New Hampshire Supreme Court Advisory Committee on Rules
Minutes of Special Public Meeting of June 8, 2018

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

The meeting was called to order at 12:30 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Hon. Paul S. Berch, Hon. R. Laurence Cullen, John A. Curran, Esq., Hon. N. William Delker, Hon. Daniel J. Feltes, Hon. Michael H. Garner, Sean P. Gill, Esq., Joshua L. Gordon, Esq., Jeanne P. Herrick, Esq., Derek D. Lick, Esq., Patrick W. Ryan, Esq., Janet L. Spalding, CPA, Charles P.E. Stewart, Hon. Patrick Donovan, and Hon. Robert J. Lynn.

Also present was the Secretary to the Committee, Carolyn Koegler, Esq.

1. Discussion and Vote on Public Hearing Items

(a) 2017-007. Supreme Court Rule 41. Limited Liability Entities

Justice Lynn reminded the Committee that the proposal put out for public hearing was to delete Supreme Court Rule 41 its entirety.

Mr. Stewart noted that a comment had been submitted by attorney Kevin Devine raising a concern about the complete elimination of the rule. Attorney Devine noted in his April 3, 2018 email to the Committee that if section (3) of the rule were eliminated in its entirety, the "slippery slope of amazon-owned law firms in NH will be impossible to negotiate and regulate professionally." Members of the Committee recalled that attorney Rolf Goodwin had attended the public hearing and had addressed the issue raised in the email. Attorney Goodwin stated that the issue is not a concern because this issue is already addressed by statute.

Following some brief discussion and upon motion made and seconded, the Committee voted to recommend that the Court eliminate Supreme Court Rule 41 in its entirety.

(b) 2017-009. Supreme Court Rules. Identification of Crime Victims

Justice Lynn reminded the Committee that the proposal put out for public hearing would adopt a Supreme Court rule that would protect crime victims' identities by prohibiting parties from including certain identifying information about crime victims in pleadings filed with the Supreme Court.

Justice Lynn reminded the Committee that it had received testimony from a number of people at the public hearing. Some people spoke in support of the proposed rule, and others spoke against it. Justice Lynn stated that he is able to understand the concerns expressed on both sides, but that he believes that the media has the better argument, and that there is some detriment to making crime victims' identities confidential. His inclination is to vote to not recommend the adoption of a rule, and to leave the determination of whether a victim's identity should be confidential to be made on a case by case basis.

Attorney Gordon stated that he believes that the reporters who attended the hearing had made good First Amendment-based arguments, but wonders whether it might make sense to have a rule that encourages people to use something other than the victims' names in filings. He wondered whether there would be pushback from the media even on a proposal like that.

Representative Berch stated that he believes that the Committee should take no action on this, but for different reasons. He believes that the proposal raises enough of a policy question that this should be a legislative decision, not a court decision. The issue involves a balancing of interests, and because of this, it is more appropriately a matter for the legislature.

Attorney Gill noted that the legislature already spoke to this issue when it adopted the Victim's Bill of Rights. Unless the defendant's constitutional rights are implicated, the victim is entitled to confidentiality. This is a very modest proposal codifying what is already the practice. The appellate defender already goes to great effort to keep a victim's name out of the filings, and the Court, as a rule, does not use the victim's name. Two meetings ago, the Committee had a discussion about the rule possibly applying in all courts, and the Committee believed that it would be better to start at the Supreme Court. Attorney Gill reminded the Committee that what is being discussed here is a proposal that would keep a victim's name from becoming part of a permanent, public, searchable record. The default should be to not mention the victim's name. When attorney Gill crafted this proposal at the request of the Committee, he defaulted to what the legislature had said overwhelmingly in the Victim's Bill of Rights. Attorney Gill noted that this proposal does not prohibit the press from reporting. Attorney Gill noted that he is expressing only his opinion, and that the Attorney General does not take a position on this issue.

