NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Information Session and Meeting of March 14, 2014

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 Anderson, Hon. Paul S. Berch, Hon. R. Laurence Cullen, Robert L. Chase, Hon. N. William Delker, Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Patrick W. Ryan, Esq., Raymond W. Taylor, Esq, and Hon. Robert J. Lynn.

Also present were Secretary to the Committee, Carolyn Koegler, Esq., and Christine Damon and Claire MacKinaw, staff.

1. PUBLIC INFORMATION SESSION

Members of the Committee responsible for drafting the proposed rules and rule amendments in the following areas made a presentation to the Advisory Committee on Rules and received the views of, and responded to questions by, members of the Committee, the public, the bench and the bar on the following proposed rules and rule amendments set forth in the February 4, 2014 Notice of Public Information Session:

(a) New Hampshire Circuit Court –District Division Small Claims Electronic Filing Pilot Rules. See Appendix A of the February 4, 2014 Notice of Public Information Session.

(b) Proposed Amendments to Circuit Court-District Division Rule 1.8. See Appendix B of the February 4, 2014 Notice of Public Information Session.

(c) Proposed Amendments to Circuit Court-District Division Rule 1.8-A. See Appendix C of the February 4, 2014 Notice of Public Information Session.

(d) Proposed Amendments to Circuit Court-District Division Rule 1.3(D). See Appendix D of the February 4, 2014 Notice of Public Information Session.

(e) Proposed Small Claims Rules applicable only to Concord and Plymouth as of the effective date of the New Hampshire Circuit Court – District

Division Small Claims Electronic Filing Pilot Rules. See Appendix E of the February 4, 2014 Notice of Public Information Session.

Justice Lynn explained that the Committee members had received copies of the proposed rules and rule amendments for the first time in anticipation of the public information session. He also stated that comments from the public on the proposals had been distributed to members of the Committee. See 2/19/14 Comment from Attorney Joshua Gordon emailed to members 2/20/14; 2/26/14 Comment from Judge Larry M. Smukler emailed to members 3/13/13; 3/3/14 Comment from Attorney Brandon Ross emailed to members 3/3/14. He also noted that Judge Kelly, Judge Nadeau, Judge Smukler and others were in attendance. He explained that Judge Kelly and Gina Appicelli would make a presentation to the Committee and would then receive comment and/or questions from Committee members and others on the proposals.

Judge Kelly explained that a group of judicial branch employees including Pat Lenz, Tim Gudas, Gina Appicelli, Carolyn Koegler, Jackie Goonan, Elaine Lessels and Kim Brackett had worked together to draft the proposed Circuit Court – District Division Small Claims Electronic Filing Pilot Rules set forth in the Notice of Public Information Session. He also explained that it is the goal of the Judicial Branch to have electronic filing in all courts across the state within three to five years. He noted that given the nature of the project, which entails creating entirely new policies and procedures regarding how documents are filed in the courts, the judicial branch understands that the rules will need to remain dynamic and subject to change, even as of day one of the effective date of the rules.

Judge Kelly explained that the rules are based upon policies adopted by the Supreme Court that had been vetted with the public, the bar, judges and court administrators, as well as the recommendations made by various committees, including the public access task force (PATF), which Judge Smukler chaired, and the Committee on Signatures, Notaries, Certifications and Redactions (SNCR). Judge Kelly called the Committee's attention to the following policies guiding the implementation of e-filing on a pilot basis in the Concord and Plymouth district courts:

1. E-filing will be mandatory;
2. Exceptions to e-filing will be permitted to ensure access to the courts;
3. Members of the public will not have remote access to court records from the beginning of the pilot project in July until at least December, and will access non-confidential court documents via kiosks at the courthouse;
4. There will be two electronic filing access points through the court's webpage: (a) an access point for self-represented parties, consisting of a guided interview; and (b) an access point for attorneys to allow attorneys to use their own form pleadings.

5. Many documents requiring notarization will allow parties to instead sign documents under pains and penalties of perjury.

Judge Kelly noted that one area of particular concern relates to the filing of confidential documents. He stated that when a document is completely confidential and is noted as such, a party will file that document electronically, and it will remain confidential. A problem arises, however, when a document is confidential but a party does not recognize it as such. The system will not be able to recognize that a document is confidential. In order to address this problem, the public access task force recommended that all pleadings be made unavailable electronically until ten days after the filing (the "ten day hold"), in order to allow parties the time to alert the court that they believe the document to be confidential. The problem is, while the vendors have been asked to explore the possibility of setting the system up so that this occurs automatically, it is not yet technologically feasible to implement this "ten-day hold," and implementing the ten day hold would require a great deal of staff time. Therefore, the current draft rules do not include a "ten day hold."

