NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting and Public Hearing of June 17, 2011

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

The meeting was called to order at 12:38 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen M. Anderson; Edda Cantor; Robert L. Chase; Hon. Richard A. Hampe; Jeanne P. Herrick, Esq.; Martin P. Honigberg, Esq.; Honorable Richard McNamara; Jennifer L. Parent, Esq.; Patrick Ryan, Esq.; Raymond W. Taylor, Esq.; and Hon. Robert J. Lynn.

Also present were Secretary to the Committee, Carolyn Koegler, Esq.; and Laura Mitchell, staff.

1. Public Hearing

Upon motion made by Justice Lynn and seconded by Judge Hampe, the Committee voted to ratify the email vote to place item 1(g) on the agenda for the public hearing. The Committee then received comments from the public on the following matters, as set forth in the May 4, 2011 public hearing notice:

(a) Rule 1.10 of the Rules of Professional Conduct (regarding the application of Rule 1.10's firm-wide imputation rule to conflicts of interest that can arise when a lawyer leaves one firm to take employment with another). See May 4, 2011 Public Hearing Notice, Appendix A.

(b) Supreme Court Rule 53.7(A)(regarding sanctions for failure to comply with continuing legal education requirements. No changes being proposed to the temporary rule now in effect). See May 4, 2011 Public Hearing Notice, Appendix B.

(c) Supreme Court Rule 48-B (regarding mediator fees in family cases. No changes being proposed to the temporary rule now in effect). See May 4, 2011 Public Hearing Notice, Appendix C.

(d) Superior Court Rule 203 (regarding vital statistics reports. No changes being proposed to the temporary rule now in effect). See May 4, 2011 Public Hearing Notice, Appendix D.

(e) Family Division Rule 2.25 (regarding vital statistics reports. No changes being proposed to the temporary rule now in effect). See May 4, 2011 Public Hearing Notice, Appendix E.

(f) District Court Rules 6.1 to 6.7 (regarding local ordinance citations. No changes being proposed to the temporary rules now in effect). See May 4, 2011 Public Hearing Notice, Appendix F.

(g) Supreme Court Rule 38, Canon 3, Rule 3.1 (regarding the 15% income limitation found in paragraph B(2)). See May 4, 2011 Public Hearing Notice, Appendix G.

2. Approval of the Minutes

Upon motion made by Justice Lynn and seconded by attorney Taylor, the Committee unanimously voted to approve the minutes of the Committee's March 23, 2011 meeting. Attorney Honigberg abstained from voting, because he was not present at the meeting on March 23.

3. Discussion and Vote on Public Hearing Items

(a) Rule 1.10 of the Rules of Professional Conduct

Following discussion of the issue, upon motion made by Judge McNamara and seconded by Justice Lynn, the Committee unanimously voted to recommend that the Supreme Court adopt the amendments proposed by the Ethics Committee of the New Hampshire Bar Association to Rule 1.10 of the Rules of Professional Conduct.

(b) Supreme Court Rule 53.7(A)

Following discussion of the issue, upon motion made by attorney Honigberg and seconded by Justice Lynn, the Committee unanimously voted to recommend that the Supreme Court adopt on a permanent basis Supreme Court Rule 53.7(A), which had been amended on a temporary basis by the Supreme Court order dated May 11, 2010.

(c) Supreme Court Rule 48-B

It was noted by a member of the Committee that there is a technical error in subsection (8) of the amended rule, and that reimbursement should be

at the IRS rate per mile round-trip for the first mediation appointment. Upon motion made by Judge Hampe and seconded by attorney Taylor, the Committee unanimously voted to recommend that the Supreme Court adopt on a permanent basis the rule which had been amended on a temporary basis by Supreme Court order dated August 10, 2010.

(d) Superior Court Rule 203

There was some discussion regarding the concerns raised about Superior Court Rule 203, and Family Division Rule 2.25 by Mr. Puiia at the public hearing. Then, upon motion made by attorney Honigberg and seconded by attorney Taylor, the Committee unanimously voted to recommend that the Supreme Court adopt on a permanent basis both Superior Court Rule 203 and Family Division Rule 2.25. Each rule had been amended by the Supreme Court on a temporary basis by order dated August 10, 2010.

