NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of March 11, 2016

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

The meeting was called to order at 12:37 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Karen M. Anderson, Hon. R. Laurence Cullen, John A. Curran, Esq., Hon. N. William Delker, Hon. Daniel J. Feltes, Hon. Michael H. Garner, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Esq., Patrick W. Ryan, Esq., Frederick H. Stephens and Hon. Robert J. Lynn.

Also present was the Secretary to the Committee, Carolyn Koegler, Esq.

Justice Lynn explained that several members of the public were present at the meeting to speak to items 2(h) and 2(i) on the agenda. Therefore, he recommended that the Committee take those two items out of order. The Committee agreed to take up those items immediately after considering whether to adopt the minutes from the December 4 meeting.

Justice Lynn announced to the Committee that one of the Court's lay appointees to the Committee, Ralph Gault, had resigned. He asked Committee members to consider whom they might recommend to replace Mr. Gault.

1. Approval of Minutes of December 4, 2015 Meeting.

Upon motion made by Judge Cullen and seconded by attorney Curran, the Committee voted to adopt the minutes, with one change – to add the word "cost" to the fourth sentence of the second paragraph.

2. Status of Items Still Pending Before the Committee

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

This item is on hold.

b. 2012-010(1) and (2) District Division Rules. Counsel at Arraignment

Justice Lynn reminded the Committee that the Court adopted these rules by Court order dated February 20, 2014, and that the rules have been implemented statewide. The rules have been incorporated into the Felonies First Rules that have been adopted by the Court for Strafford and Cheshire Counties, effective January 1, 2016. They have also been incorporated into the new Rules of Criminal Procedure that have been adopted by the Court, effective statewide on March 1, 2016 in all counties except for Cheshire and Strafford. Justice Lynn noted that while these have been incorporated into these two new sets of criminal procedure rules, the Committee has not yet held a hearing on them.

Justice Lynn stated that he believes that because these rules have been adopted as a part of both sets of criminal procedure rules that this item should be removed from the Committee's agenda. He noted that if someone were to have concerns about the rules, he or she would be able to bring it to the attention of the Committee. Some Committee members noted that a hearing has never been held on these. There was some discussion about the adoption of the criminal procedure rules, and it was noted that the Court had put those rules out for comment in the fall. However, the counsel at arraignment rules were not included in the rules that were put out for comment, but were incorporated into the new rules after the close of the comment period.

Attorney Anderson stated that she had some concerns about the fact that there has never been a hearing on these rules. Senator Feltes agreed. Justice Lynn stated that unless someone is saying that there is a problem with the rules, it feels like putting the rules out for hearing would be make-work.

Upon motion made and seconded, the Committee voted to remove this item from the agenda. Karen Anderson and Senator Feltes stated that they are opposed to removing the item from the agenda.

c. 2014-005. Electronic Filing Pilot Rules

Judge Delker stated that his understanding is that the target date for the implementation of electronic filing in civil cases in Superior Court is January 1, 2017.

d. 2014-006 through 2014-010. Superior Court Rules (Civ.)

Justice Lynn stated that a subcommittee chaired by attorney Rice had been charged with addressing the issues regarding the civil rules raised in a June 4, 2014 memo to the Committee, but she has resigned from the Committee, so a new subcommittee will need to be created. Judge Delker stated that he would be willing to chair the subcommittee. He stated that he

has been working with the rules and has realized that there may have been some oversights. For example, he notes that there is no rule on permissive v. compulsory joinder. There is plenty of common law on this, but the rule is silent. It seems there ought to be a rule on this. He notes that others he has spoken with have noted that there may be other things that are missing and that the civil rules may need some tweaks and updates.

Carolyn Koegler noted that attorney Manning had submitted a December 29, 2015 letter to the Committee asking the Committee to consider whether to recommend the adopting, as a part of the superior court rules, the Business and Commercial Dispute Docket Standing orders. She stated that it might make sense for the subcommittee considering the June 4, 2014 memo to also consider this issue.

