NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Hearing and Meeting of September 12, 2014

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 Anderson, Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Raymond W. Taylor, Esq., and Hon. Robert J. Lynn.

Also present were the Secretary to the Committee, Carolyn Koegler, Esq. Attorney Janet DeVito, General Counsel of the Attorney Discipline Office, Attorney Sara Greene, Disciplinary Counsel, and Attorney Christopher Keating, Executive Director of the New Hampshire Judicial Council.

Justice Lynn noted that there were not enough Committee members present to constitute a quorum.

1. Approval of Minutes of June 6, 2014 Meeting

Committee members generally agreed that the minutes accurately reflected what occurred at the June 6 meeting, but it was noted that the Committee could not vote to adopt the minutes because a quorum was not present. Committee members directed Carolyn Koegler to make a few changes to correct typos in the minutes, to email the minutes to Committee members and ask the Committee members to vote by email to adopt the minutes, so that they could be posted on the Committee's webpage.

2. Status of Pending Items

    a. 2014-011. Attorney Discipline – Disgorgement of Fees. Supreme Court Rules 37(19-A) and 27A(I)(e)

Justice Lynn reminded Committee members that the Committee had considered the proposal to amend the Attorney Discipline Rules to authorize the Professional Conduct Committee or the Court to order a respondent attorney to forfeit legal fees or pay restitution as a sanction for misconduct. Committee members expressed many concerns at the June meeting about the proposal.

Justice Lynn noted that the Committee had received a September 10, 2014 letter from the Professional Conduct Committee recommending that that the Committee decline to adopt the proposed amendment to Supreme Court Rule (19) that would authorize the Attorney Discipline Office to seek orders against disciplined attorneys to "pay restitution to persons financially injured, or to forfeit all or part of the attorney's or law firm's fees, and to reimburse the public protection fund." Attorney Janet DeVito and Attorney Sara Greene were present to answer the Committee's questions about the letter. Attorney DeVito noted that Attorney Peter Beeson had drafted the letter on behalf of the Professional Conduct Committee.

Committee members took no action on this proposal.

b. 2014-012. Attorney Discipline – Confidentiality Rules. Supreme Court Rules 37(2) and 37A(IV).

Justice Lynn reminded the Committee members that the Committee had considered a proposal in June to amend the Attorney Discipline Rules to make non-disciplinary decisions with warning confidential, but retained for review by the Attorney Discipline Office and the Professional Conduct Committee. The Committee voted to recommend that the Court: (1) not amend the confidentiality rules as proposed in the public hearing notice dated April 23, 2014; but (2) consider eliminating the warning process.

Justice Lynn explained that the Court generally agreed that it makes sense to eliminate the warnings and not change the confidentiality provisions. He noted that the current system does seem unfair – that an attorney can receive a warning that is not "discipline," and that the warning is posted on the Attorney Discipline Office website. It seems the fairest thing would be to either make warnings confidential or eliminate them altogether. He stated that the Court believes that it would send a bad message to the public to reimpose confidentiality, and that the better approach would be to eliminate warnings.

Attorney Sara Greene spoke to this issue. She stated that there was some discussion of warning at a meeting of the PCC, but there did not appear to be any clear consensus about the warning issue. She noted that it is difficult to use warnings, although they can be used in subsequent proceedings late in the sanctions process. She noted that the ABA standards talk about "prior discipline," but that this is difficult, because a warning is not "discipline." If a warning is not discipline, then it cannot really be used against a lawyer as part of the formal process. She opined that she would not oppose eliminating warnings from the attorney discipline process, and offered to highlight for Carolyn Koegler where references are made to warnings in the Attorney Discipline Rules (Supreme Court Rules 37 and 37A).

Justice Lynn inquired whether the Committee is prepared to vote to put the proposal to amend the rules to eliminate warnings out for public hearing. Committee members generally agreed, but did not vote on the matter, due to the lack of a quorum. The Committee members present suggested that Carolyn Koegler include the item in the public hearing notice for December, and that the Committee would vote in December prior to the public hearing, to accept comment on the proposal.

c. 2014-019. Depositions: Notice or Subpoena Directed to an Organization. Superior Court (Civ.) Rule 26.