(e) Family Division Rule 2.25

See 3(d), above.

(f) District Court Rules 6.1 to 6.7

Upon motion made by attorney Taylor and seconded by Justice Lynn, the Committee unanimously voted to recommend that the Supreme Court adopt on a permanent basis District Court Rules 6.1 to 6.7, which had been adopted by the Supreme Court on a temporary basis by order dated January 19, 2011.

(g) Supreme Court Rule 38, Canon 3, Rule 3.1

One Committee member noted that the language change being proposed in section (2) clarifies what Committee members previously understood the rule to mean. However, a concern was raised about the fact that when it comes to the matter of what royalties might be received following the publication of a book, there is not necessarily a correlation between the time spent on writing the book and the royalties the publication might generate. Thus, limiting the amount of royalties a judge might receive would not serve the purpose of the rule, if the purpose is, as Committee members believe, to prevent a judge from participating in extra-judicial activities at a level which might undermine his or her abilities to carry out his or her duties. A Committee member noted that the rule allows for an exception in these kinds of cases, because there is language in the rule stating that, "For good cause shown and in extraordinary circumstances, exceptions to this limitation may be approved, in advance by formal and unanimous vote of the supreme court."

A third Committee member noted that the language "in advance" and "unanimous" poses a greater burden than is necessary on a judge who might

fall within such an exception. Upon motion made by Judge Lynn and seconded by Judge McNamara, the Committee unanimously voted to recommend that the Supreme Court adopt the proposed amendment to Supreme Court Rule 38, Canon 3, Rule 3.1 and to further amend the rule to remove the words "in advance" and "unanimous" from Rule 3.1(B)(2).

4. Status of Pending Items

(a) District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure and Probate Administration

There was brief discussion regarding the creation of the new Circuit Court which might cause the need for some changes to these rules.

(b) 2008-013, Judicial Conduct Committee Procedures

Attorney Hilliard, Chair of the JCC subcommittee, upon invitation by the Chair of the Committee, spoke regarding the following two submissions made to the Committee by the JCC: (1) a proposed amendment to Supreme Court Rule 40(5)(c); and (2) a proposed amendment to Supreme Court Rules 40(12) and 40(13).

i. Supreme Court Rule 40(5)(c)

Justice Lynn recused himself from participation in this discussion.

The JCC proposes that Supreme Court Rule 40(5)(c) be amended to allow for a warning to be issued in conjunction with a dismissal of a grievance after review of the record, but providing that the judge complained against shall have the opportunity to either file a response, or at the discretion of the Committee, meet with the Committee prior to the issuance of any warning. Attorney Hilliard explained that the reason for the proposed amendment is that upon his working group's review of the JCC procedures, it became clear that there were instances in which the JCC would receive a grievance about a particular judge, would find that there was insufficient reason to docket the grievance as a complaint, but upon review, would conclude that there was reason to write to the judge to warn him or her about the behavior that gave rises to the grievance. As a result of this procedure, there were instances in which judges would become aware that a grievance had been filed against them only upon receipt of a warning from the JCC. The JCC concluded that it was unfair not to give the judge notice and an opportunity to be heard, and therefore proposes the amendment to the rules as set forth in the April 15, 2010 letter from the Chair of the JCC to the Justices of the Supreme Court.

Some Committee members expressed concern about the use of the word "warning" in these circumstances, and suggested that words such as "letter of

caution, "letter of advice" or "counsel" be used instead. It was noted that less emphasis is placed on concerns about the appearance of impropriety on the attorney discipline side than on the judicial discipline side, and that there may be a valid reason for this distinction.

