

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of March 15, 2019 Public Meeting

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 p.m. by Chief Justice Lynn, acting Committee Chair. The following Committee members were present: Abigail Albee, Esq., John A. Curran, Esq., Sean Gill, Esq., Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek Lick, Ari Richter, Patrick W. Ryan, Esq., Charles P.E. Stewart, and Hon. Robert J. Lynn.

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

1. Approval of Minutes of December 7, 2018 Meeting

Upon motion made by Mr. Gordon and seconded by Mr. Curran, the Committee approved the December 7, 2018 minutes. Attorneys Lick and Ryan and Chief Justice Lynn abstained from voting because they were not present at the December 7 meeting.

2. Items Still Pending Before the Committee

(a) 2017-016. Supreme Court Rule 40. Procedural Rules of Committee on Judicial Conduct.

Chief Justice Lynn referred Committee members to a February 4, 2019 memo from Carolyn Koegler. He reminded Committee members that at the December meeting, the Committee had voted to strike the words “court stenographer, monitor or reporter” from the definition of “judge,” as had been suggested by Committee member Charlie Stewart. Justice Lynn noted that the proposal had not been included in the February 2018 Report to the Court, because the Secretary was unclear whether the Committee had voted to strike the words from the existing rule, or from the rule that had been put out for public hearing. The proposal included in the Notice of the December public hearing was as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

Judge – this term includes **[the following members of the State of New Hampshire Judicial Branch]**: (1) a full-time or part time

judge of any court or division of the State of New Hampshire Judicial Branch; (2) a full-time or part-time marital master; (3) a referee or other master; **[and] (4)[, when performing an adjudicatory function,]** a court stenographer, monitor or reporter, a clerk of court or deputy clerk, including a register of probate or deputy register and anyone performing the duties of a clerk or register **[on an interim basis]**. Not everyone who is a “judge” as defined herein is bound by every canon of the Code of Judicial Conduct – the Code of Judicial Conduct applies to a judge to the extent provided in Supreme Court Rule 38.

Following some discussion of the issue, the Committee decided to strike the words “a court stenographer, monitor or reporter,” from the version of the rule that had been put out for public hearing, and not simply from the existing rule. Committee members agreed that it would not be necessary to put the proposal out for public hearing, and, upon motion made and seconded, the Committee voted to recommend that the Court make the changes to the existing rule. Carolyn Koegler stated that the recommendation would be included in the August 1, 2019 Report to the Court.

(b) 2017-018. Supreme Court Rule 37. Attorney Discipline System. Access to Confidential Records.

Carolyn Koegler referred Committee members to her February 1, 2019 memo. She reminded the Committee that at its December meeting, it had considered a proposal to amend Supreme Court Rule 37 to set out a procedure outlining when, and in what manner, the Attorney Discipline Office may access confidential court files. The proposal had been submitted by a subcommittee consisting of committee member attorney Albee, attorney discipline office disciplinary counsel Sara Greene, attorneys William Saturley and Russ Hilliard, and Carolyn Koegler. At the December meeting, Committee members Judge Delker and attorney Ryan raised some concerns about the proposal, which are outlined in the February 1, 2019 memo. Attached to that memo is a proposal designed to address those concerns.

Carolyn Koegler reported that Judge Delker, who was not able to be present at the meeting, had informed her that he is comfortable with the proposal set forth in the February 1, 2019 memo. Pat Ryan agreed that his concerns had also been addressed. Following some discussion and upon motion made by attorney Ryan and seconded, the Committee voted to put the proposal out for public hearing in June.

(c) 2018-012. Supreme Court Rule 57-A. Custody and return of documents and materials filed in camera in trial courts.

Chief Justice Lynn referred Committee members to a February 10, 2019 memo from Carolyn Koegler attaching a proposal to amend Supreme Court Rule 57-A. Justice Lynn reminded Committee members that the proposal was designed to address an issue that had arisen in a recent case. Justice Lynn explained that the case had involved an appeal from a Superior Court order denying the appellant's request for the return of confidential records submitted pursuant to court order. Although both the State and the defendant had agreed that the records should be returned, the Superior Court refused to return them, citing Supreme Court Rule 57-A.

There was some general discussion at the December meeting about how Supreme Court Rule 57-A should be amended, and Carolyn Koegler agreed to draft a proposal to amend Supreme Court Rule 57-A to implement the decisions made by the Committee. The proposal is attached to the February 10 memo.

Following some discussion about the proposal, Committee members agreed that it might make sense to narrowly tailor the rule amendment to address the issue raised in the appeal that prompted this suggested rule change. Committee members suggested that the existing rule should continue to apply to cases in which the defendant has been convicted on any charge, but that in all other cases, the trial court should have discretion to destroy the records if it concludes, following a motion by an interested party, that there is good reason to do so.

Committee members asked Carolyn Koegler to draft some language to implement this suggestion and to circulate it to committee members. The Committee agreed that it would review the proposal and vote electronically to put the revised proposal out for public hearing in June.

3. New Submissions

(a) 2019-001. Supreme Court Rules 12-D and 20. Non-precedential status of orders.

Justice Lynn referred Committee members to a February 21, 2019 email from Supreme Court Deputy Clerk Tim Gudas. Attorney Gudas suggested amendments to two Supreme Court Rules that are designed to make clear that orders issued in confidential cases should not be cited or referenced in pleadings or rulings.

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

(b) 2019-002. Circuit Court Rules. Electronic Filing.

Pat Ryan directed the Committee's attention to his March 8, 2019 email and attachments. He explained that it is the Circuit Court's goal to move civil cases in the Circuit Court to electronic filing by the end of the year. To do so, the Circuit Court will need to bring its civil process in line with the Superior Court civil process. Therefore, the Circuit Court will need to amend the Circuit Court rules relating to civil cases. Attorney Ryan has drafted suggested amendments to the Circuit Court rules to make them similar to the Superior Court Civil Rules.

