NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting and Public Hearing of June 15, 2012

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

The meeting was called to order at 12:36 pm by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen M. Anderson (arriving late); William F. J. Ardinger, Esq.; Robert L. Chase; Honorable R. Laurence Cullen; Ralph Gault; Hon. Richard A. Hampe; Martin P. Honigberg, Esq.; Hon. Richard McNamara; Patrick Ryan, Esq.; Raymond W. Taylor, Esq. and Hon. Robert J. Lynn.

Also present were Secretary to the Committee, Carolyn Koegler, Esq., Christine Damon and Claire MacKinaw, staff.

1. Public Hearing

The Committee received comments from the public on the following matters, as set forth in the May 10, 2012 Public Hearing Notice:

a. Parental Notification Rules

i. Superior Court Rules 215-222. See May 10. 2012 Public Hearing Notice, Appendix A.

ii. Supreme Court Rule 7. See May 10. 2012 Public Hearing Notice, Appendix B.

iii. Supreme Court Rule 7-B. See May 10. 2012 Public Hearing Notice, Appendix C.

iv. Supreme Court Rule 32-B. See May 10. 2012 Public Hearing Notice, Appendix D.

v. Supreme Court Rule 48. See May 10. 2012 Public Hearing Notice, Appendix E.

vi. Supreme Court Rule 48-A. See May 10. 2012 Public Hearing Notice, Appendix F.

b. Admission to the Bar, Board of Bar Examiners, Character and Fitness Committee; Uniform Bar Examination

i. Supreme Court Rule 42. See May 10, 2012 Public Hearing Notice, Appendix G.

c. Committee on Judicial Conduct

i. Supreme Court Rule 40. See May 10. 201 Public Hearing Notice, Appendix H.

d. Preservation of Issues for Appeal

i. Superior Court Rule 59-A. See May 10, 2012 Public Hearing Notice, Appendix I.

ii. Circuit Court-District Division Rule 3.11(E). See May 10, 2012 Public Hearing Notice, Appendix J.

iii. Circuit Court-Probate Division Rule 59-A. See May 10, 2012 Public Hearing Notice, Appendix K.

iv. Circuit Court-Family Division, Rule 1.26(F). See May 10, 2012 Public Hearing Notice, Appendix L.

e. Counsel in Guardianship, Involuntary Admission and Termination of Parental Rights Cases

i. Supreme Court Rule 32-A. See May 10. 2012 Public hearing Notice, Appendix M.

f. Appellate Mediation

i. Supreme Court rule 12-A. See may 10, 2012 Public hearing Notice, Appendix N

2. Discussion and Vote on Public Hearing Items

a. 2003-003. Parental Notification Rules

Justice Lynn explained that the Supreme Court had adopted on a temporary basis, by order dated December 30, 2011, a number of rule amendments to comply with the parental notification law, RSA 132:32-26, and referred the amendments to the Advisory Committee on Rules for its recommendation as to whether they should be adopted on a permanent basis. RSA 132:32-36, effective January 1, 2012, requires

parental notification before abortions can be performed on unemancipated minors. The temporary rule amendments relate to the filing for a petition for waiver of parental notice prior to abortion in superior court, and for the filing of an appeal if the petition is denied.

Justice Lynn further explained that on May 23, Governor Lynch signed a bill amending the parental notification law, effective immediately. The statutory amendments make technical corrections regarding parental notification prior to abortion. Most notably, the amendments: (1) change the time the Superior Court has to make a ruling from "48 hours" to "2 court business days" after the petition is filed; and (2) change the time the Supreme Court has to rule on the appeal from "48 hours" to "2 court business days" from the time of the docketing of the appeal. Justice Lynn explained that the Supreme Court had recently approved amending the language in temporary Superior Court Rules 218 and 219 to comply with the statute, as amended, and amending the language in Supreme Court Rule 7-B to comply with the statute, as amended, and that an order amending the rule will be issued within the next several weeks. He suggested that the Advisory Committee on Rules recommend that the Supreme Court make the parental notification rules (as will be amended to comply with the recent statutory changes) permanent.

The Committee received one written comment regarding this item, expressing the view that minors should not be required to notify their parents prior to obtaining an abortion.

Following brief discussion and upon motion made by Judge Hampe and seconded by Attorney Taylor, the Committee voted to recommend that the Supreme Court make the temporary parental notification rules (as will be amended to comply with the recent statutory changes) permanent. Attorneys Honigberg and Ardinger and Judge McNamara abstained from voting.

b. 2012-009. Supreme Court Rule 42. Admission to the Bar; Board of Bar Examiners; Character and Fitness Committee; Uniform Bar Examination

Justice Lynn summarized for the Committee the background of the proposed amendments to Supreme Court Rule 42.

At its March meeting, the Committee was apprised of the New Hampshire Supreme Court's intention to restructure Supreme Court Rule 42 with respect to the bar admissions process, and to issue an order amending Supreme Court Rule 42 sometime in April or May. The Committee was also asked to consider whether further changes should

be made to: (1) the foreign law school graduate provision of Supreme Court Rule 42 and/or (2) to make New Hampshire a Uniform Bar Examination Jurisdiction. At its March meeting, the Committee voted to put the temporary rule 42 out for public hearing in June and to include proposed amendments to the temporary rule which would make New Hampshire a Uniform Bar Examination jurisdiction. The Committee voted not to put out the proposed amendment to the foreign law school graduate provision of Supreme Court Rule 42.

