

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of March 15, 2013

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

The meeting was called to order at 12:35 pm by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen M. Anderson; William F.J. Ardinger, Esq., Hon. Paul S. Berch, Robert L. Chase, Hon. R. Laurence Cullen; Ralph D. Gault, Hon. Richard A. Hampe, Jeanne P. Herrick, Esq., Martin P. Honigberg, Esq.; Hon. Andrew Hosmer, Hon. Richard B. McNamara, Jennifer L. Parent, Esq., Patrick Ryan, Esq.; Raymond W. Taylor (arriving late), Esq. and Hon. Robert J. Lynn.

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

1. Approval of Minutes of December 14, 2012 Meeting

Upon motion made by Attorney Ardinger and seconded by Attorney Honigberg, the Committee voted to approve the December 14, 2012 minutes.

2. Status of Pending Items

a. 2011-002 Admission to the Bar of Foreign Law School Graduates

Carolyn Koegler reminded the Committee that a proposed rule had been put out for public hearing in December, that the Committee had received comments regarding the proposal, along with suggested amendments to the proposed rule from Attorney John Sullivan. The Committee requested that Carolyn Koegler work with Attorney Sullivan and to present a revised proposal to the Committee. Carolyn Koegler reported that she had not yet met with Attorney Sullivan, but that she hoped to submit a revised proposal to the Committee for consideration at the June meeting.

b. 2011-012. Juror Questionnaires

Attorney Taylor reminded the Committee that it had put a proposal

to amend the proposed Superior Court Rules and New Rules of Criminal Procedure as set forth in the Advisory Committee on Rules 2010 Annual report out for public hearing in December 2012. At the December meeting following the public hearing, it was agreed that Attorney Taylor's subcommittee on juror questionnaires would: (1) address the question of whether there is any need to amend the proposals; and (2) inquire of Judge Nadeau whether the superior court is ready for the rules to be implemented.

Attorney Taylor reported that his subcommittee had completed its work and that its final submission is reflected in a document submitted to the Committee at the meeting. The document reflects the changes proposed by the subcommittee that were put out for public hearing in June in bold and in black. Further changes made in response to comments received from the JMS Subcommittee at the public hearing in December are reflected in red.

Following some discussion, and upon motion made by Attorney Taylor and seconded by Judge Hampe, the Committee voted unanimously to recommend that the Supreme Court amend the rules and forms related to juror questionnaires, as recommended by the subcommittee.

c. District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure and Probate Administration.

Judge Cullen reported that because changes are still being made to the proposed Superior Court Civil Rules that will also need to be made to the proposed District Court Rules, he has not yet finalized a proposal regarding the District Court Rules, but will wait until the Superior Court Civil Rules are finalized. Once the Superior Court Rules are finalized, he will make any necessary changes and then send the proposed District Court Rules out for the Committee's review. Judge Hampe noted that the Probate Court Rules will follow thereafter.

Justice Lynn agreed that there is no rush regarding the District Court Rules. He stated that the Court would be adopting the New Superior Court Civil Rules in a few weeks, effective October 1, but that the New Criminal Rules of Procedure would not be adopted at that time.

Judge Cullen stated that Criminal Rule 44 should apply to the Circuit Court as well as the Superior Court.

d. 2008-013, 2012-019. Judicial Conduct Committee Procedures

Carolyn Koegler reminded the Committee that following the September meeting, at the Committee's request, she wrote to the Executive Secretary of the JCC, Bob Mittelholzer, asking the JCC to consider, and comment on: (i) the question of whether Supreme Court Rule 40(11)(j) should be amended to be consistent with the language of temporary Superior Court Rule 78 (amended by Supreme Court Order dated January 25, 2012); and (ii) A proposal submitted by Joseph R. Adamaitis requesting that the Committee consider amending Supreme Court Rule 40(4)(c)(2), to eliminate or change the period of limitations.

