NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of September 15, 2017

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

The meeting was called to order at 12:37 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Hon. Paul S. Berch, Hon. R. Laurence Cullen, Hon. N. William Delker, Hon. Michael H. Garner, Sean Gill, Esq., Joshua L. Gordon, Esq. (leaving early), Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Ari Richter, Charles Stewart and Hon. Robert J. Lynn.

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

Justice Lynn welcomed assistant attorney general Sean Gill to the Committee.

1. Approval of Minutes of June 16, 2017 Meeting

Upon motion made by Representative Berch and seconded by attorney Albee, the Committee approved the June 16, 2017 minutes.

2. Status of Items Still Pending Before the Committee

(a) 2016-013. Superior Court (Civ) Rule 12(g). Motions for Summary Judgment.

Judge Delker reminded the Committee that a proposal had been made to amend Superior Court Rule 12(g) to require both sides in the context of a motion for summary judgment to submit a single document identifying any undisputed facts and any disputed facts. He noted that the issue had been raised by Superior Court Judge McNamara and Superior Court Judge Anderson. The purpose of the proposal was to try to encourage parties to address each of the facts and to point to evidence in the record to make it clear whether a particular fact is or is not disputed. One mechanism for doing this could be to require the non-moving party to respond to each fact set forth in the moving party's statement of facts. Another approach could be to require the nonmoving party to articulate a set of facts to which the moving party has

to respond. The purpose of any rule amendment would be to make it easier for a judge to determine what is in dispute, and what is not.

Judge Anderson's initial proposal to amend the rule was put out for public hearing in June. Following the public hearing, the Committee referred the issue back to the subcommittee to address some of the concerns raised at the June meeting by Committee members.

Judge Delker reported that Judge McNamara had met with a group of 5-6 people and that the rule was redrafted and recirculated, and that there was discussion about the amended proposal in a follow-up conference call. Judge Delker noted that he had not participated in the subcommittee meeting but that attorneys Lick and Herrick had, and that they might be in a better position to speak regarding the current proposal.

Attorney Lick stated that the concern that he had had about the original proposal related to the logistics more than anything. Under the Massachusetts rule, on which the original proposal was based, no motion is filed with the court. Rather, the moving party sends a document to the opposing party, the opposing party sends the objection to the moving party and the moving party submits a package to the court. Attorney Lick noted that the problem with this approach is that people end up fighting about facts that seem like they should be undisputed. It gets very complicated very fast. The difficulty in the case he worked on in Massachusetts arose because the judge in Massachusetts required the parties to work together. Under this new proposal, the rule does not envision that. If the rule required a meet and confer, attorney Lick would have concerns about that.

Judge Delker stated that he shared attorney Lick's concern about the prior version of the rule, which requires the other party to respond. This version solves that problem. But this version also forces the parties not to hide the ball.

Attorney Lick agreed, but noted that where it starts to get complicated is when parties start to add additional facts. Regarding the additional facts, Attorney Gordon inquired how the court would manage this – how will this impact the summary judgment deadlines – what about the time crunch that may exist for judges and parties? If the point of the summary judgment deadlines is to give the judges time (90 days) to review and rule on the motions, how does this new rule impact that?

Judge Delker noted that the 90 day requirement is by scheduling order, and is not in a rule. Attorney Lick noted that the clerks' offices will need to figure this out.

Justice Lynn stated that he believes this is a good proposal, and that it forces parties to not play games.

Mr. Stewart inquired who gets to tell the story under this proposed new rule. A committee member responded that the filing party gets to tell the story, but that there is the potential for an additional filing, and potential for a cross-motion. Justice Lynn noted that the non-moving party may have the opportunity to tell the story with additional facts.

Attorney Lick noted that there is a section in the new proposed rule, on cross-motions for summary judgment, but the party who doesn't file first is still "on the other side." Cross-motions complicate the back and forth. He noted that this almost creates a race to see who can file first. He noted that this rule is much better and more workable than the original proposal, but there will still be logistical issues, and he can see this becoming complicated very quickly.