Attorney Honigberg proposed that the Committee create a subcommittee to work with attorney Hilliard to consider: (1) the propriety of using the word "warning" in these circumstances; (2) creating a procedure for dealing with these circumstances; and (3) whether a communication with a judge in these circumstances should be in writing, or more informal. The Committee agreed that this would be a good approach. Members of the subcommittee will include: attorney Honigberg, Judge McNamara, and attorney Hilliard and the members of his subcommittee. The goal of the subcommittee will be to draft a rule amendment by September, with the goal of putting out the proposed amendment for public hearing in December.

ii. Supreme Court Rules 40(12) and 40(13)

The JCC proposes that Supreme Court Rule 40(12) and 40(13) be amended to allow a judge who disagrees with a JCC determination that he or she has violated the Code of Judicial Conduct to request a de novo hearing before a judicial referee. Attorney Hilliard explained that this change was being proposed to address concerns about procedural fairness and due process in these types of proceedings, and was prompted by the overhaul of the attorney discipline system in 2004. Members of attorney Hilliard's subcommittee believe that judges are entitled, as a matter of fairness, to the same process provided to attorneys. Currently, the JCC receives a grievance, and decides whether a complaint should be docketed. If it is docketed, then the judge is asked to respond. The JCC reviews the response, decides whether to charge the judge with a violation of the Code of Judicial Conduct, and then acts as the hearing panel. There is a fairness concern about the same panel being part of the process at every stage, and members of attorney Hilliard's subcommittee believe that the most efficient way to improve this process is to insert a referee step, and therefore made this recommendation to the JCC. The recommendation and proposed amendment is set forth in the June 6, 2011 letter from the chair of the JCC to Justice Dalianis.

A concern was raised regarding the language, "shall be heard on the facts and the law" in the proposed amendment to section 40(13). An inquiry was made about whether the language means that, upon hearing an appeal from the de novo hearing before a judicial referee, the Supreme Court would be deciding facts in the case. A suggestion was made that the language be changed from "shall be heard on the facts and the law" to "hear argument on the facts and law." A Committee member then inquired what the standard of review would be in such cases. After some further discussion of these procedural questions, Attorney Honigberg proposed that the same

subcommittee tasked with addressing the proposal to amend Supreme Court Rule 40(5)(c) also examine the proposed amendment to Supreme Court Rules 40(12) and 40(13) and propose such language changes as it determines is appropriate. Committee members agreed that this would be a good approach. Thus, members of the subcommittee will include: attorney Honigberg, Judge McNamara, and attorney Hilliard and the members of his subcommittee. The goal of the subcommittee will be to draft a rule amendment by September, with the goal of putting out the proposed amendment for public hearing in December.

(c) 2007-001, Superior Court Rule 170 pertaining to Alternative Dispute Resolution

Members of the Committee asked Karen Borgstrom to address the Committee regarding mandatory alternative dispute resolution. Ms. Borgstrom reported that she had been serving on a subcommittee with Judge Nicolosi that was tasked with gathering information as to how attorneys, clerks, litigants and mediators feel about temporary Rule 170, what needs to be changed about the rule, and whether Rule 170 should be adopted as a permanent rule. Her subcommittee had prepared a survey but, for a number of reasons decided not to send it out. The temporary rule has been amended since it first went into effect. It was amended most recently on June 8, 2011. In an order issued that day, the Supreme Court expanded the scope of the proceedings subject to mandatory alternative dispute resolution procedures. In response to a concern by a Committee member that some of the cases now subject to mandatory alternative dispute resolution may not be suited for ADR, Ms. Borgstrom stated that cases can be pulled out of mediation if it is felt that mediation would not be effective.

There was some discussion by Committee members regarding the status of this item. It was noted, again, that the Supreme Court Order of June 8, 2011 made a temporary amendment to a temporary rule. When the Committee decides to put this item out for public comment, it will be putting out the entire text of temporary Superior Court Rule 170, as it has been amended since its inception. The Committee declined to vote on when this would be put out for public comment.

(d) 2010-007 Proposed Amendment to Supreme Court Rule 53.1

Members of the Committee received and reviewed a letter from the New Hampshire Minimum Continuing Legal Education Board stating that the Board had considered the Committee's proposal to amend Supreme Court Rule 53.2.4 to add part time and per diem judges to those exempted from the requirements of Rule 53.1, provided that the judge is not engaged in the practice of law. Those judges would remain subject to the continuing judicial education

requirements in Supreme Court Rule 45. The MCLE board voted to approve the proposal, effective with the reporting year that begins July 1, 2011.