Following some discussion, it was agreed that attorney Manning (not present at the meeting) and attorney Herrick would serve on the subcommittee. It was also suggested that attorney David Slawsky be contacted and asked to serve on the subcommittee. The Committee will consider: (1) the issues raised in the June 4, 2014 memo; (2) the issues raised by Judge Delker; and (3) attorney Manning's letter.

e. 2015-011. Supreme Court Rule 37(14)(b)

Carolyn Koegler reminded the Committee that it had received and reviewed a June 5, 2015 memo from Eileen Fox stating that the Court had asked the Committee to propose an amendment to Rule 37(14)(b). Carolyn Koegler is working with Abigail Albee, Eileen Fox, Sherry Hieber and Sara Green to draft a proposal to address the issues raised in the memo.

Carolyn noted that the Committee had received a February 29, 2016 memo from Eileen Fox stating that the Supreme Court would like the Committee to consider whether the name of the Attorney Discipline Office should be changed to the Office of Professional Responsibility. She stated that she believed that #2016-001 should be consolidated with #2015-011 and should be considered by the same subcommittee. Committee members agreed.

f. 2015-013. Superior Court (Civ) Rule 201. Fees for Copied Material; *and* 2015-014. Circuit Court Rules. Fees for Copied Material

Justice Lynn reminded Committee members that both the Superior Court and Circuit Court have submitted proposals to amend the rules relating to the fees to be charged to people who request copies of court documents. At the September meeting, a Committee member inquired why the fee increases from $.25 per page to $.50 per page when someone copies more than 10 pages.

At the September meeting, Justice Lynn proposed that the cost be $.25 per page across the court system, without an increase in the charge when the number of copies is high. Judge Delker stated that the Superior Court would be comfortable with this. Pat Ryan stated in September that he would gather some information on this, in particular, what the actual cost to the State is for the printing.

Pat Ryan reported that the Circuit Court is comfortable with charging $.25 per page without an increase when someone copies more than ten pages.

Pat Ryan noted that the Circuit Court had also proposed an amendment to Probate Division Rule 169 (Fees). In an email dated August 11, 2015, Attorney Ryan proposed an amendment to remove the special cost of copying wills, so that the cost will be $.50 per page rather than $1.00 per page.

After concluding that no public hearing on these proposals would be necessary, and upon motion made by Justice Lynn and seconded by Judge Delker, the Committee voted to recommend that the Court adopt these changes to court rules relating to fees.

g. 2015-020. District Division Rules 5.4, 5.7 and 5.9. Landlord and Tenant Actions.

Justice Lynn reminded the Committee that David Peck had submitted a November 4, 2015 memorandum to the Committee proposing amendments to District Division Rules relating to Landlord and Tenant Actions. He noted that the Committee had received a number of comments expressing concern about the proposal.

Following some discussion and upon motion made by Senator Feltes and seconded by Pat Ryan, the Committee voted to hold a public hearing on the proposal in June. Justice Lynn stated that he would ask David Peck to attend the public hearing to provide background about the proposal.

h. 2015-021. District Division Rule 2.7. Payment of Fines.

Justice Lynn reminded the Committee that this issue relates to proposed revisions to Circuit Court Rule 2.7 that were jointly submitted by the American Civil Liberties Union of New Hampshire, Judge King and Judge Kelly in a letter dated November 20, 2015. The proposed amendments to the current rules are designed to address concerns raised relating to the process for the use of incarceration as a means of enforcing the collection of fines. As is noted in the letter, the proposed changes aim to assure "that no person in New Hampshire is jailed for nonpayment of fines when the reason for nonpayment is an inability to pay."

Judge Kelly addressed the Committee to give the reasons for the proposal, and explained why the Circuit Court has signed on in support of the proposal. He stated that he believes that for Committee members to understand why this proposal has been made, and why it is important, they need to understand the differences between the Circuit and Superior Courts to gain a better sense of what judges and citizens are experiencing at the Circuit Court.

At the Superior Court, the challenge facing the court is the complexity of the cases and the issues (evidentiary issues, for example). The challenge for the Circuit Court is the enormous volume of cases. Last year, there were 81,000 criminal cases filed against defendants in the Circuit Court in 32 locations. By contrast, there were 7,400 cases filed in the Superior Court. It is important to understand this, to understand why this is important to the Circuit Court. Last year, $12,000,000 in fines was collected by the Circuit Court. By contrast, $230,000 was collected by the Superior Court. The Circuit Court spends an enormous amount of time dealing with the fines issue. The most common sentence in Superior Court is a jail sentence, which makes sense. By contrast, in the district division, "cash is king." Almost every case involves a fine. In most cases in which people are found guilty, they are assessed a fine.