Judge Kelly noted that in his letter of February 26, Judge Smukler had stated that the current draft rules "adopt public access policies that are not consistent with the policies recommended by the public access committee." Therefore, Judge Smukler suggests two revisions to the e-filing rules, both of which are designed to ensure that the pilot rules will not be "misread as prejudging important policy decisions;" (1) the elimination of a sentence from the preamble; and (2) the deletion of reference to documents that could never be a part of a small claim, such as juror questionnaires. Judge Kelly stated that he believes these changes should be made.

Gina Apicelli next explained why changes to the small claims rules are being proposed. She noted that Pat Ryan, a member of the Advisory Committee on Rules, assisted in drafting the new small claims rules. She also noted that the new rules do more than simply adapt existing rules to allow for electronic filing of court documents. This is because she and others working on the project had been ask to "lean the process" before layering in e-court, by finding gaps in the rules, eliminating delay and increasing the value to the court filer. These new rules have been advanced, discussed and modified by several circuit court judges, several attorneys for creditors and for debtors, and court clerks and staff. If adopted by the Court, these new small claims rules would apply in Concord and Plymouth on a pilot basis and would be effective as of the effective date of the electronic filing pilot rules.

Judge Smukler addressed the Committee next. He explained that he had been asked to chair a public access task force to recommend public access policies in 2006. In early 2012, he was asked to convene a committee to review, update and refine the proposed public access rules. He stated that he is concerned that many of the policies reflected in the electronic filing pilot

rules are not consistent with what his group recommended in 2006 and 2012. He noted that there are significant policy decisions he feels should be made by the Supreme Court and is concerned because he does not want the pilot rules to be misread as prejudging important policy decisions. He recognizes that the e-filing rules are necessary to allow the judicial branch to proceed as scheduled with the small claims electronic filing pilot project in Concord and Plymouth, and supports the adoption of the e-filing rules, as long as two changes are made to the rules. He noted that he had circulated his February 26, 2014 letter expressing his views to members of the public access task force, and that none of the members of the task force dissent from the views he expresses in the letter.

Judge Lynn thanked Judge Kelly, Gina Apicelli and Judge Smukler for their presentations, and asked Judge Kelly whether anyone from the e-court rules group had anything they wished to add. He then inquired whether Committee members had any questions for the group. He noted that he had two, both of which related to the proposed new small claims rules.

Regarding proposed small claims rule 4.10(C), Justice Lynn notes if the defendant does not elect to waive formal service, then motions for periodic payments must be made by formal service. He believes that this may be a departure from current rules and/or practice, and wonders why. Pat Ryan explained that the new rules do require that motions for periodic payment be made by formal service, but that this is not a change from the existing rule. He stated that existing Circuit Court-District Division Rule 1.21 requires formal service.

Regarding 4.12(C) – Justice Lynn noted that the rule states that "parties to any agreement, whether mediated or by agreement of the parties without mediation, shall submit an acknowledgement that they understand that exempt income and assets may not be used in the enforcement of any judgment or agreement . . . ." Judge Lynn stated that this may be a departure from current rules and/or practice, and that he is also concerned that this may be contrary to law.

Gina Apicelli stated that this issue had been discussed with attorneys for creditors and debtors in meetings about the proposed new rules, and that the attorneys felt strongly that the provision should be included in the rules. Attorneys Jay Niederman and Cheryl Driscoll addressed the Committee in response to Judge Lynn's question and explained that it is their belief that a court would not be comfortable enforcing an agreement that is contrary to law (i.e., an agreement to use assets identified as exempt by statute).

2. APPROVAL OF MINUTES OF DECEMBER 13, 2013 MEETING

Upon motion made and seconded, the Committee voted to approve the December 13, 2013 minutes.

3. STATUS OF PENDING ITEMS

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

Judge Cullen noted that this project is currently on hold.

b. Withdrawal of Court-Appointed Counsel in Criminal and Juvenile Matters

Pat Ryan explained that this proposal, which would amend court rules to permit notification of withdrawal in certain circumstances rather than a request to withdraw requiring court approval, was put out for public hearing in December. At the December meeting, some concerns about the proposal were raised regarding whether automatic withdrawal would be permitted on the eve of trial, and whether withdrawal without a hearing would be permitted in cases in which the basis of the withdrawal is caused, for example, by a breakdown in the relationship with the client. Pat Ryan agreed to amend the language of the proposal to address these concerns.

