NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of March 9, 2018 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 Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Hon. R. Laurence Cullen, John Curran, Esq., Hon. N. William Delker, Senator Dan Feltes (leaving at 2:30pm), Sean Gill, Esq., Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq. (leaving at 3pm), Derek D. Lick, Esq., Ari Richter, Pat Ryan, Esq., Janet Spalding, CPA, Charles Stewart and Hon. Robert J. Lynn.

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

Justice Lynn welcomed Ms. Janet Spalding, CPA, to the Committee.

1. Approval of Minutes of June 16, 2017 Meeting

Upon motion made by attorney Gill and seconded by attorney Albee, the Committee approved the December 8, 2017 minutes.

2. Status of Items Still Pending Before the Committee

(a) 2016-014. Superior Court Rules and Supreme Court Rules. In Camera Review of Documents.

Justice Lynn noted that attorney Sarah Warecki was present at the public meeting. She understands that this is a public meeting and not a public hearing, but requested permission from the Committee to offer comments on the proposals that had been put out for public hearing in December. Justice Lynn asked members of the Committee whether they had any objection to receiving testimony on this matter from attorney Warecki. There were no objections.

Attorney Warecki stated that she believes that both versions of the proposed in camera review proposals that had been put out for public hearing are untenable.

Attorney Warecki stated that in *State v. Lewandowski*, the Court made clear that the judiciary does not have the power to compel the State to, for the defendant's benefit, seize evidence the State never possessed. She noted that this is because the prosecutor is not an officer of the court. In light of the Court's decision in *Lewandowski*, attorney Warecki believes it is inappropriate for the rule to direct the prosecution in a criminal case to serve the order to produce the records on the custodian of the records.

Judge Delker noted that the trial court in *Lewandowski* had ordered the state to get the records the defendant had requested. At issue in the cases to which this proposed rule would apply is that the information at issue is in the hands of the State. How else would the defendant get that information?

Some discussion ensued regarding this issue. In response to a question from Attorney Gordon, Attorney Warecki agreed that her concern is that the proposed rule might be read to mean that in some cases the State will be asked to get records it does not already possess.

Attorney Warecki also stated that she believes that the standard set forth in the "triggering" provision at (a)(1) is insufficient. That is, the language that reads, "reasonable probability that the confidential or privileged records contain information that is material to the party's case" is different from the standard articulated in *State v. Cressey,* 137 N.H. 402 (1993).

Attorney Warecki noted that many victims of sexual assault feel ashamed and they seek counseling and often talk about issues other than the crime. The may talk about drug and alcohol abuse, suicidal thoughts, trauma in their childhoods. They are advised to seek help, but they know that the records kept of their treatment may be requested by the defendant, and that a judge might review the records. In her five years as a prosecutor, attorney Warecki has never seen a case in which the defendant has sought to bring these records into evidence at trial.

Justice Lynn inquired whether attorney Warecki has ever seen a case in which a lawyer violated a protective order when records were disclosed to a defendant's attorney and subject to a protective order. Attorney Warecki stated that she has never heard of such a case. But she noted that the issue of disclosure of the records is not only about that. What is at issue for the victims is the fact that a person he or she does not know is going to read about very personal experiences the victim has had - for example, a sexual assault by an uncle when he or she was three years old.

Justice Delker stated that he has had an experience in which a case was dropped after disclosure of the records was ordered because the victim did not want the records to be disclosed. Attorney Albee stated that she has seen a case in which a victim backed off following the issuance of an order to produce the records, and the case was nol prossed.

Justice Lynn stated that the fact that the victim backed off could mean that the victim was upset by the intrusion, but it could also mean that there was something in the records to indicate that the victim had said that the defendant did not do it, or that this did not happen.

