

NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

PUBLIC HEARING NOTICE

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 12:30 p.m. on Friday, December 4, 2015, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before December 3, 2015 or may be submitted at the hearing on December 4, 2015. Comments may be e-mailed to the Committee on or before December 3, 2015, at:

rulescomment@courts.state.nh.us

Comments may also be mailed or delivered to the Committee at the following address:

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Any suggestions for rules changes other than those set forth below may be submitted in writing to the secretary of the Committee for consideration by the Committee in the future.

Copies of the specific changes being considered by the Committee are available on request to the secretary of the Committee at the N.H. Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301

(Telephone 271-2646). In addition, the changes being considered are available on the Internet (in the Appendix to the Public Hearing Notice) at:

<http://www.courts.state.nh.us/committees/adviscommrules/notices.htm>

The changes being considered concern the following rules:

I. Interlocutory Appeals

(One proposed amendment would adopt a Superior Court rule, similar to Federal Rule of Civil Procedure 54(b), which would allow a court to direct that an order or portion of an order that finally resolves the case as to one or more, but fewer than all, the claims or parties be treated as a final decision on the merits, if the court expressly determines that there is no just reason for delay. A related proposed amendment would amend the Supreme Court rules to provide that an appeal from such a decision is a mandatory appeal).

1. Amend Supreme Court Rule 3, Definitions, as set forth in Appendix A.
2. Amend Rule 46 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions, as set forth in Appendix B.

II. Circuit Court – Family Division Rule 2.29. Effective Dates of Decrees in Domestic Cases

(This proposed amendment to Circuit Court – Family Division Rule 2.29 would clarify when decrees become effective in family division cases.)

1. Amend Circuit Court – Family Division Rule 2.29, as set forth in Appendix C.

III. Rule of Professional Conduct 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(This proposed amendment to New Hampshire Rule of Professional Conduct 5.5 would clarify that a lawyer who is licensed in another jurisdiction but does not practice New Hampshire law does not need to obtain a New Hampshire license to practice law solely because the lawyer is present in New Hampshire. The amendments to the Ethics Committee comments to Rule 5.5 are also set forth here. The Advisory Committee on Rules will accept comment on the proposed amendments to the New Hampshire Rule. The Advisory Committee on Rules does not recommend for adoption or amendment, and the Supreme Court does not adopt or amend the Ethics Committee Comments. Therefore, the

Advisory Committee on Rules will not accept comment on the amendment to the Ethics Committee comment, which is provided below solely to help provide context to the proposed amendments to the rule. Input on the Ethics Committee Comments should be directed to the Ethics Committee.)

1. Amend New Hampshire Rule of Professional Conduct 5.5, as set forth in Appendix D.

New Hampshire Supreme Court
Advisory Committee on Rules

By: Robert J. Lynn, Chairperson
and Carolyn A. Koegler, Secretary

October 26, 2015

APPENDIX A

Amend Supreme Court Rule 3 (“Mandatory Appeal”) (new material is in

[bold and in brackets]) as follows:

"Mandatory appeal": A mandatory appeal shall be accepted by the supreme court for review on the merits. A mandatory appeal is an appeal filed by the State pursuant to RSA 606:10, or an appeal from a final decision on the merits issued by a superior court, district court, probate court, or family division court, **[including an appeal from an order issued pursuant to superior court rule 46(b),]** that is in compliance with these rules. Provided, however, that the following appeals are NOT mandatory appeals:

(1) an appeal from a final decision on the merits issued in a post-conviction review proceeding (including petitions for writ of habeas corpus and motions for new trial);

(2) an appeal from a final decision on the merits issued in a collateral challenge to any conviction or sentence;

(3) an appeal from a final decision on the merits issued in a sentence modification or suspension proceeding;

(4) an appeal from a final decision on the merits issued in an imposition of sentence proceeding;

(5) an appeal from a final decision on the merits issued in a parole revocation proceeding;

(6) an appeal from a final decision on the merits issued in a probation revocation proceeding.;

(7) an appeal from a final decision on the merits issued in a landlord/tenant action filed under RSA chapter 540 or in a possessory action filed under RSA chapter 540; and

(8) an appeal from an order denying a motion to intervene; and

(9) an appeal from a final decision on the merits, other than the first final order, issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A).

