NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of September 14, 2012 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 pm by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen M. Anderson; Robert L. Chase; Honorable R. Laurence Cullen; Jeanne P. Herrick, Esq., Martin P. Honigberg, Esq.; Honorable Speaker O'Brien (leaving early), Patrick Ryan, Esq.; Raymond W. Taylor, Esq. and Hon. Robert J. Lynn.

Also present were Secretary to the Committee, Carolyn Koegler, Esq., Irene Dalbec, staff, and Attorney Abigail Albee, from the Office of the New Hampshire Public Defender.

Before turning to the minutes, Committee members discussed how to address the challenge presented by the fact that a quorum of members may not always be available to attend the meetings. Speaker O'Brien inquired whether Supreme Court 51 could be amended to make it possible for a member of the Committee to send someone to the meeting in his or her place when the member is unable to attend.

Justice Lynn asked Carolyn Koegler whether the rule as currently written allows Committee members to send a designee to the meeting. She responded by noting that the text of the existing rule 51(b) reads, in pertinent part, as follows:

B. Appointment of Advisory Committee on Rules
(1) There shall be an Advisory Committee on Rules, which shall be composed of sixteen members as follows:
(a) One active or retired judge from each of the following courts shall be appointed by the supreme court: district court, probate court, superior court, and supreme court.
(b) Two attorneys shall be appointed by the supreme court.
(c) Three lay persons shall be appointed by the supreme court.
(d) One member shall be appointed by the Governor.
(e) One member of the senate shall be appointed by the president of the senate.

(f) One member of the house shall be appointed by the speaker of the house.
(g) One clerk of court shall be appointed by the supreme court.
(h) One member of the New Hampshire Bar Association Board of Governors and one member of the Committee on Cooperation with the Courts shall be appointed by the president of the New Hampshire Bar Association.
(i) One active or retired judge, master, or administrator from the family division shall be appointed by the supreme court.

Discussion ensued about whether the rule should be amended to allow a committee member to appoint a designee when he or she is unable to attend a meeting. One Committee member noted that the benefit to having continuity on the Committee is that attendees are familiar with the issues that carryover from prior meetings. Another Committee member acknowledged that continuity is important, but that the Committee should probably have at least some flexibility to address the problem that arises when the Committee lacks a quorum and is therefore unable to take any action.

Following further discussion, it was suggested that Carolyn Koegler draft language to allow the Speaker of the House and the Senate President some flexibility to appoint a designee for some, or all of the meetings. The language would read something like, "(e) the president of the senate, or the president's designee" and (f) the speaker of the house, or the speaker's designee." It was agreed that, in the interest of maintaining continuity, this change should not be made to the other provisions of Supreme Court Rule 51(B)(1). Carolyn Koegler agreed to draft language for the Committee's consideration at the December meeting.

1. Approval of Minutes of June 15, 2012 Meeting

Attorney Honigberg raised a concern about the language stating, "Attorneys Honigberg and Ardinger and Judge McNamara abstained from voting" on page 3 of the June minutes. He noted that Attorneys Honigberg and Ardinger and Judge McNamara had not participated in any discussion regarding the parental notification rules, and asked that the minutes be amended to reflect this. Carolyn Koegler agreed to change the minutes to read, "Attorneys Honigberg and Ardinger and Judge McNamara abstained from participation in discussions about, and voting on, the temporary parental notification rules."

Upon motion made by Judge Cullen and seconded by Attorney Taylor, the Committee unanimously voted to approve the June 15, 2012 minutes, as amended.

2. Status of Pending Items

a. District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure

Judge Cullen will provide the Committee members with a final draft of the Circuit Court Rules, District Division, prior to the December meeting of the Committee.

b. 2008-013. Judicial Conduct Committee Procedures

(i) Ratification of Vote to Amend Definition of "Judge."

Carolyn Koegler reminded the Committee that, at its meeting in June, it voted to recommend that the Court adopt the JCC's proposal to amend Supreme Court Rule 40 (Procedural Rules of the JCC). Following the June meeting, the JCC proposed to amend the definition of "judge" in Supreme Court Rule 40. An email poll of Committee members indicated that this change should be made to the proposal, and recommended to the Supreme Court. Carolyn Koegler made this change to the proposal that was recommended to the Supreme Court in the Advisory Committee on Rules Annual Report. She suggested that the Committee vote to ratify this decision.

A Committee member asked to be reminded why the JCC had requested the change, and what the change was. Carolyn Koegler explained that the JCC had suggested the change because it believed that the creation of the new circuit court sytem calls for the definition of judge to be "readjusted." She referred the Committee to the following language from the annual report:

> Judge - This term includes: (1) a full-time or part-time judge of ~~the supreme, superior, district, and probate courts~~ **[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 . . . .

Upon motion made by Ms. Anderson and seconded by Attorney Taylor, the Committee unanimously voted to ratify the decision to amend

the definition of "judge" made in the JCC's proposal to amend Supreme Court Rule 40.

(ii) Supreme Court Rule 40(11)(j)

Carolyn Koegler explained that when she was incorporating the JCC's last set of proposed changes into the proposal being recommended to the Court, she noted that the text of Supreme Court Rule 40(11)(j) is almost identical to the text of Superior Court Rule 78 (Photographing, Recording and Broadcasting) before it was amended by the Supreme Court on a temporary basis by order dated January 25, 2012. The JCC did not recommend in its recent proposal to the Committee that this section be changed to be consistent with the language of temporary Superior Court Rule 78, and the Committee did not consider this issue.

