R-2015-003

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON RULES

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Carolyn Koegler, Secretary

August 7, 2015

Eileen Fox
Clerk of Court
New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Dear Ms. Fox:

Pursuant to Supreme Court Rule 51, I hereby submit on behalf of the Supreme Court Advisory Committee on Rules ("Committee") the Committee's annual report, which contains the final draft of proposed rules and amendments recommended for adoption by the Committee. Not included in this submission are proposals that were previously submitted to the Court during the past year. The Committee held public meetings on September 12, 2014, December 12, 2014, March 13, 2015 and June 5, 2015. The Committee held public hearings on December 12, 2014 and June 5, 2015.

The Committee voted to recommend adoption of the following proposed rules and amendments.

A. Supreme Court Rule 7. Appeals in criminal or juvenile delinquency proceedings.

Supreme Court Rule 7. These proposed amendments would confirm the time within which an appeal in a criminal or juvenile delinquency proceeding must be filed.

In early 2014, the Court requested that the Advisory Committee on Rules consider whether Supreme Court Rule 7 should be amended. At the June 2014 meeting, Justice Lynn proposed adding the language, "or, in the case of a sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is imposed" to the last sentence of Supreme Court Rule 7(1)(B) and at the end of Rule 7(2). The Committee agreed to put this language out for public hearing in December.

At the December 2014 public hearing, Justice Lynn reminded the Committee that the proposal is designed to confirm that in a criminal or juvenile delinquency case, an appeal to the Supreme Court must be filed within 30 days from the imposition of the sentence. Justice Lynn explained that the proposal was prompted by a recent case, *State v. Mottola*, 166 N.H. 173 (2014), in which a sentence was imposed but the mittimus was not issued the same day. One of the questions raised on appeal was whether the 30 day appeal period runs from the date of the imposition of the sentence or from the issuance of the mittimus. The Court held that it was from the date of the imposition of the sentence. Although the Court concluded that the rule was clear on its face, the Court asked the Committee to review the rule to determine whether any amendment was advisable. Justice Lynn stated that the proposal the Committee put out for public hearing in December 2014 was made in response to the Court's request. He noted that Attorney Tim Gudas, Deputy Clerk of the Supreme Court, had submitted some helpful comments in an email dated December 12, 2014. Attorney Gudas suggested that the Committee consider amending the proposal to: (1) amend the rule for mandatory appeals as well; and (2) change the phrase "imposition of sentence" to "pronouncement of sentence."

Following some discussion after the December 2014 public hearing, the Committee voted to recommend that the Supreme Court adopt the proposal, as amended by the Committee to: (1) make the same language change to Supreme Court Rule 7(1)(A); (2) change the word "imposed" to "pronounced," and (3) add a comment referencing the Supreme Court's decision in *State v. Mottola*, 166 N.H. 173 (2014), as set forth in Appendix A.

B. Supreme Court Rule 12. Confidentiality of a Case Record or a Portion of a Case Record in a Supreme Court case.

Supreme Court Rule 12. These amendments would clarify that a ruling by a trial court, administrative agency or other tribunal on confidentiality will presumptively apply on appeal, but that the Supreme Court may determine on its own motion, or upon motion of the party, that that there is no statute, administrative or court rule, or other compelling interest that requires that the case record or portion of the case record be kept confidential.

In September 2014, the Court requested that the Advisory Committee on Rules consider a proposal to amend Supreme Court Rule 12(2)(a). *See* September 4, 2014 memorandum from Carolyn Koegler to the Advisory Committee on Rules. The rule currently states that if a trial court, administrative agency or other tribunal has determined that a case or a portion of a case record is confidential, then it will continue to be treated as confidential on appeal. The Court requested that the Committee consider whether the rule should be amended to give the Supreme Court the authority to revisit the issue of whether materials that have been sealed by the trial court should remain sealed on appeal. The Committee agreed to put the language proposed in the September 4, 2014 memo out for public hearing in December.

The Committee did not receive any written or oral comments on the proposal before or at the December 2014 public hearing. At the meeting following the public hearing, the Committee voted to recommend that the Court adopt the proposal to amend Supreme Court Rule 12, as set forth in Appendix B.

C. Supreme Court Rule 16 and Supreme Court Rule 20. Copy of Opinion; Non-Precedential Status of Orders

Supreme Court Rule 20. These proposed amendments would allow litigants to cite and discuss unpublished opinions, but also provide that they do not constitute binding precedent.

At the Committee's March 2015 meeting, Justice Lynn informed the Committee that a suggestion had been 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. He reported that the Court would like the Committee to consider whether the rule should be changed to allow litigants to cite and discuss unpublished opinions, but still provide that they do not constitute binding precedent.

Some Committee members noted that this issue has arisen in some federal courts and that at least one opinion may suggest that a bar on citations might be problematic from a constitutional perspective. Another Committee member noted that self-represented parties cite these orders, and that a rule of some kind would be helpful to clarify what the status of orders is. A third member inquired whether there is a way to search the orders. Justice Lynn reported 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 someone will be able to find for the older cases. Following some further discussion of the issue, and of proposed language, the Committee voted to put the proposal out for public hearing in June.

Attorney Lawrence Edelman testified at the June 2014 hearing in support of the proposed amendment. He noted that he had submitted written comments in a letter dated June 3, 2015, which was circulated to the Committee prior to the public hearing. He stated that the believes that this is a wonderful amendment that should be adopted as soon as possible. In response to an inquiry from a Committee member, he noted that there does appear to be an access gap as far as attorneys' ability to find orders, and that is it is not clear that everyone has equal access to the case law. At the moment, it is necessary to read through every order. However, he stated that he does not believe that it is necessary to wait for that change before adopting the rule change.

At the meeting following the public hearing, the Committee voted to recommend that the Court adopt the proposed changes to Supreme Court Rule 20 put out for public hearing as amended to add the language "Citation Format" to the title, number the last two paragraphs of the proposal section (3) and add the language, "except as provided in (2) above" after "may be to the New Hampshire Reports only" in the first sentence of the last paragraph. The proposed changes to Rule 20 are set forth in Appendix D. The Committee also voted to recommend that the language being added as the last two paragraphs of Rule 20 should be deleted from Supreme Court Rule 16(9), as set forth in Appendix C.

D. Supreme Court Rule 28. Parties' Designation

Supreme Court Rule 28. These proposed amendments would make clear that in cases in which a statute or a rule of court requires that the name of party be kept confidential, only the first letter of the forename and the first letter of the surname of that party shall be listed.

In February 2015, the Court asked the Committee to consider whether to recommend a change to Supreme Court Rule 28. At the March 2015 meeting, Justice Lynn explained to Committee members that 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 changed its practice to use only the individual's first name and surname on opinions and orders. Following consideration of a proposed amendment set forth in a February 11, 2015 memo from Carolyn Koegler, the Committee voted to put the proposal out for public hearing in June.

No comments on the proposal were submitted at or before the June public hearing. Following some brief discussion and upon motion made and seconded, the Committee voted to recommend that the Court amend Supreme Court Rule 28, as set forth in Appendix E.

E. Supreme Court Rule 40(12) and (13). Procedural Rules of the Committee on Judicial Conduct – Dispositions Following Hearing

Supreme Court Rule 40(12) and (13). These proposed amendments would resolve an inconsistency in paragraph 12, which sets forth the procedure to be followed when the Judicial Conduct Committee determines that a judge has committed a serious violation of the Code of Judicial Conduct and would clarify two procedural issues.

At its March 2015 meeting, the Committee considered a January 7, 2015 memorandum from Eileen Fox to Justice Lynn explaining that the Supreme Court had requested that the Committee review paragraph (12) of Rule 40, which sets forth the procedure to be followed when the Judicial Conduct Committee determines that a judge has committed a serious violation of the Code of Judicial Conduct. Specifically, the Court asked the Committee to review provisions (d) and (e) of Rule 40(12) and recommend an amendment or amendments to make the provisions consistent and clarify two procedural issues. The Committee also considered a March 12, 2015 memo from Carolyn Koegler setting forth a number of amendments to Supreme Court Rule 40(12) that Justice Lynn had proposed to address the Court's concerns. Following brief discussion, the Committee voted to put the proposal out for public hearing in June.