Comment

A trial court order denying a motion by a non-party to intervene in a trial court proceeding is treated as a "final decision on the merits" for purposes of appeal. Thus, such an order is immediately appealable to the supreme court. Pursuant to this rule, however, such an appeal is not a mandatory appeal. Therefore, a non-party who wishes to appeal the trial court's denial of the non-party's motion to intervene must file an appeal pursuant to Rule 7(1)(B) within the time allowed for appeal under that rule.

Under paragraph (9), only appeals from first final orders in domestic relations matters filed under RSA Title XLIII are mandatory appeals. The April 4, 2014 amendment to paragraph (9) changes the language of the prior rule which provided that only appeals from final divorce decrees or decrees of legal separation were mandatory appeals. The change addresses the claim, identified in *In the Matter of Miller & Todd*, 161 N.H. 630 (2011), that providing for mandatory review of appeals involving married parents but discretionary review of appeals involving non-married parents raises constitutional concerns.

APPENDIX B

Amend Rule 46 of the Rules of the Superior Court of the State of new Hampshire Applicable in Civil Actions (new material is in **[bold and in brackets]**, deleted material is in ~~strikethrough~~ format) as follows:

Rule 46. Appeals and Transfers to Supreme Court

(a) **[Interlocutory Appeals.]** Whenever any question of law is to be transferred by interlocutory appeal from a ruling or by interlocutory transfer without ruling, counsel shall seasonably prepare and file with the trial court the interlocutory appeal statement or interlocutory transfer statement pursuant to Supreme Court Rule 8 or Supreme Court Rule 9, and after the court has signed the statement, counsel shall mail the number of copies provided for by the rules of the Supreme Court to the clerk thereof.

[(b) Judgment on Multiple Claims or Involving Multiple Parties.]

(1) When, in a civil action that presents more than one claim for relief – whether as a claim, counterclaim, cross-claim, or third party claim – or where multiple parties are involved, the court enters an order that finally resolves the case as to one or more, but fewer than all, the claims or parties, the court may direct that its order, or a portion of its order, be treated as a final decision on the merits as to those claims or parties if the court:

- (A) explicitly refers to this rule;**
 - (B) identifies the specific order or part thereof that is to be treated as a final decision on the merits;**
 - (C) articulates the reasons and factors warranting such treatment;**
- and**
- (D) finds that there is an absence of any just reason for delay as to the party or claim that is to be severed from the remainder of the case.**

(2) Any appeal from such an order shall be considered a mandatory appeal for purposes of Supreme Court Rule 7, and shall be taken in accordance with subsection (c).

~~(b)~~ **[(c) Final Judgment.]** In all actions in which a verdict or decree is entered, or in which a motion for a nonsuit or directed verdict is granted, or in which any motion is acted upon after verdict or decree, all appeals relating to the action shall be deemed waived and final judgment shall be entered as follows, unless the court has otherwise ordered, or unless a Notice of Appeal has then been filed with the Supreme Court pursuant to its Rule 7:

(1) Where no motion, or an untimely filed motion, has been filed after verdict or decree, on the 31st day from the date on the court's written notice that the court has made the aforementioned entry, grant or dismissal; or

(2) Where a timely filed motion has been filed after verdict or decree, on the 31st day from the date on the court's written notice that the court has taken action on the motion.

~~(e)~~ **[(d)]** The court shall not grant any requests for extensions of time to file an appeal document in the Supreme Court or requests for late entry of an appeal document in the Supreme Court; such requests shall be filed with the Supreme Court. See Supreme Court Rule 21(6).

~~(d)~~ **[(e)]** In civil actions in which a mistrial is declared, appeals from the denial of motions for nonsuit or directed verdict shall not be transferred to the Supreme Court before verdict following further trial unless the court shall approve an interlocutory appeal pursuant to Supreme Court Rule 8.

~~(e)~~ **[(f)]** The procedure for preparation of a transcript for cases appealed or transferred to the Supreme Court is governed by Supreme Court Rule 15.

[Comment

Rule 46(b) alters the rule announced in *Germain v. Germain*, 137 N.H. 83, 85 (1993) that “when a trial court issues an order that does not conclude the proceedings before it, for example, by deciding some but not all issues in the proceedings or by entering judgment with respect to some but not all parties to the action, we consider any appeal from such an order to be interlocutory.”]

APPENDIX C

Amend Circuit Court-Family Division Rule 2.29 (new material is in **and in brackets]**, deleted material is in ~~strikethrough~~ format) as follows:

2.29 Effective Dates:

A. *Uncontested Matters.* Decrees in uncontested cases where the parties have filed a permanent agreement shall become final **[effective]** on the date signed by the judge pursuant to RSA 490-D:9, unless otherwise specified by the Court.