Justice Lynn stated that he believes it makes sense for the JCC to consider this issue. He noted that temporary Superior Court Rule 78 liberalizes the rule regarding the photographing, recording and/or broadcasting of court proceedings, and believes that it makes sense for the JCC to offer its opinion about whether this would be appropriate in the context of judicial conduct committee proceedings. He suggests that the Committee forward to the JCC a copy of the former and temporary Superior Court Rule 78, explain the reasons that the Committee recommended that the Court make changes to Superior Court Rule 78, and inquire whether the JCC believes the same changes should be made to Supreme Court Rule 40(11)(j).

Upon motion made by Judge Cullen and seconded by Attorney Honigberg the Committee unanimously voted to refer this issue to the JCC and request the JCC's opinion on the matter.

c. 2012-005. Superior Court Rule 59. Preservation of Issues for Appeal.

At its March meeting, the Committee voted to put this item out for public comment in June. At its meeting in June, Committee members discussed written and oral comments submitted by Chief Appellate Defender Christopher Johnson, concluded that Attorney Johnson had raised issues requiring further thought, and decided not to recommend that the Supreme Court adopt the proposed change.

Justice Lynn reminded the Committee that before the Committee is a proposal to codify the Supreme Court's opinion in New Hampshire Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002) by amending Superior Court Rule 59-A as follows:

59-A. (1) A motion for reconsideration or other post-decision relief shall be filed within ten (10) days of the date on the Clerk's written notice of the order or decision, which shall be mailed by the Clerk on the date of the notice. The motion shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present; but the motion shall not exceed ten (10) pages. **[To preserve issues for an appeal to the Supreme Court, an appellant must have given the superior court the opportunity to consider such issues; thus, to the extent that the superior court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal.]** A hearing on the motion shall not be permitted except by order of the Court.

(2) No answer to a motion for reconsideration or other ~~postdecision~~ **[post-decision]** relief shall be required unless ordered by the Court, but any answer or objection must be filed within ten (10) days of notification of the motion.

(3) If a motion for reconsideration or other post-decision relief is granted, the Court may revise its order or take other appropriate action without rehearing or may schedule a further hearing.

(4) The filing of a motion for reconsideration or other ~~postdecision~~ **[post-decision]** relief shall not stay any order of the Court unless, upon specific written request, the Court has ordered such a stay.

[Commentary:

The third sentence of paragraph (1) derives from N.H. Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002), and is not intended to preclude a party from raising an issue on appeal under the plain error rule set forth in Supreme Court Rule 16-A.]

Attorney Johnson's concern is that the proposed amendment reflected in section 1 (above) is broader than the rule set forth in Butland. He believes that Butland was rightly decided. He notes that in Butland, the Court found not preserved a claim that the application of a certain burden of proof violated the constitution, where the appellant

never argued in the trial court that the burden of proof violated the constitution, and the trial court never considered that claim, much less ruled upon it. He noted, however, that there are cases in which the Butland preservation rule might be invoked, but should be rejected.

In a written submission to the Committee, Attorney Johnson offered the following example to illustrate his point:

> [S]uppose a defendant in a criminal case files a motion to suppress the fruits of a police search, arguing that the State lacked the requisite warrant necessary to justify the search. Suppose further that the State responds by advancing the exigency exception to the warrant requirement. The defense responds to that claim and the parties' arguments at the hearing focus on the issue of exigency. Suppose finally that, in its order, the court declines to rely on exigency, and instead, without the parties having addressed the point, relies on another doctrine, such as inevitable discovery, to deny the suppression motion.
>
> I would suggest that, because the trial court reached and decided the question of the applicability of inevitable discovery, a motion to reconsider would not be necessary to appeal the claim that the court erred in applying inevitable discovery to the facts of the case. Indeed, the fact that it decided the motion on inevitable discovery grounds shows that the trial court regarded itself as having had a fair opportunity to rule on the applicability of that doctrine to the case. If the defense wished to advance some argument not considered by the trial court, such as that the New Hampshire Constitution is more protective than the United States Constitution with respect to inevitable discovery, a motion to reconsider would be necessary, because the trial court did not consider or adjudicate that claim. However, the claim that the facts of the case do not justify application of inevitable discovery is preserved for appeal, notwithstanding the fact that the defense never filed a pleading on it, because the trial court's ruling shows that the court decided that issue.
>
> To apply the Butland rule to that situation would violate the principle that preservation rules are a means to the end of justice, rather than an end in themselves, because it would disable the defendant from appealing a ruling that the trial court actually did make.

Attorney Johnson requests that the Committee consider the following proposed amendment instead (CAPS and ~~strikethough~~ reflect where this proposed amendment differs from the first proposed amendment being considered by the Committee:

59-A. (1) A motion for reconsideration or other post-decision relief shall be filed within ten (10) days of the date on the Clerk's written notice of the order or decision, which shall be mailed by the Clerk on the date of the notice. The motion shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present; but the motion shall not exceed ten (10) pages. **[To preserve issues NOT CONSIDERED BY THE TRIAL COURT for an appeal to the Supreme Court, an appellant must have given the Court the opportunity to consider such issues; thus, to the extent that the ~~Court, in its decision, addresses~~ APPELLANT PURSUES ON APPEAL matters not previously raised or addressed in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal.]** A hearing on the motion shall not be permitted except by order of the Court.

