

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of December 10, 2021 Public Hearing and Meeting

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 Donovan, Committee Chair. The following Committee members were present in person: Hon. N. William Delker, Hon. R. Laurence Cullen, Hon. Michael H. Garner, Senator Donna Soucy, Sean P. Gill, Esq., Susan A. Lowry, Esq., Jeanne P. Herrick, Esq., Terri Peterson, and Janet Spalding. Ari Richter appeared telephonically. Lorrie Platt, Esq., Secretary to the Committee, was also present.

1. Public Hearing

(a) 2021-004 Circuit Court – Family Division Rule 3.6 – Conditions of Release

Judge Susan Ashley, Deputy Administrative Judge of the Circuit Court, testified in support of the proposed amendment to Rule 3.6. She reported that the proposal was the product of lengthy study by the New Hampshire Juvenile Probation Transformation Team, a group comprised of multiple stakeholders in the juvenile justice process, including juvenile probation and parole officers. She explained that the goal of reducing the number of “form rules” that applied to every juvenile case was to encourage tailoring of requirements to the individual needs of each juvenile who appeared before the court. By reducing the number of rules needed to succeed, the Transformation Team hoped to transform the juvenile probation system by creating individualized treatment plans and to incentivize youth to own their pathway to success.

James Plumer, New Hampshire Juvenile Probation and Parole Officer, testified in opposition to the proposed amendment. He argued that the amendment would not allow for an adequate level of supervision for juveniles on probation and urged the Committee to consider alternative rule changes submitted by a group of New Hampshire Juvenile Probation and Parole Officers.

Joseph Ribsam, Director of the New Hampshire Division for Children, Youth and Families, testified in support of the proposal, stating that the proposed amendment would allow for individualized supervision tailored to the needs of each juvenile on probation. Justice Donovan inquired about whether the proposal would result in additional paperwork, and Mr. Ribsam responded that, in his view, the proposal would result in a more streamlined process. In response to a question from Judge Delker about removing the requirement that all youth under supervision “shall not consume or possess” alcohol or controlled drugs, Mr. Ribsam responded, in part, that the proposed amendment requires all supervised youth to “obey all laws.”

The Committee also received a letter from the New Hampshire Office of the Child Advocate, a member of the Juvenile Transformation Team, expressing support for the proposed amendment.

(b) 2016-009 New Hampshire Rule of Professional Conduct 8.4(g)

Lindsey Courtney, in her capacity as Vice President of the New Hampshire Women’s Bar Association, expressed support for continuing Rule 8.4(g), stating that the rule is critical to the Association’s mission of achieving gender equality in the legal profession. Ms. Courtney further testified in support of the Association’s proposal to change the “primary purpose” language in Rule 8.4(g) to “know or reasonably should know,” consistent with ABA Model Rule of Professional Conduct 8.4(g).

Attorney Peter Imse, a member of the New Hampshire Bar Association Ethics Committee, testified in opposition to repealing Rule 8.4(g). Attorney Imse discussed the adoption and constitutionality of Rule 8.4(g) as well as the differences between Rule 8.4(g) and ABA Model Rule of Professional Conduct 8.4(g). Attorney Imse further noted that the Ethics Committee is working with the New Hampshire Supreme Court Attorney Discipline Office to draft a proposed amendment that would define the meaning of “primary purpose.” He urged the Committee to keep the matter open to allow time for the Ethics Committee to submit a proposal. Justice Donovan clarified that neither the Supreme Court nor its Advisory Committee on Rules was considering repealing Rule 8.4(g).

Attorney Rolf Goodwin, a former member of the New Hampshire Bar Association Ethics Committee, expressed support for continuing Rule 8.4(g), noting that it contains a statement of policy. He further urged the Committee to reconsider the “primary purpose” language in the rule, noting that the language makes it difficult to prove that a violation of the rule has occurred.

Attorney James Shirley, a former member of the New Hampshire Bar Association Ethics Committee, expressed support for continuing Rule 8.4(g) in its present form. In response to questioning from Justice Donovan, Attorney Shirley cautioned against reconsidering the “primary purpose” language in the rule, noting that the rule is “workable” as written.

