

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES
Minutes of Friday, September 16, 2022 Meeting
NH Supreme Court
Supreme Court Courtroom
1 Charles Doe Drive
Concord, NH 03301

Justice Donovan, Committee Chair, opened the meeting at 12:30 p.m. The following Committee members were present:

Abigail Albee, Esq., Hon. R. Laurence Cullen, Justice Patrick E. Donovan, Hon. Michael H. Garner, Sean P. Gill, Esq., Sara Greene, Esq., Jeanne Herrick, Esq., Charles Keefe, Esq., Terri Peterson, Ari Richter, Senator Donna Soucy, Janet Spalding, and Charles Stewart. Lorrie Platt, Esq., Secretary to the Committee, and Lisa Merrill, Recording Secretary, were also present.

1. Approval of June 3, 2022 Minutes

On motion by Attorney Gill and seconded by Judge Cullen, Committee members unanimously approved the draft minutes of June 3, 2022. Senator Soucy, Attorney Herrick, and Mr. Richter abstained. Attorney Keefe was not present for the vote.

Justice Donovan advised members that in the future review and approval of minutes would occur by email within thirty days of a meeting.

2. Items Pending Before the Committee

(a) 2021-002 Supreme Court Rule 35

Justice Donovan reviewed the recommendation by the Bar Association's Ethics Committee to repeal Supreme Court Rule 35, "Guidelines for the Utilization by Lawyers of the Services of Legal Assistants under the New Hampshire Rules of Professional Conduct." The Rules Committee had referred a submission by David Peck to the Ethics Committee, which recommended repeal of the rule.

On motion by Mr. Stewart and seconded by Senator Soucy, the Committee unanimously voted to recommend to the Court that Supreme Court Rule 35 be repealed.

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

Attorney Greene summarized the proposed rule change noting that it addresses immediate suspension by the court of an attorney who engages in serious misconduct that poses an immediate and substantial threat of serious harm to the public. The change will address a gap in the current rule allowing the Court to take immediate action to suspend an attorney in this circumstance.

An order soliciting public comment was issued on June 9, 2022, and submissions were due by September 8, 2022. No comments were received.

On motion by Attorney Greene and seconded by Attorney Albee, the Committee unanimously voted to recommend that the Court adopt the rule change.

Attorney Keefe was not present during the vote.

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

Attorney Gill provided an update on the subcommittee's (Attorney Gill, Representative Berch and Attorney Lowry) work reporting that the draft rule closely aligns with the 2008 American Bar Association's Rule. The subcommittee expressed different opinions about whether the rule went far enough or whether it was needed at all.

Attorney Gill reported that every jurisdiction that has adopted the rule has a safe harbor provision either in the comment section or within the body of the rule. There is a split in authority as to whether a lawyer who complies with Brady complies with RPC Rule 3.8. See Brady v. Maryland, 373 U.S. 83 (1963).

The subcommittee recommended that the proposed rule be sent out for public comment and placed on its December 9, 2022 public hearing agenda.

On motion by Attorney Gill and seconded by Attorney Greene, the Committee unanimously voted to recommend that the rule as proposed by the Ethics Committee be sent out for public comment. Attorney Keefe abstained.

(d) 2022-008 New Hampshire Rule of Criminal Procedure 19 – Transfer of Cases

Attorney Albee provided background on the proposed rule change that was requested by Superior Court Chief Justice Nadeau regarding the physical transfer of case files from the circuit court to the superior court and vice versa.

Justice Donovan asked whether the proposed rule would affect juvenile cases. Attorney Albee replied that it should not affect juvenile cases as long as the rule is broad. Judge Garner agreed with a generic rule approach versus a specific rule while Judge Delker, although not present for the meeting, had earlier expressed preference for specificity.

Justice Donovan suggested that the language in section (c) “except for de novo jury trial appeals” be replaced with “unless otherwise allowed by statute or rule.”

On motion by Attorney Albee and seconded by Attorney Keefe, the Committee voted unanimously to put the proposed rule as amended out for public comment.

(e) 2022-002 Supreme Court Rule 47 (and Rules 48 and 48-A)

The Judicial Council proposed an amendment to Supreme Court Rule 47 to increase fees for assigned counsel in indigent criminal cases. Justice Donovan referred the proposal to the Court and the Court sought additional input from the Judicial Council regarding whether Supreme Court Rules 48 and 48-A should also be amended to reflect fee increases. The Court solicited public comment; all of the submissions it received supported fee increases.

The Committee discussed the language proposed to be added to the last subparagraph of Rule 47(3) that would require the Committee to review the adequacy of rates every four years and would further provide: “The rates shall reflect inflation increases and other costs since the prior rate change.”

Attorney Herrick moved that the Committee vote to recommend that the Court not adopt this proposed amendment. Attorney Greene seconded the motion. Members approved the motion with Justice Donovan, Attorney Keefe, and Attorney Albee opposed. The motion carried 10-3.