Attorney Gordon inquired whether this all gets derailed if there is an obstinate person on the other side. Attorney Lick responded that the parties have an incentive to respond because under the proposed rule, anything not responded to will be deemed admitted. In response to Mr. Richter's concern that this may be contrary to human nature, Justice Lynn noted that the "taken as admitted" threat balances that. Attorney Lick stated that he likes the way this rule sets up the exchange. The moving party does not need to get agreement from the non-moving party, but the non-moving party does have to respond. This rule forces everyone to answer, "do you agree or not." It is hard to dance around that.

Mr. Stewart noted that this treats pro se parties differently. He is a little concerned about this, because in some cases, the pro se party will need an opportunity to respond. It seems that an attorney should still send the motion to the pro se party but that perhaps the pro se party should not be required to respond. That is, the pro se party should not be exempted on the sending side, but on the response side.

Attorney Albee stated that she would ask Gina Belmont and Karen Gorham about how this proposed new rule would work with e-filing.

Justice Lynn stated that it sounds like it might make sense to put this out for public hearing in December. Upon motion made and seconded, the Committee voted to put this out for public hearing in December.

(b) 2015-011. Supreme Court Rules 37 and 37A.

Carolyn Koegler reminded the Committee that a subcommittee had been formed to address concerns raised in a June 5, 2015 memo to the Committee

from Eileen Fox regarding the procedures to be followed in readmission and reinstatement cases. The subcommittee had suspended its work for a period of time, but reconvened over the summer to draft a proposed new Supreme Court Rule 37(14). The subcommittee's proposal is attached to a September 11, 2017 memo from Carolyn Koegler.

Attorney Gordon noted that the proposed new rule requires an attorney who has been disbarred to retake the bar examination. He asked whether the reason for the disbarment matters, and whether there might be cases in which it would not make sense to require an attorney to retake the bar examination. Attorney Sara Greene, who was a member of the subcommittee, stated that the subcommittee had considered the issue and had determined that a bright-line rule is the right approach in these cases. What is at issue here is the protection of the public. Judge Delker stated that his view is that this is appropriate in disbarment cases. An attorney who has been disbarred needs to demonstrate his or her commitment. Disbarment is serious.

There was some discussion about whether an attorney must take the bar examination before a determination is made by Character and Fitness about whether the attorney could be readmitted. It was noted that the proposed new rule requires the attorney to retake and pass the bar examination before his or her application for readmission would be considered.

Upon motion made by representative Berch and seconded by attorney Albee, the Committee voted to put this proposal out for public hearing in December.

Carolyn Koegler reminded the Committee that it also has pending before it the question of whether the name of the Attorney Discipline Office should be changed to the Office of Professional Responsibility. Carolyn Koegler reported that she had asked Attorney Discipline Office General Counsel Janet DeVito about this. Attorney DeVito stated that the professional and support staff at the ADO has no particular interest in changing the name of the office, but no particular objection if others believe it should be changed. A change to the office's name would implicate other changes to every place that the ADO is mentioned in rules, on the website, and on the signage. These changes would be time-consuming, but would not alone be a reason not to change the name.

Following some brief discussion, the Committee agreed that no action should be taken on this, and asked Carolyn Koegler to notify the Court.

(c) 2016-006. Motions to Seal.

Judge Delker reminded the Committee that at the June meeting the Committee had considered and discussed the subcommittee's May 9, 2017 submission proposing rules regarding motions to seal and unseal confidential

documents. The Committee had raised some concerns about the submission and Judge Delker agreed to raise those issues with the subcommittee.

Judge Delker reminded the Committee that one of the issues that arose at the June meeting related to what happens when a party moves to unseal documents. The proposed rule requires that orders of notice be issued to all parties and "any other persons with standing in the case." Concerns were raised about cases in which someone is moving to unseal documents after years have passed since the case was closed.