Attorney Christina Ferrari testified in support of the proposal to change the “primary purpose” language in Rule 8.4(g) to “knew or reasonably should have known.” Attorney Ferrari noted that, in her view, the “primary purpose” language imposes an excessively high standard that discourages individuals from reporting violations of the rule. She further urged the Committee to allow additional time for the submission of proposed alternatives to the “primary purpose” language. In response to questioning from Judge Delker, Attorney Ferrari provided an example of harassing conduct that would not fall within the scope of Rule 8.4(g) as written. In response to questioning from Justice Donovan, she indicated that removing the word “primary” would improve the rule, but would not be sufficient to alleviate her concerns.

Attorney Lindsay Nadeau, of Concord, expressed support for continuing Rule 8.4(g) and for the proposal to change the “primary purpose” language in the rule to “knew or should have known.”

Attorney Gretchen Wade, of Manchester, expressed opposition to the proposed amendment submitted by the New Hampshire Women’s Bar Association.

Attorney Brian Moushegian, General Counsel of the New Hampshire Supreme Court Attorney Discipline Office, expressed support for the continued existence of Rule 8.4(g). He encouraged the Committee to continue exploring the “primary purpose” language, but expressed opposition to the proposed amendment submitted by the New Hampshire Women’s Bar Association. In response to questioning from the Committee, Attorney Moushegian explained his concern that altering the “primary purpose” language would expand the rule’s scope such that otherwise legitimate activity would violate the rule. He further noted that, to his knowledge, there are no matters currently docketed as complaints that implicate Rule 8.4(g).

(c) 2021-005 Supreme Court Rule 40 – Procedural Rules of Committee on Judicial Conduct: Deferred Discipline

Jill O’Neill, Executive Director of the New Hampshire Lawyers Assistance Program, testified in support of the proposed amendment to Rule 40, providing

an overview of the professional monitoring services offered by the Lawyers Assistance Program. See Sup. Ct. R. 58. She further urged the Committee to adopt the language of the original proposal to Rule 40, noting that the original language would make it easier to connect impaired individuals to monitoring services and prevent recurrence in the future.

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

Paul Halvorsen, Merrimack County Attorney, testified in opposition to the proposed amendment to Rule 12, expressing his concern that some county attorneys may find it difficult to comply with the proposal, particularly at the circuit court level. He explained that the primary purpose of the rule is make sure that the presiding judge has all the necessary information to decide whether to order cash bail, personal recognizance or detention. He observed that oftentimes in the circuit courts, the prosecutor doesn’t know who defense counsel is until the arraignment. He also expressed concern about sharing SPOTS information. Attorney Halvorsen also questioned whether the inability to deliver records in accordance with federal standards constituted “good cause” under the proposed amendment.

Attorney Steven Endres, assistant Merrimack County Attorney, testified in opposition to the proposal. He stated that it was unlikely that a motion to reconsider bail would be ruled on without a hearing, thereby giving defense counsel a further opportunity to review the proffered criminal record.

The public hearing closed at 2:05 p.m. Ari Richter left the meeting at 2:11 p.m.

2. Discussion and Vote on Public Hearing Items

(a) 2016-009 New Hampshire Rule of Professional Conduct 8.4(g)

Justice Donovan reminded the Committee that several parties wish to submit additional proposals for consideration at the next Committee meeting. Committee members observed that, despite concerns raised at the public hearing that the “primary purpose” language deters individuals from filing complaints, there is no evidence that Rule 8.4(g)’s language has resulted in administrative issues. The Committee further discussed tabling the issue to allow the Attorney Discipline Office and Ethics Committee to submit alternative proposals to the rule.

Upon motion made by Judge Garner, and seconded by Senator Soucy, the Committee unanimously voted to table discussion of the proposed amendment until the next meeting, at which time it will decide whether to schedule the amendment or a revised amendment for further public hearing.