Attorney Warecki stated that it is important to remember that the judiciary is part of the State – and that when production of these records is ordered, this is a violation of the privacy rights of a citizen by the State. Attorney Warecki noted that the *in camera* issue arises in almost every sexual assault case she has, and that the idea that their private counseling records are going to be disclosed terrifies victims. Victims expect justice, but when they realize that their privacy is going to be invaded, they experience this as re-victimization.

Justice Lynn asked attorney Warecki whether the standard set forth in Appendix G(1)(a)(1) and also set forth in Appendix H(1)(a)(1), requiring the defendant to show that there is "a reasonable probability that the confidential or privileged records contain information that is material to the party's case" is the *Gagne* standard.

Attorney Warecki stated that the language "reasonably necessary" is vague and open to interpretation. She stated that she had a case in which the defendant came into court and stated, "I think she was in counseling before the assault," and requested a review of those records. The trial court ordered *in camera* review. Justice Lynn inquired whether she has any alternative language to propose. Attorney Warecki stated that she does not at this time.

Attorney Gordon inquired whether, if the defendant is interested in only 1-2 facts - for example, did the victim ever imply, say or suggest that the crime did not happen, or that the defendant did not commit the crime - might it make sense to require that the counselor answer 1-2 questions in a deposition.

Judge Delker explained that he had had a recent trial in which a victim's counselor came to testify in a diminished capacity case. Ultimately, there was a mistrial and a plea to lesser charges. The counselor did not want to testify because of a concern that it damaged the relationship with the patient.

Justice Lynn raised the question of whether, if the Committee decides to recommend the Delker proposal to the Court, the "essential and reasonably necessary" standard set forth in (b)(1)-(3) could be changed to the standard Justice Lynn proposed. That is, to limit it to "reasonably necessary" and to state that "reasonably necessary" means information that would "(1) constitute compelling evidence supporting the requesting party's position in the litigation; and (2) is not reasonably available from other non-privileged sources."

Judge Delker noted that the term is narrow because of the confidentiality issue. The question is, did the victim say it didn't happen, or is there other evidence to get to the core impeachment issues (that is, not the general impeachment issues). That is, what does "essential and reasonably necessary" mean? In *Ritchie* the United States Supreme Court opened the door because of the due process clause. *Ritchie* and *Davis v. Alaska* open the door as to core issues, but not as to general attacks on credibility, *i.e.*, that come in through general Rule 608-type of evidence. In Judge Delker's view, the United States Supreme Court allowed the confidentiality to be breached because of the defendant's due process right, and only to the extent of the defendant's due process rights.

Attorney Gordon asked how much a defendant has to allege. Does the defendant have to come to the judge with some reason to think or suspect that the victim actually said something to a counselor to satisfy these particular requirements?

Judge Delker stated that he believes that there has to be some basis to believe that the victim has provided inconsistent statements. For example, the victim was interviewed more than once and there was a different explanation of events in each interview. There has to be some reasonable basis upon which to conclude that the victim said something to the counselor.

Attorney Albee noted that judges are very different in terms of how they interpret this language. Attorney Gordon stated that this is a problem. Judge Delker noted that this is attorney Warecki's point.

Justice Lynn inquired how it is an invasion of privacy if the victim is going to say on the stand, "on this date, this is what happened," and he or she said the exact same thing in counseling.

Mr. Richter stated that there is no such thing in counseling – that there is no way to isolate statements in this way. Judge Delker agreed, noting that often the conversation is "I was in such a vulnerable state

because of all of these other things that happened to me." Attorney Albee agreed and stated that this is why *in camera* review is necessary.

Mr. Stewart expressed concern about having a rule that would allow a counselor to be asked questions in a deposition. Attorney Curran agreed, noting that a counselor will not necessarily be able to understand what is being asked. Attorney Herrick agreed, noting that this approach risks destroying the relationship.

Judge Delker stated that counselors are already taking the most obscure notes possible because of their fear of getting hauled into court. Attorney Albee agreed, noting that often the records at issue have the date and 3-4 words.

