

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES
Minutes of Friday, June 3, 2022 Public Hearing and Meeting
NH Supreme Court
Supreme Court Courtroom
1 Charles Doe Drive
Concord, NH 03301

Justice Donovan, Committee Chair, opened the public hearing at 12:34 p.m. The following Committee members were present:

Abigail Albee, Esq., Representative Paul S. Berch, Hon. R. Laurence Cullen, Hon. N. William Delker, Justice Patrick E. Donovan, Hon. Michael H. Garner, Sean P. Gill, Esq., Sara Greene, Esq., Charles Keefe, Esq., Derek Lick, Esq., Susan A. Lowry, Esq., Janet Spalding, and Charles Stewart. Lorrie Platt, Esq., Secretary to the Committee, and Lisa Merrill, Recording Secretary, were also present.

1. Public Hearing

Before the public session began, Justice Donovan reported that a member of the public submitted a request today asking that the Committee table all proposed rule amendments, because the individual was not able to attend the public session. The notice of public hearing posted on Tuesday, May 3, 2022, provided more than 30 days notice to members of the public of the hearing and the proposals to be considered. The request to table all proposed rule amendments was denied.

Justice Donovan opened the public hearing and asked whether anyone present wanted to address the Committee relative to docket number 2022-001.

2022-001 Supreme Court Rules 37 and 37A

(a) Supreme Court Rule 37(8)

No individuals testified.

(b) Supreme Court Rule 37(14)

No individuals testified.

(c) Supreme Court Rule 37(20)

No individuals testified

(d) Supreme Court Rule 37(21)

No individuals testified.

(e) Supreme Court Rule 37A(III)(b)(5)(F)

No individuals testified.

(f) Supreme Court Rule 37A(V)

No individuals testified.

With no comments or testimony from members of the public, Justice Donovan closed the public hearing at 12:36 p.m. and continued to the regular portion of the meeting.

2. Discussion and Vote on Public Hearing Items

2022-001 Supreme Court Rules 37 and 37A

(a) Supreme Court Rule 37(8) – Justice Donovan explained that the Attorney Discipline Office had proposed this rule amendment regarding reciprocal subpoena power.

On motion by Attorney Greene and seconded by Attorney Albee, the Committee unanimously voted to recommend adoption of the proposed amendment to the Supreme Court.

(b) Supreme Court Rule 37(14) – On motion by Attorney Greene and seconded by Judge Garner, the Committee unanimously voted to recommend adoption of the proposed amendment to the Supreme Court.

(c) Supreme Court Rule 37(20) – This amendment clarifies public access to attorney discipline files maintained at the Attorney Discipline Office. Justice Donovan asked Attorney Greene whether the Professional Conduct Committee (PCC) had a position on the amendment. She explained that there are two pieces to the amendment. Currently file(s) are available to the public to inspect and take notes, but may not be removed from the office. The PCC is in favor of the part of the amendment that would allow copies to be made. She reported that the PCC has not taken a position on the second part of the amendment; that is, whether the definition of public file is appropriate but the PCC has nothing to do with overseeing or maintaining the file. She also observed that an average of 2-4 people per year request access to the files.

On motion by Representative Berch and seconded by Judge Cullen, the Committee unanimously voted to recommend adoption of the proposed amendment to the Supreme Court.

(d) Supreme Court Rule 37(21) – On motion by Mr. Stewart and seconded by Judge Delker, the Committee unanimously voted to recommend adoption of the proposed amendment to the Supreme Court.

(e) Supreme Court Rule 37A(III)(b)(5)(F) – On motion by Attorney Greene and seconded by Attorney Lick, the Committee unanimously voted to recommend adoption of the proposed amendment to the Supreme Court.

(f) Supreme Court Rule 37A(V)

Representative Berch asked what type of censure cases would fall within the proposed expansion of the annulment process. Attorney Greene explained that censures are generally imposed for negligent conduct. If the conduct is not negligent, it would not be censure-eligible. On motion by Attorney Greene and seconded by Attorney Keefe, the Committee unanimously voted to recommend adoption of the proposed amendment to the Supreme Court.