Of 81,000 people, maybe 75,000 people per year are found guilty. In an arraignment session, a judge might see 50-100 people in a one to two hour period of time. For a particular defendant, this means everything is happening in a matter of minutes.

Judge Kelly then discussed the ACLU-NH's Report, Debtors' Prison in New Hampshire. He stated that he takes some issue with the suggestion in the report that there is a systemic problem of judges jailing defendants for nonpayment of fines without a meaningful ability to pay hearing. However, the Circuit Court agrees with many of the recommendations made in the ACLU report, and agrees, in particular, that the rules should be amended to provide judges with more guidance regarding ability to pay hearings.

Judge Kelly stated that 86% of people who are assessed fines pay the fine. This leaves 14% who don't pay. Assuming 81,000 people were assessed a fine, this means that 11,000 people did not pay. The ACLU report states that according to the ACLU's data, in 2013, "New Hampshire judges jailed people who were unable to pay fines and without conducting a meaningful ability-to-pay hearing in an estimated 148 cases." 148 out of 11,000 is not bad statistically, BUT it is not acceptable to jail 148 people without a meaningful ability to pay hearing. There is a constitutional concern here regarding providing protections to these people. It is this very small group that this proposed amendment is aimed to address. Of these 150 people, some might have mental issues, some might have difficulty understanding the difference between exempt and non-exempt assets. For these people, it is critical to have

a lawyer in these circumstances. Judge Kelly stated that his advice to judges has always been to take great care in these circumstances and to provide for a real ability to pay hearing once it is clear that the possibility of jail is on the table.

In response to a question from Judge Delker, Judge Kelly explained how the point at which a lawyer might be appointed is determined. He stated that a judge is in a position to have a good sense of whether a defendant is headed down the track toward jail once he or she has seen a defendant 3-4 times. It is usually at this point that it is clear that jail may happen if the defendant appears again. So, this is when judges should appoint a lawyer or have the defendant sign a valid waiver, and then hold a separate hearing.

Attorney Gordon inquired whether the proposed new rule 2.7 adequately defines that juncture. Judge Kelly stated that he believes that it does so in section (e), which states, "No defendant shall be incarcerated for nonpayment of a fine unless counsel has been appointed or the defendant executes a valid waiver of counsel, and the Court, having conducted an ability-to-pay hearing, concludes that the defendant willfully failed to pay the fine or perform community service."

Both Justice Lynn and attorney Gordon have concerns about whether the juncture is clearly defined. As attorney Gordon stated, he does not see where narrowing the group from 84,000 to 150 is defined in the rule. Judge Kelly stated that, in his view, what (e) says is, when a judge is contemplating sending a person to jail, at that point, it is time to reschedule. Judge Kelly agrees that the rule should not be read to mean that a lawyer is required in 84,000 cases, and that perhaps some more restrictive language should be included in the rule to make this clear.

Justice Lynn stated that he believes that this is a civil contempt proceeding, and is concerned about the argument that a similar rule should be required in cases in which a defendant appears in court due to his or her failure to pay child support. The situation is similar – often those cases involve people of limited means. If we say that there is a right to counsel in these kinds of cases, it is hard to draw a distinction between these cases and cases in which a defendant fails to pay child support or fails to pay a civil judgment. Isn't there arguably an equal protection violation there?

Judge Kelly stated that he believes that what we are talking about in these cases – where the defendant has failed to pay a fine – this is not an RSA 618:9 case, that is, a criminal contempt case. Under the statute, in criminal contempt cases, what is at issue is a determinate sentence - that is, for example, a defendant owes $500 in fines and hasn't paid. So, the sentence is 10 days in jail at $50 per day, or pay the balance. The purpose of criminal contempt is to punish. Judge Kelly believes that what is at issue here is a

hybrid civil/criminal contempt. Judge Lynn believes that this is not criminal contempt - that what is at issue here is civil contempt.

Attorney Albee stated that she believes that this is not criminal contempt at all, it is a criminal proceeding. This is different from a child support situation, which would be a civil contempt case. But, Justice Lynn noted, violations are not criminal.

