

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT OF NEW HAMPSHIRE

O R D E R

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51, the Supreme Court of New Hampshire adopts the following amendments to court rules.

1. Supreme Court Rule 22 re motion for rehearing or reconsideration. The court amends this rule as set forth in Appendix A.

2. Supreme Court Rule 40(5) re judicial conduct committee procedures. The court amends this rule on a temporary basis as set forth in Appendix B.

3. Superior Court Rule 170-A re arbitration. The court amends this rule on a temporary basis as set forth in Appendix C.

**Effective Dates**

These amendments shall take effect immediately. The amendments in Appendices B and C shall be referred to the Advisory Committee on Rules for its recommendation as to whether they should be adopted on a permanent basis.

Date: January 15, 2008

ATTEST: \_\_\_\_\_  
Eileen Fox, Clerk  
Supreme Court of New Hampshire

## **APPENDIX A**

Amend Supreme Court Rule 22 by adding a new paragraph (3-A) as follows

(3-A) If an answer/objection to a motion for rehearing or reconsideration is filed, no reply to the answer/objection may be filed without permission of the court received in advance. A motion for permission to file a reply must be filed within 10 days from the date the answer/objection has been filed in the clerk's office; provided, however, that the court may act upon a motion for rehearing or reconsideration prior to the expiration of said ten-day period. Any reply to an answer/objection filed without prior permission of the court shall not be considered by the court.

## APPENDIX B

Amend Supreme Court Rule 40(5) on a temporary basis as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

### (5) *Committee Procedure After Receipt of Grievance.*

(a) The executive secretary of the committee shall acknowledge receipt of a grievance in a timely fashion.

(b) A copy of the grievance shall be sent to each member of the committee. The committee shall review each grievance at a meeting of the committee to determine whether the grievance is against a judge and whether the grievance meets the requirements for docketing as a complaint.

(c) A grievance shall be docketed as a complaint if it is against a judge and it satisfies the following requirements:

(1) It contains a concise statement of the facts which, if true, would establish a violation of the Code of Judicial Conduct.

(a) A grievance that relates to a judge's findings, rulings or decision, which, in effect, is a substitute for an appeal, will not be considered by the committee.

(b) A grievance which is repetitive of a prior grievance or complaint, whether from the same or a different source, shall not be docketed as a complaint.

(2) It was filed by a person who is or was directly affected by the conduct complained of or who was present when the conduct complained of occurred, and it contains a concise statement establishing these facts.

(3) It is typed or in legible handwriting and signed by the grievant under oath or affirmation. The following language, or language that is substantially equivalent, must appear above the grievant's signature: "I hereby swear or affirm under the pains and penalties of perjury that the information contained in this grievance is true to the best of my knowledge."

(4) It was filed with the committee within the period of limitation set forth in section (4)(c).

**[(5) Provided, however, that upon the vote of seven or more of its members, the committee may authorize a review of the court record to include the file and any recordings of proceedings to determine whether the court record supports the allegations in the grievance. After review, the committee may dismiss the grievance if it finds that in light of the court record, there is no reasonable likelihood of a finding of judicial misconduct. If the grievance is not dismissed, the committee shall direct that it be docketed as a complaint.]**

(d) A grievance that is filed against a person who is not a judge or that fails to satisfy the requirements for docketing as a complaint as set forth in section (5)(c) shall be dismissed. The committee shall notify the grievant in writing of the reason for the committee's action. In addition, the committee shall take the following action:

(1) If the committee determines that the person who is the subject of the grievance is not subject to the Code of Judicial Conduct, it shall return the grievance to the grievant with a letter explaining the reason for the dismissal. No file on the grievance will be maintained; however, the committee shall retain a copy of the letter to the grievant returning the grievance, which shall be available for public inspection in accordance with section (16)(a). The committee may bring such matter to the attention of the authorities of the appropriate jurisdiction, or to any other duly constituted body which may provide a forum for the consideration of the grievance and shall advise the grievant of such referral.