Senator Feltes observed that the conversation and attorney Warecki's testimony seem to focus on the need for specificity. The debate has been about what could that look like. He inquired whether it might make sense to ask attorney Warecki to draft some language for the triggering mechanism, and to have the public defender review the proposed language and provide a response.

Mr. Richter noted that: (1) there seems to be a difference of opinion regarding whether the impact of a judge alone reviewing the records is itself an invasion of privacy; and (2) it seems that right now, different judges are taking different approaches.

Regarding Mr. Richter's first point, Justice Lynn stated that he agrees that this is an invasion of privacy. There is an argument to be made that the statute provides for no exceptions, but the problem is that there are some cases in which due process requires a review of the records. As a general matter, given the fact that a victim will testify at trial, compared to that, the invasion of privacy with respect to a review of the records seems minor.

Regarding Mr. Richter's second point, Judge Delker stated that the language he used in his proposal was designed to codify what the New Hampshire courts are doing now. He notes that the reason for the *in camera* review is that the due process clause trumps a statute that otherwise has no exceptions. What this means is that this needs to be decided on a case-by-case basis. Judge Delker stated that the language he used in his proposal intends to capture language used in the existing case law, but perhaps the "essential and reasonably necessary" standard should be replaced with a standard that allows for review "only to the extent necessary to satisfy the defendant's due process rights."

Senator Feltes noted that *Davis* and *Ritchie* are open to interpretation, so further discussion of this may not be beneficial. He proposed asking Attorney Warecki to draft a proposal and ask for the public defender to comment on it, and then have a debate.

Attorney Gill noted that there does not appear to be any consensus about how to proceed. He inquired what the impetus is for codifying the rule. Is it a rule to improve the process? It seems to him that the part of *Gagne* that articulates the "essential and reasonably necessary" standard is the most important part of this. It is clear: (1) that the defendant is entitled to see these records in some circumstances, for due process reasons, there is no way around this; and (2) the victim is going to feel traumatized. So the question is, how do we devise a process to minimize the damage? Is the rule designed to help the bench deal with these issues?

Judge Delker noted that there is difficulty in appealing these issues. They often come up "late in the day."

Attorney Gill inquired whether the defendant needs to be more specific and to meaningfully articulate what it is he or she is looking for. For example, "I want to see these records because I believe X, Y, and Z is in there." Justice Lynn stated that this is what *Gagne* says.

Attorney Herrick noted that the Delker proposal set forth in the public hearing notice at appendix G reflects an effort to create the mechanics for *in camera* review, as established by case law. She wonders whether the Committee should be doing this at all, or whether these issues are best sorted out in live cases. Listening to the discussion, which seems an effort to balance a defendant's due process rights against a victim's right to privacy, has caused her to question whether a rule is the right mechanism for this.

Judge Delker noted that he does not feel he needs a rule on this issue. He looks to case law to see whether there is a trigger. He drafted (G) to hew as closely as possible to the existing case law. But perhaps it is possible that we do not need a rule.

Justice Lynn stated that this issue came before the Court because of a case. In an appeal, the public defender argued that we should adopt a different mechanism in which counsel should be involved, and records disclosed, at an earlier stage. The Court did not reach the issue but there was a discussion at the Court about referring the issue to the Rules Committee for consideration of whether counsel should be involved more actively.

Mr. Stewart understands what Judge Delker is saying – but notes that not all judges seem to be doing this the way Judge Delker is, so it may make sense to continue to work on this to try to come up with a proposed rule.

Justice Lynn asked whether the Committee believes that it makes sense to ask attorney Warecki to submit some alternative proposed language, and for the Committee to consider it at the June meeting.

Attorney Lick stated that he agrees with attorney Herrick about this. He does not practice in this area. However, as he understands it, the initial impetus for this rule was to address the question of whether counsel should be involved. The Committee is now considering two versions, one of which does not include involvement by counsel. He sees the benefit of adding language to the proposed rule to specifically allow the filing of memoranda, but is not sure that it is necessary to do this by rule, and wonders whether this could be done with a tweak at the administrative level.