Some additional discussion ensued regarding whether what is at issue here is a criminal or civil contempt proceeding. Attorney Gordon stated that he believes that the contempt discussion is a straw man. The ACLU report is trying to get to criminal defendants - it is not civil, this is different from child support.

Attorney Keating stated that he supports the inclusion of proposed 2.7(G), which states:

> When the court appointed counsel to represent a defendant in a proceeding related to (E), above, the court shall grant the defendant relief from the obligation to repay the State for their appointed counsel fees under RSA 604-A:9, I(b), when the court determines that the defendant is financially unable to pay.

He believes that this is appropriate because when someone goes to jail to vindicate the court's authority, he or she is entitled to counsel.

Senator Feltes inquired about the number of cases in which counsel might be required. What is the number? Can the program absorb the cost? Judge Kelly replied that assuming the ACLU report is correct, 150 per year went to jail without a hearing or a lawyer, so this is what I would accept as an accurate estimate of how many people would need to be appointed a lawyer. Justice Lynn suggested that the number is probably even higher, because the 150 does not include the folks who, upon hearing they would be sent to jail, paid the money at the last minute.

Attorney Gordon suggested that the Committee might consider recommending the rule for adoption on a temporary basis. If it turns out that attorneys are appointed in 10,000 cases, then there will be a complaint that the rule is too broad. Justice Kelly stated that he had concerns when the counsel at arraignment rules were adopted that there would be hundreds of request for counsel, but this never materialized.

Mr. Stephens asked about the rule from the business perspective - he inquired whether there is a mechanism which would allow a defendant who is unable to pay right now to pay when he is able. Judge Kelly stated that this

does happen. There are options built into the rule – community service, and periodic payments, for example.

Justice Lynn stated that he has another concern about the proposed rule. Under current law, the defendant has the burden of proving an inability to pay. This proposal would change that. Justice Lynn has concerns about this, given the volume of cases. He believes that putting the burden on the State to prove ability to pay would require the State to undertake financial investigations, which seems unreasonable given the volume of cases. Another Committee member noted that if the burden is on the State to prove, there is a concern that word will get out that defendants can "game the system."

Judge Kelly responded that the risk is great that the system will miss a case where there is a real inability to pay, so it doesn't seem unreasonable for the State to undertake this burden.

Judge Delker inquired where in the rule proposed by the ACLU it says that the State bears the burden of proving ability to pay.

Professor Scherr addressed the Committee next. He stated that the rule is designed to address the 150 out of the 84,000 for whom this is an issue. He believes that the rule as proposed would have this effect:

- There is very likely to be an ability to pay hearing with no counsel - the judge or clerk will meet with the defendant to go through the process of filling out the financial affidavit.
- There will then be 1-2 ability to pay hearings at the court, at which the following options will be considered: periodic payments, reduction in the fine, community service. It is expected that judges may find the community service option more workable going forward. A number of law students have been working on compiling a list of community service options, so that the judge will have a book to refer to when considering this option.
- Up to this point, no jail is at issue here. If the courts follow this procedure, then in the 150 cases we are talking about, we assume that that number will go down dramatically. So, we are now at a point with the defendant at which jail is an option. At this point, the court says to the defendant, "we will now have an ability to pay hearing, at which jail may be considered as an option, we will appoint a lawyer to represent you."
- At this point, the lawyer would meet with his client and would probably be able to work something out.

Professor Scherr believes that if these procedures are followed, only a handful, perhaps a dozen, defendants will ultimately have an ability to pay hearing at

which counsel must be present. These people may actually end up going to jail. This is why the burden should be on the State to prove ability to pay.

Justice Lynn inquired how the State is to get this information. Professor Scherr notes that most of it will be provided at the sequence of hearings, where the defendant will complete financial affidavits. Justice Lynn asked what if the Judge doesn't believe the bona fides? He notes that in the child support context, if the respondent did not show inability to pay, he would be ordered to pay.

Professor Scherr stated that child support hearings do not have anything to do with these kinds of hearings. These people are very different from those at child support hearings. We are looking at a class of people who do not even have the luxury of living paycheck to paycheck.

Attorney Gordon stated that in the child support context, you have an interested party who might know about the trust fund. How would this translate in this context. How would the State know about the trust fund?

Judge Delker asked why this is not more like a deferred sentencing hearing. This is a case in which the information that is required is in the unique possession of the defendant. The defendant is the one who has the ability to show whether he was looking for a job.