(2) If the committee determines that the grievance does not allege conduct that violates the Code of Judicial Conduct, that the grievant lacks standing, ~~or~~ that the grievance was not filed within the period of limitation, **[or that in light of the court record there is no reasonable likelihood of a finding of judicial misconduct,]** the judge who is the subject of the grievance shall be provided with a copy of the grievance and the decision of the committee and will be given an opportunity to submit a reply within 30 days from the date of the notification or such further time as may be ordered by the committee. The reply shall be available for public inspection in accordance with section (16)(b).

(e) Notification to Administrative Judge. Whenever the executive secretary provides a judge with a copy of a grievance against such judge which has been dismissed, the executive secretary shall at the same time send a copy of the grievance to the chief justice or administrative judge of the court in which such person serves. In such instances, the chief justice or administrative judge shall send a copy of the grievance to the presiding justice of the particular court in which such person serves.

## APPENDIX C

Amend Superior Court Rule 170-A on a temporary basis by deleting said rule and replacing it with the following:

### 170-A. ARBITRATION

(A) *Cases for Arbitration.* Subject to RSA 542, non-criminal disputes will be assigned to arbitration upon agreement of the parties or as mandated by a written contractual provision.

(B) *Submission of Dispute to Arbitration.*

(1) Prior to the commencement of any lawsuit, if all parties to the arbitration consent, a written request for arbitration may be made to the Administrator of the Office of Mediation and Arbitration. The administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 170-A, unless the parties agree otherwise. In all cases, the parties should utilize the Office of Mediation and Arbitration and the list of approved arbitrators. The parties shall be subject to an administrative fee of \$250.00 per party, which shall be paid to the Office of Mediation and Arbitration. Parties who are indigent may petition the superior court for waiver of the administrative fee.

In cases submitted under subsection (B)(1) of this rule in which administration of the Arbitration Hearing is conducted pursuant to Rule 170-A, all references in Rule 170-A(C) through 170-A(S) to the superior court shall be deemed to refer to the Office of Mediation and Arbitration.

(2) After commencement of any lawsuit, a written request for arbitration shall be made to the Superior Court. In the event that the dispute is pending in a New Hampshire Court, a copy of the written submission shall be sent to the clerk for the appropriate court; and all proceedings in that court will cease. The administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 170-A.

(C) *Qualifications of and Approval Process for Arbitrators.*

The provisions of Superior Court Rule 170(G) shall apply to arbitrators.

(D) *Immunity for Arbitrators.*

An arbitrator selected to serve and serving under New Hampshire Superior Court Rule 170-A shall have immunity consistent with RSA 490-E.

(E) *Neutrality.*

All arbitrators, whether selected by a party, selected by all parties, selected by the court or the Office of Mediation and Arbitration, or selected by arbitrators, shall be neutral and shall serve with impartiality.

(F) *Communication with Arbitrator.*

No party and no one acting on behalf of any party shall communicate ex-parte with an arbitrator or a candidate for arbitrator concerning the arbitration.

(G) *Arbitrator's Disclosure.*

Upon receipt of notice of appointment in a case, an arbitrator shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If an arbitrator withdraws, has a conflict of interest, or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

(H) *Arbitration Panel.*

In all cases so assigned, the parties shall select arbitrator(s) from the court list of approved arbitrators. The parties may choose either a single or three-person panel. In the event the parties cannot agree upon the panel number, a three-person panel will be utilized for all cases involving claims or counterclaims exceeding \$100,000 or cases involving three or more parties. In the event the parties cannot agree upon the panel number, a single member panel will be utilized for all cases involving claims or counterclaims of \$100,000 or less.

(1) When the parties choose arbitrator(s) from the list of approved paid arbitrators, the parties shall notify the arbitrator(s) and request that the arbitrator(s) provide the parties with a schedule of fees and expenses.

