrees, but noted that the Attorney General's Office and the Public Defender's Office might not agree, and should be given the opportunity to review the protocol.

After some discussion, the Committee directed Carolyn Koegler to send copies of the proposal to: (1) the Attorney General's Office, (2) the Public Defender's Office; (3) Counsel for the Department of Health and Human Services; and (4) the Judges and Clerks of the Superior Court and Circuit Court. The cover letter sent with a copy of the proposal should explain that the Committee is considering recommending that the Court adopt the protocol as a rule and request comment on the proposed protocol. It is the Committee's goal to put this item out for public hearing in December.

(i) 2012-009. Supreme Court Rule 42, Foreign Law School Graduates and the Uniform Bar Examination

This item was discussed with item 2(d)(above).

(j) 2012-010. District Court Rules (Indigent Defendants and Arraignments)

Justice Lynn explained that very often in district court counsel is not made available to indigent defendants at their arraignments. The procedure seems to be, generally, that a criminal defendant will apply for a court-appointed attorney at his or her arraignment, but will not be assigned counsel until after the arraignment. This practice has been challenged in a case that is currently under advisement at the Supreme Court. The general sense of the Court is that no matter how the case is resolved, it raises an issue for consideration by the Advisory Committee on Rules. That is, whether there is a need for a rule to change the procedure to ensure that counsel is provided to indigent defendants at their arraignments.

There was some discussion regarding the fact that this presents a significant resources challenge. Members of the Committee acknowledged that there is no simple solution to this problem, but that the Committee does need to look carefully at this issue. Justice Lynn suggested that a subcommittee be formed to consider this issue, and inquired whether Judge Cullen would agree to Chair the subcommittee. Judge Cullen agreed to do so, but stated that he would not be able to convene a meeting for several weeks. Members of the Committee agreed that members of the subcommittee should include: (1) someone from the Public Defender's office; (2) someone from the Attorney General's office; and (3) Nina Gardner. Justice Lynn agreed to appoint members to the subcommittee.

(k) 2012-011 Supreme Court Rule 45

Justice Lynn reported that the Administrative Council has requested that the Advisory Committee on Rules consider whether Supreme Court Rule 45 should be amended to eliminate the mandatory requirement that trial judges attend the National Judicial College in Reno, NV. Justice Lynn explained that sending trial judges to the National Judicial College in Reno is very expensive. The Administrative Council would like to change the rule to allow trial judges to be trained locally. Justice Lynn suggested that the Flaschner Institute may be one option. Another Committee member suggested that the Vermont Judicial College may be another option. Judge McNamara stated that he had attended the National Judicial College and that he believes there may be better ways to train judges.

Attorney Parent reviewed the language of Rule 45 and inquired whether a rule change is really necessary, because the language seems to allow the administrative judges of the various trial courts some discretion in determining where the trial judges are to receive their training. There was some discussion regarding whether the Committee should recommend that a technical change be made to the rule to give administrative judges even greater discretion to determine how trial judges should be trained. Justice Lynn agreed to contact the Flaschner Institute to inquire about the possibility of having judges receive training there, rather than at the National Judicial College in Reno.

6. Next Meeting

The next public meeting and public hearing is scheduled for Friday, June 15, 2012, at 12:30 p.m.

7. Meeting Schedule for 2012

Friday, June 15, 2012
Friday, September 14, 2012
Friday, December 14, 2012

Upon motion made and duly seconded, the meeting was adjourned at 3:00 pm.