By order dated April 27, 2012 the New Hampshire Supreme Court amended, on a temporary basis, effective September 1, 2012, New Hampshire Supreme Court Rule 42, creating an Office of Bar Admissions, clarifying the duties and responsibilities of the Board of Bar Examiners and the Character and Fitness Committee and setting forth an appellate process for applicants who have received a negative decision from the Board of Bar Examiners regarding their eligibility for admission, a request for testing accommodation and an accusation of misconduct during the bar examination. The New Hampshire Supreme referred the temporary amendment to the Advisory Committee on Rules for its recommendation as to whether it should be adopted on a permanent basis.

Pursuant to the Committee's directive, Carolyn Koegler included in the public hearing notice temporary Supreme Court Rule 42, noting that the Committee was considering recommending both that the court adopt the temporary amendment on a permanent basis, and that the Court adopt additional amendments to make New Hampshire a Uniform Bar Examination jurisdiction.`

The Committee received two written comments regarding this item. By letter dated May 22, 2012, Attorney Charles G. Douglas, III expressed concern about the fact that knowledge of the State Constitution is no longer a requirement for admission to the New Hampshire Bar. By letter dated June 14, 2012, Attorney Gordon MacDonald, Chair of the New Hampshire Board of Bar Examiners, proposed two changes to Supreme Court Rule 42.

Attorney Ardinger, a member of the Board of Bar Examiners, explained that the changes proposed by Attorney MacDonald are not controversial. First, as Attorney MacDonald states in this letter, the Board of Bar Examiners recommends that the words "and coordinated" be stricken from the first sentence of Supreme Court Rule 42, VII(a) to make it clear that the New Hampshire Board of Bar Examiners, and ultimately, the New Hampshire Supreme Court (and not the National Conference of Bar Examiners) are responsible for the administration of the bar examination. Second, as Attorney MacDonald states in his letter,

the Board of Bar Examiners recommends that the following highlighted language be added to Supreme Court Rule 42, VII(c), " . . . with respect to an issue arising from the applicant's conduct during, or related to, the bar examination **other than score determination**, the applicant . . . ." According to Attorney MacDonald, the "purpose of the additional language is to repeat subparagraph VII(b) and thereby eliminate any possible ambiguity that may exist in subparagraph VII(c)." Attorney Ardinger explained that the purpose of this proposed language is to make it clear that score determination is not something the applicants can appeal under the subparagraph VII(c).

Following some discussion of the issue, the Committee concluded that attorney MacDonald's first proposed amendment should be included in the Committee's recommendation that the Court adopt temporary Supreme Court Rule 42 on a permanent basis. However, the Committee concluded that the proposed change to Rule 42 VII(c) is unnecessary because the language of the rule as it currently exists makes clear that score determination is not something an applicant can appeal under subparagraph VII(c). Justice Lynn agreed to speak with attorney MacDonald to let him know that the Committee believes that Rule 42VII(c) as currently drafted in unambiguous, and to inquire whether attorney MacDonald agrees.

Upon motion made and seconded, the Committee voted to recommend that the Supreme Court: (1) adopt temporary Supreme Court Rule 42 on a permanent basis; (2) adopt the proposed amendments to Rule 42 to make New Hampshire a Uniform Bar Examination jurisdiction; and (3) to adopt Attorney MacDonald's proposed amendment to Rule 42 to strike the words, "and coordinated" from the first sentence of Supreme Court Rule 42, VII(a) to make it clear that the Board of Bar Examiners, and ultimately, the New Hampshire Supreme Court, are responsible for the administration of the bar examination.

c. <u>2008-013. Supreme Court Rule 40. Judicial Conduct Committee Procedures.</u>

The Committee turned next to the JCC's proposed amendment to Supreme Court Rule 40. Because Justice Lynn is recused from this issue, attorney Honigberg agreed to act as chairperson and to lead the discussion of this issue. Attorney Honigberg noted that before the Committee is a proposal to amend Supreme Court Rule 40. He noted that the proposal included in the Public Hearing Notice was the proposal last submitted to the committee by the JCC in March 2012. Since then, the JCC has suggested additional changes to its proposal.

Attorney Honigberg noted that Bob Mittelholzer, Executive Secretary of the JCC, Dana Zucker and the Chair of the JCC, Dr. Robert Wilson were present at the meeting and prepared to address the Committee. At Attorney Honigberg's request, Dr. Robert Wilson explained the background of the JCC's proposal. He noted that a request from the Supreme Court had prompted the JCC to review Supreme Court Rule 40 to determine whether any changes should be made to the Rule. In the process of its review, the JCC concluded that there were some matters which could be made more clear, and some amendments that should be made to the rule to address issues of fairness. The JCC therefore submitted a proposal to the Committee on February 23, 2012 which sought to address these concerns.

Dr. Wilson further explained that, following the Committee's March meeting, Carolyn Koegler and Bob Mittelholzer worked together to incorporate the JCC proposals into the existing rule, using ~~strikethrough~~ and **[bold and brackets]** to indicate where in the existing rule the JCC was proposing changes. After members of the JCC reviewed the final product (which appears as Appendix H in the public hearing notice), it became clear that there were some additional substantive issues that the JCC would need to address.

