NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of September 9, 2016

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

The meeting was called to order at 12:35 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Hon. R. Laurence Cullen, John A. Curran, Esq., Hon. N. William Delker, Hon. Michael H. Garner, Jeanne P. Herrick, Esq., Maureen Raiche Manning, Esq., Ari Richter, Patrick W. Ryan, Esq., Frederick H. Stephens 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 June 3, 2016 and July 5, 2016 Meetings.

Upon motion made by attorney Ryan and seconded by attorney Albee, the Committee voted to adopt the June 3 and July 5, 2016 minutes.

2. Status of Items Still Pending Before the Committee

a. 2015-022. New Hampshire Rules of Evidence - Update

Justice Lynn referred Committee members to Carolyn Koegler's August 25, 2016 memorandum and attachment, noting that some changes had been made to the proposal to amend the New Hampshire Rules of Evidence based upon the discussion about the rules that occurred at the June 3, 2016 public hearing. He stated that there are footnotes throughout the draft highlighting where changes have been made to the language of the proposal submitted by the New Hampshire Rules of Evidence Committee, and why.

Judge Garner noted that he has concerns about the language in NHRE 1101, "Applicability of Rules." Among other things, the word "divorce" should be replaced with "domestic relations." There was also some discussion about whether the language in (b) is broad enough, and about the meaning of the word "civil."

Attorney Manning inquired whether the Committee's recommendation would include a recommendation to amend the jury questionnaire. Carolyn Koegler stated that this would be included in the report to the Court.

Judge Cullen inquired why the language, "or played before a jury" was added to Rule 803(b)(5). A committee member explained that this language was added to address a concern raised by assistant county attorney Melissa Fales at the public hearing, relating to videotaped testimony.

Carolyn Koegler stated that she had compared the language of NHRE Update Committee proposal with the text of the Federal Rules of Evidence, as printed in the United States Code. The exercise prompted a few questions, which she raised in a September 9, 2016 memo to the Committee.

The Committee first addressed Carolyn Koegler's question about the level of detail to provide in the Update Committee note following rules to which only stylistic changes are being made. The Committee agreed that it did not wish to recommend the adoption of the detailed language used in the note following the federal rule. Regarding the notes following the rules to which both stylistic and substantive changes are being made, the Committee agreed that, where appropriate, the note should refer the reader to the note following the federal rule. Regarding those instances in which the NHRE Update Committee recommended that the Court adopt the language of the federal rule, Committee members agreed that the language should be identical to the language set forth in the United States Code, rather than the language set forth in the appendix to the NHRE Update Committee report (in cases in which there is a discrepancy).

Carolyn Koegler noted that the NHRE Update Committee had recommended that the Court adopt the language of Federal Rule of Evidence 801(d), but that the NHRE Update Committee had not specifically noted that the following substantive change was made to the Rule in 2014 (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~):

> (d) *Statements That Are Not Hearsay*. A Statement that meets the following conditions is not hearsay:
>
> (1) *A Declarant-Witness's Prior Statement*. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
>
> (B) is consistent with the declarant's testimony and is offered**[:]** ~~to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or~~

**[(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or**

**(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or]**

(C) identifies a person as someone the declarant perceived earlier.

She inquired whether the Committee wished to recommend that this change be made to New Hampshire Rule of Evidence 801(d).

Following some discussion about the change, it was noted that the change is significant. Carolyn Koegler read aloud the Federal Advisory Committee notes on the 2014 change. Committee members noted that the Federal Advisory Committee notes are consistent with what they believe the amended language is designed to do, and that the language may be inconsistent with New Hampshire case law.

Following some further discussion, the Committee agreed to seek input from the NHRE Update Committee. In response to a request by Committee members, Carolyn Koegler agreed to send the draft to Professor Garvey and Judge Garfunkel and to ask them to circulate the draft to members of the NHRE Update Committee. She stated that she would ask that feedback on the proposed new language be provided as soon as possible.

b. 2015-020. Circuit Court – District Division Rules 5.4, 5.7 and 5.9. Landlord and Tenant.

Carolyn Koegler reminded the Committee that it had voted at the July 5 special meeting to recommend to the Court the amendments to Circuit Court – District Division Rules 5.4, 5.7 and 5.9, as set forth in the June public hearing notice, with additional amendments discussed at the July meeting. However, as is noted in her August 24, 2016 memo to the Committee, attorney David Peck, who submitted the proposal to the Committee, had offered a comment about the proposals at the June hearing that the Committee has not yet addressed.