Ms. Peterson expressed concerns with language in Rule 48 in two areas. Under **Travel time** she proposed striking the words **court, incarcerated,** and **in advance for exceptional circumstances** to read, *“Travel time to and from hearings and to and from meetings with a client shall be compensable; otherwise travel is not a compensable event unless expressly authorized by the court. Travel time shall not count toward the maximum fees set forth above.”* On motion by Attorney Greene and seconded by Ms. Peterson, the Committee unanimously agreed to recommend the changes to the Court.

The other language change she proposed is under Section 48-A Guardians Ad Litem Fees, (2)(a) to strike **court** and change **incapacitated adult** to **incapacitated person**. On motion by Attorney Greene and seconded

by Ms. Peterson, the Committee unanimously voted to recommend these changes to the Court.

Justice Donovan requested a motion for the Committee to recommend that the Court adopt the language changes noted in Supreme Court Rule 47, 48, and 48-A. Attorney Gill moved and Judge Garner seconded that the Committee recommend that the Court adopt all of the changes. The motion passed unanimously.

3. New Business

(a) 2022-009 Supreme Court Rule 50-A

Justice Donovan invited comments or questions about the amendment proposed by Paula Lewis from the New Hampshire Bar Association. No discussion or action was taken.

Justice Donovan advised that he had submitted the proposal directly to the Court pursuant to Supreme Court Rule 51(c)(3).

(b) 2022-010 Supreme Court Rule 35

Justice Donovan explained that Chapter 194, which was enacted by the legislature this year, establishes a pilot program to begin on January 1, 2023, that will allow limited legal services to be provided by certain paraprofessionals in the 1st, 6th and 9th Circuit Courts. The supreme court is overseeing the development of draft rules to implement the program. The proposal presented to the Committee was drafted after input from different stakeholders. Given the time constraints, Justice Donovan referred the draft rules directly to the Court. He provided the latest draft to the Committee for its review.

Senior Circuit Court Administrator Heather Kulp spoke to the Committee. She explained that she was also a member of the Access to Justice Commission. The Commission is also reviewing the legislation. She offered comments in two areas:

(1) Paragraph (4): Attorney Kulp recommends that the language make clear that a paraprofessional must file an appearance in each case in which the paraprofessional wishes to appear:

(2) Paragraph (5): Attorney Kulp recommends that the rule provide greater clarity as to the path for suspension. She cited Circuit Court Family Division Rule 1.18(b) regarding non-lawyer representatives in parenting and divorce cases. According to the rule, reinstatement of a suspended paraprofessional falls within the Rules of Professional Conduct 8.5. What is the standard for reinstatement of a paraprofessional?

Ms. Kulp invited questions and Judge Garner asked for the exact language, which she agreed to provide to Justice Donovan and Attorney Platt.

The Committee discussed cases in which a paraprofessional performs an act that cannot be imputed to the supervising lawyer. The Committee also considered whether the “suspension” and “reinstatement” provision should be defined. The Committee also suggested that the rule make clear: (1) whether a paraprofessional would be prevented from appearing in any other case while a complaint was pending; and (2) that if the supervising attorney becomes not in good standing, a paraprofessional must find another attorney to supervise. Attorney Greene advised that the Attorney Discipline Office may submit comments to the Court addressing the proposed rule.

(c) 2022-011 Supreme Court Rules 53.1, 53.2, and 53.3

Justice Donovan referenced the Report of the Subcommittee (Justice Donovan, Judge Delker, Paula Lewis, and Attorney Lowry) regarding changes proposed by the New Hampshire Bar Association for CLE credit for pro bono work and proposed that the suggested amendments be published for public comment.

Justice Donovan observed that the Court issued an order on August 10, 2022, that authorizes inactive status attorneys to elect a status with the NH Bar of “Limited Active” to accept assigned, contract and pro bono cases for indigent parties and provides a waiver from certain court rules in any year in which the attorney “has accepted no less than three indigent client cases.” The proposed amendments would codify some of the measures that were in the administrative order and include other suggested revisions.

On motion by Attorney Greene and seconded by Ms. Spalding, the Committee unanimously voted to send the proposed changes out for public comment and to place them on the agenda of the Committee’s December 9, 2022 public hearing.

(d) 2022-012 Supreme Court Rule 53.4

Justice Donovan explained that this proposal was submitted by the Bar Association and is intended to make the waiver process for annual CLE requirements consistent with the current waiver process for annual Supreme Court fees and Trust Account Compliance filing.

On motion by Ms. Spalding and seconded by Attorney Greene, the Committee unanimously voted to send the proposed changes out for public comment and to place them on the agenda of the Committee’s December 9, 2022 public hearing.

4. Remaining Meeting Dates

The next meeting is Friday, December 9, 2022.

On motion by Senator Soucy and seconded by Attorney Gill, the Committee unanimously voted to adjourn at 1:33 p.m.

Respectfully submitted,
Lisa Merrill, Recording Secretary