Attorney Gordon noted that currently, once a case is closed, notice goes to the parties. So if a case is reopened, the attorney does not receive notice of that fact. This is troubling to lawyers because it raises issues regarding an attorney's duty to his or her client. Judge Delker stated that the revised rule was going to include as part of the rule that notice is to go to the attorneys, not just to the parties.

Justice Lynn stated that if there is a request to unseal records after a certain period of time has passed, the proponent of the motion should be required to include a proposal regarding who should be notified, and what kind of service would be appropriate. It seems to make some sense to put the onus on the movant to suggest what is reasonable. Judge Delker noted that this approach exists in other contexts, *e.g.*, banks in foreclosure actions.

Attorney Herrick suggested that it may make sense to appoint a guardian in some cases. It seems that there are certain kinds of records that are so sensitive that someone should be present to speak to the issue of whether those records should continue to be sealed.

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

Attorney Joshua Gordon reminded the Committee that he had volunteered to chair a subcommittee to consider the proposal, set forth in a March 23, 2017 letter from attorney Rolf Goodwin, to amend New Hampshire Rule of Professional Conduct 8.4 to add a new subsection (g) to make it professional misconduct for a lawyer to:

> (g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation or marital status. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

Attorney Gordon reported that two people from the subcommittee would attend the Committee's December 8 meeting to speak about the issue, and noted that the subcommittee is wrestling with how to address the following concerns that have arisen regarding the proposal:

- The Ethics Rules are generally aimed at protecting clients. This proposed new rule aims to protect people other than clients; that is, law firm employees. Some question has arisen regarding whether the Statement of Purpose section of the Ethics Rules would need to be amended if this rule is adopted. One way out of the purpose problem is to add the words, "against a client or potential client," rather than leave that undefined. But it is not clear whether this would satisfy the concerns that prompted this rule proposal.

- Some difficulties have arisen regarding defining discrimination and harassment.

- Concerns have been expressed that if this rule is adopted, it will complicate employment issues at law firms, might create a conflict of interest within a law firm, and might take away the ability of the law firm to deal with the employment issues they have. It is important to note that if a firm has over six employees, the civil rights laws apply to the firm.

In response to an inquiry, attorney Gordon noted that thirty-four jurisdictions have adopted some variation on this proposal. Judge Cullen asked how many of those jurisdictions have adopted exactly the language of this rule. Attorney Gordon reported that he did not know, but that that information is contained in Attorney Imse's July 12, 2017 submission to the Committee.

One Committee member inquired whether the subcommittee has any information regarding what the record has been on enforcing this provision in the jurisdictions that have adopted it.

Attorney Lick noted that some jurisdictions have adopted a variation on the language set forth in this proposal and asked whether the subcommittee had considered different language.

Attorney Gordon noted that all of the women he had spoken to report that discrimination and harassment are clearly a problem. However, the subcommittee is not sure that this rule is the right way to solve that problem.

(e) 2016-014. New Hampshire Rules of Criminal Procedure. In Camera Review.

Justice Lynn reminded the Committee that it has before it a third proposal, set forth in a July 17, 2017 letter from attorney Johnson, relating to the procedure for *in camera* review of confidential records. Justice Lynn highlighted the primary differences between the July 17, 2017 proposal and the proposal set forth in Attorney Johnson's March 6, 2017 letter.

Justice Lynn noted that the proposal set forth in the March 6 letter states that the court is to examine records *in camera.* If the court determines that the records contain information that is "essential and reasonably necessary" to the requesting party's case, then the records are disclosed to the parties. Counsel does not participate in the review of the records.

The proposal set forth in the July 17 submission lowers the threshold. The court reviews the records *in camera* to determine whether they contain any exculpatory information. If the records contain exculpatory information, the court then discloses the information to the counsel for the parties, subject to a protective order shielding the records from further disclosure. Counsel for the party seeking to have the information in the records made available for use at trial then bears the burden of showing that the information is "reasonably necessary" to that party's case at trial. In other words, the "essential and reasonably necessary" standard goes to the admissibility of the records. Judge Lynn stated that he believes that this is a good approach.