(2) Unless the court orders or the parties otherwise agree, arbitrators who are chosen from the list of approved paid arbitrators shall be compensated as follows. In the event a single arbitrator is selected, the parties shall equally share the costs of the arbitrator. When there are two parties and they select a three-person panel, each party shall pay for the arbitrator selected by the party and share the fees of the third panel member. When there are three parties and they select a three-person panel, each party shall be responsible for the arbitrator selected by the party. In the event there are more than three parties, the parties shall pay a pro rata share of the entire arbitration panel's fees.

(3) Parties may select arbitrator(s) who are not on the court's list of approved arbitrators if the parties agree on the choice of the arbitrator(s).

(4) If the parties cannot agree on the selection of arbitrator(s), they shall so indicate in the Stipulation required to be filed pursuant to Superior Court Rule 170(C)(1). In the event the parties cannot agree on an arbitrator for single-person panels, the court shall designate an arbitrator at the structuring conference. For three-person panels, if the parties cannot unanimously agree upon the arbitrators and there are two parties, each will select an arbitrator and the two arbitrators will select the third. In the event there are three parties, each will select an arbitrator. The three selected arbitrators will serve as the panel. In the event there are more than three parties and they cannot unanimously agree upon the panel, each party will submit one name to the court and the court shall select three individuals from the names submitted to serve as the arbitration panel.

(I) *Preliminary Hearing.*

(1) At the request of any party, the panel will schedule within 14 days of the request a preliminary hearing with counsel and/or the parties. The preliminary hearing may be conducted by telephone at the panel's discretion.

(2) During the preliminary hearing, the parties and the panel shall discuss and establish a schedule for the hearings, any outstanding discovery issues, any outstanding procedural issues, and to the extent possible a clarification of the issues.

(3) Ex parte communications between a party's counsel and arbitrator are prohibited.

(J) *Hearings: When and Where Held; Notice.*

(1) Hearings shall be held at a place designated by the panel. The hearing date shall be established at the preliminary hearing or by the panel after consultation with counsel and/or the parties. Counsel and/or the parties shall respond to requests for hearing dates within seven (7) days of the request. Counsel or the parties shall be notified in writing at least thirty (30) days before the hearing of the time and place of the hearing. No hearing shall be assigned for Saturdays, Sundays, legal holidays, or evenings unless by the unanimous agreement of all counsel or parties.

(2) Unless excused by the panel, all parties shall be in attendance at the hearing, and each party shall have at least one person present who has authority to authorize settlement.

(K) *Postponement of Arbitration.*

In the event that counsel or any party for good cause shown is unable to proceed, the panel may reschedule the case in their discretion. The postponement shall be for no more than 30 days absent extraordinary circumstances.

(L) *Default and Sanctions.*

Upon failure of a party to appear at a scheduled arbitration hearing or to participate in good faith in the proceedings, a default judgment may be entered and reasonable costs and attorneys fees may be assessed against the party. Default judgments may be contested only by the filing of a Motion to Strike Default setting forth specific grounds therefor within ten (10) days of the mailing of the Notice of Default. The panel shall have discretion as to appropriate sanction, including assessing costs, attorneys' fees, or entering default.

(M) *Prehearing Submissions.*

(1) Unless otherwise agreed to at the preliminary hearing, the parties shall exchange a list of witnesses they intend to call, including experts, a short description of the anticipated testimony of each witness, an estimate of the length of direct testimony of each witness, and all exhibits at least thirty (30) calendar days before the arbitration hearing. The parties shall attempt to resolve any disputes regarding the admissibility of exhibits. The exhibits must be premarked and a list of the exhibits submitted, indicating those exhibits that are to be admitted without objection and those exhibits that are objected to.