Justice Lynn stated that he agrees that the proposed amendment expands Butland, but that it should, nevertheless, remain as drafted. He believes that it does make some sense for the trial Court to be asked to think about the issue again. Because the issue was not raised by the parties, it was not subjected to the adversarial process, and there is a danger that the Court got it wrong. Since the point of the preservation rules is to prevent unnecessary appeals, it seems to make some sense to ask the parties to tell the trial court why they think the trial court got it wrong so that the trial court has the opportunity to correct itself, thus limiting the number of unnecessary appeals.

Speaker O'Brien noted that it would be helpful to know how often it occurs that a trial judge reverses himself. He also stated that he is concerned that the amendment as proposed creates a trap for the unwary and also may cause cautious counsel to file a motion to reconsider in every case.

Attorney Joshua Gordon opined that Attorney Johnson's proposal seems to make some sense, and noted that if the trial court made an obvious error, a party will have incentive to file a motion to reconsider anyway. Attorney Honigberg stated that he agrees, philosophically, with the approach suggested by Attorney Johnson.

Attorney Herrick expressed concern about cases involving, for example, a partial motion for summary judgment. The trial court might

decide an issue on grounds not raised by either party, the trial court might be wrong. It could be that the erroneous decision creates a prevailing party who does not want to challenge the erroneous decision at that time, but might later want to raise it, but under this rule would be barred from doing so.

Justice Lynn noted that this would be the case under either of the proposed rules. He suggests that the Committee ask the staff attorney who drafted the proposed language: (1) to react to this concern about the prevailing party- what does a non-losing party do when he or she has won but the trial court has erred; to preserve the issue for appeal? and (2) to react to the language proposed by Attorney Johnson. Justice Lynn agreed to speak with the staff attorney about these issues.

d. 2010-015. Model Rules for Client Trust Account Records.

Carolyn Koegler reminded the Committee that the Ethics Committee and the Attorney Discipline Office are working together to provide a joint recommendation regarding the ABA Model Rules for Client Trust Account records, PCC Rule 1.14(a) and Supreme Court Rule 50. She stated that she had been in contact with attorney Rolf Goodwin who reported that the Bar's Ethics Committee and the Attorney Discipline office had forwarded a recommendation to the Bar Association's Board of Governors for their review and approval. The Board of Governors has not yet acted on the recommendation.

e. 2011-002. Supreme Court Rule 42 (Foreign Law School Graduates)

Carolyn Koegler reminded the Committee that at the March 2012 meeting, the Committee considered a proposal, set forth in a memo from her dated March 14, 2012, to amend the foreign law school graduate provisions of Supreme Court Rule 42. A concern was raised at the March meeting regarding whether it is fair to allow foreign law school graduates to sit for the bar examination but not to allow graduates of non-ABA accredited law schools in the United States to sit for the bar examination. The Committee requested that she: (1) contact the ABA to get its reaction to a proposal to expand the same sort of alternative way to qualify to sit for the bar examination or apply for admission on motion to graduates set forth in the foreign law school graduates rule to graduates of non-ABA accredited law schools; and (2) look at the rules in New York and California to see how they address the issue of applicants who have attended law schools that are not ABA-accredited.

Carolyn Koegler distributed to Committee members a memo dated September 12, 2012 summarizing the results of her research. She

explained that the individual she spoke with at the ABA's Office of the Consultant on Legal Education made it very clear that it is the ABA's position, set forth in the "Code of Recommended Standards for Bar Examiners," that "each applicant should be required to have completed all requirement for graduation with a J.D. or LL.B. degree from a law school approved by the American Bar Association before being eligible to take a bar examination, and to have graduated therefrom before being eligible for admission to practice. Neither private study, correspondence study, law office training, age nor experience should be substituted for law school education."

Carolyn Koegler explained that upon receiving this response by email, she contacted the ABA's Office of the Consultant on Legal Education again and inquired whether the statement in the Code is intended to also apply to graduates of law schools outside the United States. She also stated that she was aware that the ABA Section of Legal Education and Admissions to the Bar has drafted a proposed model rule that would establish criteria for an LLM program designed to qualify a foreign lawyer from a civil or common law jurisdictions to take a bar examination and to prepare the foreign lawyer for the practice of law in the United States and asked: (1) whether this means that the ABA's position is that applicants who are graduates of foreign law schools should not be eligible to sit for the bar examination unless they also complete an ABA-approved LLM program; and (2) for an update regarding the status of the proposed model rule. She was informed that the existence of the proposed model rule could not be read in the way suggested in (1) and that the proposal seems to have "stagnated."

Carolyn next reported that, at the Committee's request, she looked at the rules in New York and California to see how they address the issue of applicants who have attended law schools that are not ABA-accredited. She reported that based upon her review of the rules, and her discussion with a member of the ABA's Office of the Consultant on Legal Education, Section of Legal Education and Admission to the Bar, it appears that California is the only state with a general rule that allows graduates of non-ABA approved law schools to sit for the bar examination even if they have not already taken and passed the bar examination in another state. Some jurisdictions (like Massachusetts) do permit graduates of certain named non-ABA accredited law schools to sit for the bar examination.

Carolyn Koegler noted that she had included with her memorandum: (1) the foreign law school graduate proposal currently before the Committee; and (2) a copy of Rule VI of the Massachusetts Board of Bar Examiners, which sets forth Massachusetts' requirements for examination and admission on motion for foreign law school graduates. In response to an inquiry from a Committee member, she

explained that the language of the proposal is identical to the language submitted to the Committee in March and that the proposal is very similar to Massachusetts rule. She noted however, that the proposal before the Committee differs from the Massachusetts rule in two significant respects.