After some discussion, and upon motion made by attorney Honigberg and seconded by attorney Taylor, the Committee unanimously voted to recommend that the Supreme Court adopt the proposed amendment on a temporary basis, and to put the item out for the next public hearing in December. Attorney Parent abstained from voting. The Committee directed Carolyn Koegler to notify Judge Crocker of the Committee's decision.

(e) 2010-011 HB 1223 (Notice in class actions under Consumer Protection Act)

Because Attorney Ardinger was not present at the meeting to give a final report to the Committee regarding whether court rules are needed, this matter was deferred to the September meeting.

(f) 2010-015 Model Rules for Client Trust Account Records

Committee members discussed the contents of a May 12, 2011 email from Attorney Rolf Goodwin to Carolyn Koegler in which he proposes that a subcommittee of the Ethics Committee offer to work with the Attorney Discipline Office to produce a joint recommendation to the Advisory Committee on Rules regarding ABA Model Rules for Client Trust Account Records and current Rule 1.15(a).

The Committee asked that Carolyn Koegler contact Attorney Goodwin to thank him for his inquiry, and ask him to work with the members of the Attorney Discipline Office to produce a joint recommendation by the December meeting of the Advisory Committee on Rules.

(g) 2011-002 Supreme Court Request to Review the Provisions of Supreme Court Rule 42 Relating to the Admission to the Bar of Foreign Law School Graduates

Carolyn Koegler reported that she had researched the rules in other states related to the admission of foreign law school graduates and had learned that there is a great deal of variation from state to state. In some states, graduates of foreign law schools are not eligible for admission to the bar. In others, there are very specific guidelines about when graduates of foreign law schools may be permitted to sit for the general bar examination or apply for admission upon motion. In July 2010, the Supreme Judicial Court of Massachusetts promulgated a rule specifying the circumstances under which graduates of foreign law schools may be admitted to the bar. The rule may provide a good model for a similar rule to be adopted in New Hampshire, but because of the differences in the ways Massachusetts and New Hampshire

process bar applications, it is not possible to simply recommend the adoption of the Massachusetts rule in New Hampshire. Carolyn Koegler reported that she had spoken with Clerk Fox about this, and that she, Clerk Fox and Sherry Hieber, bar admissions coordinator, would be happy to work together to draft a proposed amendment to the New Hampshire Rule regarding foreign law school graduates. Members of the Committee agreed that this would be a good approach.

(h) 2010-020 Non-lawyer Representative Rules. Supreme Court Rules 33(2), Superior Court Rules 14(c), District Court Rule 1.3(D)(1), Probate Court Rules 14, Family Division Rule 1.18.

Members of the Committee considered the issues raised in the December 13, 2010 letter from Harriett Cady, Consultant, to Justice Carol Ann Conboy, who was, at the time, the Chair of the Advisory Committee on Rules.

After some discussion, and upon motion made by Justice Lynn and seconded by Attorney Honigberg, the Committee unanimously voted not to recommend that any changes be made to the current rules governing appearances by non-lawyers. Carolyn Koegler will notify Ms. Cady of the Committee's vote.

5. New Items for Committee Consideration

(a) 2010-019 Rule 3.1 Code of Judicial Conduct

Committee members noted that this issue had been discussed. See 4(g) (above).

(b) 2011-007 Superior Court Rule 78. Photographing, Recording and Broadcasting.

The Committee considered a submission made to the Committee on April 21 by the New Hampshire Committee on the Judiciary and the Media. The Committee on the Judiciary and the Media proposes that Superior Court Rule 78 be deleted in its entirety and replaced with the amended rule. The Committee on the Judiciary and the Media also proposes that a similar rule be adopted to apply to all trial courts throughout the state. The purpose of the proposed amendment is to clarify the presumption that the photographing, recording, and broadcasting of court proceedings is permissible, and to eliminate the differences in the procedures between the various trial courts around the State.

Justice Lynn, a member of the New Hampshire Committee on the Judiciary and the Media, explained that the amendment is being proposed in response to complaints by the media regarding differences in practice and

procedures at different courts throughout the state. He noted that subsection (e) which reads, "No court or justice shall establish notice rules, requirements or procedures that are different from those established by this rule," is the most important aspect of this proposed amended rule. He also noted that some members of the media wanted no notice requirement, but that members of the Committee on the Judiciary and the Media believed that this approach would go too far.

