NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of March 13, 2015

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

The meeting was called to order at 12:31 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: Karen Anderson, Hon. Paul S. Berch, Hon. R. Laurence Cullen, Hon. Daniel J. Feltes, Joshua L. Gordon, Esq. Hon. Richard A. Hampe, Derek D. Lick, Esq., Maureen Raiche Manning, Esq., Emily G. Rice, Esq., Patrick W. Ryan, Esq., Frederick W. Stephens, Jr., Raymond W. Taylor, Esq., and Hon. Robert J. Lynn.

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

Justice Lynn began the meeting and welcomed two new members. Maureen Raiche Manning was appointed by Governor Hassan, and the Honorable Daniel J. Feltes was asked to serve as the Senate President's designee.

1. Approval of Minutes of December 12, 2014 Meeting

Upon motion made by Representative Berch and seconded by Attorney Taylor, the Committee voted to approve the December 12, 2014 meeting minutes. Attorneys Manning and Feltes and others not present at the December meeting abstained from voting.

2. Status of Pending Items

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

Justice Lynn noted that this project is currently on hold.

   b. 2012-010(1) and (2). District Court Rules. Need for procedure to ensure that counsel is available for indigent defendants at arraignments in the district court.

Justice Lynn reported that Judge Kelly has put the counsel at

arraignment rules into effect in all Circuit Courts, but he noted that there have been some problems reported relating to the public defenders not appearing.

Pat Ryan stated that attorneys from the Office of the Public Defender had stopped appearing because the Office of the Public Defender does not have the resources to be at all of the county jails during arraignments. The courts are providing notice of the right to counsel, but attorneys from the Public Defender's Office will not appear at arraignment if they are not specifically requested in advance.

Justice Lynn stated that he had had a long discussion with Randy Hawkes. They agreed that the rules adopted were very important. They require the bail commissioner to provide an arrestee with notice of the right to counsel and an affidavit. If the arrestee completes the affidavit then counsel is appointed. A problem arises only when the arrestee waits until the day of arraignment to request counsel. It would obviously be ideal if a public defender were able to be present when this happens, but this is not always possible, given the limited resources.

Representative Berch inquired whether there is anyone assisting the accused to fill out the forms requesting counsel, because in his experience, the accused may not be able to fill out the forms. Pat Ryan stated that the bail commissioners are encouraged to have the accused fill out the form right there. Representative Berch asked whether the bail commissioner offers to have someone assist the accused. Pat Ryan noted that the accused is told that they should get the forms to the Court as soon as possible. Also, assistance is available to the accused by the call center. Attorney Gordon noted that the courts are not waiving the bail commissioner fee for indigent defendants.

c. 2013-003. Interlocutory Appeals.

Justice Lynn reminded the Committee that this issue relates to what happens when a trial court grants a motion to dismiss some, but not all, of the defendants in a case. Under New Hampshire case law, when some but not all defendants are dismissed from a case, the dismissed defendants must wait for a final decision to be done with the litigation unless the *plaintiff* both chooses to request an interlocutory appeal under Rule 8 and has his or her request granted at both the trial court and supreme court levels. The Court has asked the Committee to consider whether a rule amendment should be adopted that provides a mechanism for the trial court to certify (either on its own, or on motion, or both) that an order that would otherwise be interlocutory is final and immediately appealable.

Attorney Gordon stated that he, Karen Anderson and Judge Delker

agreed to serve on a subcommittee to address this issue, but have not yet met. Justice Lynn stated that this issue comes up somewhat frequently, so it would be helpful to resolve this issue.

d. 2014-005. Electronic Filing Pilot Rules

Justice Lynn reminded the Committee that these rules currently apply on a pilot basis to small claims cases in the Circuit Court - District Division. He stated that there is a group actively working on amendments to the rules to make them applicable in guardianship cases in the Circuit Court. He understands that e-filing will be implemented in guardianship cases this spring. The next case type to follow will be civil cases filed in the Superior Court.

Justice Lynn stated that his inclination is to let the rules roll out to the next two case types before holding a hearing to see if they should be adopted on a permanent basis. That way, if changes need to be made to the rules, they can be made as the rules are rolled out.

Attorney Manning inquired how it is the Committee knows that the rules are working. She asked whether there is any opportunity for public feedback on the rules. Carolyn Koegler explained that the Committee had held a public information session on the electronic filing rules in March 2014 and had received some feedback on the rules then. She stated that she is not sure whether the Circuit Court has requested feedback from the public about how the rules are working in small claims.