3. Approval of March 11, 2022 Minutes

Attorney Keefe reported that Item 2(b) of the draft minutes contains a misstatement of the committee vote taken on March 11, 2022. The proposed amendment approved by the Committee by 11-2 would replace “shall” with “may.” The draft minutes erroneously reported that the reference to “good cause” was also stricken. The minutes should be revised to correct this error.

Justice Donovan proposed that electronic approval of draft minutes occur within thirty days following a meeting. Committee members agreed.

On motion from Attorney Gill and seconded by Judge Garner, the Committee approved the draft minutes of March 11, 2022, with the correction noted. Ms. Spalding abstained.

4. Items Pending Before the Committee

(a) 2016-009 and 2021-008 New Hampshire Rules of Professional Conduct 8.4 (g)

Justice Donovan provided an update of the proposed rule changes and opened discussion. The Attorney Discipline Office and the Bar Association’s Ethics Committee recommend that Rule 8.4 be amended to include a new definition of “primary purpose.” Judge Delker expressed concern that the proposal may not address concerns expressed by Attorney Ferrari at the December 10, 2021 public hearing. Attorney Greene shared her thoughts about the proposed rule from an ADO perspective.

Discussion ensued about whether the proposed rule should be made available for public comment again. Justice Donovan advised that the Court

would solicit public comment on any recommendation that it received from the Committee and that the Court could also vote to hold another public hearing.

On motion from Representative Berch and seconded by Attorney Greene, the Committee voted unanimously to recommend that the Court adopt the following amendment to New Hampshire Rule of Professional Conduct 1.0.

(h) "Primary" means the principal, dominant or leading basis for the conduct engaged in, which may be inferred from the circumstances, without regard to any potential or actual secondary purposes for or effects of such conduct. Primary does not mean the sole or only reason for the conduct.

**(b) 2020-006 New Hampshire Rule of Criminal Procedure 12 –
Discovery; State's Obligation to Provide Copies to Defendant's
Criminal Record**

Because there was some confusion about the language approved by the Committee at its March meeting, this item was returned to the agenda for confirmation of the Committee's previous action. The report prepared for the March meeting was redistributed. However, at the March meeting, the subcommittee was also asked to prepare a proposed amendment to apply to proceedings in the Superior Court. The subcommittee submitted an updated report (dated May 5, 2022) that included a proposed revision to apply in the Superior Court. That report was not included in the Committee materials distributed prior to this June 3, 2022 meeting. The Committee revisited prior discussion about the proposed rule changes regarding the State's obligation to provide a copy of the criminal record at arraignment. The issues included:

- Replacement of the word "shall" with the word "may" in the proposed amendment
- Strike the word "good cause." Representative Berch proposed use of "good cause" or "may" but not both.
- The rule should incentivize, not penalize, sharing information.
- The impact of federal laws on information sharing.
- Timing issue.

Representative Berch expressed concern that not sharing information could deprive the defendant of justice. He proposed recommending that the Court adopt the original language of the proposed rule. Representative Berch made a motion for the Committee to reconsider its prior decision to approve the rule amendment, and to recommend adoption of the rule as originally proposed. There was no second to his motion. The motion failed.

Justice Donovan ruled that because the Committee had already voted at its March meeting to recommend that the court adopt the proposed amendments to rules governing the circuit court and superior court, no further vote was required.

(c) 2020-009 New Hampshire Rule of Criminal Procedure 12 – Discovery; Evidence of Other Crimes, Wrongs or Acts

Justice Donovan invited questions and discussion. On motion by Judge Delker and seconded by Mr. Stewart, the Committee voted unanimously to recommend that the Court adopt the proposed amendment to the rule.

(d) 2021-006 MCLE Pro Bono Subcommittee Report

On behalf of the subcommittee, Justice Donovan provided a brief update about a proposed rule amendment to allow CLE credit for pro bono work and reported that 18 states currently allow it. The subcommittee will meet again and will keep the Committee apprised of their findings.