On February 19, amended language was circulated to the Committee. At the meeting, Pat Ryan noted that the February 19 language did not address one of the concerns raised at the December meeting regarding whether automatic withdrawal would be permitted on the eve of trial. Therefore, he distributed additional language to the Committee.

Following review of the new language and brief discussion, the Committee concluded that a further public hearing on this item was unnecessary. Upon motion made by Judge Cullen and seconded by Representative Berch, the Committee voted to recommend that the Court adopt the proposal, as amended.

c. Filing Motions To Seal

Carolyn Koegler reminded the Committee that it had voted to recommend that the Court adopt the proposed amendments to trial court rules setting forth a procedure regarding motions to seal that had been put out for public hearing in December, with two amendments. She explained that she understood that one of the amendments was to add a provision regarding motions to seal to the criminal rules, but requested clarification from the Committee about instruction to add a provision allowing a party to “withdraw the motion to seal.”

One Committee member explained that the provision to be added would not be one allowing a party to withdraw the motion to seal, but, rather, one allowing a party to withdraw the papers they sought to seal.

d. 2012-010(1) and (2). District Court Rules. Need for procedure to ensure that counsel is available for indigent defendants at arraignments in the district court.

(1) 2012-010(1). District Division Criminal Rules 2.20-2.23.

Justice Lynn noted that the Supreme Court had, by Order dated February 20, 2014, effective April 1, 2014, adopted on a temporary basis rules setting forth the procedures designed to ensure that counsel is available for indigent defendants at arraignment in the district division. He stated that he believes it makes sense for the rules to remain in place for a period of time before they are put out for public hearing.

(2) 2012-010(2). Rule of Professional Conduct 1.7 (Conflict of Interest)

Representative Berch noted that, as is set forth in Judge Delker's March 3, 3014 memo to Justice Lynn, he has some concerns about the temporary amendments to Professional Conduct Rule 1.7. It is his view that criminal defendants should be represented by conflict-free counsel at arraignment and that a criminal defendant should have counsel when bail is set.

Judge Delker reminded the Committee that the temporary amendments to N. H. R. Prof. Conduct 1.7(c), effective October 2, 2013, exempt a lawyer employed by the N.H. Public Defender's Program from certain applications of the conflict of interest provisions of Rule 1.7 for the limited purpose of providing representatives for as many defendants as possible at arraignment. At the December meeting, he inquired whether the rules of professional conduct should be amended to exempt the N.H. Public Defender's Program from imputed conflicts of interest where there is no danger of an actual conflict of interest. At the December meeting, the Committee appointed a subcommittee consisting of Representative Paul Berch, NH Public Defender Executive Director Randy Hawks and Senior Assistant Attorney General Susan Morrell to discuss the proposal.

Judge Delker explained that the subcommittee deadlocked on whether Rule 1.10 should be amended to exempt the NHPD from a strict disqualification in imputed conflict situations where there was no actual conflict. Judge Delker stated that Attorney Hawkes had explained that the current NHPD policy is to not automatically withdraw from a case simply because the NHPD has previously represented someone who is named in police

reports as a potential witness. The NHPD conflict counsel evaluates whether the former client is likely to be an actual witness in a proceeding. If the case pleads or it becomes apparent that the former client will not actually be called to testify, the NHPD does not disqualify itself from representing a defendant. At the conflict screening stage, the NHPD also establishes a "Chinese Wall" procedure with clear instructions that the lawyer assigned to represent the defendant is not allowed to communicate with other lawyers who were involved in the former client's case. Thus, amending Rule 1.10 to exempt the NHPD from a strict disqualification in imputed conflict situations where there was no actual conflict would codify existing NHPD practice and would enable the NHPD to be involved in the maximum number of cases.

While Attorney Hawkes and Judge Delker believe that an amendment to Rule 1.10 would be appropriate, the Attorney General's Office and Representative Berch disagreed. The subcommittee unanimously agreed that the temporary changes to Rule 1.7 should be made permanent, although Representative Berch, as is noted above, expressed some reservations about the amendments.

Justice Lynn agreed with representative Berch that, ideally, criminal defendants would have conflict-free representation at proceedings in which bail is set, and at arraignment. Unfortunately, without the amendment to Rule 1.7, this would in many cases require that contract attorneys be appointed, and the resources do not exist to support that. Regarding the proposal that was before the subcommittee, Justice Lynn noted that the issue is ultimately an ethical one, and inquired whether it might make sense to ask Attorney Rothstein, Chair of the Professional Conduct Committee, for his view on the proposal. Committee members generally believed it would be a good idea for Justice Lynn to discuss this issue with Attorney Rothstein.

e. 2012-021. Superior Court Administrative Rules. "Rules Clean-up."