Derek Lick inquired whether the rules have been in place for long enough to know whether or not they are working. He noted that the Electronic Filing Pilot Rules were adopted and first became effective in the district divisions in Concord and Plymouth on July 30, 2014.

Justice Lynn stated that his inclination is to leave the rules in place on a temporary basis for a little longer, before holding a public hearing on them.

Attorney Gordon stated that when e-filing is rolled out in guardianship cases, the confidentiality rules will be fully tested.

e. 2014-006 through 2014-010. Superior Court Rules (Civ).

Attorney Rice reminded the Committee she had agreed to chair a new subcommittee to address the issues relating to the new Superior Court Civil Rules that are set forth in Carolyn Koegler's June 4, 2014 memorandum to the Committee. She stated that her subcommittee would submit a report in June.

Attorney Manning inquired what the subject of the June 4, 2014 memo was. Justice Lynn explained that some questions had arisen about the rules when the Court adopted the new Superior Court Civil Rules, and the memo asks the Committee to consider these questions.

f. 2014-016. Supreme Court Rule 51. Rulemaking Procedures

Carolyn Koegler referred members to two memos she had submitted to the Committee. One of the memos, dated February 6, 2015, attached a revised draft to the proposal to amend Supreme Court Rule 51. The revised draft included changes to the proposal that had been submitted to the Committee in December 2014 that were made by Committee members at the December meeting. Attached to the revised proposal was a copy of the State of Washington's Rulemaking Rule (upon which much of the proposed new Rule 51 is based). The second memo, dated March 11, 2015 identifies which committee members would be assigned the initial one year, two year, and three year terms.

Carolyn Koegler explained to the new members of the Committee that a working group consisting of Karen Anderson, Peter Cowan, Eileen Fox, Jeanne Herrick, Carolyn Koegler, Pat Lenz, Derek Lick, Jennifer Parent, David Slawsky, Ray Taylor and Larry Vogelman had worked together to draft the proposed new rule, and that the Committee had considered the new rule at the December 2014 meeting and asked her to make some changes to the rule.

Attorney Taylor inquired whether it might make sense to have a provision, similar to a provision in the State of Washington rule, to allow the Chair of the Committee to reject a suggestion for a rule change without first referring it to the Advisory Committee on Rules. Carolyn Koegler explained that she had considered this possibility and had discussed it with Eileen Fox when she began the drafting process, but that they had agreed that while it might simplify the process, it seemed a bit harsh. A Committee member noted that the Washington rule provides that the suggestion for a rule change is first submitted to the entire Washington Supreme Court and the entire Court decides whether to reject the suggestion. The proposed new New Hampshire rule provides that the suggestions are submitted to the Chair of the Committee, not the Court. Justice Lynn stated that it probably is better for the Chair not to have the authority to reject a suggestion. He would prefer the rule to require the suggestion to be submitted to the entire Committee, and for the Committee to decide whether to reject it. The Committee generally agreed with this.

One Committee member inquired how members of the bench, the bar and the public are notified about potential rules changes. The Committee generally agreed that the Notice of Public Hearing put out by the Committee

should be posted on the webpage and also sent out on the Court's listserve. Carolyn Koegler stated that it is certainly possible to post the notice on the listserve, and that she would be sure that the Notice of the June public hearing would be posted to the listserve.

Attorney Manning inquired how the chair of the Committee is selected. Judge Lynn explained that while this is not stated in the current or draft rule, the practice has been that the Supreme Court Justice appointed to the Committee also serves as the Chair. The Committee agreed that this generally makes sense, because this more easily allows the Chair to function as a liaison between the Committee and the Court. The Committee directed Carolyn Koegler to add some language to the rule to make it clear that the Committee Chair would be the Supreme Court member.

A Committee member noted that 51(d)(1)(B) should be amended to make it clear that the members appointed by the Governor and the designees of the Senate President and the Speaker of the House are not subject to term limits. Committee members generally agreed that this change should be made.

There was some discussion about whether the language of proposed Rule 51(d)(1)(D)(iii), which states that there shall be a vacancy on the Committee "when a judge, marital master, clerk or administrator ceases to hold the office which he or she held at the time of appointment," should be changed. It was noted that this seems to be in conflict with 51(d)(1), which allows the appointment of retired judges to the Committee. Committee members agreed that "judge, marital master," should be stricken from 51(d)(1)(D)(iii).