Senator Feltes stated that he agrees with attorney Gill. This proposal is modest and is consistent with the Victim's Bill of Rights. He does not see this as being as burdensome as it is portrayed. Senator Feltes moved that the Committee recommend that the Court adopt the rule. The motion was seconded by attorney Lick.

Representative Berch noted that issue of the victim's right to privacy was an issue in a case. Subsequently, the legislature passed legislation modifying the Victim's Rights law. When it comes to the details about the law, it is the role of the legislature to clarify those details. Representative Berch noted that he is not suggesting that the legislature would not take action and adopt a rule like the one proposed here. But he believes that the appropriate forum for this is the legislature.

Attorney Gordon noted that the language, "no party shall disclose" is not modest language. He feels strongly that it is actually family law cases where this issue is the most pressing. That is, regarding the children's right to privacy. He wonders whether there may be a middle ground. The First Amendment arguments made by the press are persuasive.

Justice Lynn noted that some people have referred to this as the proposal made by the Attorney General's office. That is not the case. He reminded the Committee that the Court had raised this issue with the Committee and that the Committee had asked attorney Gill to draft a proposal.

Justice Donovan observed that the rule, as written, will impact what the trial court does.

Attorney Gill stated that he does not believe that this will impact what the trial court does. Trial court orders can be redacted, and parties can file redacted and unredacted copies of documents.

Attorney Gordon stated that redacting can be a cumbersome process, and that it will be necessary to file redacted and unredacted documents in a lot of cases, which can cause administrative difficulty.

Justice Lynn inquired whether if the concern is publicity, isn't it the media's responsibility to behave responsibly in what they publish? He noted that he wonders about the potential historical damage of keeping things secret. Might it be important 50-100 years from the date of the event to know a victim's identity? This rule would make it difficult to get information. Is there some public interest in the public's knowing a victim's identity?

Attorney Gill stated that the press is one concern, but he noted that there are others. Given the advances in technology, and the fact that the public is able to find this information easily on their computers, there is a stronger argument that a victim's name should not be "out there" as a part of the permanent public record.

Representative Berch stated that this is a slippery slope. There is a presumption that the public has a right to know what the government does, subject to some exceptions. This proposal flips that on its head. The proposal

creates a presumption of secrecy, and makes disclosure an exception. Where does this end? Should all jury trials be held in secret? If we want to move toward greater secrecy, then the people should decide that – the legislature should decide that.

Mr. Stewart stated that the group should not confuse secrecy with privacy. He noted that under the GDPR there is a right to privacy, to have information erased, corrected.

Attorney Lick stated that he is trying to weigh the value of two things. On one side, the right of the public to observe the court process and to keep an eye on what the courts are doing. On the other side is the right of the victim to privacy. Attorney Lick stated that he is having a difficult time seeing why knowing the name of the victim is so important that it trumps the victim's right to privacy. The proposal seems like a modest measure – it is limited to filings at the Supreme Court. It is not that different from filings in the federal courts, where parties are required to redact certain information, *e.g.*, social security numbers.

Senator Feltes stated that he agrees with attorney Lick. He believes that this is a modest proposal and allows for an exception for good cause. It is consistent with the Victim's Bill of Rights.

Attorney Gordon stated that the proposal might be unconstitutional.

Upon motion made and seconded the Committee voted to recommend that the Court NOT adopt the proposal. The following Committee members voted to recommend that the Court not adopt the proposal: Justice Lynn, attorney Curran, attorney Herrick, Judge Garner, Ms. Spalding, attorney Gordon, Judge Cullen, and Representative Berch. The following Committee members dissented and voted to recommend that the Court adopt the proposal: Senator Feltes, attorney Lick, Mr. Stewart, attorney Ryan, attorney Albee, and attorney Gill.

(c) 2017-013. Superior Court (Civ.) Rule 36. Standing Trial Orders.

Justice Lynn reminded the Committee that this proposal had been made by Judge Delker. The proposed amendment would clearly establish when a party is required to notify the opposing party that he or she intends to subpoena the opposing party's lawyer as a witness.