Attorney Taylor stated that he did not have a written report on this, but that what is at issue is a strictly housekeeping matter related to Superior Court Administrative Rules 11-1 and 12-1 et. Seq. He noted that the statutes relating to Rule 11-1 et. seq. have changed, but that he does not yet have specific recommendations for amendments. He will make a recommendation on this to the Committee at the June meeting.

Regarding Superior Court Administrative Rules 12-1 et. seq., Attorney Taylor noted that the marital master program is now totally obsolete, and that, therefore, the Administrative Rules 12-1 et. seq. should be repealed. It was noted that the repeal of these rules is a technical amendment and that, therefore, no public hearing would be required. Upon motion made and

seconded the Committee voted to recommend that the Supreme Court repeal Administrative Rules 12-1 et. seq.

f. 2013-003. Interlocutory Appeals.

The Committee was reminded that the Court has asked the Committee to consider whether a rule amendment should be adopted that provides a mechanism for the trial court to certify (either on its own, or on motion, or both) that an order that would otherwise be interlocutory is final and immediately appealable. According to the January 8, 2013 memorandum from David Peck to Carolyn Koegler, the Court's request was prompted by a recent appeal.

Because Attorney Ardinger was not present at the meeting, the Committee took no action on this item.

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

The Committee was reminded that Attorney Herrick had agreed in March 2013 to chair a subcommittee to address the issues raised in the February 4, 2013 letter and enclosure from Judge Conboy to Justice Lynn regarding the recommendations made by the American Bar Association's Standing Committee on Professional Discipline.

Attorney Herrick informed the Committee that her subcommittee, which included attorneys David Rothstein, Derek Lick, Jennifer Parent, Maureen Smith, Mitch Simon, Sara Greene and Elizabeth Murphy was comprised of practicing attorneys familiar with the current disciplinary process - members of the PCC, the ADO and practitioners who have represented respondent attorneys. The subcommittee's recommendations are set forth in a comprehensive memo dated March 6, 2014. Attorney Herrick suggested that the best approach would be for the Committee to review the memo together and decide what action to take on each item. Committee members agreed.

i. Whether the rules should include a procedure to allow disciplinary counsel to participate in supreme court disciplinary proceedings if he or she disagrees with the PCC's finding or recommended sanction.

Attorney Sara Greene, Attorney Discipline Counsel, stated that the subcommittee recommends that an amendment be made to Supreme Court Rule 37(16) to allow disciplinary counsel to participate in supreme court disciplinary proceedings if the PCC recommends greater than a six month suspension and disciplinary counsel believes that the PCC's decision is based on a clearly erroneous factual finding or is erroneous as a matter of law. Under

these circumstances, disciplinary counsel would participate separately in the appellate proceedings, and special counsel would be appointed to represent the PCC in the appeal.

Justice Lynn inquired why the PCC would need a lawyer if it is essentially the adjudicatory body. Some discussion ensued regarding whether the PCC is an adjudicatory body, a legislative body, a quasi-judicial body or a prosecuting agency. Justice Lynn noted that whether the PCC has an attorney or not, the main point of the proposed amendment is that disciplinary counsel should be able to appeal if it disagrees with the PCC.

Regarding the language of the proposed amendment set forth on page 2 of the March 6, 2014 memorandum, one committee member noted that the words "shall" in the last sentence of the proposal should be replaced with "may."

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

ii. <u>Whether disciplinary sanctions may include forfeiture of legal fees or payment of restitution</u>

Attorney Herrick stated that in Justice Conboy's February 5, 2013 letter to the Committee, the Court specifically requested that the Committee provide language to clarify that disciplinary sanctions may include forfeiture of legal fees or payment of restitution. She noted that the request may have arisen in response to <u>O'Meara's Case</u>, 164 N.H. 170 (2012).

Attorney Herrick stated that despite the fact that the Supreme Court had recommended this amendment, and the fact that the ABA Model Rules for Lawyer Disciplinary Enforcement include "restitution to persons financially injured, disgorgement of all or part of the lawyer's or law firm's fee, and reimbursement to the client security [public] protection fund," the subcommittee does not recommend adding a provision to allow imposition of forfeiture of legal fees or restitution as disciplinary sanctions. She stated that the subcommittee does not recommend these sanctions because: (1) it would unduly burden the attorney discipline system with extended litigation over the appropriateness and amount of such sanctions including additional discovery, expert witness fees and superior court appearance for further resolution and enforcement of such sanctions; and (2) it would duplicate relief that may be granted through the public protection fund and other civil processes. Attorney Sara Greene noted that allowing these sanctions would greatly expand the number of complaints filed.

