NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

DRAFT Minutes of Public Hearing and Meeting of
March 17, 2017

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., Hon. N. William Delker, Hon. Daniel J. Feltes, Hon. Michael H. Garner, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Ari Richter, Frederick H. Stephens and Hon. Robert J. Lynn.

Also present was the Secretary to the Committee, Carolyn Koegler, Esq. and Charlene Desrochers, staff.

1. Approval of Minutes of December 9, 2016.

Upon motion made and seconded the Committee voted to adopt the December 9, 2016 minutes.

2. Status of Items Still Pending Before the Committee

a. 2015-011. Supreme Court Rules 37 and 37A.

Carolyn Koegler reminded the Committee that, for the reasons set forth in the Committee's September 9, 2016 minutes, the subcommittee had suspended its work. The proceeding that had prompted the subcommittee to suspend its work has just recently concluded, and the subcommittee will soon meet again to resume its work.

b. 2016-006. Motions to Seal.

At the September meeting, Judge Delker agreed to chair a subcommittee to address the issues raised by attorney William Chapman, identified in a May 31, 2016 memo from Carolyn Koegler to the Committee. Judge Delker reported that the subcommittee had met in person once, and by email once, and that the subcommittee had completed a solid draft of the proposal but that there is still one unresolved issue, relating to whether a party may withdraw documents if the motion to seal is denied. The subcommittee will meet in April to discuss this issue.

c. 2016-010. Superior Court (Civ.) Rules. Permissive Counterclaims.

Judge Delker reminded the Committee that a subcommittee he chairs had considered whether Superior Court Rule 10 should be amended to address when it is appropriate for a party to file permissive counterclaims. There is currently no Superior Court rule regarding permissive counterclaims.

Judge Delker submitted an October 4, 2016 memo on behalf of the subcommittee proposing that subsection (b) be added to Superior Court Rule 10. He noted that the language of the proposed rule differs slightly from the federal rule. Federal Rule of Civil Procedure 13(e) allows for a permissive counterclaim that matured after the complaint was originally filed. New Hampshire RSA 515:8, however, precludes this practice, so language has been added to the New Hampshire provision stating that the right of action must have existed at the time of the filing of the complaint.

Judge Delker also noted that the subcommittee proposed adding a new subsection (h) to Rule 10 to allow claims to be separated.

Upon motion made by Justice Lynn and seconded by Representative Berch, the Committee voted to put the proposal out for public hearing in June.

d. 2016-011. Superior Court (Civ.) Rules. Appearances.

Judge Delker reminded the Committee that he had submitted a December 14, 2016 memo proposing that Rule 17 be amended to say that the filing of a complaint, answer or other responsive pleading should be adequate to constitute appearance of an attorney. He noted that a self-represented litigant would still need to file an appearance under the amended rule.

Attorney Albee raised a concern about subsection (b). She noted that it is awkward that the first sentence of the rule addresses what a self-represented litigant is required to do, but that the last sentence refers to counsel, non-attorney representative or self-represented parties. It was agreed that the last sentence should be lettered section “c” and that the subsequent sections should be relettered.

Upon motion made by Justice Lynn and seconded by attorney Gordon, the Committee voted to put the proposal out for public hearing in June.

e. 2016-008. Rules of Professional Conduct and Medical Marijuana.

Justice Lynn suggested that the Committee discuss items (e) and (f) together. He noted that item (e) is quite complicated and that it is not clear what the implications of a proposed rule change would be in other areas – that is, in other areas in which there may be a conflict between state and federal

law. He also stated that he believes that while the proposal submitted on item (f) appears to be appropriate, he also has concerns about what the implications of the change would be. He believes that the proposals, set forth in (e) and (f) both need further study. Mr. Stephens stated that as part of the study of these issues, it would be helpful to examine what other states are doing. If they have adopted these changes, why, and if they have not, why not?