According to Dr. Wilson, at its meeting on June 8, 2012, the Judicial Conduct Committee discussed the proposed amendments to Supreme Court Rule 40 that the Advisory Committee on Rules had put out for public hearing. Following the June 8 meeting, attorney Mittelholzer submitted, on behalf of the JCC, additional proposed amendments to Supreme Court Rule 40.

Attorney Zucker, a member of the JCC, explained that the JCC now recommends further amending Supreme Court Rule 40(8)(f). He noted that the JCC finds the 4th paragraph, as it currently exists in appendix H, to be troublesome because it isn't clear what it means. The JCC proposes to make changes to Supreme Court Rule 40(8)(f) and the definition of the word "caution" to address its concerns and make clear that the judge is not entitled to a hearing unless the JCC is about to issue a finding of misconduct. The proposed amendments remove the right to a hearing if the Committee is not going to take any action, but allows a judge the opportunity to be heard before the JCC issues a warning or caution.

The Committee discussed what action should be taken at this point. One Committee member suggested that the Committee first deal with the latest proposed amendment submitted by the JCC, and that these proposed changes be incorporated into the proposal. Attorney Honigberg inquired whether the Committee would be comfortable taking

a vote on the proposal or whether the Committee would prefer to hold off until September. One Committee member noted that it would be helpful to have additional time to review the proposal. Attorney Honigberg then inquired of the JCC representatives whether there is any urgency to the matter. Dr. Wilson opined that it would be a good idea to make the changes as soon as possible, so that the JCC will be able to operate under the new rules. It was observed that if the Committee recommends that the Supreme Court adopt the proposed rule amendments, there will be an additional opportunity for members of the public, the bench, and the bar to comment on the proposal, because the Court will put the ACR's proposals out for public comment.

Attorney Taylor noted that the last two sentences of the definition of "caution" contained in the JCC's most recent proposal go beyond defining the term. Attorney Zucker stated that this is true, and the addition was made so that the language does not have to repeated throughout the rule when the word "caution" is used.

Upon motion made by attorney Honigberg and seconded by attorney Ryan the Committee voted to recommend that the Supreme Court adopt the proposed rule amendment set out in appendix H in the public hearing notice, as amended by the JCC's June 8 submission.

d. 2012-005. Preservation of Issues for Appeal.

Discussion turned to the proposed amendments to Superior Court Rule 59-A, Circuit Court-District Division Rule 3.11(E), Circuit Court-Probate Division Rule 59-A, and Circuit Court-Family Division Rule 1.26(F) which would include in the rules the requirement, set forth in New Hampshire Dep't of Corrections v. Butland, 147 N.H.676, 679 (2002), that in order to preserve issues for appeal, any issues which could not have been presented to the trial court prior to its decision must be presented to the trial court in a motion for reconsideration.

Committee members briefly discussed written and oral comments submitted by Chief Appellate Defender Christopher Johnson. In his comments, Attorney Johnson suggests that the language of the proposed amendment should be modified as follows (proposed deletions indicated in ~~strikethrough~~ and proposed addition indicated in **[bold and brackets]**:

> To preserve issues **[not considered by the trial court]** for an appeal to the Supreme Court, an appellant must have given the Court the opportunity to consider such issues; thus, to the extent that the **[appellant pursues on appeal]** ~~court, in its decision, addresses~~ matters not previously raised **[or addressed]** in the case, a party must identify any alleged errors

concerning those matters in a motion under this rule to preserve such issues for appeal.

Following a brief discussion, the Committee concluded that attorney Johnson has raised issues that will require further thought, and that the Committee is not prepared to vote to recommend that the Court adopt the proposed change. The Committee agreed to consider attorney Johnson's memorandum and to take the issue up at its September meeting.

e. 2012-007. Supreme Court Rule 32-A Counsel in Guardianship, Involuntary Admisison and Termination of Parental Rights Cases

Justice Lynn reminded the Committee that this proposed amendment to Supreme Court Rule 32-A, governing the appointment of appellate counsel in certain non-criminal cases would include in the rule civil commitment cases filed under RSA 135-E and involuntary admission cases filed under RSA 171-B.

Following brief discussion, the Committee voted to recommend that the Supreme Court adopt the proposed amendment to Supreme Court Rule 32-A.

f. 2012-001. Supreme Court Rule 12-A. Appellate Mediation

Justice Lynn explained that the original proposed amendment to Supreme Court rule 12-A would allow retired marital masters to serve as mediators in family law appeals. The only comment the Committee received about this item was a proposal from Administrative Judge Kelly to further amend this rule. According to Judge Kelly's 6/1/12 letter to the Committee, the additional proposed changes submitted "better reflect the language of the statute and the change in the title from director to ADR coordinator."

Following some brief discussion and upon motion made and seconded, the Committee voted to incorporate Judge Kelly's additional changes into the proposed amendment to Supreme Court Rule 12-A and to recommend that the Supreme Court adopt the proposed amendments.

3. Approval of Minutes of March 16, 2012 Meeting

Upon motion made by Attorney Ardinger and seconded by Judge McNamara, the Committee unanimously voted to approve the minutes of the Committee's March 16, 2012.

