New Hampshire Supreme Court Advisory Committee on Rules
Minutes of Public Meeting of September 7, 2018

Supreme Court Courtroom
Frank Rowe Kenison Supreme Court Building
One Charles Doe Drive
Concord, NH 03301

The meeting was called to order at 12:30 p.m. by Justice Patrick E. Donovan, Committee Chair. The following Committee members were present: Hon. Paul S. Berch, John A. Curran, Esq., Hon. N. William Delker, Hon. Daniel J. Feltes, Honorable Michael H. Garner, Sean P. Gill, Esq., Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Ari Richter, Janet L. Spalding, CPA, Charles P.E. Stewart, 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 the June 1, 2018 Public Hearing and June 8, 2018 Special Public Meeting.

Upon motion made and seconded, the Committee voted to approve the minutes from the June 1, 2018 public hearing and upon motion made and seconded, the Committee voted to approve the meeting minutes from the June 8, 2018 special public meeting.

2. Status of Items Pending Before the Committee

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

Justice Donovan reminded the Committee that it had created a subcommittee at the June meeting to work with members of the New Hampshire Bar Association Ethics Committee as well as members of the public who had expressed concern about the three proposals the Committee had put out for public hearing in June. The subcommittee was charged with drafting a compromise proposal to address the concerns.

Senator Feltes reported that he and attorney Herrick had met with the subcommittee three times over the course of the summer and had had extensive conversations about the concerns expressed about the proposals. He stated that the subcommittee included attorneys Gilles Bissonnette, Meredith Cook, Bob Dunn, Jim Shirley, Michael Tierney, Christine Ferrari, and three members of the New Hampshire Bar Association Ethics Committee who had worked on the original proposal – attorneys Smith, Goodwin and Imse.

Senator Feltes reminded the Committee that the proposal has a long history and that the public hearing showed that there are many different perspectives on the proposal. It was his goal to facilitate discussion about these different perspectives and to draft a compromise proposal. He reminded the Committee that he had submitted a compromise proposal to the Committee titled, the "Feltes-Herrick Subcommittee Proposed Rule 8.4(g)." He also submitted a number of comments from members of the working group reflecting that not all members of the working group support the proposal. He explained that during the meeting he would: (1) review the language of the proposal with the Committee; (2) summarize the different views of members of the subcommittee and the discussion about the issues; and (3) summarize his response to each issue.

He directed the Committee's attention to the Feltes-Herrick Subcommittee Proposed Rule 8.4(g), which reads:

> (g) engage in conduct while acting as a lawyer in any context that is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity; however, statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

Senator Feltes noted that:

- the language from the original proposal, "engage in conduct related to the practice of law" has been replaced with "engage in conduct while acting as a lawyer in any context." He noted that comment 4 of the original proposal reads, "see ABA Comment 4 related to the intended scope of the phrase, 'related to the practice of law.'" This language is not included in the Feltes-Herrick proposal. This is because he believes that the model comment is too specific.

- the Feltes-Herrick proposal includes gender identity as one of the protected classes because gender identity was recently added to the New Hampshire human rights statute.

- The Feltes-Herrick proposal makes clear in the rule itself that "statutory or regulatory exemptions, based upon the number of personnel in a law

firm, shall not relieve a lawyer of the requirement to comply with this Rule." This statement was included in footnote three of the comments following the proposals that were put out for public hearing in June.

- The last sentence of the Feltes-Herrick proposal ("This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.") was not included in any of the proposals put out for public hearing in June. It provides exceptions to the general rule set forth in the first sentence. This is intended to address concerns raised about the original proposals at the public hearing.

Senator Feltes stated that as is clear from the comments attached to the proposal he and attorney Herrick submitted, the subcommittee was unable to reach a broad consensus. He summarized the concerns expressed in the comments:

- Attorneys Meredith Cook and Bob Dunn stated that they could not support the proposal because it "fails to define discrimination and harassment."

- Attorney Bissonnette stated that the ACLU would not oppose the proposed language if there were language defining harassment or discrimination by reference to state or federal law. Attorney Bissonntte's comment suggests adding the words "under state or federal law" following "that is harassment and discrimination."

- The New Hampshire Women's Bar Association expressed concern that including the language, "under state or federal law" would be too limiting, and prefers "guided by state or federal law."

- Attorneys Shirley and Tierney do not support the Feltes-Herrick proposal, and attorney Tierney has submitted an alternate proposal.