Attorney Johnson explained that this new proposal tries to strike a balance between the right to privacy and ensuring accuracy in criminal cases.

Representative Berch stated that he likes a great deal about the proposed new rule. However, he inquired about the memoranda the attorneys may provide to the court to aid the court in determining whether information found in the records is exculpatory. He assumes that counsel will be sharing with the court the theory of the case, and therefore wonders whether the memoranda will be available to both sides. That is, does the defendant have to tell the prosecution his or her theory of the case? Justice Lynn stated no, an *ex parte* submission could be allowed.

Judge Delker stated that he continues to have policy concerns about the role of privilege and what effect this rule might have on the doctor/patient relationship. He is concerned that lowering the threshold in these cases may do more harm than good. He notes that the standard "exculpatory" is relatively low – and can include information that may be used to impeach a witness, whereas the standard "essential and reasonably necessary" is much higher and includes only information that will prevent a wrongful conviction. Judge

Delker is concerned that lowering the threshold will have a negative impact on a patient's relationship with his or her doctor.

Judge Delker also has a practical concern about the proposed rule. He appreciates what this rule seeks to do in the criminal context, but he notes that this issue arises in many other contexts as well. For example, in civil cases. Exculpatory is not the standard in those cases.

Mr. Richter asked Justice Lynn how frequently this issue comes before the Supreme Court. That is, how often is there a case in which the lower courts have not permitted access to the documents and the issue on appeal is whether the lower court erred.

Justice Lynn stated that there are really only a very small number of cases in which the privacy rights should have been trumped. But the challenge is that it is very uncomfortable to review a trial court's decision without the benefit of counsel. That is, without knowing "what would defense counsel have said?" Justice Lynn stated that as a trial judge he tended to be very liberal about ordering records turned over under a protective order. In eighteen years, he never had a situation in which those records were later used improperly.

In response to further inquiry from Mr. Richter, Justice Lynn explained the process that is followed when the trial judge declines to have something disclosed and that issue is appealed. What happens is that the Supreme Court reviews what the trial court reviewed. The role of the Supreme Court is essentially the same as the role of the trial court. He noted that the stakes in criminal cases are very high. There is the privacy right on one side, and the potential of a defendant going to jail for ten years on the other.

Representative Berch noted that the core of the discussion is really, how do we have judges at both the trial and appellate levels make better decisions about whether records should be given to opposing counsel? Under the current system, and the reason that there are very few reversals, is that it is hard to challenge decisions at either level. What we need is a better mechanism for the court to be better informed. There are two interests at odds- the statutory right (privilege) and a constitutional right (criminal defendant's due process rights).

Judge Delker stated that the rule used to be that if information was privileged, no one saw it. The United States Supreme Court decided in *Ritchie v. Pennsylvania*, that this cannot be the rule, but the Court set a high threshold to breach a privilege under a due process challenge. Judge Delker's concern about this proposal is that the constitutional barrier is high and this proposed rule would lower it to the detriment of the privilege holder. His concern is the impact of this on a patient who doesn't talk, for fear that the information he or she shares will be disclosed to the defendant. This is not

just about past counseling. This is ongoing. The more the standard is loosened, the worse this becomes. Judge Delker believes that the standard is appropriate where it is.

Attorney Johnson acknowledged that Judge Delker has valid concerns but believes that this additional intrusion is justified. He hopes that there will not be a chilling effect on people seeking treatment. He believes that this rule will lead to better quality decisions without too great a cost.

In response to a question by Mr. Stewart, Justice Lynn reminded the Committee that it was the Court that had asked the Committee to consider this issue. The concern arose from a case that had come before the Court recently.