The JCC submitted a response to Carolyn Koegler's request by letter dated December 19, 2012.

i. 2008-013. Supreme Court Rule 40(11)(j). Photographing, Recording and Broadcasting

Regarding the question of whether Supreme Court Rule 40(11)(j) should be amended, the JCC stated:

The Committee believes that the replacement of current Supreme Court Rule 40(11)(i), *Photographing, Recording and Broadcasting*, is ultimately a policy issue for the Supreme Court to decide and as such the Committee has declined to take a position as to the proposed amendment. The Committee, however, wishes to remind both the SCRAC and the Supreme Court that it has no experience with the use of cameras in the context of public hearings held pursuant to Supreme Court Rule 40(11) and cautions against the potential for unintended consequences of the same to include the need for security with regard to screening and enforcement of the proposed amended rule.

Justice Lynn noted that the rule at issue only applies once a JCC proceeding becomes a public proceeding. Given that the JCC does not have an objection to the adoption of the new rule in this context, he believes that the same rule should apply these public proceedings as apply in the trial courts. Upon motion made by Justice Lynn and seconded by Representative Berch, the Committee voted unanimously to put the proposal out for public hearing in June.

ii. 2012-019. Supreme Court Rule 40(c)(2). Period of Limitations.

Regarding the proposal made by Mr. Adamaitis in a July 18, 2012 submission to the Committee to eliminate or change the statute of limitations with respect to complaints filed against judges, the JCC noted that this is a proposed substantive amendment and therefore, is a policy issue for the Court to decide. The JCC, however, made a number of observations in its December 19 letter that the Committee and the Supreme Court may wish to take into account in considering whether to amend the rule to eliminate the period of limitations.

Discussion ensued regarding whether the Committee should recommend that the Court eliminate or change the period of limitations for grievances filed against judges. It was noted that a reason to eliminate the period of limitations is because there may be cases in which alleged misconduct occurs, but the party to the proceeding does not want to report the misconduct immediately because it has a case pending before the judge who would be the subject of the complaint. If the case lasts longer than two years, then the party would be barred by the period of limitations from bringing a complaint against the judge.

Others noted that there are factors suggesting that a rule amendment is inadvisable. First, the New Rule 40 allows the JCC to (for good cause) hold complaints in abeyance. This would allow a party to file a complaint with the JCC, but request that the JCC wait until the end of the proceeding pending before the judge to act on the complaint. Second, eliminating a period of limitations would allow litigants to engage in gamesmanship by, for example, waiting for the outcome of the proceeding before deciding whether to pursue a complaint. The filing of the complaint would toll the period of limitations. Finally, there is a concern that if complaints are filed long after the incident occurs, the judge's ability to respond to the allegations, and the Committee's ability to ascertain the relevant facts will likely be decreased.

It was noted that the ABA's view is that there should be no period of limitations for complaints filed against lawyers. Justice Lynn stated, however, that the New Hampshire Supreme Court had considered the issue with respect to lawyers, and felt strongly that this ABA recommendation is not one that should be adopted in New Hampshire.

One Committee member stated that because it is possible for a complainant to request that the JCC hold complaints in abeyance, and in light of the potential negative consequences of eliminating the period of limitations altogether, the Committee should vote not to put the matter out for public hearing.

Upon motion made and seconded, the Committee voted unanimously not to put the proposal out for public hearing in June and to recommend that the Court not change the current limitations period.

e. 2011-014. Counsel Fees and Guardians Ad Litem Fees Rules

Justice Lynn reminded the Committee that at issue with respect to this item is whether the Committee should recommend that the temporary rule amendments adopted by Court order on July 12, 2011 be made permanent. 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. The Committee had agreed in June that the rules should be continued in a temporary status for the next six months.

At the December meeting, Judge Hampe had stated that his sense is that the rules are working fine, but that he would like to have Judge Kelly's input on whether the rule amendments should be adopted on a permanent basis. Justice Lynn agreed to contact Judge Kelly to inquire about this.