Attorney Gordon agreed to chair a subcommittee to take a closer look at these issues. Among other things, the subcommittee will determine whether the proposals are out of the mainstream, and what the implications of the proposals, if adopted, would be. The group discussed what the composition of the subcommittee should be and it was agreed that there should be representation form the public defender's office, the Attorney General's office or county attorney, and members of the Ethics Committee. Regarding item (e), it was noted that it would be helpful to understand why the minority was against the proposal. Abigail Albee agreed to participate on the subcommittee. Jeanne Herrick noted that she would provide attorney Gordon with the name of a plaintiff's attorney who would likely be interested in item (f). Judge Delker stated that the subcommittee should also consider item (f) in light of the state statutes dealing with harassment and discrimination.

f. 2016-009. Rule of Professional Conduct 8.4. Harassment and Discrimination.

See (e) (above).

g. 2016-014. New Hampshire Rules of Criminal Procedure. In Camera Review of Documents

Justice Lynn reminded the Committee that it had considered at the December meeting a December 5, 2016 letter from Attorney Johnson in which he proposed an amendment to the Rules of Criminal Procedure relating to the procedure used by trial courts when conducting the *in camera* review of confidential records. Some concern was expressed about the proposal, particularly about the potential downstream effects on a case of giving information to defense counsel and telling him or her not to share it with his or her client. It was agreed that Judge Delker would ask attorney Johnson to convene a subcommittee to consider the proposal. Attorney Albee and representative Berch volunteered to work on the subcommittee.

The results of the subcommittee's work is summarized in a March 6, 2017 letter from attorney Johnson. Justice Lynn notes that while he understands the rationale set forth in the letter for not involving counsel in a phase of *in camera* review, he has concerns about this issue. He stated that it is extremely difficult, when the Supreme Court reviews these cases, to understand, without the benefit of advocacy whether documents should have been turned over. He

understands why it would be helpful to get counsel involved. He suggested that it might make sense to ask attorney Johnson to provide some information about what other states do. Do they give lawyers access to information?

Judge Delker noted that there is a statutory issue here as well. Regarding medical documents, for example, there is a very narrow exception to the confidentiality rule to comport with due process. In order to protect a patient's expectation of privacy, only the most essential, necessary information can be released. The balance, struck in *Gagne* is that trial judges and appellate judges can look at the records. Clearly, if the victim says the defendant didn't do it, that should be released. The feeling among members of the subcommittee was that this proposal struck the appropriate balance. The Supreme Court is not in a worse position than the trial court to make this determination. It is one thing to share information with a judge, it is quite another to give it to the defendant's lawyer and to tell the lawyer not to say anything to the defendant. This puts the lawyer in a tough position and the victim in a tough position.

Justice Lynn stated that if a protective order were issued, the lawyer would have no choice but to abide by the protective order and not share the information with his or her client, but agreed that there is no question that involving the lawyer is another step. Justice Lynn suggested that the issue be left open and that Attorney Johnson be asked to provide the Committee with more information about what other states do.

Judge Garner stated that it might be useful to seek input from the administrative trial judges regarding the civil rules. He notes that the impact on the victim witnesses is the same. Attorney Herrick stated that the civil context is not the same as the criminal, because in the criminal context, the constitution requires that the defendant be afforded as much due process as possible. Also providing the information to a criminal defense attorney but not the client creates a tension that does not exist in the civil arena.

Attorney Albee agreed, noting that saying to a criminal defense attorney, "here's this information, but do not share it with your client" raises a lot of red flags in the criminal context. Judge Delker agreed that this creates an awkward dynamic between client and counsel in the criminal context. Judge Garner noted that this is also awkward in the civil context. In light of this, the subcommittee's decision seems to have been to adopt existing law and to not modify it.

Attorney Gordon inquired whether it would make sense to require the creation of a Vaughn index enumerating what records are at issue. Judge Delker noted that he can imagine scenarios in which this would create a problem. For example, in a contentious divorce a Vaughn index might reveal the fact that the spouse was seeking mental health services, something he or

she might not want known. Judge Lynn stated that in the criminal context, for example in a sexual assault case involving a minor, the records might be held by a third party. Requiring the creation of a Vaughn index would be too complicated. Judge Delker noted that judges would like assistance from an attorney, but there is a tension here.

Judge Garner stated that a protocol in the civil context would be very helpful and stated that he would share attorney Johnson's letter with Judges Kelly and King.

There was some brief discussion regarding the issues attorney Johnson raises about the use of the terms "essential and reasonably necessary" and "material and relevant."