Members of the Judicial Conduct Committee reviewed the proposal put out for public hearing, raised concerns about it, and asked the Committee to consider revisions to the proposal. The proposed revisions are set forth in a May 25, 2015 memorandum from Carolyn Koegler, which the Committee considered at the June 2015 public hearing and meeting. Two members of the JCC, Chair Robert Wilson and Dana Zucker attended the June 5 public hearing as the JCC's representatives. Dr. Wilson testified at the public hearing and explained that the proposed amendments to Supreme Court Rule 40(12) and the additional proposed amendments to Supreme Court Rule 40(13) would make the sections of the rule consistent and clarify the process for the JCC.

Following some brief discussion and upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt the proposed amendments to Supreme Court Rules (12) and (13) set forth in the May 25 memorandum, as set forth in Appendices F and G.

F. Supreme Court Rule 42B. Character and Fitness Standards

Supreme Court Rule 42B. These proposed amendments would make technical and stylistic changes to the Rule.

At its March 2015 meeting, the Committee considered a February 13, 2015 letter from Sherry M. Hieber, General Counsel, Office of Bar Admissions asking the Committee to consider one substantive amendment to Supreme Court Rule 42B and a number of technical and stylistic changes to the rule.

Attorney Hieber's letter stated that the Character and Fitness Committee had considered and voted to recommend an amendment which would allow the disqualification of a bar 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."

Committee members Attorney Maureen Manning and Senator Dan Feltes agreed to seek input from those with expertise in the area of bar admissions, in particular, attorney Mitch Simon, who represents applicants before the Committee on Character and Fitness. Following some brief discussion and upon motion made and seconded, the Committee voted to put the proposal set forth in Attorney Hieber's February 13, 2015 letter out for public hearing in June.

Attorney Sherry Hieber appeared before the Committee at the June public hearing and testified in support of the proposal. Attorney Mitch Simon appeared before the Committee and testified against the proposal.

Committee members expressed concern about the proposal, noting that they were unable to find an example of when the proposed rule would apply that would not otherwise be covered by the existing rules and also that the proposal seemed to be vague and standardless, which raises some fairness concerns.

One Committee member noted that in addition to the substantive proposal to amend the rule, which was the subject of extensive discussion at the June 2015 public hearing, the proposal also makes technical and stylistic changes to the rule.

Upon motion made and seconded, the Committee voted to approve the changes contained in the public hearing notice, except for the change that would have added as XII language providing that an applicant for admission to the bar could be denied admission if he or she fails to sufficiently recognize the wrongfulness of his or her misconduct, even if the misconduct standing along is not significant enough to be disqualifying, as set forth in Appendix H.

G. Supreme Court Rule 51. Rulemaking Procedures

Supreme Court Rule 51. This proposed amendment would delete Supreme Court Rule 51 and replace it with a new rule. The new rule would make substantive changes to the rulemaking process.

At its September 2014 meeting, the Committee considered a September 8, 2014 memo from Carolyn Koegler setting forth the Court's request that the Committee form a working group to draft a proposal to amend Supreme Court Rule 51. The Court requested that the proposal: (1) shorten the length of time it takes for a proposal submitted to the Committee to be recommended to the Court (by requiring the Committee to report to the Court twice per year); (2) include a "fast track" provision for temporary rules and rule amendments that provides that the Court will notify someone from the Bar Association to request comment on the proposed temporary rule or rule amendment before it is adopted; and (3) provide for only one comment period, because the Court believes it may not be necessary to put the same proposal out for public comment both before and after it is recommended to the Court. Jeanne Herrick, Karen Anderson, Ray Taylor and Derek Lick agreed to serve on the subcommittee.

At the Committee's December 2014 meeting, Carolyn Koegler reported 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 met once in October for a general discussion about how members of the group believed the rulemaking process should be changed. Carolyn Koegler then drafted a proposed new rule designed to implement the suggestions made by members of the group and circulated the draft. The group met again on December 5 to review the draft. After making some changes to the proposed new rule, and following approval by the working group, Carolyn Koegler circulated the draft to the Advisory Committee on Rules for consideration at the December meeting.

Carolyn Koegler explained to Committee members at the December 2014 meeting that the most significant changes to the current process include:

- The proposed rule makes clear how someone is to submit a request for a rule change. The suggestion is sent to the Chair of the Advisory Committee on Rules;

- The Chair of the Advisory Committee on Rules reviews the suggestion. If the Chair determines that the suggestion calls for a technical change, would implement a change required by statute that permits no discretion in the drafting of the language of the rule or rule amendment, or concludes that exceptional circumstances justify expedited consideration of the suggestion, the Chair may submit the suggestion directly to the Court. Otherwise, the suggestion is added to the Committee's next agenda;

- If the rule suggestion goes to the Court, the Court follows a procedure appropriate for the type of suggestion;

- If the rule suggestion goes to the Committee, the Committee will solicit comment from those who are likely to be most affected by, or interested in, a suggested rule or rule amendment. Although the Committee may hold a public hearing on the proposal, it is not required to do so;

- The Committee reports suggestions for rules changes to the Court twice per year – on April 1, and on November 1;

- The Court requests comment on the suggestions almost immediately after they are submitted. The comment period is at least 30 days;

- The Court presumptively issues only two rules orders per year (late December/early January, for rules effective March 1 and late May/early June, for rules effective July 1).

After a brief discussion about the proposal, the Committee members agreed that the proponent of a rule change should state whether s/he wishes to be heard regarding the rule suggestion.

Another member observed that as currently written, the proposed new rule would have only one clerk or court administrator from the Circuit Court on the Committee. Committee members generally agreed that it would be important to continue to have one clerk or court administrator from each of the trial courts – the Superior Court and the Circuit Court. The Committee directed Carolyn Koegler to make this change to the proposed new rule.

Attorney Rice noted that the proposed new rule does not provide for the staggering of terms, but does provide that members serve for terms of three years. She noted that it would be important to stagger the terms, because if that is not done, then at the end of the three year term, every members of the Committee could be replaced by a new member. Committee members agreed that this would be a problem, because it is important to have at least some experienced members on the Committee every year.

There was some discussion about the language of the proposal set forth at Rule 51(d)(2)(D), which stated that one of the responsibilities of the Advisory Committee on Rules would be to "hold such public hearings as the Committee deems appropriate to receive comment from any member of the public, the bench or the bar on the suggested rule and rule amendments." Justice Lynn had raised concern in a December 8, 2014 memo to the Committee that this language might predispose the Committee to hold public hearings on all the suggested rules and rule amendments. He believes that that language should be rewritten to create a presumption that public hearings will not be held at the Committee level as follows, "To hold public hearings to receive comment from any member of the public, bench, or bar on the suggested rule and rule amendments in those unusual circumstances in which the Committee believes it appropriate to obtain additional information beyond the input it received from interested persons pursuant to subsection (d)(2)(B)."

After some concern was expressed by Committee members that Justice Lynn's proposed language would limit the Committee's authority to hold a public hearing, it was agreed that the language should be replaced by the following language, "to hold public hearings to receive comment from any

member of the public, bench or the bar on the suggested rule and rule amendments when the Committee believes it is appropriate to obtain additional information beyond the input it received from the interested persons pursuant to subsection (d)(2)(B)."

At the March 2015 meeting, Carolyn Koegler referred Committee members to two memos. One of the memos, dated February 6, 2015, attached a revised draft to the proposal to amend Supreme Court Rule 51 that included revisions Committee members had asked her to make to the draft it considered at the December meeting. Also attached to the February 6 memo was a copy of the State of Washington's rulemaking rule (upon which most of the proposed new rule 51 is based). A second memo, dated March 11, 2015, proposed which committee members should be assigned the initial one year term, two year term and three year term. This memo addressed a suggestion by a Committee member at the December 2014 meeting that the Court consider staggering terms of the Committee members.

