

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of December 6, 2019 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: Abigail Albee, Esq., Hon. Paul Berch, Hon. R. Laurence Cullen, John Curran, Esq., Hon. N. William Delker, Hon. Michael Garner, Sean Gill, Esq., Sara S. Greene, Esq., Jeanne P. Herrick, Esq., Derek Lick, Esq., Ari Richter, Patrick W. Ryan, Esq., Janet Spalding, CPA, Charles P.E. Stewart, and Hon. Patrick Donovan.

Also present were the Secretary to the Committee, Carolyn Koegler, Esq., David Peck, Esq., Charlene Desrochers and Claire Mackinaw, Staff.

1. Public Hearing

Justice Donovan opened the public hearing. He inquired whether anyone from the public wished to offer comment on any of the items that had been put out for public hearing.

No one wished to offer public comment on the items that had been included in the public hearing notice. However, attorney Sabin R. Maxwell asked to speak to the Committee regarding a recent amendment to Superior Court Rule 12. Justice Donovan reminded the Committee that it had recommended that the Supreme Court delete and replace Superior Court Rule 12(g). The new Rule 12(g) requires both sides in the context of a motion for summary judgment to submit a single document identifying any undisputed facts and any disputed facts. The Supreme Court adopted the change in an April 19, 2019 rules order, effective July 1, 2019.

Attorney Maxwell urged the Committee to recommend that the Court delete the newly adopted rule. He believes that the new rule is unnecessarily complicated and unwieldy. He understands that the new rule was intended to streamline the motion for summary judgment practice and provide the superior court with a single document of facts. In his experience, however, the rule has made the process more complicated and expensive, which has served neither clients nor judicial economy. The rule has created more motion practice and he is struggling to see how the rule has benefitted the courts.

Justice Donovan thanked attorney Maxwell for his comment, and noted that when the Court adopted the proposed amendment, it referred the amendment back to the Advisory Committee on Rules and requested that in June 2020 the Committee evaluate how the rule has worked in practice. The Committee agreed to notify attorney Maxwell when it has begun to undertake this work.

The Committee turned to discussion about the public hearing items.

2. Discussion and Vote on Public Hearing Items

(a) 2019-010. Supreme Court Rule 37A. Attorney Discipline. Electronic Filing of Grievances.

Attorney Sara Greene reminded the Committee that these proposed amendments were suggested by the Attorney Discipline Office. They are designed to facilitate the electronic filing of grievances with the Attorney Discipline Office.

Committee members agreed that the proposed rule amendments are not controversial and are designed to make the process at the Attorney Discipline Office more accessible to the public.

Upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed amendments.

(b) 2019-011. Supreme Court Rule 55. Public Protection Fund.

Attorney Sara Greene reminded the Committee that this proposed amendment would allow claims to be made against the Public Protection Fund when a lawyer has resigned while under investigation by the Attorney Discipline Office.

Judge Delker noted that there had been some correspondence between the Attorney Discipline Office and the Chair of the Public Protection Fund Committee regarding this proposal in 2015. He inquired whether there was a reason the rule amendment had not been adopted then. Attorney Greene stated that her recollection is that they did not hear back from the Chair of the Public Protection Fund at that time, and that the Attorney Discipline Office did not follow up. She noted that this suggested amendment would fill a large gap in the rules.

Following some brief discussion, and upon motion made by Mr. Curran and seconded by Representative Berch, the Committee voted to recommend that the Court adopt the proposed amendments.

(c) 2019-007. New Hampshire Rule of Criminal Procedure 8(d).

Judge Delker reminded Committee members that the Superior Court suggested this amendment. It is designed to increase efficiency in cases in which a defendant fails to appear at arraignment or the court dismisses a felony complaint but misdemeanors remain pending. Judge Delker explained that the amendment would toll the indictment deadline while the defendant remains at large.

Judge Delker explained that the superior court suggested this rule change in order to create more efficiencies in superior court in cases in which a criminal defendant fails to appear for arraignment or initial disposition. The amendments are designed to streamline the process.

Mr. Richter inquired whether it is necessary to use the word “tolled,” in the rule. He notes that this is not a term a layperson is typically familiar with. Following some discussion, the Committee concluded that use of the term “tolled” is inaccurate. What should happen is that the deadlines do not apply at all. The Committee agreed to strike the words “is tolled” and replace them with “shall not apply.” It was also noted that the reference to paragraph (d) should be to paragraph (2).

Upon motion made by Judge Delker and seconded by attorney Ryan, the Committee voted to recommend that the Supreme Court adopt the amendments to Criminal Procedure Rule 8(d), as amended by the Committee.