At the June public hearing, attorney Peck noted that he had had some difficulty drafting the proposal because he was uncertain about the current process, and hoped that the Committee would address the question of what a tenant is required to put in a motion to vacate a default. He noted that there are rules in the district division civil rules that say that if someone is defaulted for not filing an appearance, then his or her motion must include an affidavit of defense on the merits of the claim. Attorney Peck stated that he does not know whether this rule applies to landlord tenant cases.

There was some discussion at the June meeting about whether an affidavit should be required, and it was noted that the electronic filing rules make it clear that a "statement," rather than an "affidavit" is required. Attorney Peck stated that whatever is required, be believes that it is important to make clear in the rule what that is. No resolution was reached on this issue at the June meeting, and the issue was not discussed at the July meeting.

As is noted in the August 24, 2016 memo to the Committee, Justice Lynn believes that this issue should be addressed and proposes that the Committee recommend the language set forth below be inserted into the proposal to amend District Division Rule 5.4 and that the subsequent subsection be relettered as (C):

> B. No such default shall be stricken off, except by agreement, or by order of the court upon such terms as justice may require, upon motion. A motion to strike the default shall: (1) provide reasons for the default; (2) specifically set forth the defense and the facts upon which the defense is based; and (3) state that the defendant understands that making a false statement in the pleading may subject the defendant to criminal penalties.

One committee member inquired what the language "reason for the default" means. Justice Lynn explained that it means that the tenant must explain what circumstances led to the tenant being in default.

Following some discussion, the Committee agreed that this language should be added to the proposal. It was also noted that the language, "adjusted for housing assistance, if applicable" should be added to subsection (B) of the proposal to amend Rule 5.7 as follows (additions in **[bold and in brackets]**: "this amount is equal to the actual weekly rent or the periodic rent converted into a weekly sum **[adjusted for housing assistance, if applicable.]**

Upon motion made and seconded, the Committee voted to recommend that the Court adopt the changes to Circuit Court-District Division Rules 5.4, 5.7 and 5.9 as set forth in the appendices to the August 24, 2016 memorandum (with the additional amendment to Rules 5.4 and 5.7 discussed at the September 9 meeting).

c. <u>2014-006 through 2014-010. Superior Court Rules (Civ.)</u>

Judge Delker referred Committee members to his May 9, 2016 memo setting forth the subcommittee's recommendation regarding amendments to the New Hampshire Rules of Civil Procedure. He reminded the Committee that the subcommittee had been formed to continue the work of a subcommittee previously chaired by attorney Emily Rice and was also asked: (1) to review a request to consider adopting some or all of the business docket standing orders as part of the civil rules; and (2) to identify any other issues that might have

arisen since the adoption of the civil rules. The subcommittee's recommendations regarding each of the issues it addressed are set forth in the memo. The issues the subcommittee addressed and its recommendations with respect to each are summarized here:

- Eliminate Summary Jury Trials? – No. No change to existing rule.
- Should Rule 9 ("Answers, Defenses, Forms of Denials") be amended to include a list of affirmative defenses that must be included in the answer? Yes.
- Should the rules require a civil action cover sheet and final civil action disposition sheet? No. No change to current rules.
- Should there be a rule addressing amendments to the complaint and the effect of the amendment in terms of relation back to the original filing? Yes, but no change should be made to the rules now. This issue is in need of further study and should remain as a separate item on the agenda.
- Should the last sentence of Rule 205 be amended to require records of juror orientation to be retained for only six years? Yes.
- Should a rule be adopted regarding replies and surreplies? Yes. Adopt new Rule 13A to set forth a right to file a reply to an objection, the timing of that reply, and a presumption that surreplies will not be allowed without special permission from the court.
- Should a rule be adopted regarding protective orders? Yes. Adopt new Rule 29(b) to create a process and timing for filing protective orders to protect the confidentiality of certain discovery.
- Should Business Docket Standing Orders 1, 2, 4, 6, 7, 8, 9, 10, 11 be adopted? No.
- Should the rules provide more than 30 days to file an answer or other responsive pleading? No. No change to the existing rule should be made.
- Should a rule be adopted regarding permissive counterclaims? Yes, but further study is required. The subcommittee will research the issue and craft a proposal. This item should be assigned a docket number and added to the Advisory Committee on Rules agenda.
- Should the rules regarding when a party must file an appearance be amended? Yes, but further study is required. The subcommittee will research the issue and craft a proposal. This item should be assigned a docket number and added to the Advisory Committee on Rules agenda.
- Should a rule be adopted making clear that the Chief Justice of the Superior Court has issued orders which supplement/clarify the rules?
- Should Rule 28A(a), which authorizes a defendant to obtain an independent medical examination (IME) in personal injury cases "prior to or during trial" be amended? Yes. Because of the potential for prejudice and disruption of the trial process, an order for an IME outside of the expert disclosure deadlines should be a rare occurrence and only granted for good cause shown.