Upon motion made by Representative Berch and seconded by attorney Albee, the Committee voted to recommend that the Court adopt the proposed amendment.

(d) 2017-017. Superior Court (Civ.) Rules. Appeals – Municipal Actions.

Justice Lynn reminded the Committee that this proposal had been made by Judge Schulman. The proposed rule would require a party who submits, in an appeal to the superior court from the action of a state or municipal government body, an audio or video recording of the proceedings below, to provide the court with a transcript of the relevant portion of the proceedings.

Following some brief discussion, and upon motion made by Justice Lynn and seconded by attorney Curran, the Committee voted to recommend that the Court adopt the rule.

(e) 2016-006. Superior Court (Civ.) Rules. Motions to Seal.

Justice Lynn reminded the Committee that it had put out for public hearing a proposal that had been submitted by the subcommittee chaired by Judge Delker. What is proposed is a series of rules that would amend the Superior Court Rules to delineate the procedure for the filing of case records which contain confidential information or are confidential in their entirety and to provide the procedure for seeking access to case records that have been determined to be confidential.

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

Carolyn Koegler referred the Committee to a May 17, 2018 memo she had submitted regarding a recent Supreme Court Order that had been issued requesting comment on a suggestion to adopt "Supplemental Rules of the Superior Court of New Hampshire for Electronic Filing in Specified Civil Cases." She noted that while Rule 11 of these suggested Supplemental Rules is similar to the proposal the Committee just voted on, it is not identical. She stated that the Committee may wish to recommend that the Court amend (if they are adopted) the Supplemental Rules of the Superior Court of New Hampshire for Electronic Filing in Specified Civil Cases" so that the rules are not redundant or in conflict. The Committee agreed that a note about this should be made in the August 1 report.

(f) 2016-009. Rule of Professional Conduct 8.4. Harassment and Discrimination.

Senator Feltes reported that he and attorney Herrick had agreed to serve on a subcommittee that would work with the Ethics Committee and the various groups that had commented on the Ethics Committee proposal to see if they could find a compromise proposal that would address the concerns expressed about the proposal that had been put out for public hearing. A meeting has already been scheduled.

2. Approval of March 9, 2018 Meeting Minutes

Upon motion made and seconded, the Committee voted to approve the March 9, 2018 meeting minutes.

3. Status of Items Pending Before the Committee

(a) 2016-014. Superior Court Rules and Supreme Court Rules. In Camera Review of Documents.

Justice Lynn reminded the Committee that Judge Delker had submitted an email on April 19 in which he expressed the view that rulemaking is not the proper way to resolve the debate the Committee has had on this issue. He also reminded the Committee that it had put out for public hearing in December two proposals. One proposal is set forth in appendix G of the December public hearing notice. The second proposal is set forth in appendix H of the December public hearing notice ("the Lynn/Johnson proposal"). The Committee also has before it a third proposal, made by attorney Sarah E. Warecki, in an April 2, 2018 letter to the Committee (the "Warecki proposal").

Justice Lynn reminded the Committee that under the Lynn/Johnson proposal, the party seeking to discover evidence in privileged or confidential records must show a reasonable probability that the records contain information that is material to the party's case. This standard is the same as the standard set forth in the case law. But when the judge is reviewing the documents, the standard the judge applies to determine whether the records are to be disclosed to the parties (with a protective order) is not whether the records contain information that is "essential and reasonably necessary," but whether they contain information that is "exculpatory," which is a lower standard. This does not mean that the records can be used at trial. To be used at trial, the records must be "reasonably necessary" to the party's case. However, as noted, the standard to determine whether the records are disclosed to the parties is more lenient than the standard set forth in Appendix G of the December public hearing notice. Under that standard, the records are not turned over to the parties at all unless a judge concludes that they contain information that is "essential and reasonably necessary" to the requesting party's case.