First, in Massachusetts an applicant who graduated from a law school situated in a country with a civil law tradition may prove educational sufficiency. The New Hampshire proposal before the Committee permits only applicants who have graduated from law schools situated in countries with common law traditions to prove educational sufficiency. She explained that this is because New Hampshire's current rule only allows graduates of law schools situated in common law countries to sit for the bar. She believes it is not advisable to liberalize the rule at this time to include civil law jurisdictions.

Second, the Massachusetts rule requires graduates of law schools situated in countries with common law traditions to take 15 credit hours of certain courses at a law school that is ABA accredited or "otherwise authorized by a Massachusetts statute to grant the degree of bachelor of laws or juris doctor." Graduates of law schools situated in countries with civil law traditions must take 24 credit hours of certain courses at a law school that is ABA accredited or "otherwise authorized by a Massachusetts statute to grant the degree of bachelor of laws or juris doctor." In contrast, the proposed New Hampshire Rule requires 24 semester credit hours of coursework in certain areas, but allows the applicant to have completed this coursework "as a part of the law school education or at a law school accredited by the American Bar Association." Thus, the rule is more burdensome in one way, but less burdensome in another. That is, it requires 24 hours of coursework (more than Massachusetts' 15), but allows the coursework to be completed at a law school outside the United States. As a practical matter, it is highly unlikely that an applicant would not be required to do at least some coursework at an ABA-accredited law school because the rule requires "24 semester credit hours of coursework dealing with either the law of the United States or the law of one of the States of the United States."

Carolyn Koegler explained that when she and Bar Admissions Coordinator, Sherry Hieber, worked together on this proposed rule, they sought to address the Court's two main concerns, as set forth in Eileen Fox's February 17, 2011 letter to the Committee. According to that letter, the Court was primarily concerned about two aspects of the existing rule: (1) it is not easy to administer because it is often difficult to determine whether a foreign law school graduate meets the requirements of the rule, particularly the requirement that the course of study be

"substantially equivalent" to that of an ABA-accredited law school; and (2) it is unclear whether the current rule is effective in ensuring that the foreign law school graduates have the necessary background and training in the American legal system because it does not require, as the rules in some other states do, that the graduate receive additional training at an ABA-accredited law school before being admitted. Thus, Carolyn Koegler and Sherry Hieber sought to address these concerns by spelling out what it means to have a "substantially equivalent," education, without liberalizing the rule.

Justice Lynn noted that the proposed rule does, in fact liberalize the rule to some degree. He notes that the existing Supreme Court Rule 42(c) reads, in relevant part,

> (c) Foreign Law School Graduate. Notwithstanding the foregoing paragraph, a person who has graduated from a law school in an English-speaking, common law country and who has pursued a course of study substantially equivalent to that of a law school approved by the American Bar Association shall be eligible to apply for examination provided that such person is a member in good standing of the bar of that country, and is either (i) the holder of a master's degree from a law school approved by the American Bar Association, or (ii) a member of the bar of one of the States of the United States who was admitted after examination and is in good standing . . . .

The current draft of the proposed rule does not require that the applicant be either the holder of a master's degree from an ABA accredited law school or admitted in another jurisdiction in the United States. Carolyn Koegler acknowledged that this is, indeed true.

Speaker O'Brien raised some concerns about what issues might arise if foreign law school graduates are permitted to sit for the bar examination in New Hampshire, such as whether there would be an obligation to administer the exam in a language other than English. He also inquired whether there were any concerns with, for example, GATT, if New Hampshire decided not to admit foreign law school graduates. Carolyn Koegler stated that Attorney Parent had inquired of her contacts at the ABA whether there was any concern that not allowing foreign law school graduates admission to the bar would be a problem under GATT. According to Attorney Parent, this was an issue the ABA is unfamiliar with.

Attorney Honigberg noted that the Massachusetts rule appears to allow some graduates of certain law schools located in Canada to sit for

the bar examination, and inquired whether this was also true of the current New Hampshire draft rule. Carolyn Koegler stated that the current draft rule does not allow graduates of any particular law schools located outside of the United States to sit for the bar examination. She stated that the proposal currently before the Committee is identical to the proposal that she submitted to the Committee in March.

Carolyn Koegler reminded the Committee that roughly half of the jurisdictions in the United States do not allow foreign law school graduates to sit for the bar under any circumstances, and that one option would be for the Committee to suggest to the Court that the rule be deleted. She stated however, that this does seem to be "going in the wrong direction," since the trend in the United States does seem to be toward the admission of foreign law school graduates under certain circumstances. She also stated that another approach could be to let the current rule continue in place, and to await official action by the ABA (ie the adoption of a model rule). If the Committee chose to do this, she would recommend that the Committee consider the deletion of the words "English-speaking" from the existing rule. While there seems to be a reason (ie the education must be "substantially equivalent to that required by an ABA-accredited law school) to require education in the English Common law, it is not clear why the country in which the law school is situated must be one that is "English speaking."