Mr. Richter noted that both the NHWBA's proposal and the ACLU's proposal seem reasonable, and asked why Senator Feltes and attorney Herrick decided not to include either. He also suggested that the semicolon in the first sentence be replaced with a period, that "however" be deleted and that "statutory" start a second sentence.

It was noted that concern had been expressed about the removal of the language, "knows or reasonably should have known" from the proposal. Senator Feltes explained that there was a discussion in the group about the

fact that this may not be the actual standard. There was concern if the standard set forth in the rule were different from the standard set forth in state and federal law, that this would add confusion to the process.

In response to a question from attorney Gordon, Senator Feltes stated that the working group did not seek input from the Attorney Discipline Office ("ADO") about this proposal.

Justice Donovan reminded the Committee that according to Janet DeVito's testimony at the public hearing, the ADO does not support the adoption of a rule. Senator Feltes stated that this is true, and that the primary concerns expressed were that: (1) the rule would be difficult to enforce; and (2) enforcing the rule would require additional resources. He reported that Attorney Shirley had repeatedly raised the point that the ADO did not support the adoption of a rule throughout the working group's discussions. Ultimately, he and attorney Herrick concluded that they were not persuaded by the first concern (difficulty of enforcement) because the rules of professional conduct already make it misconduct for attorneys to engage in acts that are even more vaguely defined. For example, Rule 8.4 makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty," among other things.

Senator Feltes noted that attorney Tierney had proposed at one point that the Committee consider a rule similar to the one adopted in Illinois, which states that a charge of professional misconduct cannot be brought pursuant to this paragraph until a court of competent jurisdiction has made a determination that the attorney has engaged in an act that constitutes an unlawful discriminatory practice. However, attorney Feltes notes that the standard in court, which is "preponderance of the evidence," is different from the standard applied in professional misconduct cases, which requires "clear and convincing" evidence. He also noted that there are plenty of situations involving harassment and discrimination that do not become the subject of lawsuits. In light of this, he and attorney Herrick felt that, rather than recommend the adoption of the Illinois rule, it would make more sense to recommend the adoption of the rule that has been adopted in many other states.

Judge Delker inquired whether, if the reference to federal and state law is not included in the rule, it makes sense to include the language, "statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule."

Judge Delker also inquired whether, if the reference to state and federal law is included in the proposal, this would mean that the rule would not apply to conduct toward opposing counsel, for example. Senator Feltes stated that that is a concern, but it is mitigated by the "in any context" language.

Attorney Gordon inquired whether "under state and federal law," if it is incorporated into the proposal, should read "defined by state and federal law."

Representative Berch stated that he is concerned about the constitutional issues. Even putting aside the First Amendment concerns, as he sees it, there are two issues:

(1) the lack of a definition of discrimination – we are talking about punishing behavior and then deliberately not defining that behavior. This constitutional issue is then magnified by:

(2) removing the scienter requirement and making attorneys strictly liable. We would be saying to someone, "you did it, you are in trouble," but we are not going to tell you beforehand what the bad behavior is that you are not supposed to engage in is. This is troublesome. Representative Berch believes that this would be held unconstitutional – it is a punishment for undefined acts.

In response to a question from Justice Donovan, Representative Berch agreed that the inclusion of the language, "as defined by state and federal law," would mitigate his concerns. He noted that the courts have provided a lot of guidance on this.

Justice Lynn stated that his understanding is that the Federal Civil Rights Act is limited, and that it applies, for example, in the employment context, in the public accommodation context, etc., but not in other contexts. So, he understands the concern about the reference to state and federal law that Justice Delker expressed. However, he stated that he is not sure that this is so clearly an issue under the State Human Rights Statute. So, perhaps the case of harassment of opposing counsel would not be excluded. Following some discussion, the Committee concluded that the state law is segregated in much the same way the federal law is.

Justice Delker inquired whether there might be a way to draft the rule so that it does not refer to the entire body of law, but just to address the questions: What does harassment mean? What does discrimination mean? Attorney Herrick noted that, unfortunately, it is not easy to come up with a definition.

Justice Lynn inquired whether, with respect to the discrimination issue, can this be applied to disparate impact cases? That is, for example, suppose a law firm has a policy regarding the number of working hours that an attorney is required to put in, and suppose the result is that the firm is dominated by males. Would the lawyers in the firm potentially be subjected to discipline for this, even though the policy regarding hours is neutral on its face, and was not

intentionally designed to achieve this effect, *i.e.*, that the firm is dominated by men?