B. *Contested and Defaulted Matters.* In contested cases or upon the default of either party[, **the following rules apply.**

1. The following orders are effective upon the announcement of the decision by the court either orally or by the clerk's notice of decision, whichever occurs first, unless the court specifies another effective date:] ~~where no post-decree motion has been filed, the decree will not become final until the thirty first (31st) day from the date of the Clerk's notice of decision. If a timely appeal is filed, the decree will not become final until the expiration of the appeal period pursuant to Supreme Court Rule 7. If a timely post-decree motion is filed, and there is no appeal taken, the decree becomes final thirty (30) days from the Court's action on the post-decree motion.~~

- a. **Temporary orders;**
- b. **Parenting plans;**
- c. **Uniform support orders;**
- d. **Orders for alimony or on-going support; and**
- e. **Provisions concerning the welfare of a child or the safety of a party, at the discretion of the court.**

2. All orders other than those described in subsection 1 are effective on the 31st day from the date of the clerk's notice of decision unless the order specifies another effective date, a party files a timely post-decision motion (see Supreme Court Rule 7(1)(c)), or a party files an appeal.

3. If any party files a timely post-decision motion, but no appeal is filed, all orders other than those described in subsection 1 are effective on the 31st day from the date of the clerk's notice of decision on the motion or another date at the discretion of the court.

4. If any party files an appeal, all orders described in subsection 1 shall continue in effect until the supreme court mandate or the conclusion of such further proceedings as the supreme court may order. During this period, no orders as to marital or parental status or as to property division shall take effect.]

C. *Inactive Cases.* All domestic relations cases which have been placed on hold by request of the parties shall be dismissed after six (6) months unless there is a request by a party to reactivate the case, or a request for a further extension for good cause.

D. Once a decree becomes ~~final~~ **[effective]**, any further request for relief must be by petition, accompanied by a filing fee and a personal data sheet, with notice given to the other party, as set forth in Family Division Rule 2.4. Prior to a decree becoming ~~final~~ **[effective]**, no filing fee is required, and notice may be provided by regular US mail.

APPENDIX D

Amend New Hampshire Rule of Professional Conduct 5.5 (new material is in **[bold and in brackets]**, deleted material is in ~~striketrough~~ format) as follows:

LAW FIRMS AND ASSOCIATIONS

Rule 5.5: Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of **[the] law [of this jurisdiction]**; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice **[the] law [of]** ~~in~~ this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction; or

(3) relate solely to the law of a jurisdiction in which the lawyer is admitted.]

Ethics Committee Comment

1. New Hampshire has adopted ABA Model Rule 5.5.

2. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult Supreme Court Rule 60, which governs the provision of legal services following determination of major disaster.

[3. Prior versions of Rule 5.5 and prior interpretations of the Rule assumed that attorneys practice in fixed physical offices and only deal with legal issues related to the States in which their offices are located. The increased mobility of attorneys, and, in particular, the ability of attorneys to continue to communicate with and represent their clients from anywhere in the world, are circumstances that were never contemplated by the Rule. The adoption of Rules 5.5(b) and (c) in 2008 reflected the State's growing recognition that multi-jurisdictional practice is a modern reality that must be accommodated by the Rules.

The assumption that a lawyer must be licensed in New Hampshire simply because he or she happens to be present in New Hampshire no longer makes sense in all instances. Rather than focusing on where a lawyer is physically located, New Hampshire's modifications of Rule 5.5(b)(1) and (2) and adoption of new Rule 5.5(d)(3) clarify that a lawyer who is licensed in another jurisdiction but does not practice New

Hampshire law need not obtain a New Hampshire license to practice law solely because the lawyer is present in New Hampshire.

Notwithstanding the New Hampshire amendments to Rule 5.5(b)(1) and (2) and the adoption of new Rule 5.5(d)(3), Rule 8.5(a) still provides that a lawyer who is admitted in another jurisdiction, but not in New Hampshire, “is also subject to the disciplinary authority of ... [New Hampshire] if the lawyer provides or offers to provide any legal services in” New Hampshire. In particular, such a lawyer will be subject to the provisions of Rules 7.1 through 7.5 regarding the disclosure of the jurisdictional limitations of the lawyer’s practice. In addition, Rule 5.5(b)(2) continues to prohibit such a lawyer from holding out to the public or otherwise representing that the lawyer is admitted to practice New Hampshire law.]