Justice Lynn explained that his proposal arose out of his concern that it is very difficult for a judge to determine whether records are "essential and reasonably necessary" without the assistance of the attorneys in the case. He notes that a protective order would mean that the records would remain confidential as to all others unless it is determined that the records should be admitted at trial. Justice Lynn recognizes that what is involved here is a balancing between the privacy interests of an individual and the rights of a

criminal defendant. But in conducting this balancing, Justice Lynn comes out on the side of a criminal defendant who might go to jail.

Representative Berch stated that in this discussion about the various proposals, it is important to note that Committee is only considering adopting a rule in criminal cases at this point.

Mr. Stewart noted that one of the points made in Judge Delker's April 19 email is that adopting a rule would mean that the common law would not be further developed in this area. He asked Justice Lynn for his thoughts about this issue.

Justice Donovan explained that he practiced in this area and that he believes that New Hampshire needs Chief Justice Lynn's rule. Under current practice, trial court judges do not know the theory of the defendant's case, and the defendant receives no explanation when records are not disclosed. They don't even know whether there is an issue to appeal. Defendant attorneys need greater access to the records. If the records are disclosed pursuant to a protective order, they will not be shared.

Attorney Albee acknowledged that in criminal cases, attorneys are obligated to tell their clients "everything," but this does not mean that they need to share these records with their clients.

In response to Judge Garner's question about what an attorney should tell his or her client who wants to see the records, Justice Donovan stated that the attorney should simply say, "I cannot share these with you because a court order prohibits me from doing so."

Attorney Gordon stated that it is important to remember what these records are. These records are created when a person has borne his or her soul to a doctor, knowing that the conversation would be private.

Representative Berch stated that it is simply unworkable to elevate a statutory privilege over a constitutional right. He noted that we pierce privileges all the time. Privileges exist to the detriment of seeking the truth. When we are talking about the possibility of locking someone up, the privilege must yield.

Attorney Gill stated that there is no purpose for a rule unless it improves the process. He is not sure that either of the proposals the Committee is considering would improve the process. He believes that the person who seeks access to the confidential records should be required to articulate what it is he or she is looking for. More is required for someone seeking to look through someone else's garbage than is required to go looking through confidential records.

Justice Lynn stated that he believes that this is different from the warrant situation. Also, we do need to be solicitous of the victim, but if the victim is going to say, "that defendant did something to me," then it would seem that the defendant has a right to see the records from the therapist that might contain information about that incident.

Attorney Gill noted that the rule seems to apply to any confidential records - not just therapy records. Does it apply to an attorney's records? To school records? The Lynn/Johnson proposal lowers the standard to exculpatory.

Representative Berch noted that the Committee seems to be leaning against an aspect of the proposal that would allow the defense attorney to assist the judge in determining whether the records should be disclosed. If we do not include the defense attorney in this process, then the judge should err on the side of finding the records to be exculpatory.

Justice Lynn stated that he understood (putting the Warecki proposal aside) that neither the Delker proposal nor the Lynn proposal would prevent lawyers from submitting memos to the Court to use when examining the records. The main difference between the two proposals is what the standard is. Under the Delker proposed rule, the judge only turns over to the lawyers and parties is what is "essential and reasonably necessary." Under the Lynn proposal, the judge turns over anything that is "exculpatory." The "essential and reasonably necessary" standard then applies after the lawyers have seen records.

Judge Delker noted that the Warecki proposal takes this one step further. Judge Delker is not confident that we should reduce this practice to a rule because of the constitutional dimensions involved. These issues can best be resolved through litigation and briefing.

Upon motion made by Senator Feltes and seconded, the Committee voted to recommend that the Court NOT adopt any of the proposals being considered by the Committee. Those who voted to recommend that the Court take no action were: Senator Feltes, Attorney Lick, Mr. Stewart, Attorney Herrick, Attorney Ryan, Judge Garner, Ms. Spalding, attorney Gordon, Judge Delker, Attorney Gill, and Judge Cullen. Four members of the Committee voted to recommend that the Court take some action. The members who voted in favor of the Court's taking some action were: Justice Lynn, Attorney Curran, Attorney Albee and Representative Berch.