4. Status of Pending Items

a. District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure

Judge Cullen reminded Committee members that in March 2011 he submitted to the Committee a revised draft of the proposed District Court Rules of Civil Procedure. At the March 2011 meeting, the Committee decided not to put the proposed district court rules and the proposed rules of civil procedure and probate administration out for public comment at that time. Thereafter, there were concerns expressed about the new rules being put into effect because the staff of the circuit court was being cross-trained, and the call center was being set up. In March 2012, Judge Cullen had reported that he had produced what he considered to be a final draft of the rules and that he had asked Judge Kelly to review the rules. At that time, the Committee agreed that it would review the draft rules in June, and that that draft rules would likely be put out for public hearing in June.

Judge Cullen stated that he had already provided to the Committee draft rules of the proposed District Court Rules of Civil Procedure, and that the Committee should review these to consider putting them out for public hearing in December. Judge Cullen also stated that he had produced a draft of proposed rules changes for the landlord tenant rules and the small claims rules, which Judge Kelly has reviewed. He distributed these to the Committee members.

Judge Hampe stated that the proposed amendments had been drafted for the probate division rules. Judge King will need to review the rules. It is Judge Hampe's goal to submit the probate division rules for the Committee's consideration in September.

Judge Lynn reported that there is no urgency to recommend to the Supreme Court the adoption of the proposed rule amendments because the Court will not be able to implement the rules until the e-court project is further along, and that the judicial branch will need further funding for the e-courts project.

b. 2008-013. Judicial Conduct Committee Procedures

It was noted that the Committee had addressed this issue. See item 3(c).

c. 2010-015. Model Rules for Client Trust Account Records.

Carolyn Koegler reminded the Committee that the Ethics

Committee and the Attorney Discipline office are working together to provide a join recommendation regarding the ABA Model Rules for Client Trust Account records, PCC Rule 1.14(a) and Supreme Court Rule 50. She stated that she had been in contact with attorney Rolf Goodwin who reported that the Bar's Ethics Committee had recently approved the draft revisions to Professional Conduct Rule 1.15 and Supreme Court Rule 50 which the Ethics Committee task force and the Attorney Discipline Office had drafted. He noted that there is one small change requiring the approval of the Attorney Discipline Office. Once the approval is obtained, drafts will be forwarded to the Bar Association's Board of Governors for their review and approval. It is attorney Goodwin's hope that the Board of Governors will approve the drafts this summer and that they will be submitted to the Committee prior to the September meeting.

d. 2011-002. Supreme Court Rule 42 (Foreign Law School Graduates)

Carolyn Koegler will report on this item in September.

e. 2011-012. 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.

At its meeting in December 2011, the Committee considered one outstanding issue (juror questionnaires) which had been 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. In response to the juror questionnaire Comment, the Court had asked that the Rules Advisory 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, and/or administrative order should be amended to ensure consistency among them.

A subcommittee comprised of attorneys Herrick and Taylor was asked to consider this issue. Following the subcommittee's report at the December meeting of the Advisory Committee on Rules, it was generally agreed that the issues related to juror questionnaires are larger than can be resolved by a subcommittee. Justice Lynn agreed that he would work with Attorney Taylor, and that they would generate a list of people to serve on a larger Committee tasked with considering: (1) what

information should be requested from jurors; (2) how that information should be treated, with respect to confidentiality; and (3) what the mechanics will be regarding the dissemination and collection of that information. The committee will also consider whether the committee's proposal will require legislation.

Attorney Taylor reported that the Committee had been formed to address these issues, and would be meeting on July 12. The target date for the Committee's report is September 2012.

f. Counsel Fees and Guardians Ad Litem Fees Rules

Justice Lynn reminded the Committee that the Court had issued an order amending Supreme Court Rule 48(2), regarding counsel fees and expenses-other indigent cases and Supreme Court Rule 48-A(2), regarding guardians ad litem fees-indigent cases, on a temporary basis, and had referred the amendments to the Advisory Committee on Rules for its recommendation as to whether they should be adopted on a permanent basis.

Justice Lynn sought input from Judges Kelly, Nadeau and King regarding whether they believed the rules should be adopted on a permanent basis. By email dated March 20, 2012, Judge Kelly stated that based on his and Judge King's experience with the temporary rule, he is unable to recommend that the rule be adopted on a permanent basis. He requested that the Committee continue the Rules in a temporary status for the next six months.

g. 2011-015. Exchange of Pleadings By Email, Supreme Court Rule 7, Supreme Court Rule 3.

i. Exchange of Pleadings By Email

Attorney Josh Gordon reported to the Committee on behalf of the subcommittee comprised of attorneys Honigberg, Ardinger and Gordon. He reminded the Committee that in his August 3, 2011 letter to the Committee he had requested that the Committee consider rulemaking in three areas, one of which included considering creating a rules providing for the electronic sharing of pleadings and documents among lawyers. At the Committee's September 2011 meeting attorney Gordon agreed to serve on a subcommittee with attorneys Honigberg and Ardinger charged with developing proposed rules and/or rule amendments to enable email service among attorneys in litigation.