Justice Lynn reminded the Committee that it had put out for public hearing in June a proposal to amend Rule 26 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil actions. The amendment would add a provision, as subsection (m), to allow a party to name as a deponent a public or private corporation, a partnership, an association, or a governmental agency, and require the named organization to designate one or more officers, directors, managing agents or other person who consent to testify on its behalf. The Committee voted in June to recommend that the Court adopt the proposed amendment, and the recommendation was included in the 2014 Annual Report.

Following the June public hearing, the Committee received a letter dated June 6, 2014 from Attorney Irvin Gordon, expressing concerns about the proposal. In particular, he asserts that adopting the language of Federal Rule 30(b)(6) without adopting the language of Federal Rule 30(e)(1)(B), to allow a deponent to note "changes in form or substance and to submit such changes, in a post-deposition signed statement" would be unfair.

At Justice Lynn's request, Carolyn Koegler drafted some additional language to amend Superior Court Rule 26 to address Attorney Gordon's concern. The amendment would carve out an exception to the rule that "no deposition as transcribed shall be changed or altered . . . ." for depositions taken pursuant to Rule 26(m) as follows:

> (f) No deposition, as transcribed, **[except depositions taken pursuant to Rule 26(m)]** shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies.
>
> **[In the case of a Rule 26(m) deposition, on request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement listing the changes and**

the reasons for making them. If the deponent makes changes in substance to the transcript or recording, the court, on motion of the opposing party, may order a further deposition of the person in question and may allocate the cost of taking a further deposition, as justice may require.]

Carolyn Koegler distributed this additional proposed amendment to the Committee at the meeting. During the discussion about the additional proposed amendment, a Committee member inquired whether the general New Hampshire rule prohibiting a deponent from making substantive changes on an errata sheet following a deposition should be changed. Committee members discussed whether it was more appropriate to have a rule mirroring Federal Rule of Civil Procedure 30(e), which allows witnesses to review the deposition transcript and make a list of changes in form or substance or whether it is better to retain the existing New Hampshire rule, which prohibits a witness from making substantive changes to deposition testimony, and to carve out an exception for depositions taken pursuant to proposed Superior Court Rule 26(m).

No resolution was reached on this issue, but one Committee member noted that he would like to see the proposed additional language put out for public hearing in December. The Committee members present directed Carolyn Koegler to include the proposal to amend Rule 26 to add subsection (m) and amend section (f) in the public hearing notice for December. It was agreed that the the Committee would vote in December prior to the public hearing, to accept comment on the proposal.

Justice Lynn agreed to contact Judge McNamara to ask for his opinion about the concerns raised in Attorney Gordon's letter and the proposed language to amend section (f).

Attorney Herrick agreed to prepare a memo about the issue for consideration by the Committee on Cooperation with the Courts, and ask the Committee on Cooperation with the Courts to comment on the proposal.

d. <u>District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure and Probate Administration</u>

Justice Lynn noted that this project is currently on hold.

e. <u>2012-010(1) and (2). District Court Rules. Need for procedure to ensure that counsel is available for indigent defendants at arraignments in the district court.</u>

Justice Lynn noted that this project is currently on hold. He reported

that Judge Kelly has put the counsel at arraignment rules into effect everywhere.

f. 2013-003. Interlocutory Appeals.

Justice Lynn reminded the Committee that this issue relates to what happens when a trial court grants a motion to dismiss some, but not all, of the defendants in a case. Under New Hampshire case law, when some but not all defendants are dimissed from a case, the dismissed defendants must wait for a final decision to be done with the litigation unless the plaintiff both chooses to request an interlocutory appeal under Rule 8 and has his request granted at both the trial court and supreme court levels. Justice Lynn noted that other jurisdictions have procedures allowing trial judges to certify that an order is final and appealable with respect to certain defendants. Jeanne Herrick noted that the federal rules identify classes of issues favored for immediate appeals, and she believes that this is one.

In March 2013, Attorney Ardinger agreed to research this issue and propose a rule amendment. Attorney Ardinger was not present at the meeting.

g. 2014-005. Electronic Filing Pilot Rules

Carolyn Koegler reminded the Committee that the Supreme Court had adopted the Electronic Filing Pilot Rules, Circuit Court – District Division Small Claims Action Pilot Rules, and amended Circuit Court – District Division General rules, on a temporary basis by Order dated June 2, 2014.