Judge Hampe inquired whether three judges should be appointed from the Circuit Court, given that there are three divisions of the Circuit Court – district, probate and family. Representative Berch noted that this would be a substantive departure from the existing rule and practice, and that if the absence of an additional judge has not caused a problem, then no change should be made. Judge Cullen stated that the Committee does make an effort to solicit input from those not represented on the Committee. It was generally agreed that the rule would state that two active or retired judges from the Circuit Court would be appointed to the Committee.

Upon motion made and seconded, the Committee voted to put the proposal out for public hearing in June, with the amendments agreed to by Committee members.

3. New Submissions

a. 2015-001. Supreme Court Rule 40. Procedural Rules of the Committee on Judicial Conduct.

Justice Lynn summarized the contents of a January 7, 2015 memo from Eileen Fox to Justice Lynn and explained that the Supreme Court wished to bring to the Committee's attention an inconsistency in paragraph 12 of Supreme Court Rule 40, which sets forth the procedure to be followed when the JCC determines that a judge has committed a serious violation of the Code of Judicial Conduct. The Court has asked that the Committee: (1) review provisions (d) and (e) of Rule 40 and recommend an amendment or amendments to make them consistent; and (2) clarify two procedural issues.

Justice Lynn then directed the Committee's attention to Carolyn Koegler's March 12, 2015 memo to the Committee setting forth a number of amendments to Supreme Court Rule 40(12) that Justice Lynn had proposed to address the Court's concerns. Committee members generally agreed that the proposed amendments address the concerns and discussion turned to whether the proposed amendments are technical, or whether a public hearing would be necessary. Judge Cullen stated that he believes the proposal should be circulated to judges for comment before it is recommended to the Court. Others believed that if the proposal is going to be circulated to the judges, it should also be put out for public hearing. The Committee generally agreed, and also noted that the proposal should be sent to the JCC for comment.

Upon motion made and seconded, the Committee voted to put the proposed amendments set forth in the March 12, 2015 memo out for public hearing in June.

b. 2015-002. Supreme Court Rule 37. Telephonic Participation in PCC Meetings.

Justice Lynn explained that the Court had received a December 9, 2014 letter from David Rothstein, Chair of the Professional Conduct Committee, asking the Court whether members of the PCC could be permitted to participate telephonically in meetings. Attorney Rothstein noted that a member who participates telephonically would not vote in matters orally argued before the Committee. Rather, the member's participation would be limited to discussions about administrative matters, and votes in matters which the Committee decides based on pleadings and the record.

In a January 22, 2015 letter, Eileen Fox stated that the Court had advised attorney Rothstein that it had no objection to members participating in PCC meetings by telephone on these terms. She also stated that the Court

requests that the Advisory Committee on Rules review paragraph (3)(b), which sets forth the requirements for a quorum and for committee action, to consider whether an amendment is necessary to clarify that a member who participates telephonically is considered "present" for purposes of these requirements.

Justice Lynn stated that he has reviewed Eileen Fox's January 22 letter and Rule 37(3). He believes that nothing in the current version of the rule precludes the PCC from having some members participate telephonically in matters before the Committee decided on the pleadings and records, and in administrative matters. He believes that the PCC has discretion under the current rule to allow members of the various panels to participate telephonically in proceedings that do not involve hearing testimony or making credibility determinations. In addition, he does not believe it is necessary or desireable for a rule to go into this level of detail regarding the PCC's operations.

Committee members noted that the PCC is not proposing that telephonic participation be permitted where oral evidence is being presented to the Committee. Committee members had no objection to telephonic participation as described in attorney Rothstein's letter, and generally agreed that no rule amendment is required to permit this kind of telephonic participation.

Justice Lynn stated that he would convey to the Court the Committee's belief that no rule change is necessary.

c. 2015-003. Proposal for Rules Changes from Attorney Seth D. Levine.

Attorney Taylor explained that he had received the October 19, 2014 letter from Attorney Seth Levine proposing a number of rules changes and submitted it to the Committee. He noted that Attorney Levine's proposal to simplify the jurat, to allow an attorney to obtain a sworn affidavit by mailing it to his or her client for signature, removing the need for a visit to the attorney's office or the office of a notary public would be an improvement. However, it was noted that these changes are already being made to court rules, as e-filing is rolled out.

Following some brief discussion of the other proposals, the Committee generally agreed that it would take no action on the proposals. The Committee members instructed Carolyn Koegler to write to attorney Levine to explain that the Committee had considered his proposals and declined to take any action.

d. 2015-004. Supreme Court Rule 28. Parties' Designation.