At the Committee's December 15, 2011 the Committee had considered a December 15 memorandum, authored by attorney Gordon,

outlining the subcommittee's proposal to allow lawyers to exchange pleadings by email. After some concerns were raised about the proposal, it was suggested that the subcommittee draft specific language for a rule to implement the proposal and to obtain input from the Bar (specifically, the Committee on Cooperation and the Courts) and report back to the Committee.

The Committee now considered a June 14 a memorandum, authored by attorney Gordon, outlining the subcommittee's proposed rules to enable email service in litigation. The memorandum explains how the system would work, and gives the rationale for certain decisions the subcommittee made regarding how the system will work. The memorandum also proposes specific language to amend the following court rules: (1) Supreme Court Rule 26(3); (2) Superior Court Rule 21; (3) Circuit Court - District Division Rule 1.3-A; (4) Circuit Court - Probate Division Rule 21; (5) Circuit Court - Family Division Rule 1.23. The proposed language reads:

> (b) In any case when all parties are represented by lawyers, all parties' counsel may agree that pleadings filed and communications addressed to the court may be furnished to all other counsel by email. An agreement may be filed with the court by stipulation. Such agreement shall list the email address(es) at which counsel agrees to be served. The email header shall include the caption of the case and its docket number. Pleadings and communications furnished in accord with this rule shall be attached to the email in .PDF file format. Documents so furnished may have on their signature lines a copy of counsel's signature, a facsimile thereof, "/s/ [counsel's name]" as used in the federal ECF system, or similar notation indicating the document was signed.

A concern was raised regarding whether there is a failsafe in the event that one of the parties is no longer represented. It was noted that the use of the words "all" and "all parties' counsel" and "at which counsel" intend to convey that pro se litigants may not opt into the email service program. If a party is no longer represented by counsel, then e-service will no longer be permitted, and the parties will revert to service by paper.

A Committee member expressed concern about not allowing pro se litigants to participate in the e-service program, as it seems to suggest that pro se litigants are somehow more error-prone. A member of the subcommittee explained that there is a presumption of regularity with lawyers because they maintain an office, have an ongoing duty to maintain an address and there is some concern that with pro se litigants there are likely to be more errors with this kind of a system. Attorney

Honigberg stated that in the federal system pro se litigants have to seek approval to use the ECF system (the electronic filing system), and that the New Hampshire Courts do not have the protection of the ECF system, so pro se litigants should be excluded, in order to minimize the likelihood of error. Judge McNamara noted that the courts rely on lawyers to follow the rules and that when pro se litigants fail to follow the rules, this costs the courts money. He believes that this limitation is necessary until New Hampshire has an ECF system. Judge Lynn noted that it may be possible to include pro se litigants in the future, but that this incremental approach—allowing only lawyers to exchange pleadings by email-- seems to make sense.

Attorney Ryan stated that he would like the opportunity to discuss the subcommittee's proposal with his colleagues at the circuit court. Justice Lynn asked attorney Ryan to contact attorney Gordon if he has concerns about the e-service proposal and proposed rule amendments. It is likely that the Committee will vote on the proposal in September.

ii. Supreme Court Rule 7

Attorney Ardinger reported on the subcommittee's proposal to amend Supreme Court Rule 7 to remedy an ambiguity in the rule. The nature of the ambiguity is set forth in attorney Gordon's August 3, 2011 letter to the Committee and relates to what the Notice of Appeal deadline is when a lower court grants a motion for reconsideration. The subcommittee comprised of attorneys Gordon, Ardinger and Honigberg had submitted a proposal considered by the Committee at its December 16, 2011 meeting. A concern was raised about the December 16 proposal regarding the fact that it did not address a situation in which the newly losing party wants to file a new motion for reconsideration.

Attorney Ardinger distributed to Committee members proposed language to amend Supreme Court Rule 7(1)(c) as follows (deletions are in strikethrough. Additions are in **[bold and in brackets]):**

> (C) The definition of "decision on the merits" in Rule 3 includes decisions on motions made after an order, verdict, opinion, decree or sentence. A timely filed post-~~trial~~ **[decision]** motion stays the running of the appeal period for all parties to the case in the trial court including those not filing the motion. **[If the trial court's decision on a post-decision motion creates a newly losing party, and the newly-losing party files a timely motion for reconsideration, such motion will further stay the running of the appeal period for all parties to the case in the trial court including those not filing the motion.** Untimely filed post-~~trial~~

[decision] motions will not stay the running of the appeal period unless the trial court waives the untimeliness within the appeal period. Successive post-~~trial~~ **[decision]** motions **[filed by a party that is not a newly-losing party]** will not stay the running of the appeal period. *See Petition of Ellis*, 138 N.H. 159 (1993).**[; see also Superior Ct. Rule 59-A.**

. . .

Attorney Honigberg noted that the "newly losing party" language is used in the administrative law context, and that importing this concept here is not likely to cause a problem. He recommends putting this language out for public hearing in December.