Senator Feltes noted: (1) that the Attorney Discipline Office would have discretion in deciding whether to pursue this; and (2) disparate impact is actionable under state and federal law. So, potentially, the situation described could result in disciplinary action. This may cause law firms to reexamine their facially neutral employment policies.

Justice Lynn stated that his concern is the kind of remedy this would provide. It concerns him that in these circumstances a lawyer could be found to have engaged in "misconduct," and arguably, could even be disbarred.

Mr. Richter asked the attorneys in the room to explain why the language in the rule is written to include "harassment and discrimination," which, to a layperson seem to be very different things. Attorney Herrick explained that harassment is a form of discrimination, and that a whole body of case law has developed that fleshes out the meaning of "harassment."

Attorney Gordon stated that he believes that all of the proposals seem to founder. He believes that the concerns raised by the Attorney Discipline Office are on point, and he is hesitant to impose this on them.

Senator Feltes stated that this is a recommendation for the Supreme Court to consider. He is not concerned about the Attorney Discipline Office. He is more concerned about the behavior of members of the bar, and believes that this is the right thing to do.

Representative Berch expressed concerns about a standard that is something along the lines of, "you know it when you see it," and inquired whether the Committee wants to provide some sort of definition. He noted that the lack of definition is a problem, not just for the ADO, but also for the reasonable practitioner.

Justice Lynn raised a concern about the following language in the Feltes-Herrick proposal: "statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule." He noted that if one were to ask the legislature whether the reason that the human rights statute does not apply to employers with fewer than six employees is because the legislature believes that it is acceptable for an employer with fewer than six employees to discriminate, he suspects that the answer would be "no." Rather, he expects that there are other policy reasons that drove the legislature to exempt employers with fewer than six employees. Perhaps the reason is that the legislature believed that the interactions among employees in businesses with fewer than six employees are more similar to interactions you would find in a family. Perhaps the legislature

felt that regulating these businesses would be akin to trying to regulate interactions in a household. Justice Lynn inquired whether that policy choice comes into play here. Should the Committee recommend that the Court override that policy decision in this context, or is the Committee going too far?

Senator Feltes stated that the view of the subcommittee is that all lawyers should be treated equally. To say to a small subset of lawyers, "these rules do not apply to you," would send the wrong message. Furthermore, how will that play out? Attorneys are a self-regulated profession. The professional conduct rules should apply to all lawyers.

Attorney Herrick noted that a concern raised earlier regarding vagueness is a concern that was considered by the subcommittee. The subcommittee noted that there are other professional conduct rules which are similarly "vague." For example, Rule of Professional Conduct 8.4 states that "it is professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." She notes that "dishonesty" and "deceit" are pretty vague.

Mr. Richter again noted his concern that there is a great deal of confusion among laypeople about the difference between "harassment" and "discrimination." He wondered whether there should be separate rules for each.

Judge Delker stated that he believes that adding a mens rea requirement would ameliorate many of the concerns that have been raised about the rule, and believes that this might cure a rule that would otherwise arguably be unconstitutional.

Representative Berch inquired whether, if the language proposed by the ACLU were included, this would also incorporate the state of mind standard. Justice Delker stated that he did not believe it would, because that standard does not apply in the disparate impact cases – those are not tied to mens rea. Judge Delker stated that he believes that the Committee should add to the proposal the words "knowingly" or "knew or should have known."

Justice Donovan raised the question of whether, if the Committee votes to recommend that the Court adopt some version of Rule 8.4(g), the Committee would also wish to recommend that the Court hold a hearing before the full court on the recommendation. Committee members generally agreed that it would want to make that additional recommendation.

Following some discussion, and upon motion made and seconded, the Committee (attorney Albee, Judge Delker, Senator Feltes, Judge Garner, attorney Gill, attorney Herrick, attorney Lick, Mr. Richter, Ms. Spalding, Mr. Stewart, Justice Lynn and Justice Donovan) voted to recommend that the

Court amend Rule of Professional Conduct 8.4 by adopting the following provision:

> (g) engage in conduct while acting as a lawyer in any context that that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity. Statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

Justice Lynn noted that his vote to recommend that the Court adopt this provision does not mean that as a member of the Court he would necessarily support its adoption. Representative Berch, attorney Curran and attorney Gordon voted against recommending that the Court adopt this provision.