One Committee member inquired whether it might make sense to have a provision, similar to the 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. Another 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 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.

A Committee member 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.

No comments on the proposal to amend Supreme Court Rule 51 were submitted at or before the June public hearing. Following some brief discussion, and upon motion made and seconded, the Committee voted to recommend that the Court amend Supreme Court Rule 51 as set forth in Appendix I.

H. Superior Court (Civ.) Rule 26. Depositions: Notice or Subpoena Directed to an Organization.

This proposed amendment would amend Rule 26 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions. This amendment would add a provision which would allow a party to name as a deponent a public or private corporation, a partnership, an association, or a governmental agency, and require the named organization to designate one or

more officers, directors, managing agents, or other persons who consent to testify on its behalf.

This proposal was first made by Judge McNamara in October 2013. He had requested that the Committee consider recommending the adoption of a rule or rules to allow depositions similar to those permitted by the Federal Rules of Civil Procedure 30(b)(6). The proposal was put out for public hearing in June 2014, the Committee voted to recommend it to the Court, and the recommendation was included in the Committee's 2014 Annual Report. Following the June 2014 public hearing and meeting, the Committee received a letter from attorney Irvin Gordon, expressing concerns about the proposal. In particular, attorney Gordon asserted that adopting the language of Federal Rule 30(b)(6) without adopting the language of Federal Rule 30(e)(1)(B), to allow a deponent to note "changes in form or substance and to submit such changes, in a post-deposition signed statement" would be unfair. The 2014 Annual Report indicated that the Committee had received this comment from attorney Irvin Gordon. The Court therefore took no action on the recommendation at that time, and asked that the Committee consider the concerns raised in Attorney Gordon's letter.

Prior to the Committee's September 2014 meeting, at Justice Lynn's request, Carolyn Koegler drafted some language to amend Superior Court Rule 26 to address the concern expressed in Attorney Gordon's June 6, 2014 letter. The proposed amendment would have carved out an exception to the rule that "no deposition as transcribed shall be changed or altered . . . ." for depositions taken pursuant to Rule 26(m) as follows:

> (f) No deposition, as transcribed, **[except depositions taken pursuant to Rule 26(m)]** shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies.
>
> **[In the case of a Rule 26(m) deposition, on request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. If the deponent makes changes in substance to the transcript or recording, the court, on motion of the opposing party, may order a further deposition of the person in question and may allocate the cost of taking a further deposition, as justice may require.]**

Carolyn Koegler distributed this additional proposed amendment to the Committee at the September 2014 meeting. During the discussion about the issue, a Committee member inquired whether the general New Hampshire rule prohibiting a deponent from making substantive changes on an errata sheet following a deposition should be changed. Committee members discussed whether it was more appropriate to have a rule mirroring Federal Rule of Civil Procedure 30(e), which allows witnesses to review the deposition transcript and make a list of changes in form or substance or whether it is better to retain the existing New Hampshire rule, which prohibits a witness from making substantive changes to deposition testimony, and to carve out an exception for depositions taken pursuant to proposed Superior Court Rule 26(m).

No resolution was reached on this issue, but one Committee member noted that he would like to see the proposed additional language put out for public hearing in December. The Committee members present directed Carolyn Koegler to include the proposal to amend Rule 26 to add subsection (m) and amend section (f) in the public hearing notice for December. It was agreed that the Committee would vote in December prior to the public hearing, to accept comment on the proposal.

Justice Lynn agreed to ask Judge McNamara to provide his opinion about the concerns raised in Attorney Gordon's letter and the proposed language to amend section (f).

Attorney Herrick agreed to prepare a memo about the issue for consideration by the Committee on Cooperation with the Courts, and ask the Committee on Cooperation with the Courts to comment on the proposal.

At the December 2014 public hearing, Justice Lynn informed Committee members that he believes that the proposed amendment to Rule 26(f), which had been drafted in response to the concern Attorney Irvin Gordon had raised, may create more trouble than it is worth.

Justice Lynn explained that, following the September meeting, he had asked Judge McNamara to provide input on attorney Gordon's letter. In a letter dated October 16, 2014 (distributed to the Committee by email), Judge McNamara provided a very lengthy response. Justice Lynn explained that the letter basically says that adopting a rule on organizational depositions is a good thing, but that it is unnecessary to amend Rule 26(f) because the way it is worded now would allow the Court to have the discretion to allow a re-deposition if necessary. If someone in the course of correcting his or her deposition actually changes it in substance, the other party can ask the court

for a remedy. The Court would have discretion to say, "you cannot make a change," or "I am going to allow you to re-depose the witness" or the like to address any improper behavior. A comment from Attorney David Slawsky in a letter dated October 16, 2014 expressed a similar view.

At the meeting following the public hearing, Committee members generally agreed that the additional proposed amendment to Rule 26(f) to change the rule regarding altering a deposition transcript with respect to Rule 26(m) depositions is unnecessary. One Committee member noted that Judge McNamara had suggested on page 8 of his letter that the Committee might wish to consider adding a comment to Rule 26(m).

Following some further discussion and upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed amendment to add subsection (m) to Rule 26 and to recommend adding the comment Judge McNamara proposes in page 8 of his letter, as set forth in Appendix J, but not adopt the proposed amendment to Rule 26(f).

I. Circuit Court District Division Rule 2.18. Application to annul record of conviction and sentence.

Circuit Court – District Division Rule 2.18. These proposed amendments are designed to facilitate electronic filing and make other substantive changes to the rule to streamline the annulment process in the District Division.

At the March 2015 meeting, the Committee considered a proposal submitted by Pat Ryan in an email dated February 19, 2015. Attorney Ryan explained to the Committee that the proposed amendments to the rule are designed to: (1) facilitate e-filing, so that the petition to annul can be filed without someone having to swear to the application and upload it; (2) require the Clerk 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; and (3) make clear that there will not necessarily be a hearing in each case, but that if a hearing is requested, it will be scheduled.

In response to some concerns expressed by Committee members about the language of the proposal, Pat Ryan agreed to make some changes to it. The Committee voted to put the proposal, as amended, out for public hearing in June.

No comments on the proposal were submitted at or before the June public hearing. Upon motion made and seconded, the Committee voted to

recommend the amendments to Circuit Court-District Division Rule 2.18, as set forth in Appendix K.

J. Rules of Professional Conduct. ABA 20/20 Initiative.

Rule of Professional Conduct 1, 1.6, 5.3 and 5.5, Ethics Committee Comments and ABA Comments to the Model Rules. The proposed amendments to the New Hampshire Rules of Professional Conduct were recommended by the New Hampshire Bar Association Ethics Committee. They were prompted by the Ethics Committee's review of recent changes made to the American Bar Association ("ABA") Model Rules of Professional Conduct and accompanying comments in light of advances in technology and global legal practice development. The ABA reports and background materials may be found at http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

The Ethics Committee and the Advisory Committee on Rules are recommending amendments to only four of the Professional Conduct Rules. However, each New Hampshire rule potentially impacted by the ABA Model Rules of Professional Conduct updates is set forth in this report. Furthermore, although the Supreme Court does not adopt or amend the ABA Model Rules, ABA Comments or Ethics Committee Comments, both sets of comments, as amended by each Committee, are included here. This is because both sets of comments are included on the Court Rules webpage maintained by the Supreme Court. The webpage should be updated to reflect the changes that have been made.

In June 2013, the Advisory Committee on Rules considered a March 1, 2013 letter from the ABA Center on Professional Responsibility to Chief Justice Dalianis. The letter, which Chief Justice Dalianis forwarded to the Committee, "encourage[s] Supreme Courts and State Bar Associations to review their rules of professional conduct, regulation and admission to the bar as a result of the recent revisions to the ABA Model Rules." The Committee directed me to send the letter to the New Hampshire Bar Association Ethics Committee.