Upon motion made by attorney Taylor and seconded by Judge McNamara, the Committee voted unanimously to put the proposed amendment out for public hearing in December.

iii. Supreme Court Rule 3. Definitions ("Mandatory Appeal") (this is also item #2011-008)

Discussion turned to the third item raised in attorney Gordon's August 3, 2011 letter to the Committee. In his letter, Attorney Gordon asserted that Supreme Court Rule 3 should be amended to address the concern that the current rule is unlawful and unconstitutional because it provides for mandatory review of appeals involving married parents but discretionary review of appeals involving non-married parents. At the Committee's December 16, 2011 meeting, the Committee considered Mr. Gordon's December 9, 2011 letter proposing a solution to address his concern. After concerns were raised regarding the proposal, Mr. Gordon agreed to amend the language proposed in his letter to: (1) insure that parties would not be able to "fudge" in response to the "appeal of the same issue" question; and (2) make clear that the proposed amendment intends to expand the ability of unmarried people to get a mandatory appeal.

Attorney Gordon distributed a memorandum dated June 15, 2012 responding to the Committee's request that he develop a proposal regarding mandatory and discretionary appeals. The memorandum provides some alternative amendments to Supreme Court Rules 25, 3, and the notice of appeal form.

Attorney Gordon explained that his understanding is that the reason the current rule distinguishes between married and unmarried people is that it provides the Supreme Court with some discretion in dealing with "frequent fliers." As currently written, however, the rule automatically excludes non-married people from mandatory appeals, but

not married people with unmeritorious appeals, and therefore does not fully serve the goal of addressing the "frequent flier" problem. Attorney Gordon suggests a rule (to apply either only in the family law area, or in all cases) that better provides the Court with a basis to decide whether the case being appealed is a "frequent flier" case or not. Specifically, he proposes the following amendments (deletions are in ~~strikethrough~~, additions are **[in bold and in brackets]**):

Supreme Court Rule 25 (7):

> (7) In a mandatory appeal, any party may file a motion to dismiss the appeal based upon lack of subject matter jurisdiction, mootness, untimeliness, **[the existence of a previous appeal in the same case, among the same parties, or arising out of the same dispute;]** or other cause unrelated to the merits of the appeal. The court may, without the issuance of any order, defer ruling upon the motion until after briefs are filed and oral argument, if any, is held. Any order or decision by the court disposing of the case on the merits shall be deemed to be a denial of any pending motion to dismiss.
>
> In a mandatory appeal, the supreme court may at any time, on its own motion and without notice or on such notice as it may order, dismiss the appeal based upon lack of subject matter jurisdiction, mootness, untimeliness, **[the existence of a previous appeal in the same case, among the same parties, or arising out of the same dispute;]** or other cause unrelated to the merits of the appeal.

Supreme Court Rule 3. Definitions. "Mandatory Appeal" (Attorney Gordon provides three alternatives to amend the definition):

> "Mandatory appeal": A mandatory appeal shall be accepted by the supreme court for review on the merits. A mandatory appeal is an appeal filed by the State pursuant to RSA 606:10, or an appeal from a final decision on the merits issued by a superior court, district court, probate court, or family division court, that is in compliance with these rules. Provided, however, that the following appeals are NOT mandatory appeals:
>
> (1) an appeal from a final decision on the merits issued in a post-conviction review proceeding (including petitions for writ of habeas corpus and motions for new trial);
>
> (2) an appeal from a final decision on the merits issued in a collateral challenge to any conviction or sentence;
>
> (3) an appeal from a final decision on the merits issued in a sentence modification or suspension proceeding;

(4) an appeal from a final decision on the merits issued in an imposition of sentence proceeding;

(5) an appeal from a final decision on the merits issued in a parole revocation proceeding;

(6) an appeal from a final decision on the merits issued in a probation revocation proceeding.;

(7) an appeal from a final decision on the merits issued in a landlord/tenant action filed under RSA chapter 540 or in a possessory action filed under RSA chapter 540; and

(8) an appeal from an order denying a motion to intervene; and

(9) an appeal from a final decision on the merits issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A)**[if the parties have previously appealed]**; ~~provided, however, that an appeal from a final divorce decree or decree of legal separation shall be a mandatory appeal~~.

OR

(9) ~~an appeal from a final decision on the merits issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A); provided, however, that an appeal from a final divorce decree or decree of legal separation shall be a mandatory appeal~~. **[Any appeal where the parties have previously appealed].**

OR

(9) ~~an appeal from a final decision on the merits issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A); provided, however, that an appeal from a final divorce decree or decree of legal separation shall be a mandatory appeal.~~ **[Any case among the same parties arising out of the same dispute which has been previously appealed.]**

Attorney Gordon also proposes adding the following question to the Notice of Appeal form:

Has any case among these parties arising out of the same dispute previously been appealed? If so, identify the name of the case, the trial court docket number(s), and the docket number(s) in this court.

Regarding Attorney Gordon's alternative proposals to amend Supreme Court Rule 3, Justice Lynn stated that he had not had time

to fully consider the issue, but he is inclined toward the third option. Attorney Gordon stated that he agrees, because the third option would allow the Court to determine whether the appeal is a "frequent flier" appeal, and then decide whether it wishes to exercise discretionary jurisdiction and take the appeal. Although the first option addresses the concern raised in Miller v. Todd and attorney Gordon's 8/3/11 letter, the third option is broader and would allow the Court to deal with the "frequent flier" problem outside of the family law context. Justice Lynn noted that option three serves two purposes: (1) it expands the rule to allow non-married people one mandatory appeal; and (2) also allows the Supreme Court to have discretionary review in appeals where the parties have appealed before.