Justice Lynn reported that he had spoken with Judge Kelly and that while Judge Kelly had noted that the rule amendments had created a lot of work, he believes that the rules should be made permanent.

Upon motion made by Judge Hampe and seconded by Attorney Honigberg, the Committee voted to recommend that the Supreme Court adopt the temporary rule amendments on a permanent basis.

f. 2011-021. Superior Court Pilot Rules—PAD

Justice Lynn reminded the Committee that the Court had recently adopted a temporary amendment to expand the PAD Rules statewide on March 1, 2013.

Justice Lynn noted that there might be some logistical issues associated with putting the PAD rules out for public hearing in the future, due to the overlap with the adoption of the New Superior Court Civil Rules. He noted that the Court would be integrating the PAD Rules into the New Civil Rules before the New Civil Rules were adopted.

It was generally agreed that this item would remain on the agenda, but that the Committee would take no action for several months, but would revisit the issue in December.

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

Judge McNamara reminded the Committee that he had submitted his subcommittee's proposal to delete existing Rule 170 and replace it with a new Rule 170 in December. The proposals were discussed in great detail at the December meeting, and members of the ADR subcommittee were present at that meeting to respond to questions from the Committee. Discussion at the December meeting centered around the funding mechanism and the training requirements.

In February, Judge McNamara submitted a revised proposal to amend Superior Court Rule 170, which was distributed by email to members of the Committee. Judge McNamara explained that the thrust of the new rule is to eliminate the onerous requirements of how people become mediators, to allow the court greater control over the process, and to ensure that people take the process more seriously. He noted that the biggest area of concern remains Section (F) of the new rule, which calls for a surcharge. He explained that this provision would need legislation.

Justice Lynn stated that his understanding is that the legislature is very sensitive to any effort to increase the filing fee because it is concerned about the costliness of filing. Therefore, the Court cannot simply decide to collect the ADR fee as part of the filing fee, without the legislative approval, particularly since implementation of the e-court system will cause an increase in the filing fee.

Discussion ensued regarding different approaches to collecting the fee. Attorney Taylor noted that he does not want to see the revisions to the ADR rule stall due to the \$10.00 surcharge issue. Justice Lynn noted that the current funding system is not really working, but since it will not be possible to secure a legislative change, he suggested that the Committee put the proposal out for public hearing, with the understanding that all but the funding issue has been agreed to. In other words, he suggests that the Committee propose that the rule be put in place with no change to the funding mechanism. Judge McNamara suggested that the proposal be amended to add "Surcharge to be considered" to section (F) to indicate that this is a concept to be considered. Justice Lynn proposed that several minor technical amendments be made to the proposal.

Attorney Ardinger noted that if the legislature previously adopted legislation reading the collection of revenue to fund ADR, it might be worth looking at the legislative record to see whether the legislative approval still applies. Justice Lynn agreed that this is a good point.

Upon motion made by Attorney Taylor and seconded by Attorney Parent, the Committee unanimously voted to put the proposal, as amended, out for public hearing in June.

g. 2012-004. IOLTA.

Judge Lynn reminded that Committee that a subcommittee had been formed to consider the proposal, made by Attorney Middleton, 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. The Committee will address the questions of what entities can be subject to IOLTA, and what entities should be subject to IOLTA.

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

Carolyn Koegler reminded the Committee that she was asked to research the question of whether it would be appropriate to amend Supreme Court Rule 37(9)(b) to include the language of the ABA rule. She noted that a new item on the agenda, item 3(c) calls for the Committee to consider whether to recommend that the Court adopt ABA recommendations to amend Supreme Court Rules 37 and 37A. She suggested that if the Committee forms a subcommittee to consider the ABA recommendations, it would make sense to charge the subcommittee with the task of making a recommendation regarding Rule 37(9)(b). Committee members agreed that this would make sense. The Committee instructed Carolyn Koegler to consolidate this item with item 3(c).

i. 2012-008. Protocol for In Camera Review of Documents.