In a letter dated October 23, 2013, Attorney Goodwin responded to the request on behalf of the Ethics Committee. He reported that the Ethics Committee had completed its review of the revisions to the Model Rules of Professional Conduct and the ABA comments approved by the American Bar Association through February 11, 2013 and set forth the Ethics Committee's recommendation with respect to each revision made to the ABA Model Rules.

Following a brief discussion at its meeting in December 2013, the Committee directed Carolyn Koegler to forward Attorney Goodwin's letter to the Professional Conduct Committee to request the Professional Conduct Committee's comment on the Ethics Committee's proposal.

Attorney David Rothstein responded to the Committee's request by letter dated May 22, 2014. Attorney Rothstein reported that the PCC had only one concern about the Ethics Committee's proposal. For the reasons set forth in the letter, the PCC recommended not adding a sentence proposed by the Ethics Committee to Comment [4] of Rule 1.4 of the ABA model. Comment [4] states that a "lawyer should promptly respond to or acknowledge client communications." The Ethics Committee recommended adding the sentence "A lawyer need not necessarily respond to or acknowledge client communications where such response or acknowledgement is impractical, unreasonable, or inappropriate." The Professional Conduct Committee believes that this sentence "undercuts the clarity of the ABA's statement of a lawyer's basic obligations with regard to client communications," and should therefore be removed from the Ethics Committee proposal.

Following brief discussion at the June 2014 meeting, and upon motion made and seconded, the Committee voted to put the Ethics Committee's recommendations to amend the New Hampshire Rules of Professional Conduct, set forth in the October 23, 2013 letter from Attorney Rolf Goodwin, out for public hearing, as amended to remove the sentence, "A lawyer need not necessarily respond to or acknowledge client communications where such response or acknowledgement is impractical, unreasonable, or inappropriate."

Disciplinary Counsel Sara Greene was present at the public hearing in December 2014 and stated that the Attorney Discipline Office has no concerns about the proposals. No other comments on these proposals were offered prior to or during the public hearing. Following brief discussion and upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt the proposals made by the Ethics Committee, as set forth in Appendices L through X.

On January 26, 2015, Carolyn Koegler received an email from Attorney Rolf Goodwin stating that the Ethics Committee had revised the Ethics Committee comment to Rule 1.18, and that the revision was reviewed by the Bar Association Board of Governors. As Attorney Goodwin noted in his email, it is unnecessary for the Advisory Committee on Rules to consider the amendment because the Ethics Committee comments are maintained by the Ethics Committee, just as the ABA comments are maintained by the ABA, and the Supreme Court publishes the comments for information purposes. The

Comment set forth in Appendix P reflects the amendments to the Ethics Committee comments to Rule 1.18 set forth in attorney Goodwin's January 26, 2015 email.

K. Technical Amendments

Throughout the year, the Committee voted to recommend certain proposed technical amendments to court rules without holding public hearings on the proposals.

1. Supreme Court Rules 1 and 3

At its June 2015 meeting, the Committee considered a June 23, 2015 memorandum from Carolyn Koegler proposing that references to "registers of probate" be deleted from Supreme Court Rules 1 and 3.

Following a brief discussion, Committee members agreed that this change is technical and, upon motion made and seconded, voted to recommend that the Court adopt the proposed change set forth in Appendices Y and Z.

2. Circuit Court – Family Division Rule 2.29

At its meeting in March 2015, the Committee considered an issue Attorney Joshua Gordon raised in a March 11, 2015 email. Circuit Court – Family Division Rule 2.29(A) currently reads:

> A. *Uncontested Matters.* Decrees in uncontested cases where the parties have filed a permanent agreement shall become final on the date signed by the judge pursuant to RSA 490-D:9, unless otherwise specified by the Court.

According to Attorney Gordon, this leaves it unclear, in cases in which family law cases are heard by a judge only, with no master, what the effective date of an uncontested judge-only decree would be. This is because rule 2.29(A) uses the word "pursuant" in reference to RSA 490-D:9 and RSA 490-D:9 seems to assume the presence of a master and then a judge. When that is the case, there is no problem. However, today many or most family law cases are heard by a judge only, with no master. Attorney Gordon suggested in his March 11, 2015 email that one solution would be to replace the words "pursuant to" with a comma and a *see* cite. Attorney Ryan stated that he would explore this issue with the circuit court administration and would propose a solution.

At the June 2015 meeting, the Committee considered an April 2, 2015 email from attorney Ryan proposing that Family Division Rule 2.29A be amended to insert the words "or countersigned by a judge" prior to the words, "pursuant to RSA 490-D:9." Following some discussion, and upon motion made and seconded, the Committee voted to recommend that the Court adopt the proposed amendment to Family Division Rule 2.29(A), as set forth in Appendix AA.

L. Temporary Rules Currently In Effect

Throughout the year, the Supreme Court adopted a number of rules and rule amendments on a temporary basis and referred those rules to the Committee for its recommendation as to whether the rules should be adopted on a permanent basis.

1. Bar Admissions

Supreme Court Rule 42(IV). At its March 13, 2015 meeting, the Committee considered an amendment to Supreme Court Rule 42(IV) which was adopted on a temporary basis by Supreme Court Order dated December 29, 2014. The temporary amendments allow the disclosure of name-specific pass/fail information to the law schools and clarify the circumstances under which the Board of Bar Examiners and Character and Fitness Committee may disclose otherwise confidential information. The Committee voted to put the temporary amendment out for public hearing in June.

No comments on the temporary rule were received prior to or during the June 5, 2015 public hearing. Upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt, on a permanent basis, the temporary rule amendment set forth in Appendix BB.

2. Judicial Conduct Committee

Supreme Court Rule 40(11)(j). At its March 13, 2015 meeting, the Committee considered a temporary amendment to Supreme Court Rule 40(11)(j) which was adopted on a temporary basis by Supreme Court Order dated April 4, 2014. The temporary amendments made some technical changes to the rule and adopted the same amendment recently adopted to govern media access to proceedings in the trial courts to clarify the presumption that the photographing, recording and broadcasting of Judicial Conduct Committee Proceedings that are open to the public is permissible.

The Committee voted to put the temporary amendment out for public hearing in June.

No comments on the temporary rule were received prior to or during the June 5, 2015 public hearing. Upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt, on a permanent basis, the temporary rule amendment set forth in Appendix CC.

3. Superior Court Rules (Crim.)

Superior Court (Crim.) Rule 98. At its March 13, 2015 meeting, the Committee considered a temporary amendment to Rule 98 of the Rules of the Superior Court of the State of New Hampshire Applicable in Criminal Cases Filed in Superior Court. The temporary amendments were adopted by Supreme Court order dated February 20, 2014. The amendments make structural changes, change how discovery deadlines are calculated, and add a provision regarding dispositional conferences. The Committee voted to put the temporary amendments out for public hearing in June.

No comments on the temporary amendments were received prior to or during the June 5, 2015 public hearing. Upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt, on a permanent basis, the temporary rule amendment set forth in Appendix DD.

4. Proof of Validity of Will/Trust

Circuit Court – Probate Division Rule 96-A. At its March 13, 2015 meeting, the Committee considered this temporary rule, adopted by Supreme Court Order dated December 29, 2014. The temporary rule, prompted by recent statutory changes to the Uniform Trust Code, provide the procedure to allow an individual to petition the court to declare a will or trust valid. The Committee voted to put the temporary rule out for public hearing in June.

No comments were received on the temporary rule prior to or during the June 5, 2015 public hearing. Upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt, on a permanent basis, the temporary rule set forth in Appendix EE.

5. Gestational Carrier Agreements – Parentage Orders

Circuit Court – Probate Division Rule 94. At its March 13, 2015 meeting, the Committee considered this temporary rule, adopted by Supreme Court order dated December 29, 2014. The temporary rule, prompted by the

legislature's repeal of the old law regarding surrogacy and enactment of a comprehensive law to govern surrogacy and other reproductive technologies, provides the procedure for petitioning the Circuit Court for a parentage order. The Committee voted to put the temporary rule out for public hearing in June.