Professor Scherr stated that this would already have been developed. He noted that in all of the 300 cases the ACLU looked at, not one person was sent to jail from the Superior Court. Judge Delker noted that the Superior Court collects a far smaller percentage of the fines.

Justice Lynn inquired what other states do. Professor Scherr noted that the State of Mississippi has a better way of doing this. It has a set of presumptions built into the statute. It handles the burden of proof issue in a different way. The presumptions kick in only after non-payment, not at the sentencing phase. Professor Scherr agreed to provide Carolyn with a copy of the Mississippi statute.

Justice Lynn inquired why this could not be viewed more as an affirmative defense issue – the defendant is required to pay the fine, but defendant's defense is, I have an excuse, I am unable to pay the fine. Professor Scherr replied that this is not the law in New Hampshire on criminal contempt.

Professor Scherr stated that the purpose of the amendment is to:

(1) give Circuit Court judges better guidance regarding ability to pay hearings than is provided under the old rule;

(2) develop a "funnel." It is true that 150 cases is a small percentage of the whole, but too many people are going to jail without an adequate ability to pay hearing and without counsel;

(3) we don't want to design a system aimed at the 20 bad actors out of 81,000 cases that are in the system.

Professor Scherr noted that there is little cost to this system. He believes that it is possible to disagree on the constitutionality issue and still adopt this limited rule that counsel should be provided in these very limited number of cases. The Court has the authority to do this without drawing any conclusions about whether this is a criminal or a civil contempt proceeding.

Justice Delker inquired whether under RSA 604-A the Court has statutory authority to appoint counsel in these cases. Justice Lynn noted that RSA 604-A:2 states that in every criminal case in which the defendant is charged with a felony or a class A misdemeanor, the defendant must be advised of his or her right to appointed counsel if he or she is financially unable to obtain counsel. He asked whether the Court can require counsel where the statute does not.

Professor Scherr stated that he believes that the Court can do so, as it has in 3JX cases. He notes that there is no constitutional right to counsel in discretionary appeals. Justice Lynn inquires whether, where there is at least a question as to the Court's authority to do this, the Court ought not defer to the legislature on this. Professor Scherr noted that the Court did not defer to the legislature on the counsel at arraignment issue, and adopted rules designed to insure that counsel is available to all indigent clients at arraignment in Circuit Court.

Senator Feltes inquired what the cost of this rule amendment would be. Christopher Keating, Executive Director of the New Hampshire Judicial Council was present at the public meeting and addressed this issue. He believes that it will be possible to leverage staff at the public defender's office to absorb most of the potential cost of this. Attorney Keating noted that throughout the state, courts are working all of this out – that is, many judges are not sending people to jail without an adequate ability to pay hearing. In those cases where no adequate hearing is held, this rule will help and will have next to no impact financially. Attorney Keating confirmed Senator Feltes' assertion that the bottom line is that the cost per year to the system will likely be anywhere between $0 and $2000.

Judge Delker inquired how the Court has the authority to spend money on this when it hasn't been granted legislative authority to do so. Judge Kelly responded that the judicial branch already does this in some cases. *See* RSA 490:31.

Professor Scherr stated that he would be providing a written response to Justice Lynn's memorandum.

Justice Lynn suggested that it might make sense to put both the ACLU-NH's proposed rule out for public hearing in June, along with his version.

Justice Lynn noted that he had had a discussion with Senator Feltes about advising the legislature about this proposed rule change. Senator Feltes reported that he had spoken with the Senate President about this, and the Senate President stated that he would need more information about the cost of this rule change before drawing any conclusions about it. Senator Feltes noted that the information provided today was very helpful, and that he would provide the information to the Senate President, who will need some time to think this through.

Justice Lynn noted that Representative Neal Kurk had contacted him and Howard Zibel about this issue and had expressed concerns both about the cost, but also about whether this is a policy decision that the legislature might wish to weigh in on.

Senator Feltes stated that he would have information from the legislature by the time of the June 3 hearing regarding: (1) whether it would be more appropriate for the legislature to consider this issue; and (2) if not, whether the estimate of the cost of this poses any concern.