Carolyn Koegler reminded Committee members about the history of this item. She then stated that most recently, at the December meeting, the Committee had considered a letter from Judge Nicolosi and the protocol as it had been revised to implement recommendations made by the Superior Court in response to the concerns raised by the Public Defender. Additions to the protocol originally submitted were indicated in bold and deletions were indicated in strikethrough. The Committee was reminded in December that it had not yet addressed the issue raised in Deputy Attorney General Ann Rice's letter regarding a conflict between the draft protocol and Supreme Court Rule 57-A. The draft protocol requires the trial court to retain the documents for ten years after the appeal period has expired, but Supreme Court Rule 57-A requires the trial court to return the documents to the submitting party or individual upon the expiration of the appeal period or upon the receipt of the Supreme Court mandate. Carolyn Koegler reminded the Committee that at the meeting in December, some Committee members inquired why the

provision requires the Court to retain documents for ten years, and that there was some discussion about the issue, but no resolution.

Carolyn Koegler informed the Committee that following the December 14 meeting, she emailed a copy of the protocol, as it had been revised to implement the recommendations made by the Superior Court in response to the concerns raised by the Public Defender, to Attorney Abigail Albee. She asked Attorney Albee: (1) to review the draft protocol and the proposed changes and to let her know whether the proposed changes adequately address the concerns raised by the public defender's office; and (2) to offer the view of the Public Defender's office regarding the conflict between the draft protocol, which requires the trial court to retain in camera documents for ten years, and Supreme Court Rule 57-A, which requires that the trial court return the documents to the submitting party or individual upon the expiration of the appeal period or upon receipt of the Supreme Court mandate.

Attorney Albee reviewed the document and confirmed that the proposed changes adequately address the concerns raised by the Public Defender. Regarding the conflict between the Protocol and Supreme Court Rule 57-A she explained that the Public Defender is concerned about the issue of collateral appeals and attacks on the conviction, and that an amendment to Supreme Court Rule 57-A to require the trial court to keep the documents for ten years beyond the conclusion of the case, before destruction, would alleviate much of that concern.

There was general discussion about how best to address the concern raised by Attorney Albee. Representative Berch noted that the problem presented is a conflict between two values – on one side there is the practical problem presented by being required retain paper for a long period of time, on the other side are the ethical concerns that might arise if the materials are destroyed. Attorney Taylor suggested that it might make sense to have Supreme Court Rule 57-A apply only in civil cases. Others agreed that Supreme Court Rule 57-A should be amended so that the text of the current rule applies in civil cases, but the protocol applies in criminal cases.

Following some further discussion of the issue, the Committee directed Carolyn Koegler to draft a proposed amendment to Supreme Court Rule 57-A and the protocol to make clear that the standard of current Rule 57-A applies in civil cases, but that courts will retain documents for ten years in criminal cases. The Committee instructed Carolyn Koegler to send the draft amendment to Chief Judge Nadeau for her review. If Chief Judge Nadeau is comfortable with the amendments, then the documents, as amended, would be sent to Committee members for their review. Committee members agreed

that if they approved the changes, they would vote to put the proposed amendments to Supreme Court Rule 57-A and the protocol and related documents out for public hearing in June.

j. 2012-010. District Court Rules.

Justice Lynn reminded the Committee that at issue is the need for a procedure to insure that counsel is available for indigent defendants at their arraignments in the district court, and that a subcommittee had met several times to address this issue. He explained some of the logistical challenges the court system faces in making this happen, and stated that the Supreme Court would soon be issuing an order adopting rules that members of the subcommittee are comfortable with. He anticipates that the rules would be made effective on a temporary basis sometime around the end of 2013, and that the rules would be referred to the Advisory Committee on Rules for its recommendation as to whether they should be adopted on a permanent basis.