Judge Delker noted that the Lynn/Johnson proposal, involving counsel, would overrule *MacDonald*, and he wonders whether the Committee has the authority to do this. It seems to him that the rule has to be premised on due process because New Hampshire has a statute that says certain information is privileged, no exceptions, except where constitutionally required.

Senator Feltes noted that the Constitution, state statutes and court rules are all implicated here. Perhaps it is best to do nothing.

In response to an inquiry, Judge Delker stated that the New Hampshire Supreme Court has never said disclosure is limited to *Ritchie*, *i.e.*, "the victim said it never happened." He distilled this from the case law.

In response to an inquiry, attorney Warecki stated that she would prefer a clear standard set out in the rule. She suggested that it might be possible to simply remove (a)(1) from the rule, and begin the rule with (2).

It was agreed that attorney Warecki would draft a proposal and that the Committee would consider the new language at its meeting in June.

(b) 2016-013. Superior Court Rule 12(g). Motions for Summary Judgment.

Justice Lynn reminded the Committee that it had requested comment on a proposal to delete Superior Court Rule 12(g) and replace it with a rule that would require both sides in the context of a motion for summary judgment to submit a single document identifying any undisputed facts and any facts.

Upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed amendment. Attorney Gordon voted against the recommendation. Ms. Spalding abstained from voting, because she is new to the Committee and was not present at the public hearing in December.

(c) 2017-011. New Hampshire Rule of Evidence 404(b).

Justice Lynn reminded the Committee that it had put out for public hearing in December a proposed amendment to New Hampshire Rule of Evidence 404 ("Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes"). The proposed amendment would codify the three part test adopted by the New Hampshire Supreme Court for admitting evidence under Rule 404(b), but would change the second prong of the test.

Justice Lynn stated that at issue is what the "clear proof" language in the current rule means, or doesn't mean. Justice Lynn had always understood that "clear proof" is already covered in Rule of Evidence 103(b)(4) regarding conditional admissibility, and that this was just made explicit in Rule 404(b). Judge Delker stated that he agrees, but notes that some trial judges do not see it this way. They require clear and convincing evidence, or at least some threshold determination regarding credibility.

Attorney Gordon noted that the proposal would change the standard because it would move the determination of sufficient evidence to the judge – that is, "could a factfinder find."

Justice Lynn noted that in a case several years ago, the State had argued that an indictment satisfied the "clear proof" prong, but the Supreme Court disagreed. In response to a question from attorney Gordon, Justice Lynn stated that under the proposed new rule, an indictment would not be sufficient to satisfy the second prong.

Justice Delker noted that in *State v. Michaud*, 135 N.H. 723 (1992), the Court held that because the State had not established that the defendant, and not some other person, had committed the prior act, the trial court had erred in finding "clear proof." While there was clear proof that the prior act had occurred, there was insufficient proof that the

defendant committed it. Justice Lynn explained that "clear proof" means that there is clear proof: (1) that the prior act happened; and (2) that the defendant committed the prior act. Judge Delker explained under the current rule, the judge is required to make this determination.

Judge Delker noted that the clear proof prong came out of whole cloth under the common law and was crafted into the rule. The proposed amendment to Rule 404(b) codifies the U.S. Supreme Court's holding in *Huddleston.*

There was some discussion about whether the language of the proposed rule should be amended to make explicit that the amendment doesn't change the clear proof requirement, but, rather, further defines what it means. Judge Delker proposed amending proposed 404(b)(2) as follows (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~):

(b)(2) Evidence of other crimes, wrongs or acts is admissible under this subsection only if:

(A) it is relevant for a purpose other than proving the person's character or disposition;

(B) there is **[clear proof, meaning that there is]** sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them; and

(C) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Upon motion made and seconded the Committee voted to amend the proposal and to recommend that the Court adopt the proposed rule change, as amended.