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

Committee members expressed concern that the proposed amendment will deprive judges of information necessary to make informed bail decisions, even when such information is readily available. It was also noted that, in some counties, prosecutors may not have access to the information prior to arraignment, making it hard to comply with the proposed amendment. Judge Delker advised that, based upon his discussions with prosecutors and his fellow judges, this issue may affect counties differently, particularly at the circuit court level. He proposed an additional amendment allowing defendants to request additional bail hearings when the State has not complied with the rule, adding that such an amendment would incentivize compliance without compromising the defendant’s due process rights. The Committee discussed whether Rule 12 already entitles defendants to request additional bail hearings, obviating the need for Judge Delker’s proposal.

Upon motion made by Attorney Gill, and seconded by Judge Garner, the Committee unanimously voted to refer the issue back to the subcommittee, which will review the proposed amendment and suggest revisions for consideration at the next meeting.

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

Justice Donovan reminded the Committee that it received no public comments on the proposed amendment. Judge Delker noted that Judge Houran strongly supports the proposal. The Committee discussed whether further review by a subcommittee would be helpful to determine the impact of the proposal. The Committee further discussed whether the proposed amendment will differentiate Circuit Court practice from Superior Court practice. Judge Delker observed that it would be helpful to develop a comment to accompany the rule and volunteered to draft it.

Upon motion made by Attorney Herrick, and seconded by Senator Soucy, the Committee unanimously voted to refer the issue back to the subcommittee, which will review the proposed amendment and suggest revisions for consideration at the next meeting.

(d) 2021-005 Supreme Court Rule 40 – Procedural Rules of Committee on Judicial Conduct: Deferred Discipline

Justice Donovan reminded the Committee that Ms. O’Neill testified in support of the original language of the proposed amendment, which differs from the language that the subcommittee recommended. Members of the subcommittee explained why its recommendation differed from the original proposal, and the Committee discussed the placement of the recommended language within Rule 40.

Upon motion made by Attorney Herrick, and seconded by Senator Soucy, the Committee unanimously voted to refer the issue back to the subcommittee, which will review the proposed amendment and suggest revisions for consideration at the next meeting.

(e) 2021-003 New Hampshire Rule of Evidence 902 – Self-Authenticating Evidence

Upon motion made by Judge Delker, and seconded by Judge Garner, the Committee unanimously voted to recommend the adoption of the proposed amendment.

(f) 2021-004 Circuit Court – Family Division Rule 3.6 – Conditions of Release

Attorney Herrick expressed concern that the proposed amendment eliminates the requirement that juveniles must refrain from using or possessing alcohol or controlled substances. Other Committee members echoed her concern. Judge Garner urged the Committee to defer to the recommendations set forth in the proposed amendment, given the amount of time that the Juvenile Transformation Team had spent researching and developing the proposal. Attorney Lowry and Terri Peterson agreed with Judge Garner’s observations.

Upon motion made by Judge Garner, and seconded by Terri Peterson, the Committee unanimously voted to recommend the adoption of the proposed amendment.

3. Approval of Meeting Minutes from September 10, 2021

Upon motion made by Judge Cullen and seconded by Senator Soucy, the Committee unanimously voted to approve the minutes from September 10, 2021.

4. Other Business

(a) 2021-006 New Hampshire Supreme Court Report on the Recommendations of the Criminal Defense Task Force

Justice Donovan advised the Committee of the recommendations made by the Criminal Defense Task Force. The Committee discussed the Task Force's recommendation with respect to court rules pertaining to pro bono work, pro hac vice admission, and continuing legal education requirements. The Committee agreed to create a subcommittee to further discuss the recommendations. Justice Donovan, Judge Delker, and Attorney Lowry volunteered to serve on the subcommittee.

5. 2022 Hearing Dates

The Committee will meet on the following dates:

Friday, March 11, 2022

Friday, June 3, 2022

Friday, September 16, 2022

Friday, December 9, 2022

Public hearings will be held on June 3, 2022 and December 9, 2022.

6. Adjournment

Upon motion made by Senator Soucy, and seconded by Attorney Lowry, the Committee voted to adjourn the meeting. The next public meeting of the Committee is scheduled for Friday, March 11, 2022.