No comments on the temporary rule were received prior to or during the June 5, 2015 public hearing. Upon motion made and seconded, the Committee voted to recommend that the Supreme Court adopt, on a permanent basis, the temporary rule set forth in Appendix FF.

The Committee did not vote to recommend that the Supreme Court hold a public hearing on its annual submission.

Very Truly Yours,

Carolyn A. Koegler
Secretary

APPENDIX A

Amend Supreme Court Rule 7 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 7. Appeal from Trial Court Decision on the Merits.

(1)(A) *Mandatory appeals.*

Unless otherwise provided by law or by these rules, a mandatory appeal, other than an appeal in a parental notification case under RSA 132:34, shall be by notice of appeal in the form of notice of appeal approved by the supreme court for the filing of a mandatory appeal ("Notice of Mandatory Appeal" form). Such an appeal shall be filed by the moving party within 30 days from the date on the clerk's written notice of the decision on the merits **[or, in the case of a sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is pronounced]**.

(B) *Other appeals from trial court decisions on the merits.*

The supreme court may, in its discretion, decline to accept an appeal, other than a mandatory appeal, or any question raised therein, from a trial court after a decision on the merits, or may summarily dispose of such an appeal, or any question raised therein, as provided in Rule 25. Unless otherwise provided by law or by these rules, an appeal from a trial court decision on the merits other than a mandatory appeal shall be by notice of appeal in the form of notice of appeal approved by the supreme court for the filing of such an appeal ("Notice of Discretionary Appeal" form). Such an appeal shall be filed by the moving party within 30 days from the date on the clerk's written notice of the decision on the merits **[or, in the case of a sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is pronounced]**.

(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-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-decision motions will not stay the running of the appeal period unless the trial court

waives the untimeliness within the appeal period. In the absence of an express waiver of the untimeliness made by the trial court within the appeal period, the appeal period is not extended even if the trial court rules on the merits of an untimely filed post-decision motion. Successive post-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* Super. Ct. (Crim.) Rule 59-A; Super. Ct. (Civ.) Rule 12(e).

In criminal appeals, the time for filing a notice of appeal shall be within 30 days from the date of sentencing or the date of the clerk's written notice of disposition of post-decision motions, whichever is later, provided, however, that the date of the clerk's written notice of disposition of post-decision motion shall not be used to calculate the time for filing a notice of appeal in criminal cases if the post-decision motion was filed more than 10 days after sentencing.

(2) An appeal shall be deemed filed when the original and all copies of the notice of appeal in proper form, together with the filing fee, are received by the clerk of this court within 30 days from the date on the clerk's written notice of the decision **[or, in the case of a sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is pronounced]**.

(3) An appeal permitted by law on a different form and by a different procedure shall be deemed timely filed when it is received by the clerk of this court on the form and by the procedure prescribed by law.

(4) All parties to the proceedings in the court from whose decision on the merits the appeal is being taken shall be deemed parties in this court, unless the moving party shall notify the clerk of this court in writing of his belief that one or more of the parties below has no interest in the outcome of the transfer. The moving party shall mail a copy of the letter first class, or give a copy, to each party in the proceeding below. A party thus designated as no longer interested may remain a party in this court by notifying the clerk of this court, with notice mailed first class or given to the other parties, that he has an interest in the transfer. Parties supporting the position of the moving party shall meet the time schedule provided for that party.

(5) If a timely notice of appeal is filed by a party, any other party may file a notice of cross-appeal within 10 days from the date on which the first notice of appeal was filed and shall pay a filing fee therewith.

(6)(A) The appealing party in a mandatory appeal shall attach to the notice of appeal the decision below, the clerk's written notice of the decision below,

any order disposing of a timely-filed post-trial motion, and the clerk's written notice of any order disposing of a timely-filed post-trial motion.

(B) The appealing party in an appeal other than a mandatory appeal shall attach to the notice of appeal the decision below, the clerk's written notice of the decision below, any order disposing of a timely-filed post-trial motion, and the clerk's written notice of any order disposing of a timely-filed post-trial motion. Any other pleadings and documents that the appealing party believes are necessary for the court to evaluate the specific questions raised on appeal and to determine whether the appeal is timely filed shall be filed as a separate appendix. The appendix shall contain a table of contents referring to numbered pages, and only 8 copies shall be filed. Note: Also see Rule 26(5). If a ground for appeal is the legal sufficiency of the evidence, the question in the notice of appeal form raising that ground shall contain a succinct statement of why the evidence is alleged to be insufficient as a matter of law.

[Comment

The language, "or, in the case of a sentence imposed in a criminal or juvenile delinquency proceeding, within 30 days of the date the sentence is pronounced" was added to the last sentence of sections (1)(A) and (1)(B) and to section (2) in response to this court's decision in *State v. Mottola*, 166 N.H. 173 (2014).]

APPENDIX B

Amend Supreme Court Rule 12 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 12. Requests for Confidentiality of Case Records; Access to Case Records

(1) **Supreme Court Records Subject to Public Inspection.**

(a) General Rule. In all cases in which relief is sought in the supreme court, all pleadings, docketed entries, and filings related thereto (hereinafter referred to as "case records") shall be available for public inspection unless otherwise ordered by the court in accordance with this rule.

(b) Exceptions. The following categories of case records are not available for public inspection:

(1) records of juvenile cases, including cases of delinquency, abuse or neglect, children in need of services, termination of parental rights, and adoption, which by statute are confidential;

(2) records of guardianship cases filed under RSA chapter 463, but only to the extent that such records relate to the personal history or circumstances of the minor and the minor's family, see RSA 463:9;

(3) records of guardianship cases filed under RSA chapter 464-A, but only to the extent that such records directly relate to alleged specific functional limitations of the proposed ward, see RSA 464-A:8;

(4) applications for a grand jury and grand jury records, which by statute and common law are confidential;

(5) records of other cases that are confidential by statute, administrative or court rule, or court order.

(c) Burden of Proof. The burden of proving that a case record or a portion of a case record should be confidential rests with the party or person seeking confidentiality.

(d) Notwithstanding anything in this rule to the contrary, the supreme court may make public any order or opinion of the supreme court dismissing,

declining, summarily disposing of, or deciding any case. Information which would compromise the court's determination of confidentiality, e.g., the name of a juvenile, shall be omitted or replaced by a descriptive term.

(2) **Procedure For Requesting Confidentiality of a Case Record or a Portion of a Case Record in a Supreme Court Case.**

(a) Case Record or Portion of Case Record That Has Already Been Determined to be Confidential. The appealing party shall indicate on the notice of appeal form or in the appeal document, e.g., appeal from administrative agency, that the case record or a portion of the case record was determined to be confidential by the trial court, administrative agency, or other tribunal, and shall cite the authority for confidentiality, e.g., the statute, administrative or court rule, or court order providing for confidentiality. Upon filing, the portion of the case record determined to be confidential by the trial court, administrative agency, or other tribunal shall remain confidential**[, unless and until the court determines on its own motion or the motion of a party that there is no statute, administrative or court rule, or other compelling interest that requires that the case record or portion of the case record be kept confidential]**. Whenever a party files a pleading or other document that is confidential in part or in its entirety, the party shall identify, by cover letter or otherwise, in a conspicuous manner, the portion of the materials filed that is confidential.

(b) Cases in Which There Has Been No Prior Determination of Confidentiality. The following procedure shall be followed when a party or other person with standing seeks to have the case record or a portion of the case record determined to be confidential by the supreme court:

(1) Any party or other person with standing who seeks a determination that a case record or a portion of a case record is confidential shall file a motion to seal the case record or the portion of the case record in question. The motion shall state the authority for confidentiality, i.e., the statute, administrative or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. Upon filing of the motion to seal, the case record or the portion of the case record which is the subject of the motion shall be kept confidential pending a ruling on the motion.

(2) Within 30 days of filing, a motion to seal will be reviewed by a single justice of the court who shall determine whether the case record or the portion of the case record that is the subject of the motion shall be confidential or who may refer the motion to the full court for a ruling.

(3) An order will be issued setting forth the ruling on the motion to seal.