One member of the Committee inquired about subsection (c) of the proposed amended rule, and what the phrase "intended to be used" means. The Committee member inquired whether this would include cell phones. Justice Lynn noted that this rule is not limited to members of the "organized media," because it would not be appropriate to have different rules for the media and other members of the public. Therefore, the rule would cover cell phones. Justice Lynn also pointed out that 78(g) allows a presiding judge to limit the number of cameras in the courtroom, and in such circumstances, has the discretion to give preference to the established media.

Upon motion made by Justice Lynn and seconded by attorney Taylor, the Committee voted unanimously to put proposed amended rule 78 out for public hearing in December. The Committee directed Carolyn Koegler to identify and to draft proposed amendments to the analogous rules applicable in other courts to make those rules consistent with proposed amended Superior Court Rule 78.

(c) 2011-008 Supreme Court Rule 3. Definitions. "Mandatory Appeal."

The Committee discussed the contents of the May 4, 2011 memorandum from Carolyn Koegler to the Rules Advisory Committee regarding a recent New Hampshire Supreme Court opinion. One of the issues raised in In the Matter of James J. Miller and Janet S. Todd was whether Supreme Court Rule 3, providing for mandatory review of appeals involving married parents but discretionary review of appeals involving non-married parents is unlawful and unconstitutional.

One Committee member suggested that it would be appropriate to reach out to the family law section of the bar to seek its input on the issue. The Committee directed Carolyn Koegler to send a letter requesting input to the chair of the family law section of the bar (with a copy to Jeanine McCoy) along with the May 4, 2011 memo and attachments and information regarding how many requests for review from final decrees the Supreme Court has had in the last couple of years.

(d) 2011-009 Supreme Court Rule 50-A(1)

The Committee considered the contents of a May 10, 2011 memorandum from Clerk Fox to Carolyn Koegler regarding a technical amendment to Supreme Court Rule 50-A(1). The technical amendment would eliminate 50-A(1)(C), which currently allows an attorney or foreign legal consultant to certify that he or she is willing to submit to a spot compliance audit of the attorney or foreign legal consultant's trust accounts.

Upon motion by attorney Honigberg, seconded by Justice Lynn, the Committee voted unanimously to recommend that the Supreme Court adopt the technical amendment.

(e) 2011-010 Letter from Attorney Seth Levine

The Committee considered a letter from attorney Seth Levine offering to assist the Committee in its work. The Committee directed Carolyn Koegler to send attorney Levine a letter: (1) thanking him for his offer of help; (2) notifying him that there are currently no vacancies on the Committee, but that we will keep him in mind if a vacancy should arise; and (3) noting that the meetings of the Committee are now open to the public, and that meeting dates and locations are posted on the website, as are the Committee minutes.

(f) 2011-011 Supreme Court Rule 54

The Committee considered the text of Supreme Court Rule 54, which was amended on a temporary basis, by Order dated May 23, 2011. One member of the Committee noted that section 3 should be changed to make clear that both Judges King and Kelly are members of the administrative council. Members of the Committee agreed that the sentence, "membership on the council shall include each administrative judge and the director of the administrative office of the courts," should be changed to read, "membership on the council shall consist of the chief justice of the superior court, the administrative judge and deputy administrative judge of the circuit court, and the director of the administrative office of the courts." In addition, members of the Committee agreed that the phrase "on the administrative council, and" should be deleted from section 4(k).

Upon motion made by Justice Lynn and seconded by Judge Hampe, the Committee voted that the temporary rule be put out for public hearing, as amended. Following the vote, an inquiry was made regarding whether all of the changes being proposed to Supreme Court Rule 54 are technical, and that, therefore, a public hearing is unnecessary. Following a brief discussion about this issue, it was generally agreed that the changes are technical, and that a public hearing on Supreme Court Rule 54 is not necessary.

