

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of September 10, 2021 Public Meeting

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

The meeting was called to order at 1:00 p.m. by Justice Donovan, Committee Chair. The following Committee members attended the meeting: Abigail Albee, Esq.; Hon. R. Laurence Cullen; Hon. N. William Delker; Hon. Michael Garner; Sean Gill, Esq.; Sara S. Greene, Esq.; Jeanne P. Herrick, Esq.; Derek Lick, Esq.; Susan A. Lowry, Esq.; Ari Richter; Senator Donna M. Soucy; and Janet L. Spalding. Lorrie Platt, Esq., Secretary to the Committee, was also present.

1. Approval of Minutes of June 4, 2021 Meeting

Upon motion made and seconded, the Committee approved the minutes of its June 4, 2021 meeting. Senator Soucy and Janet Spalding abstained because they were not present for the June meeting.

2. Items Pending Before the Committee

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

In its July 15, 2019 order amending Rule 8.4, the Supreme Court provided that the Committee would review the amended rule after it had been in effect for two years and provide the Court with its recommendations, if any, upon completing this review.

Sara Greene, disciplinary counsel for the Attorney Discipline Office, reported that the ADO has just recently received one grievance, still confidential, which implicates this rule. The Committee also invited comment from Attorney James Allmendinger, a member of the Bar Association's Ethics Committee, who was in attendance at the meeting. He advised that the Ethics Committee took no position on review of the rule but would like to be involved if further review were conducted.

After further discussion, the Committee voted upon motion made and seconded to advise the Court that no further action was necessary at this time. Judge Garner inquired whether a complete review of the effect of the rule could

be done without soliciting input from the public. Upon motion made by Attorney Lick, who had voted with the prevailing side on the earlier motion, and duly seconded, the Committee then voted to reconsider its earlier vote.

Upon further motion made and seconded, the majority of the Committee voted to invite public comment on the impact of Rule 8.4(g) since its 2019 amendment. It will be included on the docket of the Committee's December public hearing.

(b) 2020-009 Proposed Amendment to Criminal Rule of Procedure
12(b)(1)(f) -- Notice of State's Intention to Offer at Trial
Evidence of Defendant's Prior Crimes/Acts

In 2020, the Office of the New Hampshire Public Defender submitted a proposal to amend the rules of criminal procedure regarding the State's obligation to notify the defendant of its intention to offer Rule 404(b) evidence at trial. A subcommittee, consisting of Judge Delker, Judge Garner and Attorney Keefe, reviewed the proposal, including the scope of the required notice and its application in the Circuit Court, and submitted its report and recommended language.

Judge Delker explained that the issue can arise late in trial. The subcommittee determined that the existing rule when applied in the superior court sets the disclosure deadline too early. The new rule would require disclosure 60 days before jury selection. Forty-five days before jury selection, the party seeking to admit Rule 404(b) evidence must file a motion to admit the evidence. Thirty days before trial a party can file a motion to exclude the evidence.

A separate provision would be applicable to the circuit court. It would require that not less than 14 days before trial, a party seeking to admit Rule 404(b) evidence must provide to the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the evidence is offered and the supporting reasoning as well as include all statements, reports or other materials that the proponent will rely on to prove the act(s).

Upon motion made and seconded, the Committee voted to send the proposed amendment out for public comment at its December public hearing.

(c) 2021-003 Proposed Amendment to New Hampshire Rule of Evidence
902

Judge Schulman submitted a proposal, modelled upon Federal Rule of Evidence 902, to expand the rule governing self-authenticating records to

include certified records generated by an electronic process or system and certified data copied from an electronic device, storage medium or file.

Upon motion made and seconded, the Committee voted to send the proposed amendment out for public comment at its December public hearing.

(d) 2021-004 Proposed Amendment to Circuit Court –
Family Division Rule 3.6

The Committee considered a proposal submitted by Judge Susan Ashley, deputy administrative judge of the Circuit Court, to amend Circuit Court Family Division Rule 3.6. Judge Ashley wrote that the proposed amendment “is intended to consolidate and reduce” the number of rules of juvenile probation that currently apply to every youth on probation. On September 9, 2021, the Committee received a submission from several current juvenile probation and parole officers who opposed this amendment. Judge Garner reported to the Committee that he had forwarded the submission to Judge Ashley, who was not aware of this opposition.

Upon motion made and seconded, the Committee voted to put the proposed amendment out for public comment at its December public hearing and to invite the parties to submit additional materials.

(e) 2021-005 Proposal by Judicial Conduct Committee to Amend
Supreme Court Rule 40

The JCC has proposed an amendment to Supreme Court Rule 40, which sets forth the JCC’s procedural rules regulating the investigation and litigation of judicial conduct. The proposed amendment seeks to add a “Deferral of Impairment Case” option in cases involving less serious instances of judicial misconduct arising from substance misuse or mental health disorders. Sara Greene observed that the Attorney Discipline Office has similar procedures for diverting attorney misconduct resulting from similar impairments. The committee discussed, and Jeanne Herrick and Sara Greene agreed to serve on, a subcommittee to review the proposal and suggest revisions to mirror Board of Medicine and PCC rules.

Upon motion made and seconded, the Committee voted to send the JCC’s proposal out for public comment at its December public hearing.

3. New Business

(a) Justice Donovan provided a report of the action taken by the Supreme Court in response to the Rules Committee’s July 1, 2021 report to the Court.

(i) Supreme Court Rule 12-A(1): The Court adopted the Committee's recommendation to approve an amendment to Supreme Court Rule 12A(1), which expands the pool of qualified mediators necessary to mediate Supreme Court appeals. The amendment was implemented by a Supreme Court order on September 13, 2021.

(ii) Superior Court Rule 207: The Court adopted a recommended technical rule change to Superior Court Rule 207 to remove references designating the specific location of the Business and Commercial Dispute Docket. The amendment was implemented by a Supreme Court order on September 13, 2021. The Superior Court will now designate the location of the BCDD by way of an administrative Superior Court order.

(iii) Superior Court Rule 12(g): Summary Judgment: The Supreme Court proposed edits to Superior Court Rule 12(g)'s amendments, which were recommended by the Advisory Committee. The Court's edits were reviewed, and approved by the subcommittee to Rule 12(g).

(iv) Rules Governing the Dismissal of Actions in the Trial Courts: The Supreme Court decided to retain the Advisory Committee's recommendations with respect to rules governing the voluntary and involuntary dismissal of actions.

(v) New Hampshire Rule of Criminal Procedure 12 - Discovery of Criminal Defendant's Record: The Supreme Court referred proposed amendments to this Rule back to the Advisory Committee for further evaluation. The Committee discussed the need for additional input from the bar, bench and public with respect to how the proposed amendments will impact proceedings in the Circuit Courts and whether recent legislative amendments to RSA 597 conflict with the proposed amendments to Rule 12. Upon a motion made and seconded, the Committee agreed to put out the proposed amendments for further public comment at its December public hearing.

(b) The Committee discussed whether subcommittees created by the Advisory Committee on Rules should be required to provide a brief report explaining the reasons for any proposed action that they recommend be taken on proposed amendments and agreed that the requirement be adopted.

5. Adjournment

Upon motion made and seconded, the Committee voted to adjourn the meeting. The next public meeting of the Committee is scheduled for Friday, December 10, 2021. The meeting will include a public hearing, which will begin at 12:30 p.m.