(e) 2022-004 Supreme Court Rule 37(9-A) and 37(9-B)

Justice Donovan reported that the subcommittee had determined that Rule 37 would benefit from an amendment addressing ADO cases that may require that the court order immediate summary suspension if the attorney has engaged in serious misconduct that poses an immediate and substantial threat of serious harm to the public or to the integrity of the legal profession. Attorney Greene explained that this process would not be a complete ex parte proceeding because if the court ordered suspension, the attorney would receive notice and, if a hearing were requested, it would be done within 10 days.

Justice Donovan reported that the subcommittee also included Attorney Lowry and Attorney Russ Hilliard.

Representative Berch asked whether “serious misconduct” would include arrest for a DUI or an aggravated DUI. Attorney Greene explained that the process to be applied to that type of criminal conduct involved a different set of rules. Mr. Stewart expressed concern about not providing an attorney with enough time to discontinue practicing and wrap up outstanding cases. Justice Donovan observed that attorneys in this situation are usually aware of the proceedings.

Discussion about whether the Committee should seek public comment or schedule the proposed amendment for a public hearing. On motion by Attorney Greene and seconded by Attorney Albee, the Committee unanimously voted to set a 90-day public comment period and to determine at its September

meeting whether to include the proposed amendment on its December public hearing agenda.

5. New Business

(a) 2022-005 Circuit Court-Family Division Rules that Impose 10-Day Deadline

Justice Donovan opened discussion on whether the current 10 day rule should be amended. He observed that complaints are being made that 10 days is not enough time to receive notice from the trial courts. Judge Garner addressed the issue, explaining that it appears that the bulk of the complaints address cases in the circuit court family division. The complaints focus on three issues. One involves postal delays, the second involves e-filing in family cases (domestic violence cases), and the third appears to be a complaint that attorneys are unable to access court clerks directly by email. The second and third concerns are case processing issues. Judge Garner observed that e-filing in the family division is still in the implementation phase and that direct email access to court clerks is not an issue that the Rules Committee should be addressing. He also reported anecdotally that if the parties are filing a late objection, an order to accept the late objection is usually routinely granted. He explained that, in his court, if a judge is given a file with a pending motion and no objection has been received, the judge will carefully review the file to determine whether an objection should be expected and may delay ruling on the motion for an additional period of time. He concluded by opining that the issue raised is likely transitional and does not occur on a regular basis, and observed that the rule has been in place in all the circuit courts and the superior court for decades.

On motion by Judge Garner and seconded by Attorney Lick, the Committee voted unanimously to table further discussion of the issue.

(b) 2022-006 New Hampshire Rule of Professional Conduct 3.8

Justice Donovan noted that the Ethics Committee submitted the proposed rule amendment. A subcommittee of Attorney Gill, Representative Berch, and Attorney Lowry was established. They will report to the Committee at the September meeting.

(c) 2022-007 Rule of Criminal Procedure 11(c) – May 30, 2022 proposed amendment submitted by Attorney David Peck

The Committee discussed proposed changes to the rule regarding conditional guilty pleas. Judge Delker explained that the law has been in effect for 35 years. General discussion ensued as to trials on stipulated facts, offers of proof and the process followed in the federal court.

On motion by Mr. Stewart and seconded by Attorney Greene, the Committee unanimously voted to table the amendment to the next meeting so that additional information may be gathered.

(d) 2022-008 Rule of Criminal Procedure 19 – May 31, 2022 proposed amendment submitted by Attorney Abigail Albee

Attorney Albee submitted the proposed amendment on behalf of Superior Court Chief Justice Tina Nadeau regarding the physical transfer of case files from the circuit court to the superior court and vice versa.

A subcommittee composed of Attorney Albee and Judge Delker was created. They will provide a revised proposal at the September Committee meeting.

On motion by Attorney Lowry and seconded by Attorney Greene, the Committee voted to table discussion to the next meeting.

6. Remaining Meeting Dates

The next two meetings are Friday, September 16 and Friday, December 9, 2022.

On motion by Attorney Greene and seconded by Attorney Lick, the Committee unanimously voted to adjourn. Meeting adjourned at 1:55 p.m.

Respectfully submitted,
Lisa Merrill, Recording Secretary