(2) If the parties intend to offer expert witnesses at the time of the hearing, at least sixty (60) calendar days before the arbitration hearing an expert disclosure consistent with the then existing Superior Court Rule 35 shall be made. Failure to make such a disclosure will result in the exclusion of the expert as a witness at the hearing. Any objection to the sufficiency of the disclosure and, therefore, the admissibility of the expert's testimony will be ruled upon by the panel.

(N) *Case Summary.*

(1) All parties shall submit and exchange no later than ten (10) days prior to the arbitration hearing a double-spaced typewritten summary of not more four (4) pages upon 8½" x 11" paper of the significant portions of their case.

(2) All such summaries shall contain a written stipulation, or, if counsel cannot agree to file a stipulation, a separate statement by each party, setting forth the following information:

- (i) All uncontested facts;
- (ii) All contested facts;
- (iii) Pertinent applicable law;
- (iv) Disputed issues of law;
- (v) Specific claims of liability by each party making such claims;
- (vi) Specific defenses to liability by each party asserting such defenses;
- (vii) An itemized statement of special damages by each party claiming such damages;

(3) All such summaries shall contain a statement of compliance with the exchange requirement.

(4) The purpose of the case summary submission is to apprise the panel of the issues in dispute.

(O) *Securing Witnesses and Documents for the Arbitration Hearing.*

(1) The panel may issue subpoenas for the attendance of witnesses or the production of documents. All parties shall produce for the Arbitration Hearing all witnesses requested in writing by another party that are in their employ or under their control. This shall be done without the need of subpoena.

(2) The testimony of witnesses shall be given under oath.

(3) The plaintiff shall present all of his/her evidence. In the event of multiple plaintiffs, each plaintiff shall present all of his/her evidence. The defendant will then present evidence to support its defenses and any counterclaims. In the event of multiple defendants, one defendant will complete his evidence and then the remaining defendants will proceed.

(4) Witnesses will be subject to cross-examination by other counsel (or the opposing party where a party is unrepresented) and the panel. The panel has the discretion to vary this procedure provided the parties are

treated fairly, justly, and equally and that each party is given an adequate opportunity to present his/her case.

(5) The panel exercising its discretion shall conduct the proceedings with a view to expediting the hearing and expediting the resolution of the dispute. Therefore, strict conformity to New Hampshire Rules of Evidence is not required, with the exception that the panel shall apply applicable New Hampshire law relating to privileges and work product. The panel shall consider evidence that is relevant and material to the dispute, giving the evidence such weight as is appropriate. The panel may limit testimony to exclude evidence that would be unduly repetitive.

(6) Openings and closing will be allowed and may be made orally or in writing.

(P) *Hearing Closure.*

If post-hearing memoranda are to be submitted or closing arguments are to be made in writing, the hearing shall be deemed closed upon receipt by the panel of the written submissions. The date for the written submissions shall be established; otherwise, the hearing will be closed at the conclusion of the presentation of the evidence and oral arguments.

(Q) *Transcript of the Testimony.*

Any party may arrange for a stenographic or other record to be made of the hearing and shall inform the other parties in advance. The requesting party shall bear the cost of the stenographic record. A copy of the stenographic record shall be made available to all other parties upon request.

(R) *Report of Award.*

(1) Within twenty (20) days after the hearing closure date, the panel shall file a Report of Award. Originals of the Award shall be mailed to all counsel or parties. If there is a dissent, it shall be signed separately; but, the Award shall be binding if signed by the majority of a three-member panel.

(2) The decision need not be in a particular form but must include sufficient findings of fact and conclusions of law to establish a basis for the decision.

(S) *Legal Effect of Report and Award; Entry of Judgment.*

The Report of Award, unless appealed consistent with provisions of New Hampshire RSA 542:8, shall be final and shall have the attributes and legal effect of a verdict. If no appeal is taken within the time and in the manner

specified in New Hampshire RSA 542:8, any party may move for confirmation and entry of judgment in accordance with New Hampshire RSA 542:8. After entry of such judgment, execution process may be issued as in the case of other judgments.