Following some discussion, and upon motion made by Attorney Honigberg and seconded by Judge Cullen, the Committee voted unanimously to put the proposed foreign law school graduate provision out for public hearing in December.

f. <u>2011-012. Supreme Court Request to Review Individual Superior Court Rules and Rules of Criminal Procedure in light of Comments received when new Superior Court Rules and new Rules of Criminal Procedure were put out for Public Comment.</u>

At its meeting in December 2011, the Committee considered one outstanding issue (juror questionnaires) which had been raised in a May 24, 2011 letter from David Peck to Carolyn Koegler regarding public comments received when the proposed Superior Court rules and new Rules of Criminal Procedure were put out for public comment. In response to the comments related to the juror questionnaires, the Court had asked the Rules Advisory Committee to:

> Review the relevant rules as well as the jury questionnaire form and Superior Court Administrative Order 30 with respect both to whether any provision regarding return and destruction of questionnaires should be added to the rules and whether the rules,

and/or administrative order should be amended to ensure consistency among them.

At the December meeting of the Advisory Committee on Rules, it was generally agreed that the issues related to juror questionnaires are larger than can be resolved by a subcommittee. Justice Lynn and Attorney Taylor worked together to put together a committee tasked with considering: (1) what information should be requested from jurors; (2) how that information should be treated, with respect to confidentiality; and (3) what the mechanics will be regarding the dissemination and collection of that information; (4) whether the committee's proposal will require legislation.

Attorney Taylor submitted the "Report of Subcommittee on Juror Questionnaires" dated September 12, 2012. According to the memorandum, the subcommittee was asked to address the following issues with respect to juror questionnaires: (1) what information should be requested from prospective jurors, that is, what questions are on the juror questionnaire; (2) who should have access to the questionnaires, and for what period of time; (3) for what period of time should the questionnaires be preserved after the juror's term is over. The subcommittee was also asked to examine how other state and federal courts have addressed these issues and to make recommendations for statutory or rules changes that may be needed to make improvements in the court system's utilization of juror questionnaires.

The September 12, 2012 report identifies the members of the subcommittee, details when and where the meetings took place and who was present, lists the information provided to subcommittee members by Ray Taylor, the Chair of the Committee, and sets out the subcommittee's recommendations regarding the following: (1) What information should be requested from prospective jurors; (2) Who should have access to the questionnaire and for what period of time; and (3) For what period of time should the questionnaires be preserved after the juror's term is over.

Attorney Taylor explained that much of the information considered by the subcommittee was provided by Paula Hannaford, the Director of the Center for Juror Studies at the National Center for State Courts. Director Hannaford serves on a subcommittee of the ABA Commission on the American Jury that is considering the same issues the subcommittee is charged with considering. Therefore, she was able to provide an overview of what other states are doing. Attorney Taylor noted that the issue of juror privacy is one that is being considered nationally.

Attorney Taylor also noted that Chief Justice Nadeau had advised the subcommittee that the Superior Court is presently in the process of completely revamping the jury process to make the selection process electronic and centralized. Apparently, the groundwork for this has been done, and the change is imminent. Attorney Taylor stated that while the subcommittee has made suggestions about the need for changes to the current system, he believes that the issues addressed by the subcommittee should be looked at again after these changes have been made.

Justice Lynn stated that he agrees with the recommendations made in the subcommittee's report in terms of substance, but recognizes that if the proposed changes go out for public hearing in December, some changes may need to be made after the jury process is changed to make the selection process electronic and centralized. He notes that while the philosophy underlying the subcommittee's recommendation will carry forward, some of the mechanics related to the recommendations will change.

Karen Anderson stated that she believes there is a benefit to putting the recommendations out for public hearing in December because it will at least provide an opportunity for the public to comment on whether the Committee is headed in the right direction philosophically.

Speaker O'Brien noted that the questions on the current Juror Questionnaire go far beyond what is listed in the statute. He inquired: (1) where the authority is for asking these questions; and (2) how it is that the form requires the juror to sign the statement, "the above responses are true to the best of my knowledge. I understand that a willful misrepresentation of a material fact may be punishable as a misdemeanor under state law," if the information asked for on the form goes beyond what is required by statute.

Upon motion made and seconded, the Committee voted to put the subcommittee's recommendations out for public hearing in December.

g. Counsel Fees and Guardians Ad Litem Fees Rules

It was noted that no action is required on this item because the Committee agreed in June that the rules should be continued in a temporary status for the next six months.

h. 2011-015. Exchange of Pleadings By Email, Supreme Court Rule 7, Supreme Court Rule 3.

i. Exchange of Pleadings By Email

At its June meeting, the Committee considered a June 14 memorandum, authored by attorney Gordon, outlining the subcommittee's proposed rules to enable email service in litigation. The memorandum explains how the system would work, and gives the rationale for certain decisions the subcommittee made regarding how the system will work. The memorandum also proposes specific language to amend the following court rules: (1) Supreme Court Rule 26(3); (2) Superior Court Rule 21; (3) Circuit Court, District Division Rule 1.3-A; (4) Circuit Court, Probate Division Rule 21; (5) Circuit Court, Family Division Rule 1.23.

At the June meeting, Attorney Ryan stated that he would like the opportunity to discuss the subcommittee's proposal with his colleagues at the circuit court. Attorney Ryan indicated that he had done so, and that he is comfortable with the approach outlined in the June 14 memorandum.

Upon motion made by Attorney Honigberg and seconded by Justice Lynn the Committee unanimously voted to put the proposed rule amendments, as set forth in the June 14 memorandum, out for public hearing in December.

ii. Supreme Court Rule 7

It was noted that no action is required on this item because the Committee voted to put the proposal to amend Supreme Court Rule 7(1)(c) (set forth in the email from attorney Ardinger which was distributed to the Committee at the June meeting) out for public hearing in December.

iii. Supreme Court Rule 3. Definitions ("Mandatory Appeal") (this is also item #2011-008)

The Committee asked Attorney Gordon to summarize the proposals currently before the Committee.