(d) 2019-006. New Hampshire Rule of Criminal Procedure 12.

Justice Donovan reminded the Committee that this proposed amendment would change and clarify expert witness disclosure deadlines, placing the burden on the parties to set disclosure deadlines at the dispositional conference. He noted that David Rothstein, the Director of Litigation at the New Hampshire Public Defender, had submitted a letter to the Committee expressing concerns about the proposed amendment.

Judge Delker explained that the suggested change was prompted by two things: (1) the need to resolve a conflict between two parts of the existing rule; and (2) the desire to force the parties to think about the issue of expert disclosure earlier in the case, *e.g.*, do we need experts, what are the issues, what are the deadlines? Judge Delker noted that attorney Rothstein is correct in his observation that the rule as written will not work in all cases because every case is different. Judge Donovan suggested that “shall be grounds to exclude the expert from testifying at trial” should be changed to “may be grounds to exclude the expert from testifying at trial.” It was noted that it would be impossible to address all concerns in a rule, and that courts would need to be flexible in the application of the rule, including perhaps setting a conference to resolve the issues at a later date.

Upon motion made by Judge Delker and seconded by Representative Berch, the Committee voted to recommend that the Supreme Court adopt the amendments to Criminal Procedure Rule 12(b) as amended by the Committee, to replace “shall” with “may” in subparagraph (F).

3. Approval of September 6, 2019 Meeting Minutes.

Upon motion made and seconded, the Committee approved the September 6, 2019 minutes. Representative Berch and Judge Delker abstained from voting because they were not present at the meeting.

4. Items Still Pending Before the Committee.

(a) 2019-008. Rules relating to the Administration of Animal Cruelty Cases.

Attorney Ryan explained that the animal cruelty case subcommittee, comprised of Committee members Abigail Albee, Pat Ryan and Judge Garner recommends that no formal rules be adopted at this time to address new legislation relating to animal cruelty cases. However, because the new statute calls for a hearing in certain instances in which the timing might conflict with current rules, the subcommittee concluded that it would be appropriate for both the Superior and Circuit courts to issue administrative orders appropriate to address the scheduling conflict, for the reasons set forth in attorney Ryan’s November 25 email to the Committee.

Upon motion made by Judge Garner and seconded by Representative Berch, the Committee voted to table this issue. Carolyn Koegler agreed to remove the item from the Committee’s agenda.

(b) 2019-012. Circuit Court – Family Division Rules.

Judge Garner reminded the Committee that in a September 5, 2019 letter, attorney Jay Markell had suggested that Family Division Rule 1.25(A) be amended. Judge Garner reported that he had conducted an informal survey of his colleagues regarding Family Division Rule 1.25-A (“Mandatory Initial Self-Disclosure”) designed to help inform whether attorney Markell’s proposed amendment to Family Division Rule 1.25(A) would be beneficial. The general consensus seemed to be that there is no concern about the application of the rule as it exists now, and that, whether or not the rule is amended as proposed by attorney Markell, the judges would continue to apply Rule 1.25-A as they have been. There was no strong consensus in favor of, or against, the proposed amendment. The general conclusion was that amending the rule would cause no harm; nor is it particularly necessary.

Upon motion made and seconded, the Committee voted not to recommend a change to the rule.

5. New Submissions

(a) 2017-016. Supreme Court Rule 38. Code of Judicial Conduct.

Carolyn Koegler referred Committee members to her November 15, 2019 memo noting that Attorney Albee had raised the question of whether Supreme Court Rule 38 should be amended to comport with the new definition of “judge” recently adopted by the Supreme Court, and effective January 1, 2020.

Judge Delker reported that there had been some discussion about this matter at a recent meeting of the Judicial Conduct Committee. Some concerns had been raised about how to identify what is an “adjudicatory function.” Attorney Albee noted that there may be a need for the Committee to consider whether amendments should be made to Superior Court Administrative Rule 1-6 (“Authority of Clerks”). There was some brief discussion of these issues.

Upon motion made by Mr. Stewart and seconded by attorney Green, the Committee voted to: (1) recommend that the Court adopt the changes to Superior Court Rule 38, as set forth in Carolyn Koegler’s November 15 memo; and (2) add to the agenda for March the questions of whether the term “adjudicatory function” should be further defined, and whether Superior Court Administrative Rule 1-6 should be amended as a result of the changes that have been made to the definition of “judge” in Supreme Court Rule 40.

6. 2020 MEETING DATES

- Friday, March 6
- Friday, May 29
- Friday, September 11
- Friday, December 4