(c) Court Action When Confidentiality is Required.

(1) The failure of a party or other person with standing to request that a case record or a portion of a case record be confidential shall not preclude the court from determining on its own motion that a statute, administrative or court rule, or other compelling interest requires that a case record or a portion of a case record proceeding be kept confidential.

(2) Before sealing a case record or a portion of a case record other than a case record or a portion of a case record that was determined to be confidential by the trial court, administrative agency, or other tribunal, a single justice or the court shall determine that there is a basis for keeping the case record confidential.

(3) If a single justice or the court determines that a case record or a portion of a case record should be confidential, an order will be issued setting forth the ruling.

(d) Access to Supreme Court Orders On Confidentiality. Every order of the supreme court that a case record or a portion of a case record is confidential shall be available for public inspection. Information which would compromise the court's determination of confidentiality, e.g., the name of a juvenile, shall be redacted.

(3) **Procedure For Seeking Access To Case Records That Have Been Determined to be Confidential.**

(a) A person who is neither a party nor counsel in a case and who seeks access to a case record or portion of a case record that has been determined ~~by the supreme court~~ to be confidential shall file a petition with the court requesting access to the record in question.

(b) Upon receipt of the petition, an order of notice shall be issued to all parties and other persons with standing in the case.

(c) A single justice of the supreme court or a judicial referee appointed by the court shall examine the case record in question to determine whether there is a basis for nondisclosure.

(d) An order shall be issued setting forth the justice's or referee's ruling on the petition, which shall be made public. In the event that the justice or referee determines that the records are confidential, the order shall include findings of fact and rulings of law that support the decision of nondisclosure.

(e) Within 10 days of the date of the clerk's notice of the justice's or referee's decision, any party or person with standing aggrieved by the decision may file a motion for review by the full court.

APPENDIX C

Amend Supreme Court Rule 16(9) as follows (deleted material is in ~~strikethrough~~ format):

(9) All references in a brief or memorandum of law to the appendix or to the record must be accompanied by the appropriate page number.

~~Citations to Supreme Court of the United States cases that cannot be made to the official *United States Reports* or to the *Supreme Court Reporter* shall include the month, day, and year of decision or a reference to *United States Law Week*. Citations to other federal decisions not presently reported shall identify the court, docket number, and date.~~

~~Citations to the decisions of this court may be to the New Hampshire Reports only. Citations to other State court decisions may either be: (a) to the official report and to the West Reporter system, with the year of decision; or (b) to the West Reporter only, in which case the citation should identify the State court by name or level, and should mention the year of decision.~~

APPENDIX D

Amend Supreme Court Rule 20 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 20. Copy of Opinion; Non[-]precedential Status of Orders[; Citation Format].

(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) Non**[-]**precedential 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]** ~~and shall not be cited~~ in ~~any~~ pleadings or rulings in any court in this state**[, so long as it is identified as a non-precedential order. Such non-precedential 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). **[All citations to non-precedential orders shall identify the court, docket number and date.**

[(3) Citations to Supreme Court of the United States cases that cannot be made to the official *United States Reports* or to the *Supreme Court Reporter* shall include the month, day, and year of decision or a reference to *United States Law Week*. Citations to other federal decisions not presently reported shall identify the court, docket number, and date.

Citations to the decisions of this court may be to the New Hampshire Reports only, except as provided in (2) above. Citations to other State court decisions may either be: (a) to the official report and to the West Reporter system, with the year of decision; or (b) to the West Reporter only, in which case the citation should identify the State court by name or level, and should mention the year of decision.]

APPENDIX E

Amend Supreme Court Rule 28 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 28. Parties' Designation.

(1) (a) In a case entered by a petition requesting the supreme court to exercise its original jurisdiction, the party filing the petition shall be designated as the petitioner, even though the party may have filed the petition in the supreme court by reason of proceedings pending in a trial court or in an administrative agency in which the party is the defendant. In all other types of cases entered, the parties shall retain their trial court or administrative agency designations as plaintiffs and defendants.

(b) When a statute or a rule of court requires that the name of a party be kept confidential, the **[first letter of the]** forename and first letter of the surname of that party shall be listed only, unless another form of listing the party's name is preferable in the circumstances of the case.

(2) Unless the supreme court expressly orders differently, cases in which the State, a State agency, or a State official is a party, the State's name shall be listed as "The State of New Hampshire"; the name of the State agency shall be preceded by the words "New Hampshire", *e.g.,* "New Hampshire Department of Health and Welfare"; the name of a State division shall be preceded by the words "New Hampshire" but shall not mention the parent agency, e.g., "New Hampshire Division of Human Services"; and the title of a State official, but not his name, shall be listed, *e.g.,* "Secretary of State". If the title of a State official is identical to that of a municipal or county official, the State official's title shall be preceded by the words "New Hampshire".

(3) The supreme court may process and report a case under a new name or names.

APPENDIX F

Amend Supreme Court Rule 40(12) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(12) *Dispositions Following Hearing.*

(a) The committee shall render its decision promptly after the hearing.

(b) If the committee decides that a violation of the Code of Judicial Conduct has not been established, the proceeding shall be dismissed, with or without a caution, and the judge**[, hearing counsel]** and the reporter shall be so notified.

(c) **[*Violation Not Warranting Formal Discipline.*]** If the committee determines, by the affirmative vote of at least seven of its members, that there has been a violation of the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the supreme court, it shall dispose of the matter by resolution without formal discipline, with or without consent of the judge. Such disposition may take the form of issuing a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, or other similar remedial action, or any combination of the foregoing. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with a resolution without formal discipline. If a proceeding is disposed of by resolution without formal discipline ~~pursuant to this subsection (c),~~ the committee shall prepare a report of its findings and disposition, ~~which shall be available for public inspection.~~ **[which shall be filed in the public docket of the committee. Any member who dissents from the determination of the committee may prepare a minority report which shall be appended to the report of the committee. A copy of the decision shall be sent to the judge and committee hearing counsel.]** Disclosure to the reporter shall be ~~limited~~ as provided in subsection (3)(d)(2) of this rule.

[(1) If the judge disagrees with the findings or recommendations reached by the committee, the judge may, within 15 days of the notice of the decision of the committee, file a request with the supreme court for a *de novo* hearing. If such a request is filed, only the certified statement of formal charges and the judge's answer shall be filed with the court by the committee, and the supreme court shall appoint a judicial referee to conduct the hearing. The hearing shall be public. After hearing, the

judicial referee shall issue a decision including any findings and recommendations for sanctions. The decision of the judicial referee together with any other pleadings and exhibits introduced at the hearing, shall be filed by the judicial referee with the supreme court which shall issue a notice of decision to the judge, committee hearing counsel and the committee. The supreme court shall order a transcript of the hearing before the judicial referee to be prepared and filed with the court.

(2) If the judge does not file a request for a *de novo* hearing within 15 days of the notice of decision of the committee, the findings and disposition of the committee shall be final. The committee shall file the report of its findings and disposition with the supreme court for informational purposes only.]

(d) **[*Violation Warranting Formal Discipline.*]** If the committee determines, by the affirmative vote of at least seven of its members, that the judge complained against has violated the Code of Judicial Conduct and that the violation is of a serious nature so as to warrant formal disciplinary action by the supreme court, the committee shall prepare a summary report of the proceeding and of its findings **[which shall be filed in the public docket of the committee]**. Such report shall include the recommendations of the committee (if any) concerning the sanctions to be imposed. Any member who dissents from the determination of the committee may prepare a minority opinion which shall be appended to the report of the committee. **[A copy of the decision shall be sent to the judge and committee hearing counsel, and the committee shall also notify the supreme court that a decision finding serious judicial misconduct has been docketed. Disclosure to the reporter shall be as provided in subsection (3)(d)(2) of this rule.]** ~~The committee shall also prepare a record of the proceeding, which shall include the committee's formal statement of charges, the judge's answer, any other pleadings, exhibits, and a transcript of the hearing. The committee's report and the record of the proceeding, certified by the chair or the executive secretary, shall be filed with the supreme court. Said report and record and all further proceedings before the court shall be public. Contemporaneously with such filing, copies shall be served on the judge, in the manner provided in section 9(a), and proof of such service shall be filed with the court.~~

[(1) If the judge disagrees with the findings or recommendations reached by the committee, the judge may, within 15 days of the notice of the decision of the committee, file a request with the supreme court for a *de novo* hearing. If such a request is filed, only the certified statement of formal charges and the judge's answer shall be filed with the court by the committee, and the supreme court shall appoint a judicial referee to

conduct the hearing. The hearing shall be public. After hearing, the judicial referee shall issue a decision including any findings and recommendations for sanctions. The decision of the judicial referee together with any other pleadings and exhibits introduced at the hearing, shall be filed by the judicial referee with the supreme court which shall issue a notice of decision to the judge, committee hearing counsel, and the committee. The supreme court shall order a transcript of the hearing before the judicial referee to be prepared and filed with the court.