Attorney Gordon reminded the Committee that in his August 3, 2011 letter to the Committee he had asserted that Supreme Court Rule 3 should be amended to address the concern that the current rule is unlawful and unconstitutional because it provides for mandatory review of appeals involving married parents but discretionary review of appeals involving non-married parents. At the December 2011 meeting, the Committee had asked Attorney Gordon to propose language to address his concern. Most recently, at the Committee's June 2012 meeting,

Attorney Gordon provided the Committee with a June 15, 2012 memorandum setting forth some alternative amendments to Supreme Court Rules 25, 3, and the notice of appeal form.

Attorney Gordon reminded the Committee that, as he explained at the meeting in June, his understanding is that the reason the current rule distinguishes between married and unmarried people is that it provides the Supreme Court with some discretion in dealing with "frequent fliers." As currently written, however, the rule automatically excludes non-married people from mandatory appeals, but not married people with unmeritorious appeals, and therefore does not fully serve the goal of addressing the "frequent flier" problem. Attorney Gordon suggests a rule (to apply either only in the family law area, or in all cases) that better provides the Court with a basis to decide whether the case being appealed is a "frequent flier" case or not. Attorney Gordon's memorandum of June 15, 2012 sets forth a number of different approaches, and the specific language changes that would need to be made to the rule to implement each approach.

Justice Lynn reminded the Committee that at the June meeting, he had indicated that he was inclined toward the third option presented in Attorney Gordon's memorandum. Although the first option set forth in Attorney Gordon's memorandum addresses the concern raised in Miller v. Todd and attorney Gordon's 8/3/11 letter, this third option is broader and would allow the Court to deal with the "frequent flier" problem outside of the family law context. Justice Lynn noted that option three serves two purposes: (1) it expands the rule to allow non-married people one mandatory appeal; and (2) also allows the Supreme Court to have discretionary review in appeals where the parties have appealed before.

Attorney Gordon reminded the Committee that at the June meeting, after noting that some work needed to be done on the specific language in the proposal, the Committee had asked him to return in September with final language to implement option three of the proposals set forth in the June 15 memorandum. Attorney Gordon sought to do so in his September 14, 2012 memorandum. There, he stated, "It is my understanding that the committee preferred to address rule changes to all "frequent flyer appellants, and not just those in the family law area." He also indicated that, to implement this proposal, "changes must be made to Supreme Court Rule 25, Supreme Court Rule 3, and the Supreme Court Discretionary Notice of Appeal form," and set forth specific language to amend the rules and the form.

The specific language proposed to amend Supreme Court Rule 3(9) follows (additions in **bold**; deletions in ~~strikethrough~~):

"Mandatory appeal": A mandatory appeal shall be accepted by the supreme court for review on the merits. . . .Provided, however, that the following appeals are NOT mandatory appeals:

. . .

(9) ~~an appeal from a final decision on the merits issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A), provided, however, that an appeal from a final divorce decree or a decree of legal separation shall be a mandatory appeal~~. **any appeal among any of the same parties arising out of the same case which has been previously appealed.**

Attorney Honigberg stated that he had some concerns about the use of the language "same case," and wonders what this means in cases where there has been a refiling. Speaker O'Brien shared this concern, noted that the language seems remarkably broad, and inquired how this would apply to cases that had been remanded, and cases in which there had been an interlocutory appeal.

Some discussion ensued about how the language in Attorney Gordon's proposal could be changed to address these concerns. Different language was suggested and rejected. Attorney Honigberg reminded the Committee that it had been asked to address the problem presented by the current language of Supreme Court Rule 3(9), which automatically excludes non-married people from mandatory appeals, but not married people with unmeritorious appeals. Justice Lynn inquired whether it was the Committee's desire to address the broader problem of the "frequent flier," or the narrower problem of the distinction made between married and unmarried people. Attorney Honigberg stated, and members of the Committee generally agreed, that it is more feasible to address the narrower problem.

Following some discussion about how to amend the language of Supreme Court Rule 3(9) to accomplish this, the Committee proposed the following language (additions in **bold**; deletions in ~~strikethrough~~)::

"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, that is in compliance with these rules. Provided, however, that the following appeals are NOT mandatory appeals:

. . .

(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~~); provided, however, that an appeal from a final divorce decree or decree of legal separation shall be a mandatory appeal.~~**[.]**

Upon motion made by Speaker O'Brien and seconded by Justice Lynn the Committee unanimously voted to put the proposed amendment to Supreme Court Rule 3(9) out for public hearing in December. The committee does not wish to include any of the other proposed rule amendments set forth in Attorney Gordon's memorandum.

At this point, Speaker O'Brien left the meeting to attend a previously scheduled appointment. The Committee meeting continued, despite the lack of a quorum.

i. 2011-021. Superior Court Pilot Rules—PAD

Justice Lynn reminded the Committee that the Court had adopted a temporary amendment to the temporary rule, which expanded the PAD rules into Hillsborough North and South. It was decided that the PAD Rules should remain temporary and that no action was required by the Committee.

j. 2007-001. Superior Court Rule 170 (ADR)

The Committee was reminded that at the June meeting, Judge McNamara stated that he would put together a bullet-point outline summarizing the significant changes that are being proposed to the rule, and would circulate it to the ADR subcommittee for comment, and then take those comments, put them into one document, and circulate that document to the committee.