Upon motion made and seconded, the Committee voted to recommend that the Court hold a hearing before the full court on this proposal.

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

Carolyn Koegler reminded the Committee that the Court had issued an order on June 15, 2017 amending Rules 8(d) and 10(c) of the New Hampshire Rule of Criminal Procedure on a temporary basis, and had referred the amendments to the Committee for its recommendation as to whether they should be adopted on a permanent basis. At its September 2017 meeting, the Committee had agreed that the amendments should remain in place for a year and that it would consider in September 2018 what action to take. This is why the item was included on the agenda for this meeting.

Carolyn Koegler reminded the Committee that the amendments to Rule 8(d) were designed to: (1) extend the deadline for filing indictments to 90 days after the complaint is filed in Superior Court; and (2) permit judges to exercise discretion to grant or deny requests for extensions of time for filing indictments. The amendments to Rule 10(c) were designed to require complaints to be filed 48 hours before arraignment for non-incarcerated defendants. She also reminded the Committee that, at its June meeting, it had considered Judge Delker's suggestion to amend New Hampshire Rule of

Criminal Procedure 8(d) as proposed in Carolyn Koegler's May 9, 2018 memo. The Committee had voted to recommend that the Court adopt Judge Delker's suggestion.

Following some discussion of the issue, the Committee agreed that a public hearing would not be necessary, and voted to recommend that the Committee adopt the changes to Rules 8(d) and 10(c) on a permanent basis, and to make additional changes to Rule 8(d) that had been suggested by Judge Delker in the May 9, 2018 memo.

(c) 2017-016. Supreme Court Rules 38 and 40. Application of Code of Judicial Conduct to Court Staff Generally.

Carolyn Koegler reminded the Committee that at its June meeting, the Committee had considered a May 29, 2018 memo from her proposing that the definition of "Judge" set forth in Supreme Court Rule 40(2) should be amended as follows (proposed additions are in **[bold and in brackets]**; proposed deletions are 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 cannon of the Code of Judicial Conduct – the Code of Judicial Conduct applied to a judge to the extent provided in Supreme Court Rule 38.

At the June meeting, Attorney Ryan had expressed a number of concerns about the proposal and distributed to Committee members a new proposal for the Committee to consider. The Committee voted in June to put two proposals out for public hearing in December. However, attorney Ryan (not present at the September 7 meeting) contacted Carolyn Koegler recently, withdrew his proposal, and indicated that he supported the Committee's putting out for public hearing the proposal set forth in the May 29 memo.

Following brief discussion, the Committee voted to put out for public hearing in December the proposal set forth in the May 29 memo.

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

Carolyn Koegler reminded the Committee that attorney Dempsey, in a November 22, 2017 letter to Justice Lynn, had raised some concerns about Supreme Court Rule 37 on behalf of the New Hampshire Judicial Branch Administrative Council ("Administrative Council").

According to the letter, the Administrative Council would like the Committee to consider whether the rule should be amended to make clear that in order to access confidential court records, the attorney discipline office ("ADO") must first file a motion with the court and establish good cause. The Administrative Council also asks that the Committee consider whether there should be a rule governing how confidential records are to be treated once they are turned over to the ADO. The Administrative Council's concern seems to be that records held by the ADO are at some point in the process subject to public inspection, and Rule 37 does not exempt from public inspection any records except work product, internal memoranda and deliberations.

Carolyn Koegler noted that attorney Sara Greene, Disciplinary Counsel at the ADO, had informed her that she would be willing to serve on a subcommittee to propose amendments to Supreme Court Rule 37 to address the concerns raised in the November 22 letter. Justice Donovan inquired whether any members of the Committee would be willing to serve on the subcommittee. Abigail Albee stated that she would be happy to work with attorney Greene and Carolyn Koegler on this project. A member of the Committee suggested that the subcommittee reach out to members of the bar who practice before the Attorney Discipline Office, to inquire whether they would like to serve on the subcommittee. Committee members generally agreed that this would be a good idea.

(e) 2018-002. Rule of Prof. Conduct 1.15. Safekeeping Property.

Carolyn Koegler reported that Lisa Nelson from the New Hampshire Bar Foundation had left her a voicemail message informing her that they wish to withdraw their proposal to amend Rule of Professional Conduct 1.15. They have reviewed the submissions made since the last Advisory Committee on Rules meeting and would like a bit more time to consider the issue.