Justice Lynn inquired how many other states allow for the recovery of fees. Attorney Greene stated that she did not know, but that she would try to find out. There was some discussion about the interplay between malpractice cases and PCC cases arising out of the same facts. Attorney Greene stated that the ADO matter will often be stayed, pending resolution of the civil matter.

Representative Berch stated that, speaking as a member of the public, he can understand why the public might have a problem with having the PCC say "we have determined that the attorney acted with misconduct, etc., but in order to recover your fees, you are going to have to sue civilly." He stated that not making this amendment will likely not sit well with the public. He notes that amending the rules as the Supreme Court has suggested would change what the PCC does in terms of the penalty portion of the case, but it would not change how the PCC determines how serious the misconduct was. He stated that the public response to this part of O'Meara was not positive.

Upon motion made by Judge Cullen and seconded by Attorney Taylor, the Committee voted to put the proposal to amend rules to clarify that disciplinary sanctions may include forfeiture of legal fees or payment of restitution out for public hearing in June.

iii. Whether the rules should be amended to authorize ADO attorneys to issue subpoenas during investigative phase

Attorney Greene noted that under the current rules, ADO attorneys may issue subpoenas only when a proceeding reaches the hearing panel, and that the ABA recommends amending Supreme Court Rules 37 and 37A to authorize attorneys from the attorney discipline office to issue subpoenas during the investigative stage of a proceeding. The subcommittee believes that allowing general counsel to issue subpoenas during informal proceedings will assist them in their investigative function, and recommends this amendment.

There was some discussion about the need to amend the language of the proposal set forth on page 4 of the March 6, 2014 memorandum to strike, in (a), the phrase "counsel for respondent attorneys and respondent attorneys representing themselves may conduct discovery, including interrogatories and depositions" and to add, in (b), the phrase "may issue subpoenas and subpoenas *duces tecum* to summon witnesses with or without documents" after "representing themselves."

Upon motion made by Karen Anderson and seconded by Judge Delker, the Committee voted to put the recommendation, as amended, out for public hearing in June.

iv. Whether the rules should be changed to make pre-hearing conferences mandatory or opt-out

Attorney Herrick explained that under the existing rule and procedure, pre-hearing conferences may be requested by any party or the trier of fact. The ABA recommended amending the rules to require that pre-hearing conferences be held in all cases, and that strict time limits be set in cases, and continuances granted only for good cause. She stated that the subcommittee recommends that the rule be amended as set forth on pages 5-6 of the March 6, 2014 memorandum.

Upon motion made by Karen Anderson and seconded by Judge Delker, the Committee voted to put the recommendation out for public hearing in June.

v. Whether records that are available for public review should be made available electronically and past records should be scanned and indexed.

Attorney Greene explained that under current procedures, records available for public inspection are kept in file cabinets at the ADO office. The ABA recommends that records of the ADO and PCC available for public review should be made available electronically and that past records be scanned and indexed.

The subcommittee recommends that the ABA's proposal be adopted only prospectively, for all final decisions of the PCC on docketed matters. The subcommittee does not believe that the proposal should be adopted retrospectively, due to the cost of implementing the proposal. Furthermore, the subcommittee recommends that the rules be changed to keep all non-docketed matters confidential (unavailable to the public, whether in paper or electronic form) because these matters were found not to have met the threshold requirements for docketing as a formal complaint. Finally, the subcommittee recommends that all "non-disciplinary decisions with warning" be kept confidential because such decisions specifically note that no violation of the Rules of Professional Conduct was found. However, the subcommittee recommends that "non-disciplinary decisions with a warning," though confidential, be retained for review by the ADO and PCC for a period of 5 years.

Attorney Greene explained that the recommendation to change the rule to keep all non-docketed matters confidential was prompted by a recognition that there is a distinction between making these available for public inspection at the ADO offices, and making them available on the internet. Jeanne Herrick noted that the recommendation to retain "non-disciplinary decisions with a warning," for a period of 5 years is consistent with the timeframe used by the Board of Medicine.