(d) 2016-006. Motions to Seal.

Judge Delker reminded the Committee that he had submitted, on behalf of the subcommittee he chaired, a series of proposed rules regarding motions to seal in a November 2, 2017 memorandum to the Committee.

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

(e) 2016-009. Rule of Professional Conduct 8.4. Harassment and Discrimination

Justice Lynn reminded the Committee that the Committee has before it several proposals to add a new subsection (g) to Professional Conduct Rule 8.4. The New Hampshire Bar Association Ethics Committee proposes (as set forth in attachment B of its February 23, 2018 memo) that new subsection (g) make it professional misconduct for a lawyer to:

> (g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation or marital status. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

Justice Lynn explained that two additional proposals would recommend the adoption of this provision, but would amend it slightly. Attorney Gordon set forth, in a February 12, 2018 memo to the Committee, a proposal to add the language "against a client" following "harassment or discrimination." Justice Lynn set forth, in a March 6, 2018 memo to the Committee, a proposal to add the language, "as defined by substantive state or federal law" following "harassment or discrimination."

Justice Lynn stated that he believed that the Committee would vote to put at least one of these proposals out for public hearing in June, and noted that Attorney Peter Imse, a member of the New Hampshire Bar Association Ethics Committee, was present at the meeting to answer any questions the Committee might have about the proposals. Attorney Imse explained that he and Maureen Smith (also present at the meeting) encourage the Committee to put the proposal recommended by the Ethics Committee out for public hearing in June.

Justice Lynn explained that he had proposed adding the language "as defined by substantive state or federal law" following "harassment or discrimination" in the rule itself to make it clear that misconduct under the rule does not encompass behavior that would not otherwise be actionable under state or federal law. Attorney Gordon stated that he has some concerns about this amendment because it might be read to exempt small employers. Attorney Delker noted that the comment as currently drafted makes clear that the rule still applies to small firms. Justice Lynn stated that he would be inclined to delete the language in the comment which reads, "statutory or regulatory exemptions based upon the number of personnel in a law office, for example, shall not relieve a lawyer of the requirement to comply with this rule." He believes that because the legislature has exempted small employers for policy reasons, small employers should be exempt from this as well.

Senator Feltes noted that attorneys are a self-regulated profession. There are many rules of professional conduct which address policy issues. Therefore, he does not believe that this is an issue that needs to go through the legislature.

Attorney Imse noted that it is this carve out of the small employer that forms the basis for this rule. He believes that regardless of a firm's size, this behavior should be treated the same way.

Attorney Delker inquired what "as defined by substantive law" in Justice Lynn's proposal means. He has concerns that this would mean that the rule would not apply to, for example, behavior toward opposing counsel, court clerks, etc. (*e.g.*, sexist comments). He believes that this would be problematic.

Following some further discussion of the issues, and upon motion made by Justice Lynn and seconded by attorney Curran, the Committee voted to put out for public hearing: (1) the proposal made by the Ethics Committee; (2) the proposal made by Attorney Gordon; and (3) the proposal made by Justice Lynn. It was agreed that the Notice will state that the Committee will consider these three proposals, as well as any other language suggested at the public hearing.

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

It was agreed that no action would be taken on this item.

(g) 2017-007. Supreme Court Rule 41. Limited Liability Entities.

Justice Lynn reminded the Committee that the Court had asked the Committee to consider whether Supreme Court Rule 41 continues to serve the purpose for which it was adopted. The Committee asked the New Hampshire Bar Association Ethics Committee to consider whether Supreme Court Rule 41 should be deleted. In a letter dated February 27, 2018, the Ethics Committee stated that it had reviewed the rule and, for the reasons articulated in the letter, has concluded that "it serves no useful purpose and should be deleted."

Attorney Gordon noted that the reason the Ethics Committee has recommended deletion of the rule is that it appears to be superfluous.