Justice Lynn explained that the Court has changed the way it titles confidential cases. In the past, the Court used the full name and the initial of an individual's surname in the title of the confidential case. Because the spelling of many first names is unusual, the Court has concluded that the practice of using the full name may not protect an individual's identity and has decided to change the Court's practice so that it uses only the initial of an individual's first name and surname on opinions and orders. In light of this, the Court has asked the Committee to consider whether to recommend a change to Supreme Court Rule 28.

Following consideration of a proposed amendment to Supreme Court Rule 28 set forth in a February 11, 2015 memo from Carolyn Koegler to the Committee, and upon motion made and seconded the Committee voted to put the proposed amendment out for public hearing in June.

e. 2015-005. Supreme Court Rule 42B

Justice Lynn directed Committee members' attention to a February 13, 2015 letter from Sherry Hieber, General Counsel of the New Hampshire Supreme Court Office of Bar Admissions. He stated that the Office of Bar Admissions is proposing amendments to Supreme Court Rule 42B. One proposed amendment would allow the disqualification of an applicant who fails to sufficiently recognize the wrongfulness of his or her misconduct, even if the conduct standing alone is not significant enough to be disqualifying. Additional proposed amendments would make technical and stylistic changes to the rule.

Attorney Gordon inquired whether the proposal is to state in the rule that if an applicant did a few minor things that are wrong and did not admit it, that applicant cannot be a member of the bar. Justice Lynn stated that yes, this rule would state that where there is no doubt that the applicant did something wrong, and the applicant failed to accept responsibility for his or her actions, the applicant might be denied admission to the bar. He notes that this issue arose *In re: Application of Burch*, in which the Ohio Supreme Court agreed with the character and fitness board's recommendation to deny the applicant admission to the bar.

Attorney Manning inquired whether the Committee should seek input from those with expertise in this area, for example, Mitch Simon or others who represent applicants before the Committee on Character and Fitness. Senator Feltes agreed with Attorney Manning that it would be important to have some input from these folks. He inquired whether Sherry Hieber had had conversations with some of these people. Another Committee member agreed

that it would be helpful to talk to, for example, David Rothstein, Steve Tober, Russell Hilliard, and the Board of Bar Examiners. Attorney Manning and Senator Feltes agreed that they would circulate the proposal and seek input from some people with expertise in this area, and get back to the Committee.

In light of the Committee's desire to solicit input from others, Judge Hampe inquired whether it might make sense for the Committee to wait until December to put this out for public hearing. After some discussion, Committee members agreed that the proposal should be put out for public hearing in June, and also that Attorney Manning and Senator Feltes would report back to the Committee by May 25 with the results of their work.

Upon motion made and seconded, the Committee voted to put the proposal out for public hearing in June.

f. 2015-006. Circuit Court District Division Rule 2.18

Attorney Ryan stated that he had submitted to the Committee proposed amendments to Circuit Court – District Division Rule 2.18 (Application to Annul Record of Conviction and Sentence) that had been approved by Judge Kelly. He stated that the new language is designed to facilitate e-filing, so that the petition can be filed without someone having to swear to the application and upload it. Another change states that the Clerk is to send a copy of the petition to the arresting law enforcement agency or the prosecutor for the arresting law enforcement agency, rather than the county attorney. A change to section (E) would make clear that there will not necessarily be a hearing in each case, but that if a hearing is requested, it will be scheduled.

Attorney Gordon noted that the first sentence of the last paragraph is a bit confusing and may need to be reworked. Attorney Ryan agreed to make some changes to the language of the proposal and to send the changes to Carolyn Koegler.

Upon motion made and seconded, the Committee voted to put the proposal, as amendment by Attorney Ryan, out for public hearing in June.

g. 2014-012. Supreme Court Rules 37 and 37-A. Warnings.

The Committee next considered a draft letter from Carolyn Koegler to the Supreme Court informing the Court of the Committee's vote to recommend that the Court amend Supreme Court Rules 37 and 37A to eliminate the authority of the attorney discipline office general counsel and the complaint screening committee and the professional conduct committee to issue warnings when it is determined that an attorney acted in a manner which did not constitute a clear

violation of the rules of professional conduct, but which involved behavior requiring attention.