3. New Submissions

a. 2017-001. Super. Ct. R. 28. Requests for Admissions

Judge Delker called the Committee's attention to a January 26, 2017 memo from Carolyn Koegler stating that the civil rules subcommittee believes that Superior Court (Civ.) Rule 28 should be amended to delete the requirement that requests for admissions and responses to requests for admissions be filed with the court. He stated that these filings do not require any action from the Court and so should be eliminated.

Judge Garner stated that he believes that the Circuit Court rules should be similarly amended.

Upon motion made and seconded, the Committee voted to put out for public hearing the proposal to delete the requirement in Superior Court Rule 28 and the equivalent rules in the Circuit Court that requests for admissions and responses to requests for admissions be filed with the court.

b. 2017-002. New Hampshire Rule of Evidence 801(d)(1)(B)

The Committee next considered the issue raised in a February 23, 2017 memo from Carolyn Koegler regarding whether the change made to Federal Rule of Evidence 801(d)(1)(B) in 2014 should be made to New Hampshire Rule of Evidence 801(d)(1)(B). It was noted that this would change existing law.

Following some brief discussion, Judge Delker, Justice Lynn, Attorney Albee and Senator Feltes agreed to serve on a subcommittee to further research this issue and make a recommendation to the Committee.

c. 2017-003. Sup. Ct. R. 37(A(II)(a)(3)(a)-(b). Procedure after Receipt of a Grievance.

Justice Lynn explained that he would like the Committee to consider whether Supreme Court Rule 37A(II)(a)(3)(A)-(B) should be amended to make clear that the Attorney Discipline Office may decline to docket a grievance as a complaint if it concludes that a hearing panel would not likely find clear and convincing evidence that the attorney violated the Rules of Professional Conduct. This issue arose in a recent case. While the case was decided on other grounds, it became clear that, read literally, the rule requires the ADO to docket every grievance as a complaint.

Discussion ensued regarding what harm there is in docketing the complaint. It was noted that there is a cost in terms of staff time. The Committee generally agreed that this change should be made and asked Carolyn Koegler to contact the ADO and ask them to provide a proposal to amend the language of the rule.

d. 2017-004. Super. Ct. R. 35. Final Pretrial Conference Order.

The Committee next considered a March 9, 2017 memo from Carolyn Koegler asking that the Committee consider whether Superior Court Rule 35 ("Trial Management Conference") should be amended to: (1) require that the trial court issue an order following a final pretrial conference; and (2) make clear that the order will control the course of the action at trial and supersede prior pleadings in the case.

Justice Lynn stated that his memory is that the final pretrial order is often not a comprehensive order, so the question is, should the Court make a rule that the pretrial order is "it," and governs the case moving forward?

Judge Delker noted that it is rare that he issues a formal order. Often he just has notes from the final pretrial conference. If the parties want an order that limits the issues, the parties file motions in limine. The practice in New Hampshire state court is unlike the practice in the federal court. For example, the federal courts tend to have greater involvement throughout the litigation than the New Hampshire state courts do.

Attorney Herrick stated that she has concerns about the proposal because it would make a big change to practice. Attorney Gordon noted that the orders referred to in the federal rules do seem different from the orders that arise from the process Judge Delker has described. Justice Lynn agreed that if this kind of a rule change were made, it does seem that there will be more "gotcha" types of situations that arise under the rule, and it does seem that New Hampshire tries to avoid this.

After some further discussion, the Committee declined to take any action on this proposal. The item will be removed from the agenda.

e. 2017-005. Sup. Ct. R. 37(12). Reciprocal Discipline.

The Committee next considered a March 15, 2017 memo from Carolyn Koegler which states that the Court has asked the Committee to consider whether Supreme Court Rule 37(12) should be amended to include a procedure for determining final discipline in cases in which the court is notified that an attorney has been disciplined in another jurisdiction.

Following some brief discussion, the Committee agreed that a subcommittee should be formed to consider this issue. The subcommittee will include Abigail Albee, Sara Greene (Disciplinary Counsel at the Attorney Discipline Office, Janet DeVito (General Counsel at the Attorney Discipline Office), Eileen Fox and Carolyn Koegler

4. Meeting Dates

The remaining 2017 meeting dates are:

- Friday, June 16
- Friday, September 15
- Friday, December 8