Carolyn Koegler reminded the Committee that the proposed new language would be included in Rule 29(e) of the New Hampshire Rules of Criminal Procedure, rather than District Division Rule 2.7 because the District Division Criminal rules have been deleted. She reminded the Committee that by Order dated November 23, the Court had adopted, effective January 1, 2016, the Strafford and Cheshire County Rules of Criminal Procedure. The rules are the same as the New Hampshire Rules of Criminal Procedure, except that they have built into them amendments to those rules designed to facilitate the implementation of felonies first in those counties. By order dated January 1, 2016, the Court adopted, effective March 1, 2016, the New Hampshire Rules of Criminal Procedure. Rule 29(e) of those rules sets forth language identical to the language of Rule 29(e) of the Strafford and Cheshire County Rules of Criminal Procedure. The January 1, 2016 order deletes the District Division Criminal Rules. Rule 29(e) of both sets of criminal rules sets forth language similar, but not identical to, the language of deleted District Division Rule 2.7.

Justice Lynn suggested that the Committee consider putting the ACLU proposal out for public hearing. Attorney Gordon stated that it would probably be a good idea to do so, even if Committee members are undecided about what they might recommend with respect to the counsel and burden of proof issues.

Following some discussion, and upon motion made by attorney Curran and seconded by Mr. Stephens, the Committee voted to put out for public hearing both the ACLU proposal and the proposal made by Justice Lynn. Committee members also requested that Carolyn include existing Criminal Rule of Procedure 29(e) in the public hearing notice so that members of the public can see what the existing rule looks like and compare it to the language of the proposals.

i. 2015-022. New Hampshire Rules of Evidence – Update.

Justice Lynn referred the Committee to a December 1, 2015 memorandum and attachment from Carolyn Koegler. He explained that some time ago, Professor John Garvey had contacted him and noted that a number of changes had been made to the Federal Rules of Evidence that had not been made to the New Hampshire Rules of Evidence. At the Court's request, a committee co-chaired by Professor Garvey and Judge Garfunkel undertook a review of the New Hampshire Rules of Evidence to consider whether changes made to the federal rules should be made to the New Hampshire Rules. The results of the committee's review are summarized in an August 3, 2015 report submitted to the Court.

At the December meeting Committee members stated that the report is very difficult to read, and asked to see the proposed NHRE Committee changes in the context of the existing New Hampshire Rules of Evidence. In an attachment to a March 8, 2016 memorandum, Carolyn reprinted in a draft public hearing notice each of the existing New Hampshire rules of evidence and used **[bold and brackets]** to indicate where the NHRE Committee proposes that language be added and ~~strikethrough~~ to indicate where the Committee proposes that language be deleted.

Professor John Garvey and Judge Garfunkel were present at the meeting to explain how the New Hampshire Rules of Evidence (NHRE) Committee was formed and why. Judge Garfunkel explained that the New Hampshire Rules of Evidence have not been updated since they were first adopted in 1985, whereas the Federal Rules are updated every year. The Federal Rules of Evidence were revised in 2010 with the goal of using plain language to make the rules easier to understand. The Committee approached the Court several years ago to ask whether the Court would like the Committee to do the same with the New Hampshire Rules.

As the August 3 report reflects, and as Judge Garfunkel explained, the Committee applied the following principles when it undertook review of the New Hampshire rules:

- Where the New Hampshire rule was originally intended to follow the federal rule, and where no substantive changes were made in the restyled federal rule, the committee recommended adoption of the restyled federal language;
- Where the New Hampshire rule was originally intended to follow the then- existing federal rule, and substantive changes were made to the federal rule either prior to or during the restyling which have not been adopted in the New Hampshire rule, the committee reviewed the substantive changes, considered whether the changes were appropriate, and made a recommendation based upon the committee's analysis and conclusions; and
- Where the New Hampshire rule was originally intended to be different than the then-existing federal rule, the committee reviewed the differences between the New Hampshire rule and the then-existing federal rule and the reasons for those differences. The Committee then considered whether the differences are still appropriate and made recommendations based upon the committee's analysis and conclusions.

Judge Garfunkel explained that Committee members included representatives from the prosecution, defense, and civil plaintiffs and defendants, as well as law students. What is reflected in the August 3, 2015 report is the view of all of the Committee members – a broad sampling of the bar.