Attorney Ardinger noted that some work may need to be done on the specific language of the proposal. For example, "case" should read "appeal," to be consistent with the terms used in Rule 3.

Attorney Honigberg suggested that Attorney Gordon return to the Committee in September with final language to implement option three of attorney Gordon's proposal.

h. 2011-021. Superior Court Pilot Rules—PAD

Justice Lynn reported that he had received an email from Chief Judge Nadeau stating that it is the Superior Court's intention to expand the PAD rules to Hillsborough North and South. He suggests that the best course of action is to leave the rule temporary, and for the Supreme Court to amend the temporary rule to include Hillsborough North and South.

i. 2007-001. Superior Court Rule 170 (ADR)

Judge McNamara reported that the subcommittee charged with reviewing temporary Supreme Court Rule 170 believes that the current temporary rule should be amended, and that it should not be recommended for adoption on a permanent basis as it is currently written. He stated that Laurie Levin, the former director of the office of mediation and arbitration, had convened a committee to address the question of how current Rule 170 should be amended, and had made some progress prior to her resignation, but since then little progress has been made. Judge McNamara noted that the current director of the office of mediation and arbitration has some questions about the current draft of the rule.

Judge McNamara stated that his view is that the best way to proceed is to solicit and obtain comment from stakeholders. He was surprised by how many lawyers are dissatisfied with the current rule. Attorney Taylor stated that he is not sure how to approach this, and that while the Committee should aim to put this out for public hearing in December, he has also seen the number of comments that have been made about the rule.

Attorney Honigberg proposed that a new subcommittee be formed, (to include the new director of the Office of Mediation and Arbitration), and charged with creating a report for the Committee's consideration at the September meeting which: (1) identifies the problems with the existing rule; and (2) shows how the proposed new rule addresses these concerns.

Judge McNamara stated that the two most controversial items include: (1) the lowering of the fees; and (2) greater court control over the mediation process. He stated that he would put together a bullet-point outline summarizing the significant changes that are being proposed to the rule, and will circulate it to the ADR subcommittee for comment, and then take those comments, put them into one document, and circulate that document to the committee. The aim will be to put the proposed new rule out for public comment in December.

Justice Lynn inquired whether the subcommittee had addressed the multiple comments that came in regarding the June 8, 2011 Order amending temporary Superior Court Rule 170(A)(2) making ADR mandatory in all cases involving municipalities. Judge McNamara stated that the subcommittee had considered this issue and had decided that municipalities should continue to be subject to mandatory ADR.

j. 2011-007. Photographing, Recording and Broadcasting.

Justice Lynn reminded the Committee that Judge Nadeau had stated in her December 16, 2011 letter to the Committee that the Superior Court recommends that Superior Court Rule 78(c) be immediately amended to eliminate the requirement that the court conduct a hearing upon the application of established media organizations to photograph or record court proceedings. Judge Nadeau states in her letter that the court will automatically permit the established media organization to photograph or record the proceedings, unless a party objects, in which case, the court would conduct a hearing.

Judge Lynn explained that he does not believe that the issue Judge Nadeau raised requires any action by the Committee. As the temporary Rule 78(c) currently reads, anyone who wishes to record court

proceedings must give notice to the presiding judge, and if there is an objection, then a hearing will be held. It was never the view of the Committee on the Judiciary and the Media that a formal hearing be held in every case. The way the rule works now, it applies to everyone who wants to broadcast, including the media, but also, for example, individuals who wish to record. The purpose of the notice requirement is to ensure that someone does not just come into the courtroom with a camera and record without anyone's knowledge. Notice allows the judge to take into consideration the rights of others, for example, the rights of jurors. Under the existing temporary rule, a hearing is not required, but may be held.

Judge Cullen noted that it is important to have a rule like this because electronic devices are now so small that without notice, a judge and others in the courtroom might be completely unaware that they are being recorded.

k. 2012-004. IOLTA.

Judge Lynn reported that a Committee comprised (in part) of Attorneys Howard, Cooper and Midddleton had been formed to consider the proposal, made by Attorney Middleton, that the Annual Trust Accounting Compliance Certificate be amended to include questions relative to whether the attorney completing the form has any interest in a title or closing company that handles real estate closings. The Committee will likely be expanded to include a representative of the Attorney General's Office and someone representing a title insurance company. The Committee will address the questions of what entities can be subject to IOLTA, and what entities should be subject to IOLTA.

l. Supreme Court Rule 37(9)(b)

At its March meeting, the Committee requested that Carolyn Koegler research the question of whether it would be appropriate to amend Supreme Court Rule 37(9)(b) to include the language of the ABA rule. Carolyn Koegler will report on this in September.

m. 2012-008. Protocol for In Camera Review of Documents.

Justice Lynn reminded the Committee that the Supreme Court had notified the Committee that the Superior Court had drafted a protocol for in camera review. Because the protocol establishes procedures that would be applicable to parties and counsel in civil and criminal cases, the Supreme Court felt that the protocol should probably be adopted in some form as one or more rules, and asked the Committee to consider this issue.