1. 2012-021. Superior Court Administrative Rules. “Rules Clean-up.”

Carolyn Kogler reminded the Committee that she had been charged with addressing two issues regarding the need for a “rules cleanup” of the Superior Court Administrative Rules raised in her September 7, 2012 memorandum. She reported that she had attempted to address the issues, but that the task is more complicated than it originally appeared. A subcommittee was formed, chaired by Attorney Taylor, to undertake review of the rules and submit a proposal to the Committee to amend the rules.

m. 2012-022. Supreme Court Rule 54.

Justice Lynn reminded the Committee that at the December meeting, the Committee had unanimously voted to immediately recommend that the Court adopt on a temporary basis an amendment to Supreme Court Rule 54 authorizing the administrative judge of the Circuit Court to appoint a presiding judge for each court location. The Court issued an Order on January 2, 2013 amending Supreme Court Rule 54(4)(i) on a temporary basis and referring the issue to the Advisory Committee on Rules for its recommendation as to whether it should be adopted on a permanent basis.

Following brief discussion, it was agreed that this is a technical amendment and that no public hearing was required. Upon motion

made and seconded, the Committee voted unanimously to recommend that the Court adopt the amendment on a permanent basis.

n. 2012-026. Trial Court Rules – Personal Jurisdiction.

At the December meeting, the Committee had considered the question of whether the trial court rules should be changed to overrule current practice with respect to challenging personal jurisdiction. Under current New Hampshire case law, if a litigant is sued in New Hampshire and wishes to challenge the jurisdiction of New Hampshire Courts over him, he must file a special appearance and a motion to dismiss and can do nothing more than this, such as raising other defenses, because his doing so will be treated as a waiver of the challenge to jurisdiction.

At the December meeting, Attorney Ardinger and Judge McNamara agreed to serve on a subcommittee to consider this issue. Attorney Ardinger reported that he had begun to research this issue, but that the subcommittee was not yet ready to make a recommendation.

Justice Lynn noted that the issue raised in item 3(b) (“2013-002. Interlocutory Appeals”) relates to the issue currently being considered by this subcommittee. Item 3(b) relates to a proposal to amend the current rules with respect to the ability of a party to bring an interlocutory appeal following the grant of a motion to dismiss in cases involving multiple defendants. The issue is set forth in greater detail in the January 8, 2013 memorandum from David Peck to Carolyn Koegler.

After some brief discussion, it was agreed that the issue raised in item 3(b) would be addressed by the same subcommittee.

3. New Submissions

a. 2013-001. Supreme Court Rule 37A(I)(i).

Members of the Committee noted that in a letter and submission dated December 22, 2012, Mr. Adamaitis requested that the Committee consider recommending that the Supreme Court amend Supreme Court Rule 37(A)I(i) to change the period of limitations for grievances filed against attorneys. Attorney Adamaitis enclosed with his submission a recommendation contained in a 2010 ABA report on the New Hampshire Attorney Discipline System (“Recommendation 10”). Recommendation 10 recommends that the court amend Rule 37A(I)(i) and related rules to eliminate the statute of limitations.

Members of the Committee noted that the issue Mr. Adamaitis raises was also raised and addressed in a letter from Justice Conboy to Justice Lynn as Chair of the Advisory Committee on Rules. Justice Conboy's letter of February 4, 2013 states that the Court had considered the recommendations made in the ABA report and had made decisions regarding each of the recommendations. Justice Conboy's letter makes clear that the Court has decided that no change should be made to Rules 37 and 37A to eliminate or change the time limitation for filing a grievance in an attorney discipline case.