Following some brief discussion of the issue, the Committee agreed that this item should be removed from the agenda.

(f) 2018-004. Supreme Court Rule 36. Appearances in Court by Eligible Law Students and Graduates.

Justice Lynn reminded Committee members that Eileen Fox had submitted an April 13, 2018 memorandum and attached letter to the Committee. The memo asks whether the Supreme Court should amend or clarify Supreme Court Rule 36 to allow students who have completed a 9 hour training program for the DOVE project (offered to second year Daniel Websters scholars) to appear in court pursuant to the rule.

Justice Lynn reported that he had spoken with Professor John Garvey, the Director of the Daniel Webster Scholar Honors Program, to ask about the details of the proposed change. He stated that he believes that the change that has been requested is very small. He notes that the change would allow students who complete the training program during the spring semester of their second year to start supervised practice right away, rather than wait until the end of the semester. Professor Garvey is in favor of the rule change.

Attorney Albee noted that it is only the Daniel Webster Scholars students who are doing this. The rule change would be very narrowly tailored.

The Committee asked Carolyn Koegler to draft language to implement this proposal, and, upon motion made and seconded, voted to put the proposed change out for public hearing in December.

(g) 2018-006. Type-Volume Limitations for Supreme Court Briefs.

Attorney Gordon distributed a September 6, 2018 memorandum to the Committee. He reminded the Committee that in May he "brought to this committee's attention a perhaps-unintended shortening of supreme court briefs that were contained in the type-volume limitations in the e-filing rules." He reminded the Committee that the Court recently changed the Supreme Court rules to facilitate the electronic filing of briefs. When it did so, it changed the page limits set forth in the rules to type-volume limits. Attorney Gordon believes that in making these changes, the Court may have made an arithmetical error and inadvertently reduced the permissible length of briefs.

Attorney Gordon explained that at the September meeting, the Committee had requested that he count the total words in a sample of filed briefs to determine the average word-count per page. He referred the Committee to his September 7, 2018 memo and explained that his data shows "that the 9,500 word limit does not accurately reflect what appears to be the common practice when briefs are at or near the 35-page limit."

Justice Donovan explained that he had spoken with Supreme Court Clerk Eileen Fox and Deputy Clerk Tim Gudas about how they made a determination regarding word limit. There was discussion about what the federal court's word limit is, and a reference to the 2016 Federal Rules Advisory Committee notes.

Following some discussion, upon motion made by attorney Gordon and seconded by Mr. Stewart, the Committee voted to put out for public hearing in December a proposal to amend the relevant Supreme Court Rules to change the 9,500 word limit to a 11,250 word limit. Attorney Herrick, Justice Donovan and Representative Feltes voted against putting the proposal out for public hearing.

3. New Submissions

(a) 2018-008. Rule of Professional Conduct 6.5. Nonprofit and Court-Annexed Limited Legal Service Programs.

Justice Lynn referred the Committee to a July 13, 2018 New Hampshire Supreme Court order. He noted that the order included the adoption of a comment to follow New Hampshire Rule of Professional Conduct 6.5. The order made clear that the comment was being adopted on a temporary basis and would be referred to the Advisory Committee on Rules of its recommendation as to whether the comment should be adopted on a permanent basis, or some other action should be taken.

Justice Lynn explained that the Ethics Committee and the Access to Justice Committee had had a disagreement about what to do, but that the Court felt that it was important to adopt this comment. Justice Lynn recommended that the Committee hold a public hearing on this.

Upon motion made and seconded, the Committee voted to put the comment out for public hearing in December.

(b) 2018-009. Gender Neutral Language in Supreme Court Rules

Carolyn Koegler referred the Committee to her September 4, 2018 memo. She explained that attorney Gordon had suggested that Supreme Court Rule 16(7) be amended to make the rule gender-neutral. She also noted that supreme court staff attorney David Peck had raised this issue a number of times over the last several years and had suggested that all of the Supreme Court Rules be amended to make the language gender-neutral.

Following some discussion about the issue, the Committee voted to recommend that the Court adopt the language changes suggested by attorney

Peck, effective July 1, 2019, so that the changes are made after Lexis-Nexis issues a supplement, but before it prints the next volume of the rulebook.

There being no further business, the Committee voted to adjourn at 2:35pm.