At its meeting in March, the Committee directed Carolyn Koegler to send copies of the proposal to: (1) the Attorney General's office; (2) the Public Defender's Office; (3) Counsel for the Department of Health and Human Services; and (4) the Judges and Clerks of the Superior Court and Circuit Court. Judge Lynn reported that Carolyn Koegler had done so, and that in response the Committee had received a letter from Christopher M. Keating, the Executive Director of the New Hampshire Public Defender. Attorney Keating raises concerns about Section 8 of the protocol which currently reads as follows:

> 8. After the appeal period in the case has expired, the parties shall destroy the in camera documents in their possession. The Clerk shall retain the original in camera documents as part of the official court file. The Clerk or designee shall destroy the in camera documents after 10 years. The date of return or destruction will be entered in the CMS.

Attorney Keating raises a number of concerns about this section of the proposal, and suggests that it be eliminated and that sections 4, 5, and 6 of the protocol police the disposition of confidential records produced after in camera review.

Judge McNamara noted that attorney Keating's letter raises some serious issues, and that there is a great deal to think about. Attorney Honigberg suggested that the Committee ask attorney Keating, and perhaps someone from the Attorney General's office to come to the Committee's September meeting to discuss the issues raised in the letter. Perhaps it would be useful to forward a copy of attorney Keating's letter to the Attorney General's office.

Judge McNamara stated that it might also be helpful to look to the law of other jurisdictions, as the issue of in camera review clearly arises elsewhere.

n. 2012-010. District Court Rules.

Justice Lynn reported that a subcommittee chaired by Judge Cullen had been formed to address the need for a procedure to insure that counsel is available for indigent defendants at their arraignments in the district court. The subcommittee will meet and May and June and is hoping to be able to submit something to the Committee by September.

o. 2012-011. Supreme Court Rule 45.

Justice Lynn recommends that the Committee take no action on

this item because a rule change does not appear to be necessary, given the flexibility provided in the rule for the selection of the judicial education program. Judges Nadeau and Kelly are currently researching educational programs to find appropriate judicial education programs.

5. New Submissions

a. 2012-012. Supreme Court Rule 37(15)

The Committee next considered a 4/17/12 memorandum from David Peck to the Committee suggesting that the Committee consider amending Supreme Court Rule 37(15) to include a cap on the fees to be paid to the Bar when an attorney who has resigned seeks readmission.

Judge McNamara queried whether it is reasonable to require attorneys who seek readmission to pay dues at all. He notes that requiring additional education might make some sense, but requiring them to pay money does not.

Attorney Honigberg suggested that a subcommittee research what the rules say about what requirements an attorney must meet in order to be readmitted to the bar, and that the subcommittee report back in September. Attorney Ardinger agreed to research the questions of what does an attorney need to do to: (1) rejoin the bar after resignation; and (2) move from inactive to active status.

b. 2012-013. Circuit Court Rules. Dismissal of Cases

The Committee next considered a 5/31/12 letter and attachment from Administrative Judge Kelly proposing a rule applicable to the three divisions of the Circuit Court which would provide for the dismissal by the court of certain cases if they have seen no activity for a period of two years.

Judge Hampe requested that the Committee consider this proposed rule in September after he has had the opportunity to consider how the proposed rule would impact the probate division.

c. 2012-014. Supreme Court Rule 12-A (Mediation)

The Committee next considered a 6/1/12 letter and attachment from Administrative Judge Kelly proposing changes to Supreme Court Rule 12-A to "better reflect the language of the statute and the change in the title from the director to ADR Coordinator." It was noted that this issue was addressed in the context of the discussion about the proposal to amend Supreme Court Rule 12-A, which had been put out for public

hearing. See item 2(f). The Committee had voted to recommend that the Supreme Court adopt the technical amendments proposed by Judge Kelly.

d. 2012-015. Correspondence from Attorney Lanea Witkus

The Committee discussed next a 5/15/12 letter from Attorney Witkus to Carolyn Koegler. Judge Lynn explained that Attorney Witkus seems to be raising some concerns in response to a bar survey that was conducted regarding amendments the ABA had proposed to the Professional Conduct Committee Rules. Apparently, many members of the bar were taken aback by the ABA's proposal. It seems that Attorney Witkus' letter comments about a submission to the Committee that has not yet been made.

The Committee took no action on this item, other than to direct Carolyn Koegler to contact Attorney Trevethick to see whether he has received a copy of this letter.

e. Item # 2012-016. Supreme Court Rule 51. Rule-making Procedures

Carolyn Koegler noted that Rule 51 currently requires that the Advisory Committee on Rules submit a final draft of any proposed rules or amendments with the Clerk of the Supreme Court on or before June 1. She notes that for the last several years (due to the fact that a public hearing is often held in June) the Secretary has required an extension to file the proposed rules or rule amendments to August 1, and requested that the Committee considered amending Supreme Court Rules 51(2)(f) and 51(3)(a) to require that the submission be made on or before August 1.

After brief discussion, the Committee determined that this change should be recommended, and that no public hearing would be necessary. Upon motion made and seconded, the Committee voted to recommend that the Court amend Supreme Court Rules 51(2)(f) and 51(3)(a) to require that the annual submission be made on or before August 1.

6. Meeting Schedule for 2012

Friday, September 14, 2012
Friday, December 14, 2012

Upon motion made and seconded, the meeting adjourned at 3:10 p.m.