Justice Lynn reminded the Committee that it had voted at its meeting in December to make this recommendation to the Court. He explained that pending before the Supreme Court are a number of proposals to amend Supreme Court Rules 37 and 37A that had been made in the Committee's 2014 Annual Report that the Court has not yet taken action on, because it is awaiting the Committee's recommendation regarding eliminating warnings. He asked that the Committee consider making the recommendation to eliminate warnings now, rather than to wait to include it in the 2015 annual report. He believes that some action on the pending proposals should be taken soon, because the proposal to amend the attorney discipline rules were first presented to the Committee two years ago.

Upon motion made and seconded, the Committee voted to recommend immediately that the Court amend Supreme Court Rules 37 and 37A to eliminate warnings.

h. 2015-007. Circuit Court –Family Division Rule 2.29A

Attorney Gordon explained that he has a concern about Circuit Court – Family Division Rule 2.29, as noted in his March 11, 2015 email to Carolyn Koegler. Justice Lynn noted that the problem can be addressed, as Attorney Gordon suggested, by the addition of the *see* cite. Attorney Ryan stated that he would take the rule and the proposal back to the Circuit Court to see what other changes might need to be made.

Following some discussion, it was decided that the proposal calls for a technical change, and that no public hearing on the proposal is necessary. The Committee will vote at its meeting in June on whether to recommend the proposed change to the Court.

i. 2015-008. Supreme Court Rule 20. Non Precedential Status of Orders.

Justice Lynn explained that a suggestion was made in the recent public evaluation of the Supreme Court that the Court's rule prohibiting litigants from citing or relying upon unpublished decisions of the Supreme Court should be changed. One proposed change would be to allow litigants to cite and discuss unpublished opinions, but still provide that they do not constitute binding precedent. The Court has asked that the Committee consider this issue, and, if it believes Supreme Court Rule 20 should be amended, to provide the language for the proposed amendment

Attorney Gordon noted that this issue has arisen in some federal courts. He believes that one opinion may suggest that there is a constitutional issue here – *i.e.,* that the bar on citations may be problematic. His perception is that in the last few years the Court has issued substantive decisions by order that are not precedential.

Another Committee member noted that the bar on citations is troubling from a litigant's perspective. Pro se parties cite these orders "left and right," and this is confusing. There should be a rule of some kind to make clear what the status of these orders is.

Attorney Taylor inquired whether there is any way to search the orders. Justice Lynn stated that the Court has begun to put all orders on its website, so that the problem of having access to the orders is being eliminated, but it is still going to be "hit or miss" as to what you can find for the older cases.

The Committee discussed how the existing Supreme Court Rule 20 might be amended. The Committee agreed to the following amendment (additions in **[bold and in brackets]**; deletions in ~~strikethrough~~:

Rule 20. Copy of Opinion; Nonprecedential Status of Orders.

(1) In each case, the clerk of the supreme court shall distribute without charge to counsel of record for each party one copy of the opinion filed by the court and of the order made.

(2) Nonprecedential Status of Orders. An order disposing of any case that has been briefed but in which no opinion is issued, whether or not oral argument has been held, shall have no precedential value**[, but it may, nevertheless, be cited or referenced in]** ~~and shall not be cited in any pleadings or rulings in~~ any court in this state, **[so long as it is identified as a nonprecedential order. Such nonprecedential orders]** ~~provided, however, that such order~~ may be cited and shall be controlling with respect to issues of claim preclusion, law of the case and similar issues involving the parties or facts of the case in which the order was issued. *See also* Rule 12-D(3).

One Committee member suggested that it would be helpful for the rule to state how these non-precedential orders should be cited. Committee members generally agreed, and asked Carolyn Koegler to locate the provision in the Supreme Court rules stating how decisions should be cited and to include either the same language in an amendment to Supreme Court Rule 20 or a cross reference to the rule. Carolyn Koegler agreed to make the

amendments the Committee requested and to circulate the language to the Committee by email.

Upon motion made by Judge Cullen and seconded by Justice Lynn, the Committee voted to put the proposal out for public hearing in June.

j. Temporary Rules

Carolyn Koegler noted that the Court had adopted a number of temporary rules throughout the year, and inquired whether the Committee would like to put those rules out for public hearing in June. Upon motion made and seconded, the Committee voted to put out for public comment temporary amendments made to Supreme Court Rule 42(IV) and to put out for public comment new Circuit Court - Probate Division Rules 94 and 96-A.

There being no further business to come before the Committee, the meeting adjourned.

4. Meeting Dates

The remaining 2015 meeting dates are:

Friday, June 5, 2015
Friday, September 11, 2015
Friday, December 4, 2015