Committee members noted that, given the fact that the rules will be in place on a pilot basis, it does not appear that any action is required by the Committee at this time.

h. 2014-006 through 2014-010. Superior Court Rules (Civ).

Carolyn Koegler reminded the Committee that Attorney Rice had agreed to chair a new subcommittee to address the issues relating to the new Superior Court Civil Rules that are set forth in her June 4, 2014 memorandum to the Committee. Attorney Rice was not present at the meeting, and therefore did not report on this item.

Derek Lick requested that Carolyn Koegler add to the subcommittee's agenda consideration of whether requiring defendants to file an Answer 30 days from the date of service is an unreasonably short period of time. He explained that the short deadline can be particularly problematic for his insurance clients.

3. New Submissions

a. 2014-013. Supreme Court Rule 47. Counsel Fees and Expenses – Indigent Criminal Cases

The Committee considered a July 16, 2014 Letter from Attorney Christopher Keating, Executive Director of the New Hampshire Judicial Council in which Attorney Keating, on behalf of the Judicial Council, proposes that Supreme Court Rule 47 be amended to raise the hourly rate for assigned counsel working on major crimes cases from $60 to $100 per hour. "Major crimes" are defined in the proposed amendment as "capital murder, homicide, aggravated felonious sexual assault, felonious sexual assault, and first degree assault."

Attorney Keating was present at the meeting, and, at Justice Lynn's request, explained to Committee members the reasons for the proposal. He stated that one of the reasons the proposal makes a distinction between major crimes cases and other cases is pragmatic. He notes that lawyers generally are comfortable with the $60/hour rate on small cases, because they seem to view this as a part of their professional obligation. With the larger cases, for example, homicide, which often require hundreds of hours of work, this becomes a real financial hardship for attorneys. As a result, it has become increasingly difficult to find lawyers who are competent to handle these cases at a satisfactory level.

Attorney Keating explained that increasing the fee for major cases from $60 per hour to $100 per hour will result in an additional expenditure in assigned counsel cases of $80,000. If the fee was raised from $60 to $100 in all cases, the additional expenditure would be between $450,000 and $460,000. He believes that legislators will be able to appreciate the need for an $80,000 increase to be applied to this subset of cases, but that they might be resistant to a wholesale increase in rates.

Justice Lynn stated that he and his colleagues on the Court are supportive of this request, but wonder why the request is not being made to increase fees on the smaller cases as well. Justice Lynn stated that he shares attorney Keating's view that $60, even on the smaller cases, is insufficient.

Attorney Keating agreed and noted that the rate is really confiscatory, and that the work the attorneys do in these cases should be recognized as pro bono work. There has been no change in the rate since 1995. He noted, citing *Smith v. State*, 118 N.H. 764 (1978), that the Supreme Court has the right to set the rates, and that it is unconstitutional for the legislature to set them.

In response to a question from Attorney Herrick, Attorney Keating stated that the fee caps do not change under the proposal. He believes that the cap

for homicide cases is $20,000. Attorney Keating stated that the courts have been very good about recognizing when it is appropriate to exceed the fee caps, so that when a lawyer moves to exceed, that motion is often granted. Attorney Taylor stated that his sense is that there will not be motions to exceed in most cases.

The Committee members present directed Carolyn Koegler to include the proposal to amend Supreme Court Rule 47 in the public hearing notice for December, and that the Committee would vote in December prior to the public hearing, to accept comment on the proposal.

b. 2014-014. Trial Court Rules. Motions to Seal.

Justice Lynn referred Committee members to an August 26, 2014 memorandum from Carolyn Koegler to the Committee. The memorandum notes that Judge Delker has proposed that the Committee consider recommending an amendment to the proposals relating to court rules regarding motions to seal that were made in the Advisory Committee on Rules 2014 Annual Report. Judge Delker notes that a Superior Court Administrative Order has been issued requiring a party filing a pleading which will be under seal to caption the document in a way that identifies the general nature of the pleading without disclosing the confidential information, and that this caption will be the caption for the pleading for the public record. He suggested that this order be adopted as part of the rules governing motions to seal.