Following some brief discussion and upon motion made by Justice Lynn and seconded by Senator Feltes, the Committee voted to put the proposal to delete the rule out for public hearing in June.

(h) 2017-009. Supreme Court Rules. Identification of Crime Victims.

Attorney Gill reminded the Committee that a June 8, 2017 memo from Supreme Court Clerk Eileen Fox asked the Committee to consider whether it would be appropriate to have a rule requiring that briefs or other documents identify crime victims by initials or with generic descriptive terms. As is noted in the memo, a New Hampshire Statute, RSA 21-M:8-k, Rights of Crime Victims, provides that crime victims have a right "to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." At the September meeting, the Committee asked Attorney Gill to draft a proposed rule for the Committee's consideration. The proposed rule is set forth in a December 5, 2017 email from attorney Gill.

One Committee member suggested that the rule should be extended to children in family law cases. Another Committee member suggested that it should apply in juvenile cases. Concern was expressed about the fact that using initials in lieu of names would make it difficult to conduct electronic searches. Mr. Stewart expressed the view that technology should not hold the Committee back from doing what is right.

Following some discussion of the issue, the Committee concluded that it would be difficult to draft a single rule to be applicable in many different kinds of cases. Therefore, upon motion made and seconded, the Committee voted to put out for public hearing only attorney Gill's proposed Supreme Court rule.

(i) 2017-010. New Hampshire Rules of Criminal Procedure (Felonies First Counties).

Justice Lynn reminded the Committee that the Court had referred to the Committee rules that had been adopted on a temporary basis for the Committee's recommendation regarding whether they should be adopted on a permanent basis.

Following some brief discussion about whether these should be put out for public hearing in December, the Committee agreed to take no action but to keep this item on the agenda.

(j) 2017-013. Super. Ct. (Civ.) Rule 36(d)(5).

Judge Delker reminded the Committee that he had submitted a proposal, dated March 8, 2018, to amend New Hampshire Rule of Civil Procedure 36. His proposal is designed to clearly establish when a party

is required to notify the opposing party that he or she intends to subpoena the opposing party's lawyer as a witness.

Following some discussion, it was generally agreed that the language, "Except for good cause shown" should be inserted before "Such notice shall be provided . . . ." in the proposal.

Upon motion made and seconded, the Committee voted to put the proposal set forth in the March 8, 2018 memo, as amended, out for public hearing in June.

(k) 2017-016. Supreme Court Rules 38 and 40.

Justice Lynn directed the Committee's attention to the October 16, 2017 letter from the Judicial Conduct Committee. The letter asks the Committee to consider what the prevailing opinion is regarding the application and reach of Supreme Court Rule 40(2), defining the term "judge," and the application section of Supreme Court Rule 38 as to Court staff beyond clerks, deputy clerks, court stenographers, monitors, and reporters.

Justice Lynn stated that the Court reviewed the letter and the Court's view is that the current definition of judge is too broad. The Court believes that only the decision maker should be subject to the Code of Judicial Conduct. The others currently listed in the rule are managed by the Court. He explained that the reason we have the Judicial Conduct Committee is because of lifetime appointments. If a judge does something wrong, then there must be a way to address that because the Court cannot simply say, "you're fired." The others currently listed under the rule present a different issue. If they do something wrong, the Court can fire them.

Attorney Gordon stated that this makes sense to him. The JCC exists because we need to be able to deal with judges who act inappropriately, whereas clerks, etc. can be dealt with in the employment context.

Attorney Albee inquired how to address the issue about when lawyer clerks make decisions. Some discussion ensued about this issue, and also about how to address the issue of marital masters.

Following some discussion, it was decided that the rule should be amended as follows (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~):

Judge – this term includes: **[a full or part-time judicial officer appointed by the Governor and Council.]** ~~(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; (4) a court stenographer, monitor or reporter, a clerk of court or deputy clerk, including a register of probate or deputy register, and any person performing the duties of a clerk or register. 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 apples to a judge to the extent provided in Supreme Court Rule 38.~~

Members of the Committee directed Carolyn Koegler to forward the proposed rule amendment to JCC Executive Secretary Attorney Robert Mittelholzer and to ask the Judicial Conduct Committee to comment on the proposed amendment.