Judge Garfunkel noted that he and Judge Shulman have submitted a minority report, set forth in footnote 32 on page 65 of the draft public hearing notice, regarding the proposal to amend Rule 803 to add section (22). Judge Garfunkel explained that the proposal would adopt as an exception to the hearsay rule evidence of a final judgment of conviction. Judge Garfunkel, Judge Shulman and Attorney Johnson are opposed to its adoption. The Committee consulted Judge Laplante about the issue, and he does not share their concerns. Nor does Professor Garvey. The other committee members did not voice an objection to the proposed rule.

Attorney Gordon inquired whether any of the proposals would make a change in the law. Judge Garfunkel stated that there has been a change – in the expert area, where the federal rule was rewritten in 2010/11.

Another change is in the sequestration rule. It changes what was in the New Hampshire rule in two ways: (1) it eliminates a distinction between criminal and civil cases, and makes sequestration mandatory in all cases; and (2) defines what sequestration means. Professor Garvey stated that these were not changes proposed by the Committee, which recommended that no changes be made to the rule. Both changes were recommended by Justice Lynn.

Judge Garfunkel noted that there were a series of exchanges between Justice Lynn and the Committee regarding Rule 615. At one point, Judge Garfunkel had suggested that the following language be included in a comment to the rule:

> Unless otherwise ordered by the court, sequestration, by agreement or by court order, prohibits sequestered witnesses (1) from being present in the courtroom until after the witness has testified (and is not subject to being recalled by any party), and (2) from discussing his/her testimony, including the questions asked of him/her, with any other witness who is subject to sequestration and who has not yet testified.

Judge Garfunkel explained that Justice Lynn had added most of this language to the rule itself at 615(2), but that Judge Garfunkel still believed the language "including the questions asked of him/her" should be included in the rule.

Judge Delker stated that he had concerns about including this language.

Judge Delker stated, if this language is included in the rule, it would raise questions about what is ok and what is not – for example, suppose an attorney puts W on the stand and says, "did you send emails to X" and W answers "no." Then the attorney prepping X later wants to ask X about this. Is this ok? Judge Garfunkel stated that the attorney could not say, "W was just asked," but he could ask X about this. Judge Garfunkel explained that he added this language because he doesn't want a witness to be able to say, "well, I can't tell you what I said, but I can tell you what I was asked." There is a very subtle difference between asking what happened in the courtroom as opposed to areas not previously inquired into. With this language, an attorney can prep a witness for the same questions but cannot say, "this is what the other witness was asked."

Attorney Delker opined that adding this amendment would complicate the rule. Judge Lynn suggested that the language could read, "from discussing the testimony . . . . or the questions asked in the proceeding." Judge Delker stated that he does not believe that there is a substantive difference between the two.

Judge Garfunkel stated that the proposed language is designed to prevent a witness from saying, "I cannot tell you what I testified to, but here are the questions I was asked." Judge Delker noted that that is what the lawyer is doing. The lawyer can ask the same questions the witness on the stand was just asked. How is the witness then any less prepared? Judge Garfunkel noted that the purpose of the rules it to prevent witness violations. Judge Delker disagreed and stated that the purpose is also to prevent lawyer violations.

Justice Lynn noted that not amending the rule to add this language removes the opportunity for surprise. Is it important to allow for the opportunity to surprise? Judge Garfunkel stated that this is a philosophical question: Does sequestration include protecting a preview of the questions asked? It is important to draw the line at some point. You cannot preclude a lawyer, having heard the testimony of one witness, from, while prepping another witness, saying "here's an area that we didn't talk about, but we should." The lawyer cannot repeat the question the first witness was asked, but s/he can talk about the areas that were asked about. The question is – where to draw the line.

Someone inquired whether it would be possible to add a comment to address Judge Delker's concern.