After some discussion, upon motion made by Attorney Parent and seconded by Representative Berch, the Committee voted not to act on Mr. Adamaitis' request to recommend a change to the statute of limitations in attorney discipline cases. The Committee directed Carolyn Kogler to write a formal letter to Attorney Adamaitis informing him of the Committee's decision.

b. 2013-002. Interlocutory Appeals

As noted in item 2(n), this issue was referred to the subcommittee chaired by Attorney Ardinger.

c. 2013-003. Supreme Court Rules 37 and 37A. Attorney Discipline

The Committee next considered the February 4, 2013 letter and enclosure from Justice Conboy to Justice Lynn regarding the recommendations made by the American Bar Association's Standing Committee on Professional Discipline. Justice Lynn explained that the Court had reviewed a report from the ABA's Standing Committee on Professional Discipline. The report made a number of recommendations for changes to the current disciplinary process and court rules. As is stated in Justice Conboy's letter:

The Supreme Court solicited comments on the ABA report from the Professional Conduct Committee, the New Hampshire Bar Association, and the staff of the Attorney Discipline Office. The court then reviewed the recommendations in the ABA report as well as the comments submitted by these entities, and decided upon the action that should be taken on the recommendations.

Enclosed with Justice Conboy's letter is a summary reflecting the Court's decision on each of the recommendations in the ABA report. Regarding each recommendation, the Court either: (1) adopted the recommendation; (2) decided not to adopt the recommendation; or (3)

concluded that further review of the ABA recommendations was required before deciding whether the process should be changed. According to the letter:

In order to implement the recommendations that the court has approved, it will be necessary to amend Supreme Court Rules 37 and 37A. The Supreme Court requests that the Advisory Committee on Rules draft the amendments necessary to implement the recommendations approved by the Supreme Court. As for the recommendations that the court believes require further study, the court requests that the Advisory Committee on Rules consider these recommendations and submit a recommendation to the court on whether further action should be taken. It suggests that the Advisory Committee on Rules create a subcommittee which includes members of the bar association and individuals involved in the Attorney Discipline process, to solicit input on the recommendations and to recommend whether changes should be made.

Justice Lynn stated that he believed a subcommittee should consider each of the issues raised in the letter. It was generally agreed that the subcommittee should be chaired by a member of the Advisory Committee on Rules and that members of the Bar, the Attorney Discipline Office, and the Attorney General's Office, among others, should serve on the Committee. Attorney Herrick agreed to serve as the chair of the subcommittee.

d. 2013-005. Supreme Court Rule 56. Judicial Performance Evaluations.

Justice Lynn explained that on July 17, 2012 the Supreme Court adopted temporary amendments to Supreme Court Rule 56 and referred the temporary amendments to the Committee for its recommendation as to whether they should be adopted on a permanent basis. Following some discussion and upon motion made and seconded, the Committee voted unanimously to put the rule amendments out for public hearing in June.

e. 2013-005. Supreme Court Rule 59. Preparation of Transcripts of Court Proceedings; Designation of Transcriber and Approval of Transcript Fees

Justice Lynn explained that on January 2, 2013, the Supreme Court adopted temporary amendments to Supreme Court Rule 59 and referred the temporary amendments to the Committee for its

recommendation as to whether they should be adopted on a permanent basis. Following a brief discussion, the Committee concluded that the amendments are technical, and that no public hearing is required. Upon motion made and seconded, the Committee voted to recommend that the Court adopt the rule amendments on a permanent basis.

f. 2013-006. Superior Court Sentence Review Division Rules.

Justice Lynn explained that on February 25, 2013 the Supreme Court adopted temporary amendments to the Superior Court Sentence Review Division Rules and referred the temporary amendments to the Committee for its recommendation as to whether they should be adopted on a permanent basis. Following some discussion and upon motion made and seconded, the Committee voted unanimously to put the rule amendments out for public hearing in June.

4. Miscellaneous

Committee members agreed to move the meeting scheduled for Friday, June 14, 2013 to Friday, June 7, 2013.

The next meeting date is Friday, June 7, 2013. The remaining meeting dates for 2013 are as follows:

Friday, September 20, 2013
Friday, December 13, 2013

The meeting adjourned.