Judge Delker stated that he is uncomfortable with the notion that because a document might now be made available on the internet, rather than simply be open for public inspection at the ADO office, that document should be made confidential. Some discussion ensued about this issue and some committee members expressed concern about "retrenching" on these rules, noting that the ABA made a recommendation and that the recommendation should be followed. Regarding the ABA recommendation to make past records available electronically, Jeanne Herrick noted that while this is a laudable goal, there was great concern expressed at the subcommittee level about the cost of doing this. Regarding the concern about the recommendation to keep "non-disciplinary decisions with a warning" confidential, attorney Greene stated that perhaps the concerns go broader and deeper than whether they should be kept confidential, and go to whether these should be used at all.

Judge Lynn suggested that the Committee vote to put the recommendation out for public hearing, keeping in mind the concerns that have been expressed. Upon motion made by Attorney Lick and seconded by Judge Lynn, the Committee voted to put the recommendation out for public hearing in June. Judge Delker is opposed to putting the recommendation out for public hearing, noting that he has concerns about the confidentiality rules reverting to the way they were written before the year 2000.

vi. Whether letters to grievants who file complaints against individuals who are not subject to the rules should be made available for public inspection and whether warnings should be made available for the public to review at all.

Attorney Greene stated that the subcommittee agrees with the ABA proposal to amend Rule 37 to eliminate the requirements: (1) that the ADO retain letters sent to grievants who file complaints against individuals who are not subject to the rules; and (2) that the letters be available for public inspection for a period of two years.

Following brief discussion, and upon motion made and seconded, the Committee voted to put the recommendation out for public hearing in June.

vii. Whether the rules should be amended to protect sensitive personal information that may become part of the record related to a publicly available grievance.

Whether Rules 37 and 37A confidentiality rules ought to be amended to make them clearer and more user-friendly.

Attorney Herrick explained that the recommendations set forth on pages 10-18 of the March 6, 2014 memorandum reflect a clean-up of the rules. As is

stated in the memorandum, the existing confidentiality and public access rules are very confusing, and "were lengthy transitional rules necessitated by the significant changes adopted in 2000." This proposal reorganizes the two rules on confidentiality and public access into a single, unified rule. The proposal also creates retention rules and adds a provision making clear that 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 PCC. Attorney Herrick noted that the suggested language does not integrate the additional changes recommended in sections 5 and 6 of the memorandum. Therefore, if the Committee recommends the changes set forth in sections 5 and 6 and the recommendations made in section 7, then they should be harmonized.

Upon motion made and seconded, the Committee voted to put the recommendation out for public hearing in June.

viii. Whether the Supreme Court should adopt an overdraft notification rule to identify conduct that may injure clients.

Attorney Herrick noted that the subcommittee agrees with the ABA recommendation and that the language set forth on pages 18-19 of the March 6, 2014 memorandum was developed in conjunction with the Bar Foundation and reviewed with representatives from the banking industry.

Upon motion made by Judge Delker and seconded by Justice Lynn, the Committee voted to put the recommendation out for public hearing in June.

ix. Whether to amend the rules to eliminate the option of requesting to resign while under disciplinary investigation and/or to adopt a procedure for an attorney to consent to disbarment.

Attorney Greene explained that under existing rules, an attorney who is under investigation may ask to resign by filing an affidavit in which he fully admits to the alleged misconduct. The ABA recommended that the option to "resign while under investigation" should be eliminated and replaced with "consent to disbarment," apparently due to a concern that the present procedure does not adequately protect the public. For the reasons stated on page 20 of the March 6, 2014 memorandum, the subcommittee disagrees and recommends that the rule not be changed.

Justice Lynn stated that his sense is that the rule should not be amended. Upon motion made and seconded, the Committee voted to take no action on this item.

x. Whether to amend the rules to provide that any attorney found guilty of a "serious crime" is subject to immediate summary suspension.

Attorney Herrick explained that Rule 37(9) provides that the Court may enter an order of suspension pending final disciplinary proceedings when a certified copy of a court record is filed that indicates that the attorney has been convicted of a "serious crime." The subcommittee recommends that the rule be amended to make clear that the suspension is immediate (that is, effective upon receipt of the proper paperwork) and summary (no further proceedings until disciplinary proceedings are instituted). The language of the proposed amendment is set forth on page 21 of the March 6, 2014 memorandum.

In response to one Committee member's question about what constitutes a serious crime, Attorney Herrick read the definition set forth in Supreme Court Rule 37(9)(b). It was noted that the definition is broad and could include, for example, shoplifting. Concerns were expressed about whether an attorney should be entitled to a hearing under these circumstances. It was noted, however, that the Court "may," but is not required, to enter an order of suspension, which gives the Court some discretion about whether to hold a hearing, for example. Attorney Lick noted that the rule currently permits interim suspension, the proposed language simply clarifies that the suspension is summary and is effective immediately upon receipt of the paperwork.