The suggestions to amend the Circuit Court District Division Rules to facilitate the implementation of e-filing include:

- (1) Deleting the current District Division Civil Rules 3.1 through 3.28 and replacing them with a variation on the Superior Court Civil Rules;
- (2) Amending Circuit Court Rules: 1.3 ("Attorneys"), 1.3-A ("Pleadings – Copies to all parties"), 1.7 ("Argument of Counsel"), 1.8 ("Motions"), 1.21 ("Periodic Payments"), 1.27 ("Dismissal of Cases Pending Without Action"), 5.3 ("Entry of Actions"), 5.6 ("Discovery and Continuances");
- (3) Deleting Circuit Court District Division Rules 1.9 ("Depositions and use of video tape depositions"), and 1.10 ("Written Interrogatories");
- (4) Adopting Circuit Court District Division Rule 1.28 ("Court Fees") and Circuit Court Probate Division Rule 173 ("Name Change Actions");
- (5) Deleting Circuit Court – Family Division Rule 9.1, and replacing it with reference to Probate Division Rule 173;
- (6) Amending Circuit Court Probate Division Rule 169 ("Fees"),
- (7) Amending Circuit Court-Family Division Rule 1.3 ("Fees"); and
- (8) Amending Circuit Court-Family Division Section 9 ("Name Change Actions").

Attorney Ryan stated that the timing of the adoption of these rules is critical, and that these suggestions are being made with the goal of making e-filing possible and easier. He also noted that there are some Superior Court rules that are clearly inapplicable to the Circuit Court, such as the rule on jury

trials and class actions. Therefore, these are not included in the proposed new Circuit Court rules. He also noted that:

- (1) The current rule 3.3 (the “fee” rule) is now being included as part of the “general” district division rules, at Rule 1.28.
- (2) An e-filing surcharge has been added.
- (3) A name change rule has been added to the probate division rules, and removed from the family division rules.
- (4) the numbering of the Circuit Court Rules is roughly the same as the Superior Court rules.

Attorney Ryan stated that his hope is that the Committee will vote to put these proposed rules out for public hearing in June, and that the Committee will ultimately vote to recommend them to the Court, so that they can be included in the Committee’s August 1 report. If these rules are not in place by the fall, then the Circuit Court will not be able to move forward with e-filing in civil cases before the end of the year.

Upon motion made by Justice Lynn and seconded by attorney Curran, the Committee voted to put the suggested rule amendments out for public hearing in June.

(c) 2019-003. Pro Hac Vice Fees.

Chief Justice Lynn referred Committee members to a March 13, 2019 memo from Carolyn Koegler explaining that the access to Justice Commission suggests that the Court amend court rules to increase the fees charged to out of state counsel who seek to appear *pro hac vice* from \$250.00 to \$350.00.

Following some brief discussion, and upon motion made and seconded, the Committee agreed that no public hearing on the proposal would be necessary, and voted to recommend that the Court increase the fee, as suggested. It was agreed that Carolyn Koegler would refer the recommendation to the Court immediately, and not wait to include the recommendation in the August report.

(d) 2019-004. Circuit Court Rules. Domestic Violence Orders of Protection.

Attorney Gordon explained that he was concerned about an issue regarding the timing of filing requests to renew domestic violence orders of protection that arose in *T.P. v. B.P.* (December 21, 2018). Attorney Gordon explained that courts sometimes issue temporary orders of protection in domestic violence cases that are in place for one year, and that, pursuant to RSA 173-B:5, VI, can be extended by order of the court. The Court in *T.P. v. B.P.* held that because the plaintiff had not filed to extend the order prior to the expiration of

the first order, her request was untimely and the trial court did not err when it denied her motion to extend the domestic violence final order of protection. Attorney Gordon explained that due to the facts of the case, it was unclear to the plaintiff in the case when the domestic violence order of protection was due to expire.

Chief Justice Lynn suggested that there might be a simple fix to this problem that would not require a rule amendment. He suggested that the language on the temporary order form be changed to make it clear that “this order shall be effective on x date, and will expire on y date.” Pat Ryan agreed that it would be better for the plaintiffs in these kinds of cases to have this language included in the order of protection itself, rather than in a court rule. He also noted that it would be better for judges as well to know that the domestic violence order expires on a date certain.

Committee members agreed that no rule amendment would be necessary, but that changes should be made on the form, and in practice, to address this issue.

(e) 2019-005. Supreme Court Rule 48-B. Family Mediator Fees.

Carolyn Koegler referred Committee members to a March 14, 2019 email and attachment from Heather Scheiwe Kulp, NH Judicial Branch Alternative Dispute Resolution Coordinator. She explained that the Office of Mediation and Arbitration and the Circuit Court are requesting that changes be made to Supreme Court Rule 48-B for the reasons set forth in a March letter from attorney Schiwe Kulp. Carolyn Koegler noted that attorney Schiwe Kulp had provided a marked-up version of Supreme Court Rule 48-B and asked whether the Committee wished to include the proposal in the notice of the June public hearing.

Attorney Gordon stated that he had taken a close look at the submission and has some concerns about it. He proposed that he provide Carolyn Koegler with the specifics of his concerns and that she work with attorney Schiwe Kulp on revising the proposal if necessary, and that the Committee then vote electronically to put the revised proposal out for public hearing in June.

Following some further discussion and upon motion made and seconded, the Committee voted to put the proposal, as revised by Carolyn Koegler and attorney Schiwe Kulp out for public hearing in June.

The meeting adjourned at 1:20 pm.