Following some discussion, Judge Delker moved that the Committee recommend (if, despite the Committee's recommendation, the Court considers adopting a rule) that the Court request formal briefing and oral argument on

the issue from all interested parties. Attorney Herrick seconded the motion. She believes that it would be important for the Court to have the benefit of hearing from interested parties before it adopts a rule. The Committee voted to recommend that if the Court considers adopting a rule, it request formal briefing and oral argument on the proposal from all interested parties.

(b) 2017-010. New Hampshire Rules of Criminal Procedure (Felonies First Counties)

No action was taken on this item. This issue will be discussed at the September meeting.

(c) 2017-016. Supreme Court Rules 38 and 40. Application of Code of Judicial Conduct to Court Staff Generally.

Justice Lynn reminded the Committee that in an October 16, 2017 letter to the Committee, Executive Director of the Judicial Conduct Committee, Robert Mittelholzer, had raised a concern relating to the definition of "judge" found in Supreme Court Rule 40(2). At its March meeting, the Committee had proposed to amend the rule to define "judge" to include only "a full or part-time judicial officer appointed by the Governor and Counsel," and asked the JCC to comment on this proposal.

In an April 16, 2018 letter to the Committee, the JCC expressed concern about the Committee's proposal. Justice Lynn stated that he understood the concerns expressed in the April 16, 2018 letter, but nevertheless, believes that the proposal should be narrowed to make clear that those members of court staff are included in the definition of judge only when they perform adjudicatory functions. He directed the Committee's attention to the language set forth in Carolyn Koegler's May 29, 2018 memo. The memo proposes that the rule be amended as follows (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~ format):

> Judge – this term includes **[the following members of the State of New Hampshire Judicial Branch]**: (1) a full-time or part time judge of any court or division ~~of the State of New Hampshire Judicial Branch~~; (2) a full-time or part-time marital master; (3) a referee or other master; **[and]** (4)**[, when performing an adjudicatory function,]** a court stenographer, monitor or reporter, a clerk of court or deputy clerk, including a register of probate or deputy register and anyone performing the duties of a clerk or register **[on an interim basis]**. Not everyone who is a "judge" as defined herein is bound by every cannon of the Code of Judicial Conduct – the Code of Judicial Conduct applied to a judge to the extent provided in Supreme Court Rule 38.

Attorney Ryan raised a number of concerns about this proposal. He distributed another proposal to Committee members at the meeting to address his concern that bail commissioners were not included in the rule, and to clarify what is meant by "an adjudicatory function." Attorney Ryan's proposal reads as follows:

> Judge – this term includes **[the following members of the State of New Hampshire Judicial Branch]**: (1) a full-time or part time judge of any court or division of the State of New Hampshire Judicial Branch; (2) a full-time or part-time marital master; (3) a referee or other master; (4)**[a bail commissioner; and (5),]** ~~a court stenographer, monitor or reporter~~, a clerk of court or deputy clerk **[when performing a function authorized by Superior Court Administrative Rule 1-6, II and III.]** ~~including a register of probate or deputy register and anyone performing the duties of a clerk or register~~ **[on an interim basis]**~~.~~ Not everyone who is a "judge" as defined herein is bound by every cannon of the Code of Judicial Conduct – the Code of Judicial Conduct applies to a judge to the extent provided in Supreme Court Rule 38.

Justice Lynn suggested that perhaps the Committee could put two proposals out for public comment.

Upon motion made by Mr. Stewart and seconded by Representative Berch, the Committee voted to put two proposals out for public hearing in December.

Attorney Lick expressed concern about using the word "judge" in the last sentence.