(l) 2017-017. Superior Court (Civ.) Rules. Appeal from Municipal Actions.

The Committee next considered a proposal to adopt Rule of Civil Procedure 55, as set forth in a November 6, 2017 email from Judge Delker. Judge Delker explained that Judge Shulman had asked him to submit the proposal to add a rule regarding appeals from municipal actions to the Committee for consideration. The rule would require a party who relies on a hearing from a state or municipal government body to provide the hearing transcript.

Following some discussion of the issue, the Committee agreed that the following changes should be made to the proposal (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~):

Proposed Rule of Civil Procedure 55: Appeal from Municipal Actions

In all appeals to the superior court from the action of a state or municipal government body, including but not limited to appeals from the decision of a planning board, zoning board of adjustment, local land use commission, or any other local legislative body, ~~no~~ **[a]** party may submit an audio or video recording of the proceedings below ~~unless~~ **[provided]** that recording is also accompanied by ~~a~~ **[the relevant portion of the]** transcript of the proceedings. The party relying on the recording has the responsibl~~e~~**[ity]** for providing the court with a transcript.

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

Attorney Lick inquired whether, if the recording is part of the record, the transcript should be required.

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

Justice Lynn referred Committee members to a November 22, 2017 letter from the New Hampshire Judicial Branch's Administrative Council. In the letter, the Administrative Council asks the Committee to review New Hampshire Supreme Court Rule 37 to determine "whether a procedure should be specifically outlined for when, and in what manner, the Attorney Discipline Office may access confidential court files." The Administrative Council also asks the Committee to consider adopting a rule detailing the confidential manner in which such records are to be maintained throughout the entire process.

Justice Lynn stated that he believes that both the PCC and the JCC should be required to request access to the records from a judge. In other words, he does not believe that if there is to be a rule, that the rule should be that the PCC and the JCC have access to whatever confidential records they wish to see. If, in the course of conducting an investigation, the Attorney Discipline Office or the Judicial Conduct Committee wish to access confidential records, they must file a motion, along with a proposed protective order, with the court that is the custodian of those records.

Justice Lynn asked Carolyn Koegler to draft a proposed rule to address the issues raised in the November 22 letter, along the lines Justice Lynn has suggested.

3. NEW SUBMISSIONS

(a) 2018-001. Circuit Court – Family Division Rule 2.29. Effective Dates.

Justice Lynn reminded the Committee that in a February 8, 2018 email attorney Gordon had raised a concern about what impact the Court's recent decision in *In re Eckroate-Breagy* might have on Family Division Rule 2.29.

Justice Lynn stated that he had reviewed the issue, and that he does not believe the rule is inconsistent with the recent decision. Attorney Gordon agreed that he does not believe there is a problem. The Committee agreed that no action should be taken on this.

(b) 2018-002. Rule of Prof. Cond. 1.15. Safekeeping Property.

The Committee next considered the February 14, 2018 letter from Christopher Keating, Director of the Administrative Office of the Courts. The New Hampshire Bar Foundation, in cooperation with the Supreme Court Attorney Discipline Office, has submitted a proposed amendment to Rule of Professional Conduct 1.15. The goal of the proposed amendment is to provide guidance and authority for lawyers in circumstances when they encounter unclaimed or unidentified funds in Client Trust Accounts.

Judge Delker inquired whether the proposed amendment violates New Hampshire statutes relating to lost or abandoned property.

Following some discussion, the Committee directed Carolyn Koegler to send the proposal to the Attorney General's Office and request comment on it.

4. REMAINING 2018 MEETING DATES

- June 1
- September 7
- December 7

The meeting adjourned at 3:55pm.