

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of September 6, 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 Justice Donovan, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Hon. R. Laurence Cullen, Sean Gill, Esq., Hon. Michael Garner, Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek Lick, Esq. (arriving late), Ari Richter, Patrick W. Ryan, Esq., Janet Spalding, CPA, Charles P.E. Stewart, and Hon. Patrick Donovan.

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

1. Approval of Minutes of June 14, 2019 Meeting

Upon motion made and seconded, the Committee approved the June 14, 2019 minutes. Attorney Gill abstained from voting because he was not present at the June 14 meeting.

2. Items Still Pending Before the Committee

(a) 2019-006. New Hampshire Rule of Criminal Procedure 12.

Justice Donovan noted that the Committee had voted in June to put this suggestion out for public hearing in December.

(b) 2019-007. New Hampshire Rule of Criminal Procedure 8.

Justice Donovan noted that the Committee had voted in June to put this suggestion out for public hearing in December.

(c) 2019-008. Rules Relating to the Administration of Animal Cruelty Cases.

Justice Donovan reported that he had written to attorney Patricia Morris, the Chair of the Governor's Commission on the Humane Treatment of Animals. He explained that he invited the Commission to submit proposed rules for the Committee's consideration if they have specific ways the rules could be amended to address the Commission's concerns. To date he has received no response to the letter.

Attorney Ryan stated that it is his understanding that House Bill 459, signed by the Governor on July 30, 2019, makes changes to the Animal Cruelty statute, RSA 6:44:8, that may require amendments to court rules. Among other things, the amendments provide that in cases in which animals have been confiscated by an arresting officer or his or her agency, a status conference shall be held within 14 days of the confiscation.

Justice Donovan thanked attorney Ryan for bringing this matter to the Committee's attention. Following some brief discussion, it was agreed that attorney Ryan would chair a subcommittee to review the legislation, determine whether any changes to court rules would be necessary, and draft any suggested amendments to court rules.

3. New Submissions.

(a) 2019-010. Supreme Court Rule 37A. Electronic Filing of Grievances.

Justice Donovan referred Committee members to the August 8, 2019 memo from Carolyn Koegler. He reminded Committee members that the Attorney Discipline Office is in the process of developing a system to allow grievances against attorneys to be filed electronically, and that the suggested amendments to Supreme Court Rule 37A are designed to facilitate the filing of grievances electronically. Justice Donovan inquired whether the Committee would like to put the suggested amendments out for public hearing in December.

Upon motion made and seconded, the Committee voted to put out for public hearing the suggested amendments to Supreme Court Rule 37A set forth in the August 8, 2019 memo.

(b) 2019-011. Supreme Court Rule 55. Public Protection Fund.

Justice Donovan referred Committee members to the August 21, 2019 memo. He reminded Committee members that the Attorney Discipline Office has suggested that Supreme Court Rule 55 be amended to allow claims to be made against the Fund when a lawyer has resigned while under investigation. He noted that the Attorney Discipline Office had written to the Chair of the Public Protection Fund in August 2015, but that no suggestion to amend the rule had been made at that time. Justice Donovan inquired whether the Committee would like to put the suggested amendments out for public hearing in December.

Upon motion made and seconded, the Committee voted to put out for public hearing the suggested amendments to Supreme Court Rule 55 set forth in the August 21, 2019 memo.

(c) 2019-012. Circuit Court - Family Division Rules.

Justice Donovan asked that Carolyn Koegler distribute copies of a September 5, 2019 letter from attorney Jay Markell asking the Committee to consider two suggestions to amend the Circuit Court-Family Division Rules.

The first suggestion is to amend Family Division Rule 1.25(A) (“Discovery”) as follows (additions are in **bold**):

A. General. Unless specified in another section of these rules, these discovery rules apply in all family division case types. The Court, in its discretion, may limit or expand the scope of discovery in any case as justice requires. **When considering limiting or expanding discovery, the Court may consider the following: (1) whether the discovery is proportional to the needs of the case considering the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties’ relative access to the information; (4) the parties resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense outweighs its likely benefit.**

Judge Garner inquired whether it is really necessary to add this language to the rule. He noted that the Family Division is already addressing the issue of limiting discovery in cases. Attorney Gordon expressed concern about the suggestion. He noted that he receives a lot of comments on the mandatory initial disclosure rule set forth in Family Division Rule 1.25-A. Most of the comments relate to a concern expressed by attorneys that Rule 1.25-A is not being properly or stringently enforced. This rule suggestion seems to go in the opposite direction.

Attorney Lick noted that Superior Court Rule 25, relating to Discovery of Electronically Stored Information (ESI), includes a proportionality component. That is, the rule provides that requests for ESI are to be made in proportion to the significance of the issues in dispute. Following some brief discussion, it was agreed that the proportionality rule is appropriate in the electronic discovery context. With electronic discovery, it can often be hard to find materials that may be responsive. The rule is really designed to address electronic discovery issues that arise in the corporate environment. Much of the case law relating to the analogous federal rule relates to this issue.

It was noted that existing Circuit Court-Family Division Rule 1.25 is the same as the Superior Court Civil Rule.

Following some discussion, it was agreed that: (1) attorney Gordon would consult with family law practitioners via the list service and inquire whether existing Rule 1.25(A) is a concern as it has been applied; and (2) attorney

Herrick would raise this issue at the next meeting of the Committee on Cooperation with the Courts. Judge Garner noted that it would be important to inquire whether practitioners believe that different judges are applying the existing rule differently. It was agreed that attorneys Herrick and Gordon would report back to the Committee in December, and the Committee would discuss the issue again.

The second suggestion made in attorney Markell's September 5 letter is to amend existing Family Division Rule 1.26 ("Motions") to add a provision (G) to permit the filing of information motions. It was noted in the letter that information motions are used in the First Circuit.

Committee members noted that even though there is no Family Division rule specifically permitting parties to file information motions, parties do so. It was also noted that a "motion" is a request asking a judge to issue a ruling or order on a legal matter, and filings that simply provide information to the Court do not request that the Court take any action. Following some brief discussion, it was agreed that the Committee would not suggest that the Court adopt a rule regarding information motions.

(d) 2019-013. Rule of Professional Conduct 8.4(g)

Justice Donovan asked Carolyn Koegler to distribute copies of a July 15, 2019 order of the Court adopting an amendment to Rule of Professional Conduct 8.4(g). Justice Donovan reminded Committee members that the Court had adopted a rule amendment, but that the Court had directed the Committee to undertake a review of the rule after the rule has been in effect for two years, and that the Committee provide the Court with its recommendations, if any, upon completing that review.

Following some brief discussion, the Committee agreed that this item should be placed on the agenda for the September 2021 Advisory Committee on Rules meeting.

4. Meeting Dates

The Committee meets next on Friday, December 6 at 12:30. The Committee agreed to meet on the following dates in 2020, at 12:30pm:

- Friday, March 6
- Friday, May 29
- Friday, September 11
- Friday, December 4

The meeting adjourned at 1:20 pm.