(2) If the judge does not file a request for a *de novo* hearing within 15 days of the notice of decision of the committee, the committee shall immediately file its certified decision together with the statement of formal charges, the judge's answer and any other pleadings and exhibits with the supreme court. The supreme court shall order a transcript of the hearing before the committee to be prepared and filed with the court. The decision and record of the committee and all further proceedings before the court shall be public.

~~(c) If the committee determines, by the affirmative vote of at least seven of its members, that the judge complained against has violated the Code of Judicial Conduct, and the judge disagrees with the findings or recommendations reached by the committee, the judge may, within 15 days of the notice of the decision of the committee, file a request with the supreme court for a *de novo* hearing. If such a request is filed, only the statement of formal charges and the judge's answer shall be filed by the committee, and the supreme court shall appoint a judicial referee to conduct the hearing. After hearing, the judicial referee shall issue a decision including any findings and recommendations for sanctions. A record of the proceedings shall be prepared, which shall include the statement of formal charges, the judge's answer and any other pleadings , exhibits and a transcript of the hearing. The decision and record shall be filed with the supreme court.~~

APPENDIX G

Amend Supreme Court Rule 40(13) (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

(13) *Review by Supreme Court.*

Upon receipt of a report of the findings and record of the proceedings before the committee under section 12(d)**[(2)]**, or after a *de novo* hearing before a ~~J~~**[j]**udicial ~~R~~**[r]**eferee under **[sub]**section**[s]** 12~~(e)~~**[(c)(1) and 12(d)(1)]**, the supreme court shall set the matter down for briefing and oral argument which shall be open to the public. **[Any findings or discipline imposed under these three subsections shall not be final or in effect pending review by the court.]** At such oral argument the committee and the judge complained against shall have the opportunity to appear in person and/or by counsel. The supreme court shall file a written opinion and judgment determining whether the findings of fact are supported by the record, and directing such disciplinary action as it finds just and proper, or exonerating the judge complained against.

APPENDIX H

Amend Supreme Court Rule 42B as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 42B. Character and Fitness Standards.

(I) **Admission a privilege, not a right.** The right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business. It is a ~~peculiar~~ privilege granted ~~and continued~~ only to those who demonstrate ~~special fitness in intellectual attainment and in~~ **[good]** moral character **[and fitness to practice law]**.

(II) **Requirement to establish character and fitness.** All persons who desire to be admitted to practice law shall be required to establish their moral character and fitness to the satisfaction of the Standing Committee on Character and Fitness of the Supreme Court of New Hampshire in advance of such admission.

(III) **Burden of proof on the applicant.** Any person who seeks admission to practice law in the State of New Hampshire shall at all times have the burden of proving his or her good moral character and fitness before the Committee on Character and Fitness ~~of~~ **[and]** the Supreme Court of New Hampshire. This burden requires both the production of evidence and the persuasion of the Committee and Court as to the applicant's good moral character and fitness.

(IV) **Proof by clear and convincing evidence.** The applicant must prove his or her good moral character and fitness by clear and convincing evidence.

(V) **Doubts resolved in favor of protecting the public.** Any doubt concerning an applicant's character and fitness shall be resolved in favor of protecting the public by denying admission to the applicant.

(VI) **Positive Characteristics To Be Considered.** The Committee will consider **[the following]** positive characteristics in evaluating an applicant's character and fitness to practice law ~~including~~:

(1) The ability to reason, recall complex factual information and integrate that information with complex legal theories;

(2) The ability to communicate with clients, attorneys, courts, and others with a high degree of organization and clarity;

(3) The ability to use good judgment on behalf of clients and in conducting one's professional business;

(4) The ability to avoid acts which exhibit disregard for the rights or welfare of others;

(5) The ability to act diligently and reliably in fulfilling one's obligations to clients, attorneys, courts, and others;

(6) The ability to use good judgment in financial dealings on behalf of oneself, clients, and others; and

(7) The ability to comply with deadlines and time constraints.

(VII) **Grounds to deny admission.** Any of the following may be grounds for the Committee to recommend denial of admission for lack of character or fitness:

(1) ~~Insufficient~~ **[Failure to possess sufficient]** positive characteristics set forth in section (VI) above.

(2) Acts Involving Dishonesty, Fraud, Deceit or Misrepresentation.

Character and Fitness Committee Comment

"In order to maintain public confidence in the bar and trust among members of the bar, attorneys must be honest in their dealings." *Application of T.J.S.*, 141 N.H. 697, 702 (1997). An applicant's record of conduct should demonstrate the honesty which future clients, adversaries, courts and others have a right to expect of a lawyer.

[The committee may consider such acts regardless of] ~~It is irrelevant~~ whether the applicant has been charged with and/or convicted of a crime as result of such an act **[and regardless of]**~~. It is also irrelevant~~ whether the act was committed in the applicant's personal life or in the course of an occupation or employment.

(3) False or Misleading Statements or Omissions in the Application Process.

Character and Fitness Committee Comment

Much of the information that the Committee uses in assessing an applicant's character and fitness is contained in the Petition and Questionnaire for Admission to

the Bar of New Hampshire. The information in the Petition and Questionnaire is also one of the sources of information used for requesting further information from the applicant and in conducting further investigation. As such, it is crucial that applicants be absolutely candid**[, honest]** and complete in disclosing the information requested in the form or in response to further inquiries by the Committee.

(4) Lack of Candor in Dealing with the Committee or Staff.

Character and Fitness Committee Comment

As with false and misleading statements or omissions during the application process, the failure of an applicant to deal with the Committee or its staff in a candid **[and forthright]** manner may result in recommendation of denial of admission.

(5) Failure to Cooperate with or to Provide Information to the Committee or its Staff.

Character and Fitness Committee Comment

Because the burden of proving good moral character and fitness is on the applicant, the Committee and its staff often require applicants to provide further information and/or documentation concerning matters of concern to them. Failure to provide such information and/or to cooperate with the Committee and its staff in their efforts to fully investigate matters may make it impossible for the Committee to complete its task of assessing the applicant's character and fitness and may thereby result in a recommendation to deny admission.

(6) Criminal Acts.

Character and Fitness Committee Comment

Conduct which is criminal in nature which the Committee finds to have occurred may be grounds for recommending denial of admission whether or not the conduct results in a prosecution and conviction and even though the arrest and/or conviction for the conduct have been annulled.

(7) Other Unlawful Conduct which Demonstrates a Disrespect for or Unwillingness to Obey the Law.

Character and Fitness Committee Comment

The New Hampshire Supreme Court in *Application of Appell*, 116 N.H. 400 (1976), denied admission to an applicant and upheld the findings of a single justice who had determined that the applicant's "violations of various statutes and regulations indicate at best a careless failure to determine the legality of his actions

and at worst an arrogant disregard of the law." Thus, when the Committee finds that an applicant has committed acts, **[that]** ~~which~~ are not criminal, but **[that]** ~~which~~ are unlawful and demonstrate disrespect for the law, the Committee may determine that the applicant does not possess the necessary moral character for admission to the bar.

(8) Violation of a Court Order.