Upon motion made by Judge Delker and seconded by Judge Cullen, the Committee voted to put this recommendation out for public hearing.

xi. Whether to amend the rules to provide that the Supreme Court may issue an interim suspension for substantial threat of serious harm to the public

Attorney Greene stated that the ABA recommends that Rule 37 be amended to provide that the Supreme Court may suspend an attorney whose conduct poses a substantial threat of serious harm to the public pending final disposition. She stated that the PCC and ADO favor an amendment, but that the New Hampshire Bar Association opposes it. Attorney Greene stated that suspensions have been sought in these kinds of situations in the past under the existing rules. She noted that the rules as they exist do not clearly address the situation, but seem to confer upon the Court the same power it has to act in the event of a conviction of a serious crime. She stated that because the term "threat of substantial harm" is more vague than "conviction of serious crime," she believes that there must be a clear accusation, a clear argument that immediate action is needed, an opportunity to respond, and an evidentiary record. In other words, more due process is required in the "threat of substantial harm" situation than the "conviction of serious crime" situation.

Representative Berch noted that he finds the rationale for this rule amendment set forth on page 23 of the March 6, 2014 memorandum convincing.

Upon motion made and seconded, the Committee voted to put this recommendation out for public hearing.

xii. Whether to draft a rule governing stipulations

Whether the rules should be amended to provide that the PCC will uphold a hearing panel's findings of fact unless clearly erroneous or manifestly in error, and that conclusions of law and sanctions be reviewed de novo

Attorney Greene explained that the proposed amendments were prompted by: (1) the New Hampshire Supreme Court Order in In the Matter of Linda A. Theroux, in which the Court referred the matter to the Advisory Committee on Rules to consider the use and effect of stipulations in attorney disciplinary proceedings; and (2) the ABA's recommendation to amend Supreme Court Rules 37 and 37A to provide that the PCC will uphold the hearing panel's findings of fact unless clearly erroneous or manifestly in error, and that conclusions of law and sanction recommendations will be subject to de novo review.

The subcommittee recommends amendments to Rule 37A that would be incorporated into, and expand upon, current rules to govern the use and effect of both dispositive and partial stipulations in attorney discipline proceedings. The revisions address dispositive and partial stipulations as well as how the hearing panel and the PCC will review such stipulations. The language of the proposed amendments is set forth on pages 24-28 of the March 6, 2014 memorandum.

Upon motion made by Judge Cullen and seconded by Justice Lynn, the Committee voted to put this recommendation out for public hearing.

xiii. Whether to amend the rules to state that complainants are not parties to the disciplinary proceeding and lack standing

Attorney Greene explained that most jurisdictions expressly state in their rules that complainants are not parties, in part to make clear that disciplinary counsel retains prosecutorial authority and that complainants lack standing to object to recommendations of disciplinary counsel.

Upon motion made by Justice Lynn and seconded by Karen Anderson, the Committee voted to put the recommendation, set forth on page 30 of the March 6, 2014 memorandum, out for public hearing.

xiv. <u>Whether to remove references to "prior to 2000" from the rules.</u>

Jeanne Herrick explained that the grandfathering provisions set forth in Rule 37A(I)(i) are no longer necessary. Following brief discussion, the Committee concluded that the proposed amendments are technical.

Upon motion made and seconded, the Committee voted that no public hearing on this matter was necessary, and to recommend that the Court adopt the proposed amendment, as set forth on pages 30-31 of the March 6, 2014 memorandum.

xv. <u>Whether to amend the rule requiring that the entire file be turned over to the hearing panel once it is appointed.</u>

Attorney Greene explained that the rules currently require disciplinary counsel to forward the hearing panel a copy of the entire file. She noted that this rule has never been followed in practice by the ADO, nor have respondents ever pressed for its application. Attorney Greene explained that requiring the provision of the entire file would be a burden to the hearing panel and would be very expensive for the respondents (as they are assessed the cost of printing, at $.25 per page). The current practice at the ADO is for disciplinary counsel to forward everything in her file (except for work product) to the respondent, bates-stamped, usually at the same time as filing the Notice of Charges. The subcommittee recommends amending Rule 37A(III)(b) to be consistent with current practice.