(g) 2011-011 Supreme Court Request to Review Individual Superior Court Rules and Rules of Criminal Procedure in Light of Comments Received When New Superior Court Rules and New Rules of Criminal Procedure Were Put Out for Public Comment.

The Committee next considered three issues raised in a May 24, 2011 letter from David Peck to Carolyn Koegler regarding public comments received when the proposed Superior Court rules and new Rules of Criminal Procedure were put out for public comment. David Peck noted that because these substantive suggestions could be implemented regardless of whether or not the proposed Superior Court Rules and Rules of Criminal Procedure are adopted, the Court requests that the Committee make recommendations regarding the suggestions.

i. Motions Practice

The Committee first considered the following comment, received from the Superior Court Clerk's Association:

> We ask the committee to consider requiring separate motions when multiple issues are being brought before the court for ruling. It is confusing and difficult to track rulings when one pleading contains a number of unrelated motions.

David Peck noted in his letter that this comment was directed to proposed Superior Court Rule 11, and that it may also relate to proposed Criminal Procedure Rule 15.

One member of the Committee noted that in undertaking to consolidate the rules, the Committee deliberately tried to avoid making substantive changes to the rules. The concern was that substantive policy changes would cause problems with the Committee's ability to consolidate the rules. Two Committee members agreed that the change proposed here would be unrelated to the purpose of the rules consolidation. It was noted that, as a substantive matter, the federal courts do require separate motions in these circumstances, and that this might be a good idea. Another Committee member stated that he believed that the Court should continue with its implementation of the rules, and that the substantive change being proposed should be considered at a public hearing. Upon motion made by Justice Lynn and seconded by Judge Hampe, the Committee voted unanimously to recommend that the Court decline to adopt this proposed change now, and continue to implement the rules, but that the proposed change be put out for public hearing.

ii. Dismissal of Civil Actions

The Committee next considered the following comment, received from the Superior Court Clerk's Association, regarding proposed Superior Court Rule 36:

> We feel the committee should consider broadening this rule to refer to "All cases," not just non-jury cases.

After some discussion, upon motion made by Justice Lynn and seconded by Judge Hampe, the Committee voted unanimously to recommend that the Court change the language from "non-jury" to "all cases."

iii. Juror Questionnaire

The Committee next considered the following comment, regarding proposed Superior Court Rule 33:

> Rule 33 There is no provision for return & destruction of questionnaires. This leaves the questionnaires available and disposition uncertain. Jurors are very comforted by the fact that the confidential questionnaires are destroyed and no copies remain.

Regarding this comment, and as set forth in David Peck's letter:

> The court requests that the Rules Committee review the relevant rules as well as the jury questionnaire form and Superior Court Administrative Order 30 with respect both to whether any provision regarding return and destruction of questionnaires should be added to the rules and whether the rules, form and/or administrative order should be amended to ensure consistency among them.

One Committee member noted that the Court's request regarding juror questionnaires raises three issues: (1) should lawyers only be permitted access to jury questionnaires, or should they also be permitted to copy them; (2) if copies are permitted, should there be a requirement that the copies be returned; and (3) should the form be reviewed to be more like the federal form, that is, to request less information then is now being requested. Another Committee member suggested that it would be a good idea to create a subcommittee to address these questions. Jeanne Herrick and Ray Taylor agreed to work as a subcommittee, and to report back to the Committee at the December meeting of the Committee.

(h). Administrative Issues Related to Decision to Hold Public Meetings

Justice Lynn inquired whether the Committee would like to consider holding more than two public hearings per year. After some discussion, it was decided that two public hearings per year is preferable to having three or four. Public hearings will continue to be held in June and December.

Justice Lynn inquired whether the draft minutes should be posted immediately following the public meeting, or only after the Committee votes to approve the minutes. Committee members agreed that the minutes should be posted on the website only after the Committee votes to approve them.

Upon motion made by Justice Lynn and seconded by Judge McNamara, the Committee voted to extend the deadline for the filing of the annual report to August 31.

6. Next Meeting

The next public meeting is scheduled for Friday, September 16, 2011, at 12:30 p.m.

7. Meeting Schedule for 2011

Friday, Sept. 16, 2011
Friday, Dec. 16, 2011

The meeting adjourned.