It was noted that Judge McNamara would speak about this issue at the December meeting.

k. 2012-004. IOLTA.

Judge Lynn reminded that Committee that a Committee had been formed to consider the proposal, made by Attorney Middleton, that the Annual Trust Accounting Compliance Certificate be amended to include questions relative to whether the attorney completing the form has any interest in a title or closing company that handles real estate closings. The Committee will address the questions of what entities can be subject to IOLTA, and what entities should be subject to IOLTA.

l. Supreme Court Rule 37(9)(b)

Carolyn Koegler reminded the Committee that she was asked, at the March meeting, to research the question of whether it would be appropriate to amend Supreme Court Rule 37(9)(b) to include the language of the ABA rule as follows:

(9) *Attorneys Convicted of Serious Crime:*

(a) Upon the filing with the court of a certified copy of any court record establishing that an attorney has been convicted of a serious crime as hereinafter defined, the court may enter an order suspending the attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction.

(b) **[Definition of "Serious Crime."]** ~~The term~~ **A** "serious crime" ~~shall include~~ **is** any felony **[or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,]** ~~and~~ or any ~~lesser~~ crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

. . . .

Carolyn Koegler reported that she had attempted to trace the histories of the New Hampshire rule and the ABA rule to try to determine

whether there is a policy reason that New Hampshire decided not to include the same language that is included in the ABA rule. She noted that she had learned that in 1992 a Commission charged with studying the functioning of lawyer disciplinary systems produced a report with recommendations, commonly referred to as the "McKay Report." At that time, the language of the definition of "serious crime" in New Hampshire was identical to the language in the ABA Model Rule. Some time thereafter, the language in the ABA rule changed, but the language in the New Hampshire Rule did not. Carolyn reported that in1999 the ABA Discipline Committee proposed that the ABA Model Rules for Lawyer Disciplinary Enforcement be amended to enable the disciplinary agency to seek summary suspension upon a finding of guilt, and the ABA House of Delegates approved the amendment. However, it is not clear when the ABA definition of "serious crime" changed.

Carolyn stated that she will: (1) contact someone at the ABA to inquire when the ABA changed the definition of "serious crime," and why; and (2) compare the procedures under the ABA rule and the New Hampshire rule to determine why the New Hampshire definition might be different. Justice Lynn suggested that she might also want to look at the language of the federal rules, as he recalls a recent case in the New Hampshire district court in which the definition of "serious crime" came into play.

m. 2012-008. Protocol for In Camera Review of Documents.

Justice Lynn reminded the Committee that the Supreme Court had notified the Committee that the Superior Court had drafted a protocol for in camera review. Because the protocol establishes procedures that would be applicable to parties and counsel in civil and criminal cases, the Supreme Court felt that the protocol should probably be adopted in some form as one or more rules, and asked the Committee to consider this issue. At the Committee's direction, Carolyn Koegler sent copies of the proposal out to a number of different people requesting comment.

By letter dated June 7, 2012, Christopher M. Keating, Executive Director of the New Hampshire Public Defender, raised concerns about section 8 of the protocol, and suggested that it be eliminated and that sections 4, 5, and 6 of the protocol police the disposition of confidential records produced after in camera review. At the June meeting, the Committee directed Carolyn Koegler to forward copies of Attorney Keating's letter to the Attorney General's Office and to Judges Nadeau, Kelly and King and to request their comments on the letter. Judge Nadeau responded to the request by email, as reflected in Carolyn Koegler's September 6, 2012 memorandum to the Committee. Deputy

Attorney General Ann Rice responded to the request by letter dated September 7, 2012.

Attorney Abigail Albee was present at the meeting to represent the views of the Public Defender's Office. She noted that the primary concern of the Public Defender's Office is section 8 of the "In Camera Protective Order (Under Seal)," which reads, in pertinent part:

> 8. In criminal cases: If the Defendant is convicted of the charges, after the conviction is final following direct appeal, the State and defense shall destroy all copies of the records in their possession along with any notes taken by counsel in connection with their review of the records. If the Defendant is acquitted or the case otherwise terminates without a conviction, then the State and defense shall immediately destroy all copies of the records and said counsel notes in their possession . . . .

Attorney Albee stated that her Office's concern is about the requirement that all counsel notes be destroyed.

Some discussion ensued about how to address this concern. A suggestion was made that the protective order be amended: (1) to require that, rather than be destroyed, the documents be returned to the court, and (2) to delete the requirement that counsel's notes be destroyed.

Attorney Taylor stated that he has a concern about a sentence in paragraph 8 of the Protocol, which requires that the court retain documents for ten years, because often entire original files are submitted in camera. Karen Anderson suggested that one approach to handling this would be to scan the files, as was suggested by Judge Nadeau in her email. Attorney Taylor responded that this would present a new challenge -- staff time to scan.