Judge Delker reminded the Committee that there is currently no rule at all on the question of *in camera* review of documents. He believes that attorney Johnson's March 6, 2017 proposal codifies existing practice. Both attorney Johnson's original proposal (dated December 5, 2016) and the most recent proposal (dated July 17, 2017) would modify the existing standard. Judge Delker does not agree that this should be done and therefore supports the March 6, 2017 proposal. He reiterated his concern that the use of the "exculpatory" standard would not be appropriate in all cases.

Justice Lynn asked the Committee whether it might make sense to codify the March 6, 2017 proposal in all cases except in cases in which a criminal defendant seeks access to records. In those cases in which the criminal defendant is the moving party, the proposal made in the July 17 submission would apply. Following some discussion, Committee members agreed that the March 6 proposal should apply in civil cases, that the March 6 proposal should also apply in criminal cases, except those cases in which the party seeking the records is a criminal defendant, and that the July 17 proposal should apply in those cases in which the party seeking the records is a criminal defendant.

It was agreed that Carolyn Koegler would work with Justice Lynn and attorney Johnson to implement the Committee's decision and would circulate the proposals to be included in the public hearing notice for the December public hearing. Upon motion made and seconded, the Committee voted to put both the March 6 and the July 17 proposals out for public hearing.

(f) <u>2017-002. New Hampshire Rule of Evidence 801(d)(1)(B).</u>

No action was taken on this item. This will be considered next at the September 2018 meeting.

(g) 2017-005. Sup. Ct. R. 37(12). Reciprocal Discipline.

The Committee considered the proposal set forth in the June 12, 2017 to amend Supreme Court Rule 37(12) to include a procedure for determining final discipline in cases in which the court concludes that the imposition of discipline identical or similar to the discipline imposed in another jurisdiction is unwarranted.

Following some brief discussion and upon motion made and seconded the Committee voted to put the proposal out for public hearing in December.

(h) 2017-006. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

The Committee next considered a proposal made in a March 28, 2017 email from Mr. Steven Karels in which Mr. Karels proposes that Supreme Court Rule 36 be amended to allow students interning for, and supervised by, a New Hampshire attorney to appear before the Court, even if they: (1) do not attend an ABA-certified law school; and/or (2) are not full-time law students.

Following some discussion of the issue, the Committee concluded that the rule should not be amended to allow students at non-ABA certified law schools to appear before the Court, but that some consideration should be given to allowing part-time law students to appear before the Court.

Upon motion made and seconded, the Committee voted to put Mr. Karel's proposal to amend the rule to allow part-time law students to appear before the Court out for public hearing in December. Committee members asked Carolyn Koegler to ask Eileen Fox, Clerk of the New Hampshire Supreme Court and Sherry Hieber, Office of Bar Admissions General Counsel, whether the proposal that part-time students be enrolled at least 75% of the time to be qualified is reasonable.

(i) 2017-007. Supreme Court Rule 41. Limited Liability Entities.

Justice Lynn reminded Committee members that, as is reflected in an April 5, 2017 memo from Clerk Eileen Fox, the New Hampshire Supreme Court has asked the Committee to review Supreme Court Rule 41 ("Limited Liability Companies") to determine whether the rule continues to serve the purpose for which it was adopted. Justice Lynn agreed to follow up with Eileen about this provision.

(j) 2017-009. Supreme Court Rules. Identification of Crime Victims.

The Committee next considered a June 8, 2017 memo from Eileen Fox asking that the Committee consider whether a Supreme Court Rule should be

adopted relating to identifying crime victims in documents filed in appellate cases.

In response to a question from Representative Berch, Justice Lynn explained that the Court became concerned about this issue when it was notified that a woman who had been a sexual assault victim, and whose name was included in an opinion, had a daughter who learned about the assault when she used her mother's name in a search online. Justice Lynn noted that one of the issues to consider is whether there is value in the public knowing the name of a victim. Judge Delker stated that a rule might be helpful, but he does not know if it is essential. Using the victim's initials does provide some functional obscurity, but someone could find out the name of the victim by getting the transcripts, etc. He also stated that there are some victims who wish to be identified.