Upon motion made by Judge Cullen and seconded by Attorney Taylor, the Committee voted to put the recommendation, set forth on pages 31-32 of the March 6, 2014 memorandum, out for public hearing.

xvi. <u>Whether to amend the rules regarding the running of the statute of limitations for those cases in which the usual 2-year limitations period expires during the pendency of civil litigation involving the same conduct.</u>

Attorney Herrick noted that Attorney Rothstein drafted the language included in the March 6, 2014 memorandum. As the memorandum states, the subcommittee recommends that Rule 37A(I)(i)(5) be amended because the current rule has unintended consequences and can create unfair results. According to the memorandum:

> The current rule provides that where the two-year SOL expires during the pendency of civil litigation involving the same conduct (e.g. a malpractice case), formal proceedings must begin within one

year after final conclusion of the civil proceeding. The rule should be revised to reflect that the GRIEVANCE must be filed within one year of conclusion of the civil proceeding.

This places the burden on the grievant (or referring attorney or judge) to file papers with the ADO within one year after the civil matter concludes. It thus takes the burden off of General and Deputy General Counsel to track civil litigation and try and follow, whether the complainant informs them or not, when the civil matter has reached "conclusion."

Upon motion made and seconded, the Committee voted to put the recommendation set forth on pages 32-33 of the March 6, 2014 memorandum out for public hearing.

xvii. Whether to amend Rule 37(9) to include a self-reporting requirement

Attorney Herrick explained that the rule currently requires a New Hampshire clerk of court to send a certificate of an attorney's conviction of a crime to the Supreme Court within ten days, but does not require the attorney to self-report the conviction, and does not address out-of-state convictions. The ADO and the subcommittee believe that these issues should be addressed in a rule, and proposed that the language of Supreme Court Rule 37(9)(g) be amended as set forth on page 33 of the March 6, 2014 memorandum.

One Committee member noted, and others agreed, that the proposal should be amended to include the words "sentencing on" after "within ten (10) days of." Another committee member inquired whether this should apply to any crime, or only to "serious crimes." Following brief discussion, the Committee concluded that this should probably apply to any crime, but that perhaps this question should be revisited.

Upon motion made by Judge Delker and seconded by Attorney Taylor, the Committee voted to put the recommendation set forth on page 33 of the March 6, 2014 memorandum, as amended, to include the words "sentencing on" after "within ten (10) days of" out for public hearing.

h. 2013-007. New Superior Court Civil Rules

The Committee next turned to a March 13, 2014 memorandum from Carolyn Koegler to the Committee. Carolyn Koegler explained that she and Attorney Honigberg have made recommendations regarding all of the issues set forth in the August 15, 2013 memorandum from the Superior Court Civil Rules subcommittee to the Committee. Carolyn Koegler and Attorney Honigberg recommend that the Committee vote to recommend a number of technical

amendments to the Court immediately and that the Committee assign new docket numbers to a number of other items.

Following motion made by Judge Delker and seconded by Attorney Taylor the Committee voted to recommend that the proposed amendments identified in the March 13, 2014 be made to the Court immediately.

i. 2013-010. ABA Commission on Ethics

Carolyn Koegler reported that at the Committee's request, she had forwarded Attorney Goodwin's October 23, 2013 letter to the Professional Conduct Committee. She has, at the Committee's direction, requested comment on the Ethic's Committee's recommendation with respect to each revision made to the ABA Model Rules. The Committee is awaiting a response from the Professional Conduct Committee.

j. 2013-013. Deadlines for Filing Motions to Suppress

Justice Lynn reminded the Committee that the Court had asked the Committee to consider whether the Court should adopt a rule creating a deadline for motions to suppress in delinquency cases, and that he had agreed at the September meeting to draft a proposed rule. He reported that he had drafted a proposed rule, and had requested comment on it from the Attorney General and the Public Defender.

4. NEW SUBMISSIONS

a. 2014-001. Supreme Court Rule 7.

The Committee next considered a February 18, 2014 memorandum from Carolyn Koegler to the Committee stating that a staff attorney at the Court had requested that the Committee consider whether an amendment should be made to Supreme Court Rule 7 to address a concern about references to the "clerk's written notice of the decision on the merits."

The Committee took no action on this item.

b. 2014-002. Superior Court (Crim.) Rule 98

Justice Lynn reminded the Committee that by order dated February 20, 2014, the Court had adopted temporary amendments to Rule 98 of the Rules of the Superior Court of the State of New Hampshire Applicable in Criminal Cases Filed in Superior Court. Justice Lynn suggested that the rules remain in place for six months before they are put out for public hearing. The Committee agreed that these rules should probably be put out for public hearing in December.

5. MEETING DATES

June 6, 2014
September 19, 2014
December 12, 2014