After some discussion, it was the consensus of the Committee that, at the very least, the court should retain one copy of whatever is submitted in camera. The Committee directed Carolyn Koegler to draft a memorandum to Judge Nadeau summarizing the following concerns about the protocol (first raised by the Public Defender's Office and Deputy Attorney General Ann Rice in her September 7, 2012 letter to the Committee):

(1) Paragraph 8 of the In Camera Protective Order is problematic to the extent that it requires the parties to destroy their notes or work product;

(2) Paragraph 8 of the Protocol and Paragraph 8 of the In Camera Protective Order are problematic to the extent that they require parties to

destroy documents. The Committee believes that the documents should be returned to the clerk of court who will then destroy all of the documents, except for the original;

(3) The Committee believes that the clerk should retain one copy of the original records in some way (whether in original paper form, or electronic form);

(4) Paragraph 4 of the protocol, which requires the State or moving party to deliver the documents to the court "immediately upon receipt" should be changed to "within one or two business days," because there are often times that "immediate action" is not possible;

(5) Both the certification form and the order for production suggest that the documents be delivered to "Prosecutor." If this language is inserted as standard language, rather than just sample language, this could be problematic, as there is often no prosecutor involved;

(6) Paragraphs 3 and 4 of the Protocol and the Order for Production of Records for In Camera Review are problematic to the extent that they require the provider/agency to deliver the in camera documents to the State or moving civil party in a sealed envelope or other sealed container. The Committee believes that it would be preferable for the prosecutor to continue to be responsible for delivering the request, but that the provider/agency should deliver the in camera documents directly to the Court. The Committee also believes that the order should contain some language stating that the materials should be brought to the attention of the presiding judge immediately.

The Committee requested that Carolyn Koegler outline these concerns in a letter to Judge Nadeau and that she request that Judge Nadeau revise the proposed forms and protocols to address these concerns.

n. 2012-010. District Court Rules.

Justice Lynn reported that the subcommittee chaired by Judge Cullen is still working to address the need for a procedure to insure that counsel is available for indigent defendants at their arraignments in the district court.

o. 2012-012. Supreme Court Rule 37(15)

At the June meeting, Attorney Ardinger agreed to research the questions of what an attorney needs to do to: (1) rejoin the bar after

resignation; and (2) move from inactive to active status. He will report at the December meeting.

p. 2012-013. Circuit Court Rules. Dismissal of Cases

At the June meeting, Judge Hampe requested that the Committee consider Judge Kelly's proposal after he has had the opportunity to consider how the proposed rule would impact the probate division. This issue will be considered at the December meeting.

3. New Items for Consideration

a. 2012-017. Transcripts of Court Proceedings

It was noted that the Supreme Court had adopted, by Order dated April 27, 2012, temporary rule amendments making changes to Supreme Court Rules and forms relating to the preparation of transcripts of court proceedings and appeal transcripts, and had referred those temporary amendments to the Advisory Committee on Rules for its recommendation as to whether they should be adopted on a permanent basis. There was some discussion about whether, given the fact that the Committee lacked a quorum, a vote to put this item out for public hearing in December could be made electronically. It was agreed that Carolyn Koegler would email Committee members and ask them whether they agree this item should be put out for public hearing in December.

b. 2012-018. Law Clerk Code of Conduct

It was noted that the Supreme Court had adopted, by Order dated July 17, 2012, a temporary amendment to Supreme Court Rule 46, governing the law clerks' use of writing samples for job search purposes, and had referred the temporary amendment to the Advisory Committee on Rules for its recommendation as to whether it should be adopted on a permanent basis. The Committee directed Carolyn Koegler to email Committee members and ask them whether they agree this item should be put out for public hearing in December.

c. 2012-019. Procedural Rules of the JCC

It was noted that the Committee had received a proposal to amend Supreme Court Rule 40(4)(c)(2) by letter dated July 23, 2012, from Joseph R. Adamaitis. Mr. Adamaitis proposes amendment the procedural rules of the JCC to eliminate the two year period of limitations contained in Rule 40(4)(c)(2).

The Committee instructed Carolyn Koegler to forward the proposal to the JCC and to ask the JCC to comment on the proposal.

d. 2012-020. Proposal to Make Technical Amendment. Supreme Court Rule 32-A.

The Committee agreed that it could take no action on this matter because it lacked a quorum.

e. 2012-021. Superior Court Administrative Rules. "Rules Cleanup."

The Committee considered the September 7, 2012 memorandum from Carolyn Koegler to the Advisory Committee on Rules stating that a staff attorney at the Court had raised two issues regarding the need for a "rules clean-up" of the Superior Court Administrative Rules.

The Committee directed Carolyn Koegler to review the rules and submit a proposal to amend the rules to the Committee in December. It was noted that it might be necessary to consider the district court rules as well, as there may have been legislation which might require that the "special district court jury trial rules" be deleted.

f. 2012-021. Supreme Court Rule 54.

Justice Lynn informed the Committee that a proposal was made in the New Hampshire House of Representatives during the 2011-12 session which would have undermined the authority of the administrative judge of the circuit court. This proposal, which would have undone many of the steps taken in relation to the creation of the Circuit Court, was defeated in the Senate. However, an issue worth considering arose out of this discussion when it became clear that the reason for this proposal was a concern that some local constituencies -- police departments, public defenders, etc. -- felt that they had "nowhere to go" to raise concerns about a local court.

To address this issue, it has been proposed that it would make sense of have, similar to a Superior Court supervising judge, a liason judge for each court. That is, it might make sense to have a "presiding judge" of the Circuit Court, who is available most of the time, where people could go to raise concerns.

4. Miscellaneous

The next meeting date is Friday, December 14, 2012. Carolyn Koegler noted that the meeting dates for 2013 have not been set.

Following a brief discussion, it was agreed that the Chair would propose dates for the 2013 meetings and that Carolyn Koegler would confirm by email that these dates work for Committee members.

The meeting adjourned at 3:15.