The Committee seemed to be in agreement with the recommendations made by the subcommittee, except for the recommendation to adopt a rule making clear that the Chief Justice of the Superior Court has issued orders which supplement/clarify the rules. A concern was raised about this. One committee member suggested that to the extent that these administrative orders are more like rules, they should be included in the rules. There was some discussion about the nature of the administrative orders. It was noted that some of the orders are purely administrative, while others seem to be more like rules. To the extent that the orders are purely administrative, then there is no reason they need to be published other than to the Superior Court judges. If they are more like rules and affect the rights of the parties, then they should probably be adopted as rules. Justice Lynn suggested that this item should be assigned a separate docket number, and that someone should review the administrative orders to determine: (1) whether the order is obsolete and can be revoked; (2) whether the order is purely administrative; or (3) whether the order is more like a rule. If the order is more like a rule, then a rule should be drafted and submitted to the Committee for consideration. Judge Delker volunteered to review the administrative orders and complete this assignment.

Following some further discussion, and upon motion made and seconded, the Committee voted to the following proposals (as set forth in the subcommittee's May 9, 2016 memo) out for public hearing in December: (1) amend Rule 9; (2) amend Rule 205; (3) adopt Rule 13A; (4) amend Rule 28A; and (5) adopt Rule 29(b). Each of the items requiring further study will be assigned a docket number and added to the Committee's December agenda.

d. 2015-011. Supreme Court Rules 37 and 37A

Carolyn Koegler reminded the Committee that Clerk Eileen Fox informed the Committee in a June 5, 2015 memo that the Court believes that Rule 37(14)(b) should be amended to make clear (to the extent that it is unclear) that a disbarred attorney seeking readmission must submit an application and petition for admission to the bar, take and pass the bar examination, and submit to the additional review required by the rule. Carolyn Koegler reminded the Committee that a subcommittee had been formed to consider this issue, and other issues relating to reinstatement and readmission.

The subcommittee, comprised of Eileen Fox, Sherry Hieber and Abigail Albee and Carolyn Koegler had met and had begun work on a draft proposal to amend the rule. However, they were informed that a disbarred lawyer recently filed a petition with the court for readmission and the petition was referred to the PCC and Character and Fitness in accordance with the current rule. In light of this, the subcommittee agreed with Clerk Fox that it would be helpful in deciding how the rule should be amended to have the experience of considering

the current petition. For this reason, the subcommittee has chosen to wait until after the proceedings to finalize the proposed amendments to the rule.

3. New Submissions

a. 2016-003. Supreme Court Rule 37

The Committee next considered the proposal, set forth in a March 16 email and attachment from attorney David Rothstein, to amend Supreme Court Rule 37 to add a new subsection to provide a summary suspension procedure for respondent attorneys who do not cooperate with the disciplinary authority.

Attorney Albee raised a concern about the use of the language "an attorney" in subsection (a) of the revised proposed summary suspension rule. Some discussion ensued regarding whether the summary suspension rule should apply to all attorneys or only to those attorneys who are under investigation. Some committee members stated that they like the rule as written. Others opined that the summary suspension rule should apply only to those attorneys who are being investigated because interim suspension suggests that an attorney is thought to be a threat to the public. One Committee member inquired whether the proposal is really intended to apply to all attorneys. Justice Lynn agreed to contact attorney Rothstein to determine whether he would be comfortable with replacing "an attorney" with "an attorney under investigation" in lines 1 and 3 of subsection (a).

A concern was raised that subsection (c) states that the attorney discipline office may file a petition for summary suspension with the court, apparently without notice to the attorney. It was agreed that the language, "with copies to the subject attorney," should be added following "with this court" in (c).

Upon motion made and seconded, the Committee voted to put out for public hearing the proposal to amend Rule 37 to add section 9-B, with the following amendments to: (1) replace the language "an attorney" with the language "an attorney under investigation" to subsection (a); and (2) add the language, "with a copy to the subject attorney" in subsection (c). Justice Lynn agreed to speak with attorney Rothstein about the proposed change to subsection (a). It was agreed that if attorney Rothstein is comfortable with the change to subsection (a), the language would be included in the public hearing notice.

b. 2016-004. Supreme Court Rule 51.

