#2013-002

TO: Carolyn Koegler, Advisory Committee on Rules
FROM: Tim Gudas
DATE: December 3, 2015

RE: December 4, 2015 Public Hearing

Having reviewed the proposed amendments to Supreme Court Rule 3 (Appendix A to the October 26, 2015 public hearing notice) and Superior Court Rule 46 (Appendix B to the October 26, 2015 public hearing notice), I have a few comments and suggestions.

Supreme Court Rule 3

As drafted, the proposal would amend the definition of "mandatory appeal" to include the following language in bold text:

"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, **[including an appeal from an order issued pursuant to superior court rule 46(b),]** 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, other than the first final order, issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A).

In order to make clear that an order issued pursuant to Superior Court Rule 46(b) is subject to the same 9 exceptions from the definition of "mandatory appeal" that the order would be if that order fully resolved the entire case,[1] I recommend adding the following language (in italicized text) to the Committee's bold-text proposal: "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, **[including an appeal from an order issued pursuant to superior court rule 46(b)** ***if a final decision on the merits of the entire case would be a mandatory appeal,***] that is in compliance with these rules. Provided, however, ..."

Alternatively, the Committee could leave the definition of "mandatory appeal" in Supreme Court Rule 3 as it is in its currently effective version (thereby jettisoning both the Committee's proposal and my variation on it), and instead amend Supreme Court Rule 3's definition

[1] For example, a Superior Court Rule 46(b) order in a possessory action that was commenced pursuant to RSA chapter 540 in circuit court, and then transferred to or entered in superior court to address a plea of title, would not be a mandatory appeal. Similarly, to the extent that habeas corpus petitions are governed by the Superior Court's Civil Rules, a Superior Court Rule 46(b) order deciding some claims (ineffective assistance of counsel), but not others (prosecutorial withholding of exculpatory evidence), would not be a mandatory appeal.

of "Decision on the merits" so that it would provide as follows (new language in bold text):

"'Decision on the merits': Includes order, verdict, opinion, decree, or sentence following a hearing on the merits or trial on the merits and the decision on motions made after such order, verdict, opinion, decree or sentence; **also includes an order issued pursuant to Superior Court Rule 46(b)**. Untimely filed post-trial motions will not stay the running of the appeal period unless the trial court waives the untimeliness within the appeal period."

Superior Court Rule 46(b)

As drafted, the proposal would add a new Superior Court Rule 46(b), subsection (2) of which would provide: **"Any appeal from such an order shall be considered a mandatory appeal for purposes of Supreme Court Rule 7, and shall be taken in accordance with subsection (c)."**

For reasons explained above, I do not think that an appeal from a Superior Court Rule 46(b) order should be treated as a mandatory appeal if a final decision on the merits of that entire case would not be a mandatory appeal. Accordingly, I recommend adding the following language (in italicized text) to the Committee's bold-text proposal: **"Any appeal from such an order shall be considered a mandatory appeal for purposes of Supreme Court Rule 7 *if a final decision on the***

***merits of the entire case would be a mandatory appeal*, and shall be taken in accordance with subsection (c)."**

I also have a more fundamental concern about characterizing every appeal from a Superior Court Rule 46(b) order as a "mandatory appeal," even as to those cases in which a truly final order (resolving all claims and all parties) would give rise to a mandatory appeal. Pursuant to Supreme Court Rule 3, a mandatory appeal "shall be accepted by the supreme court for review on the merits," and Supreme Court Rule 21(8) states that "[i]n mandatory appeals, the clerk may issue orders accepting the case" (emphasis added). Taken together, these two rules indicate that a mandatory appeal is relatively easy to identify as such and to process toward a merits-based decision by the supreme court – but here is a passage from a First Circuit decision, Kersey v. Dennison Mfg. Co., 3 F.3d 482, 486-87 (1st Cir. 1993), that demonstrates that appellate review of Rule 54(b) certifications (the federal analogue to a Superior Court Rule 46(b) order) is more searching, involved, and nuanced than the term "mandatory appeal" conveys.

> We lack appellate jurisdiction to review the partial summary judgment absent a proper Rule 54(b) certification. See Pahlavi v. Palandjian, 744 F.2d 902, 903 n. 2 (1st Cir.1984) (citing Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 436, 76 S.Ct. 895, 900, 100 L.Ed. 1297 (1956)). Even were we to assume arguendo that the dismissed claims (Counts 1-6) in the present case qualified as "final," see Consolidated Rail Corp. v. Fore River Ry. Co., 861 F.2d 322, 325 (1st Cir.1988), the Rule 54(b) certification would falter on the "interrelationship" prong of the discretionary test set out in Spiegel v. Trustees of Tufts College, 843 F.2d 38, 44 (1st Cir.1988). The Spiegel test requires the court of appeals to scrutinize (1) the district court's evaluation of any interrelationship or overlap

between the legal and factual issues raised by the dismissed and pending claims, and (2) the district court's assessment of the equities for and against an immediate appeal. In cases where the district court has provided a written statement of the grounds for certification, we normally accord its discretionary decision "substantial deference," id., and will dismiss for lack of appellate jurisdiction only if the court's certification was "clearly unreasonable." Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10, 100 S.Ct. 1460, 1466, 64 L.Ed.2d 1 (1980).