Attorney Gill stated that he believes that there is a need for a rule. He just does not see the public right to know as an issue. Another Committee member inquired whether there should be a rule to apply across courts.

There was some discussion about whether the proposal should be put out for public hearing. Committee members stated that they would like to discuss the issue further at the December meeting and were not in favor of putting the proposal out for public hearing. Attorney Gill stated that he would submit a proposal for the Committee to consider in December.

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

This issue relates to the temporary amendments the Court made to the felonies first rules. The amendments extend the deadline for filing indictments to 90 days after the complaint is filed in Superior Court and permit judges to exercise discretion to grant or deny requests for extensions of time for filing indictments. The Committee agreed to wait until June to put the temporary amendments out for public hearing.

3. New Submissions

(a) 2017-011. New Hampshire Rule of Evidence 404(b).

The Committee next discussed a June 26, 2017 memo from Attorney David Peck proposing amendments to New Hampshire Rule of Evidence 404(b)("Other Crimes, Wrongs, or Acts") and a September 14, 2017 email from Judge Delker to the Committee regarding the Peck submission.

Justice Lynn reminded the Committee that attorney Peck's suggested amendments would codify the three-part test adopted by the New Hampshire Supreme Court for admitting evidence under Rule 404(b), but would change the second prong of the test. The second prong currently requires "clear proof" that the defendant committed the other crime, wrong or act. Attorney Peck's proposal would change this prong to read, "there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them." Justice Lynn explained that the suggestion is that the Court adopt the federal standard which would allow the evidence to come in if a jury could find that the acts occurred and that the person committed them.

Following brief discussion and upon motion made and seconded, the Committee voted to put the proposal set forth in David Peck's memo out for public hearing in December.

(b) 2017-012. Criteria for the Certification of Professional Guardians.

The Committee next considered a July 26, 2017 submission from Ms. Jeannette Marino, a September 11, 2017 memo from Carolyn Koegler to the Committee and a memo from Judge Garner suggesting that the Committee decline to take action on Ms. Marino's request.

Following some discussion of this issue, and upon motion made by Justice Lynn and seconded by Representative Berch, the Committee voted to take no action on this submission. The Committee directed Carolyn Koegler to write a letter to Ms. Marino informing her of the Committee's decision.

(c) 2017-013. Super. Ct. (Civ.) Rule 36(d)(5).

The Committee next considered an August 18, 2017 email from Judge Delker raising a concern about New Hampshire Rule of Civil Procedure 36(d)(5). Judge Delker explained his concern and stated that he would submit a proposal to amend the rule prior to the December meeting.

(d) 2017-014. Sup. Ct. R 37(16).

The Committee next considered an August 25, 2017 letter from Sara Green, disciplinary counsel at the Attorney Discipline Office, proposing an amendment to Supreme Court Rule 37(16), regarding dispositive stipulations.

Following some discussion of this issue and upon motion made by Mr. Stewart and seconded by Justice Lynn, the Committee voted to put the proposal out for public hearing in December.

(e) 2017-015. Super. Ct. Civ. R. 7 or 11 and Crim. Pro. R. 21.

The Committee next considered an August 23, 2017 memo from Abigail Albee suggesting an amendment to New Hampshire Superior Court Rule 7 (or 11) and New Hampshire Superior Court Criminal Rule 21, relating to motions. Attorney Albee explained that the Superior Court Clerk's Association suggests that the rules be amended to include language mirroring the language of a district court local rule stating that motions seeking separate and distinct relief shall not be combined in a single filing.

Following brief discussion of this issue, and upon motion made and seconded, the Committee voted to put the proposal out for public hearing in December.

4. Meeting Dates

Committee members agreed on the following 2018 meeting dates:

- March 9
- June 1
- September 7
- December 7