The Committee next considered the May 26, 2016 memo and attachment from Carolyn Koegler requesting that the Committee consider amending

Supreme Court Rule 51 to require the Secretary of the Advisory Committee on Rules to file reports with the Supreme Court on February 1 and August 1, rather than April 1 and November 1 of each year.

Upon motion made and seconded, the Committee voted to recommend that the Court amend Supreme Court Rule 51 as set forth in appendix A of the May 26 memo.

c. 2016-005. Superior Court (Civ.) Rules 1 and 4.

The Committee next considered a May 24, 2016 memo from David Peck proposing amendments to Superior Court Rules 1 and 4, relating to the procedures to be followed when a filing is rejected by a court clerk.

Justice Lynn explained that this proposal was made in response to a case that was recently appealed to the Supreme Court. It involved an appeal from the denial of benefits under the Aid to the Permanently and Totally Disabled program. The plaintiff in the case had filed a complaint in Superior Court on the last day of the filing deadline contesting the denial of benefits. His complaint was rejected one day after the filing deadline because it was not accompanied by the filing fee and because of insufficient copies. The plaintiff refiled the complaint a week later, along with a motion to waive the filing fee. Because that filing was made after the expiration of the filing deadline, the trial court dismissed the complaint. The issue on appeal was whether the plaintiff should have had an opportunity to correct the problem. The Supreme Court reversed the trial court's dismissal of the case. The proposal David Peck has submitted to the Committee would amend the rules to allow a party to cure defects in filings. Justice Lynn noted that the Circuit and Superior Courts might have concerns about the administrative problems this could create.

Judge Delker noted that this aspect of the rules has always concerned him – that is, allowing clerks to reject pleadings. He instructs his clerks not to reject pleadings without speaking to a judge first.

Justice Lynn suggested that it might make sense for attorneys Albee and Ryan to talk with Judges Kelly and Nadeau, as well as other clerks to let them know that the Supreme Court feels that something should be done to address this concern, but that the Court would like to do so in a way that makes this easy for the Circuit and Superior Courts, from an administrative standpoint.

Attorney Manning stated that she has concerns about the way the rule is drafted. The language of the rule seems to suggest that someone could file a negligence claim on day one, and if the filing has some defects that need to be cured, the person could refile to correct the defects and then include thirteen new claims that are 15 days beyond the statute of limitations. Do those

thirteen new claims then relate back to the original filing so that they fall within the statute of limitations?

Attorney Curran stated that there is case law on this that has developed under Federal Rule of Civil Procedure 15 ("Amended and Supplemental Pleadings"). He noted that in some sense it is almost better for the clerk to accept the filing because then it is clear what the party is trying to file, and you can then avoid the problem attorney Manning points to.

Attorneys Albee and Ryan agreed that they would ask for feedback from the appropriate people at the Superior and Circuit Courts about the proposal set forth in the May 24, 2016 memo from David Peck.

d. 2016-006. Motions to Seal.

The Committee next considered a May 31, 2016 memo from Carolyn Koegler. The memo explains that attorney William Chapman has proposed that the Court consider adopting a rule establishing time limits for documents filed under seal to minimize the likelihood that they remain sealed longer than necessary. Justice Lynn believes that while the Committee is considering the issue raised by attorney Chapman it should also revisit the question of whether to again recommend the adoption of rules addressing how a party may request that the Court seal a case record or a portion of a case record. The Committee had recommended the adoption of such a rule in 2014. The Court did not adopt the recommended changes at that time.

Following some discussion, the Committee agreed that a subcommittee consisting of the following people should be formed: (1) Judge Delker; (2) Attorney Chapman; (3) Judge Garner; (4) court staff involved in e-filing; (5) an attorney with a business litigation background; (6) an attorney with a complicated divorce practice; and (7) others listed in the last paragraph of the May 31, 2016 memo.

e. 2016-007. Supreme Court Rule 54. Administrative Council.

The Committee next considered the proposal set forth in Eileen Fox's August 19, 2016 memo. Following some discussion, the Committee concluded that a public hearing on this item would not be necessary. Upon motion made and seconded the Committee voted to recommend that the Court adopt the proposal to amend Supreme Court Rule 54 to make the Chief Justice of the Supreme Court, or his or her designee, a member of the administrative council.

4. Meeting Dates

The next meeting date is December 9, 2016. The 2017 meeting dates are:

- Friday, March 17
- Friday, June 16
- Friday, September 15
- Friday, December 8