It was noted that the Committee recommended in its 2014 Annual Report that the Supreme Court amend trial court rules to: (1) address how a party may request that the court seal a case record or a portion of a case record; and (2) amend Supreme Court Rule 12 (2)(b) to allow a party to withdraw documents if its motion to seal is denied. The Court recently put those proposals out for public comment. The close of the comment period is October 20.

Following some discussion, Committee members concluded that Judge Delker's proposal constitutes a technical change to the rules, and, therefore, does not require a public hearing. Committee members directed Carolyn Koegler to recommend to the Court prior to October 20 that the amendment be made to the trial court rules. It was agreed that a sentence should be added to the proposals to amend trial court rules to incorporate the language of the Administrative Order 2014-007.

The language of the proposed amended trial court rules reads (with Judge Delker's additional proposed amendment in **[bold and in brackets]**:

(h) Motions to Seal.

The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the superior court:

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. **[The party filing the pleading shall caption the pleading in a manner that provides sufficient information to identify the general subject matter of the pleading without disclosing the specific information the party is seeking to maintain as confidential.]** Upon filing of the motion to seal, **[the caption of the pleading as written by the party filing the pleading shall be docketed on the public index and shall be available to the public, but]** the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

. . . .

c. 2014-015. Supreme Court Rule 50-A.

Justice Lynn referred committee members to the September 4, 2014 letter from Eileen Fox to Justice Lynn stating that the Supreme Court has requested that the Committee consider whether Supreme Court Rule 50-A, which establishes the Trust Accounting Certification requirement, should be amended to increase the fees for noncompliance.

Justice Lynn reported that the Court was aghast to recently review a list with the names of some 500 attorneys who had not filed by August 1. However, he stated that, due to some clerical issues, the number of attorneys who failed to file by August 1 may have been overstated. In light of this, Justice Lynn recommended that the Committee put the proposal out for public hearing in December, with the understanding that the Committee and the Court might learn at some point before then that the number of attorneys who failed to file by August 1 might actually be substantially lower.

The Committee members present directed Carolyn Koegler to include the proposal to amend Supreme Court rule 50-A to increase the fines for non-compliance in the public hearing notice for December, and that the Committee would vote in December prior to the public hearing, to accept comment on the proposal.

d. 2014-016. Supreme Court Rule 51.

Carolyn Koegler referred members to her September 8, 2014 memo to the Committee. The memo sets forth the Court's request that the Committee form a working group to draft a proposal to amend Supreme Court Rule 51 (Rulemaking). Carolyn Koegler explained that the Court has requested that the proposal: (1) shorten the length of time it takes for a proposal submitted to the Committee to be recommended to the Court (by requiring the Committee to report to the Court twice per year); (2) include a "fast track" provision for temporary rules and rule amendments that provides that the Court will notify someone from the Bar Association to request comment on the proposed temporary rule or rule amendment before it is adopted; and (3) provide for only one comment period, because the Court believes it may not be necessary to put the same proposal out for public comment both before and after it is recommended to the Court.

Jeanne Herrick, Karen Anderson, Ray Taylor and Derek Lick agreed to serve on the subcommittee.

e. 2014-017. Supreme Court Rule 12.

Carolyn Koegler referred members of the Committee to her September 4, 2014 memo to the Committee. The memo sets forth the Court's request that the Committee consider a proposal to amend Supreme Court Rule 12(2)(a), which relates to a case record or a portion of a case record that has already been determined to be confidential by a trial court, administrative agency, or other tribunal.

The rule currently states that if the trial court has determined that a case or a portion of the case record has been determined to be confidential, then it will continue to be treated as confidential on appeal. The Court would like the Committee to consider whether the rule should be amended to give the Supreme Court the authority to revisit the issue of whether materials that have been sealed by the trial court should remain sealed on appeal. That is, whether the rule should make clear that the trial court's ruling on confidentiality will not automatically apply in the Supreme Court appeal.

Following some brief discussion, the Committee members present directed Carolyn Koegler to include the proposal to amend Supreme Court rule 12(2)(a) as set forth in the September 4 memo. The Committee will vote in December prior to the public hearing, to accept comment on the proposal.

4. Meeting Dates

The remaining 2014 meeting date is December 12, 2014. The 2015 meeting dates are:

Friday, March 13, 2015
Friday, June 5, 2015
Friday, September 11, 2015
Friday, December 4, 2015