Attorney Gordon inquired whether there are any changes in the rules that codify decisions of the Court. Justice Lynn stated that the change to Rule 104(b) reflects current law. That provision, as proposed (with additional amendments proposed by Justice Lynn in **red**), reads:

> **[(b) *Relevance That Depends on a Fact*. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. ~~The court may admit the proposed evidence on the condition that the proof be introduced later.~~] If such proof is presented, or the court finds that it will be presented, the court shall admit the evidence.]**

Some concerns were expressed about the language Justice Lynn proposed. Judge Delker is concerned that the language does not allow for conditionality – that is, it doesn't allow a trial judge to condition admissibility on other facts being established. Justice Lynn explained that he was concerned that as drafted, a judge could decide not to admit the evidence even if the conditional evidence is presented. Judge Delker proposed that the language be changed to read:

> **[(b) *Relevance That Depends on a Fact*. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. If such proof is presented the court shall admit the evidence. The court may admit the proposed evidence on the condition that the proof be introduced later.]**

It was generally agreed that revising the rule to read this way would address the concerns raised by Justice Lynn and Judge Delker and Judge Garfunkel. Justice Lynn stated that he would circulate this language to

committee members for approval before the language is put out for public hearing.

Attorney Gordon inquired whether there are any changes to the rules which would overrule a decision of the Supreme Court. Judge Garfunkel stated that he does not believe that there are any of these.

There was some discussion about Rule 613. Judge Garfunkel agreed to draft some language for a comment to the rule relating to prior consistent statements admitted only for credibility purposes.

Judge Delker inquired about the proposed change to Rule 703, which would read

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

The addition of the last sentence would constitute a substantive change to the New Hampshire Rule. Professor Buzz Scherr, who was present at the meeting to address another issue before the Committee, explained why this change was made to the federal rule.

Judge Delker inquired whether, if the purpose of the change is to allow the use of inadmissible evidence in order to assist the jury in evaluating the opinion of the expert, it would make sense to include language in the rule to make clear that the inadmissible evidence is not to be admitted substantively. Judge Garfunkel noted that it might make sense to include this in the language of the rule or in a comment.

John Garvey agreed to pull the comment to the federal rule to clarify what the amendment is designed to do.

Judge Garfunkel agreed to provide information to the Committee regarding the Rule 613 changes. Professor Garvey agreed to provide information to the Committee regarding the Rule 703 changes. Justice Lynn agreed to provide some language to amend Rule 615.

Justice Lynn suggested that the Committee vote to put the proposals out for public hearing as reflected in the draft public hearing notice, understanding

that the Committee might approve by email some changes proposed by Judge Garfunkel, Professor Garvey and/or Justice Lynn.

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

j. 2015-023. Proposed New Hampshire Rules of Criminal Procedure – Rule 12.

Carolyn Koegler reminded the Committee that it had been asked to consider a comment that had been submitted when the Court put the proposed New Hampshire Rules of Criminal Procedure out for public comment on September 28, 2015. The comment proposes the following amendment to Rule of Criminal Procedure 12(a), relating to discovery, as follows (proposed additions are in **[bold and in brackets]**, deletions are in ~~strikethrough~~):

(1) ~~Upon request,~~ **[Within 10 calendar days after the arraignment]** in misdemeanor **[cases]** and **[upon request in]** violation-level cases, the prosecuting attorney shall furnish the defendant's attorney, or the defendant, if *pro se*, with **[any and all discovery, including but not limited to]** the following:

(A) A copy of records of statements or confessions, signed or unsigned, by the defendant, to any law enforcement officer or agent;

(B) A list of any tangible objects, papers, documents or books obtained from or belonging to the defendant; and

(C) A statement as to whether or not the foregoing evidence, or any part thereof, will be offered at the trial.

At the December meeting, Attorney Ryan stated that he believed it would be important to solicit input from all stakeholders on this proposed change. Attorney Gordon agreed and suggested stakeholders be asked to provide their input by the date of the March meeting.

It was noted that a number of comments had been submitted expressing concerns about the proposal. Attorney Gordon reported that he has heard many complaints from criminal attorneys regarding discovery problems, and stated that automatic disclosure might solve some of these problems.

Justice Lynn stated that the comment submitted by Attorney Randy Hawkes makes clear that this amendment would not impact the practices of the New Hampshire Public Defender because New Hampshire Public Defender attorneys are in the practice of sending an initial discovery letter to prosecutors, and will continue to do so. Attorney Gordon stated that the lack

of automatic discovery does not appear to be a problem with the public defender's office, but with contract and private attorneys and with pro se defendants.

Following some brief discussion of the issue, and upon motion made by Justice Lynn and seconded by attorney Curran, the Committee voted to put the proposal out for public hearing in June.

4. Meeting Dates

The remaining 2016 meeting dates are:

Friday, June 3
Friday, September 9
Friday, December 9