

NEW HAMPSHIRE SUPREME COURT  
ADVISORY COMMITTEE ON RULES

Minutes of Friday, March 11, 2022 Meeting

NH Supreme Court  
Supreme Court Courtroom  
1 Charles Doe Drive  
Concord, NH 03301

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Justice Donovan, Committee Chair, called the meeting to order at 12:30 p.m. The following Committee members were present in person:

Abigail Albee, Esq., Hon. R. Laurence Cullen, Hon. N. William Delker, Justice Patrick E. Donovan, Hon. Michael H. Garner, Sean P. Gill, Esq., Sara Greene, Esq., Jeanne P. Herrick, Esq., Charles Keefe, Esq., Derek Lick, Esq., Susan A. Lowry, Esq., Terri Peterson, Ari Richter, and Charles Stewart.

**1. Approval of December 10, 2021 Minutes**

On motion from Attorney Gill and seconded by Judge Cullen, the minutes of December 10, 2021 were approved. Attorney Lick, Mr. Stewart, Attorney Albee, and Attorney Greene abstained.

**2. Items Pending Before the Committee**

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

Attorney Brian Moushegian provided a brief update about a proposed amendment that would define the term “primary purpose” as it is currently included in Rule 8.4(g). He asked the Committee to table this item until the June meeting of the Advisory Committee on Rules to provide time for review by the NH Bar Association Board of Governors.

On motion by Mr. Stewart and seconded by Attorney Albee, the Committee unanimously voted to table the item until the June meeting.

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

At the December 10, 2021 meeting, the Committee voted to refer this issue back to the subcommittee to review the proposed amendment and suggest revisions for consideration. Justice Donovan referenced the

March 4, 2022 report of the subcommittee and asked the subcommittee to provide an update. The subcommittee reported opposing views on the proposed amendment and struggled with two primary issues. The first issue concerns the confidentiality of an individual's criminal record and the second concerns whether exclusion of the record should be the remedy if the State fails to produce the record prior to a bail hearing without showing good cause.

Judge Delker reported that Chief Justice Nadeau had issued an administrative order in the Superior Court regarding dissemination of a defendant's criminal record and it has worked well. Attorney Keefe reported that in his experience, pro se defendants in the Circuit Court do not normally receive a copy of their criminal records prior to arraignment. The subcommittee generally agreed that a proposed rule should incentivize sharing the criminal record but issues about disclosure, confidentiality, and due process remain.

The subcommittee proposed two rules that do and do not include "exclusion" as a remedy.

A motion to recommend to the Supreme Court Version A of the amendment failed. Discussion ensued.

On motion by Attorney Keefe and seconded by Attorney Lowry, the Committee approved by 11-2, the proposed rule amendment to replace "shall" with "may." This amendment will be recommended to the Supreme Court for adoption.

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

Judge Delker addressed the subcommittee's memo dated March 8, 2022, that provides commentary for proposed rule changes to NH Rules of Criminal Procedure 12 and Rule of Evidence 404(b).

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

Attorney Herrick addressed the subcommittee's March 9, 2022, report about the placement of adding a deferred discipline option to the Procedural Rules of Committee on Judicial Conduct.

The proposed amendment to Supreme Court Rule 40(5)(c)(6) would allow the Judicial Conduct Committee to vote to hold any matter in abeyance at any stage of the proceedings for "good cause." The proposed amendment adds language to include as "good cause" a deferral to

provide the opportunity for the judge to submit to a confidential evaluation under the supervision of the New Hampshire Lawyers Assistance Program.

Judge Delker reported that the Judicial Conduct Committee had met earlier on March 11, 2022, and was satisfied with the proposed amendment. He also shared the revised amendment with Jill O'Neill, who was also satisfied.

On motion by Attorney Green and seconded by Attorney Keefe, the Committee unanimously agreed to recommend adoption of the amended rule to the Court.

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

Justice Donovan explained that the subcommittee agreed that the Access to Justice Commission is working on the proposals outlined in the Recommendations of the Criminal Defense Task Force, so no further action is required at this time.

### **3. New Submissions**

- (a) 2021-007 Super.Ct. R. 41; Dist. Div. R. 1.27; Prob. Div. R. 172; Fam. Div. R. 1.32 – December 17, 2021 Memo from David Peck

Justice Donovan referenced the December 17, 2021, memo from David Peck to the Committee regarding the issue of providing clarity about whether dismissals are with or without prejudice. After brief discussion, on motion by Judge Delker and seconded by Attorney Albee, the Committee unanimously voted to table the item.

- (b) 2022-001 Supreme Court Rule 37A(V) – January 27, 2022 letter from the New Hampshire Attorney Discipline Office

Attorney Greene reviewed six proposed rule amendments as outlined in a January 27, 2022, memo to the Committee from the Attorney Discipline Office. After some discussion, on motion by Attorney Greene and seconded by Attorney Lick, the Committee unanimously agreed to prepare the proposed amendments for public comment.

- (c) 2022-002 Supreme Court Rule 47 – February 24, 2022 letter from Judicial Council and Sandra Cabrera on behalf of the Bar Association Board of Governors

Justice Donovan discussed the February 24, 2022 joint letter from the Judicial Council and Sandra Cabrera, President-elect of the New Hampshire Bar Association, that proposed an increase in the indigent fee schedule set forth in Supreme Court Rule 47. Justice Donovan discussed the need for expedited consideration of this request. See Supreme Court Rule 51(f)(3). On motion by Attorney Greene and seconded by Attorney Albee, the Committee agreed that the proposal should be referred to the Supreme Court. Mr. Stewart abstained.

- (d) 2022-003 Supreme Court Rules 27 and 42 – March 3, 2022 letters from Dianne Martin, Director, Administrative Office of the Courts

Justice Donovan provided a general overview of the proposed changes to Rules 27 and 42, which are needed to integrate the merger of the Attorney Discipline Office and the Office of Bar Admissions into the Judicial Branch. Upon review of the submission, Justice Donovan explained that exceptional circumstances justified expedited consideration of the proposed amendments and submitted them directly to the Court for review pursuant to Supreme Court Rule 51(c)(3).

#### **4. Other Business**

Justice Donovan reported that the Court had voted to adopt the amendments to N.H. Rule of Evidence 902 and to Circuit Court Rule 3.6 that the Rules Committee had recommended in its December 15, 2021 report.

Justice Donovan proposed a subcommittee be established to review changes to Rule 37(9) and 37(16) regarding immediate suspension of attorneys. Justice Donovan, Attorney Greene, Attorney Lowry, and Timothy Gudas, Supreme Court Clerk, will serve on the subcommittee.

With no further business before the Committee, the meeting adjourned at 2:06 p.m.

Respectfully submitted,  
Lisa Merrill, Recording Secretary