(d) <u>2017-018. Supreme Court Rule 37. Attorney Discipline System. Access to Confidential Records</u>

Carolyn Koegler reminded the Committee that at the meeting in March, the Committee had considered a November 22, 2017 letter from the Judicial Branch Administrative Council asking the Committee to review New Hampshire Supreme Court Rule 37 to determine "whether a procedure should be specifically outlined for when, and in what manner, the Attorney Discipline Office may access confidential court files." At the March meeting, Justice Lynn asked Carolyn Koegler to draft a proposed rule to address the issues raised in the letter. Pat Ryan agreed to assist with this. Carolyn Koegler and Pat Ryan will submit something to the Committee prior to the September meeting.

(e) 2018-002. Rule of Prof. Conduct 1.15. Safekeeping Property.

At the March meeting, the Committee directed Carolyn Koegler to forward a proposal set forth in a February 14, 2018 letter from Christopher Keating, Executive Director of the Administrative Office of the Courts to the Attorney General's Office, and to request comment on the proposal. Carolyn Koegler reported that she had done so.

(f) 2018-003. Rule of Criminal Procedure 3(a).

Carolyn Koegler explained that no action was required on this. This item was included on the agenda for informational purposes only. Justice Lynn referred a suggested technical change to Criminal Procedure Rule set forth in a April 5, 2018 letter directly to the Court pursuant to Supreme Court Rule 51(f).

(g) 2018-004. Supreme Court Rule 36. Appearances in Court by Eligible Law Students and Graduates.

Justice Lynn referred the Committee to an April 13, 2018 memorandum and attached letter from Eileen Fox. The memo asks whether the Supreme Court should amend or clarify Supreme Court Rule 36 to allow students who have completed a 9 hour training program for the DOVE project (offered for second year Daniel Websters scholars) to appear in court pursuant to the rule. Justice Lynn stated that he had contacted Professor John Garvey, the Director of the Daniel Webster Scholar Honors Program, to inquire whether he supports this proposal. He has not yet heard back from Professor Garvey.

(h) 2018-005. New Hampshire Rule of Criminal Procedure 8(d).

Judge Delker referred the Committee to Carolyn Koegler's May 9, 2018 memorandum and explained that he had submitted a suggestion to amend New Hampshire Criminal Procedure Rule 8(d).

Following brief discussion, the Committee concluded that the change is technical. Upon motion made and seconded, the Committee voted to recommend that the court adopt the change proposed in the memo and asked that Carolyn Koegler include the proposed change in the Committee's August 1 report.

(i) 2018-006. Type-Volume Limitations for Supreme Court Briefs.

Attorney Gordon referred Committee to his May 30, 2018 memorandum. He explained that the Court recently changed the Supreme Court rules to facilitate the electronic filing of briefs. When it did so, it changed the page limits set forth in the rules to type-volume limits. Attorney Gordon believes

that in making these changes, the Court may have made an arithmetical error and inadvertently reduced the permissible length of briefs.

Justice Lynn reported that he had spoken with New Hampshire Supreme Court Clerk Eileen Fox, and that she believes that attorney Gordon is incorrect. Justice Lynn asked Attorney Gordon to send 4-5 of the briefs attorney Gordon has looked at that support his conclusion to Justices Lynn and Donovan. The Committee will consider this issue again in September.

(j) 2018-007. Supreme Court Rule 36.

Justice Lynn referred the Committee to an April 25 letter from attorney Steven N. Karels asking the Court to reconsider the Rule 36 requirements for application of student internships in New Hampshire. Justice Lynn reminded the Committee that it had considered attorney Karels' suggestion that the rule be amended to: (1) allow part-time students; and (2) students attending non-ABA accredited law schools to appear in court when they are interning for a New Hampshire attorney. The Committee discussed the issue and recommended that the Court amend the rule to allow part-time law students to appear in court when they are interning for a New Hampshire attorney, but declined to recommend that students attending non-ABA accredited law schools to appear in court.

Justice Lynn stated that he believes this is not an issue for the Committee, but, rather, one for the Court. He asked Carolyn Koegler to refer the letter to Clerk Eileen Fox.