Character and Fitness Committee Comment

Respect for **[judicial authority]** ~~the law~~ and obedience of court orders and directives are crucial to the operation of the judicial system. Violations of court orders and/or directives, either in the applicant's professional or personal life, may be grounds for a recommendation of the denial of admission.

(9) Abuse of the Judicial Process.

Character and Fitness Committee Comment

Applicants are asked to disclose on their applications all judicial and administrative proceedings to which they have been a party. The Committee quite often requests applicants to provide detailed information concerning those proceedings. Applicants who abuse the judicial process in either their personal affairs or in professional matters may be deemed to put the public at risk of continuing such behavior if they are admitted. **[The Committee may consider abuse of the judicial process regardless of]** ~~It is irrelevant~~ whether ~~the courts in those matters~~ **[a court has]** ~~have~~ made **[a]** judicial determinations that ~~such~~ abuse has occurred, **[and regardless of]** ~~or~~ whether **[a court has imposed** sanctions ~~have been imposed~~ for **[the]** ~~such~~ abuse.

(10) Academic Misconduct - Plagiarism and Cheating.

Character and Fitness Committee Comment

As part of the approval process, the Committee requests law school deans to complete a questionnaire concerning each applicant. The Committee also requires applicants to disclose whether they have been dropped, suspended, placed on probation, expelled or requested to resign from any school, college, university or law school, or requested or advised by any such school or institution to discontinue their studies therein. If plagiarism and/or cheating **[are]** ~~is~~ disclosed, the Committee conducts a further inquiry to determine the seriousness of the matter.

(11) Financial Irresponsibility.

Character and Fitness Committee Comment

An applicant must demonstrate that he/she is acting responsibly with respect to his or her financial obligations. Being in debt or unable to stay current with debts is not in itself disqualifying. However, the Committee expects an applicant with debt to keep each creditor informed of a current address, to make payment when the applicant is able to, and when unable to pay debts, to make reasonable efforts to work out settlements and/or repayment plans.

A declaration of bankruptcy is not a ground for recommending denial of admission. However, bankruptcy petition**[s]** are generally scrutinized by the Committee. Any false statements, admissions or acts involving dishonesty, fraud, deceit or misrepresentation in connection with the filing of bankruptcy may be grounds for a recommendation of denial of admission. Further, the facts and circumstances surrounding a bankruptcy may also bear on the issue of whether the applicant is able to handle his or her affairs.

(12) Mental Disorders which Impair the Ability to Practice Law.

Character and Fitness Committee Comment

A**[n existing or recent]** mental disorder that impairs an applicant's **[current]** ability to practice law may be disqualifying. Should the Committee become aware of a**[n existing or recent]** mental disorder which has the potential to impair an applicant's **[current]** ability to practice law, it will ask for details of any treatment, and may ask treating or independent professionals for reports as to whether the disorder will impair the applicant's ability to practice law in a competent and professional manner.

(13) Alcohol or Drug Addiction or Abuse.

Character and Fitness Committee Comment

An applicant who has become addicted to alcohol or other drugs or is using illegal drugs, will not be approved by the Committee if he/she is still currently using the substance or if the Committee believes that there is an undue risk that the applicant will begin using the substance after admission to the bar. Applicants who have been addicted to alcohol or other drugs are expected to demonstrate a meaningful period of non-use and to have developed support and/or coping mechanisms, either external or internal, which make it unlikely that the applicant will again use the addictive substance.

Applicants who have been addicted to or abused alcohol or drugs are generally expected to be free of alcohol use or drug abuse for at least 1 year in order to be approved.

(14) Inability to Handle One's Own Affairs.

Character and Fitness Committee Comment

The practice of law often involves being entrusted with the affairs of clients. The inability of an applicant to handle his/her own affairs in a responsible manner may be grounds for finding that such an applicant does not possess the requisite fitness to engage in the practice of law.

(VIII) **Causes for further inquiry.** In addition to any of the above, any of the following are cause for further inquiry (but not in themselves disqualifying) before the Character and Fitness Committee decides whether the applicant possesses the character and fitness to practice law:

(1) Denial of admission to the bar in another jurisdiction on character and fitness grounds;

(2) Disciplinary action by a lawyer disciplinary agency or other professional disciplinary agencies of any jurisdiction;

(3) Employment termination due to alleged misconduct;

(4) Receipt of negative references;

(5) Complaints of domestic violence against the applicant;

(6) Other than honorable military discharge;

(7) Bankruptcy;

(8) Debt obligations in default.

(IX) **Determination of disqualification.**

The Character and Fitness Committee must first determine whether any conduct or condition of the applicant is disqualifying.

(X) **When ~~is~~ [mis]conduct or condition [is] disqualifying.**

The misconduct or condition is disqualifying when it is so serious or significant that denying admission is necessary to protect the public and maintain public confidence in the bar.

Character and Fitness Committee Comment

In the character and fitness review process, the need to protect the public and maintain public confidence in the bar always overrides any concern that denying admission to an applicant who has successfully completed law school and passed the bar examination may seem unfair.

(XI) **Cumulative effect of events of misconduct.** The Committee may find the cumulative effect of two or more events of misconduct disqualifying even though no one of the events alone would be disqualifying.

(XII) **Determination of current character and fitness.** If the Character and Fitness Committee finds any conduct or condition to be disqualifying, it must then determine whether the current character and fitness of the applicant qualifies the applicant for admission. It is the Committee's task to determine whether the applicant is sufficiently rehabilitated to remove the serious taint of the applicant's prior unfitness.

(XIII) **Factors considered [in assessing adequacy of rehabilitation].** The following factors, although not inclusive, may be considered when determining whether an applicant has demonstrated sufficient rehabilitation:

(1) The nature of the act of misconduct, including whether it involved moral turpitude, whether there were aggravating or mitigating circumstances, and whether the activity was an isolated event or part of a pattern.

(2) The age and education of the applicant at the time of the act of misconduct and the age and education of the applicant at the present time.

(3) The length of time that has passed between the act of misconduct and the present, absent any involvement in ~~any~~ further acts of **[misconduct]** ~~moral turpitude~~. The amount of time and the extent of rehabilitation will be dependent upon the nature and seriousness of the act of misconduct under consideration.

(4) Restitution to any person who has suffered monetary losses through related acts or omissions of the applicant.

(5) Expungement of a conviction.

(6) Successful completion or early discharge from probation or parole.

(7) Abstinence from the use of controlled substances or alcohol if the specific act of misconduct was attributable in part to the use of a controlled

substance or alcohol. **[Proof of a]**~~A~~bstinence may **[include]** ~~be demonstrated by~~, but is not necessarily limited to, **[enrollment]** ~~enrolling~~ in and **[compliance]** ~~complying~~ with a self-help or professional treatment program.

(8) Evidence of remission if the specific act of misconduct was attributable in part to a medically recognized mental disease, disorder or illness. Evidence of remission may include, but is not limited to, seeking professional assistance and complying with the treatment program prescribed by the professional and submission of letters from the psychiatrist/psychologist verifying that the medically recognized mental disease, disorder or illness is in remission.

(9) Payment of the fine imposed in connection with any criminal conviction.

(10) Correction of behavior responsible in some degree for the act of misconduct.

(11) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.

(12) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(13) Change in attitude from that which existed at the time of the act of misconduct in question as evidenced by any or all of the following:

(a) Statements of the applicant.

(b) Statements from family members, friends, or other persons familiar with the applicant's previous conduct and with subsequent attitudes and behavioral patterns.

(c) Statements from probation or parole officers or law enforcement officials as to the applicant's social adjustments.

(d) Statements from persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(XIV) **Degree of rehabilitation.** The more serious the misconduct, the greater the showing of rehabilitation that will be required.

Character and Fitness Committee Comment

For applicants who have committed a criminal offense that would disqualify them from holding a license or certificate to practice another profession in this state, the burden of proving sufficient rehabilitation is extraordinarily difficult.

(XV) **Period of time of rehabilitation.** An applicant who has engaged in disqualifying misconduct in the past **[must demonstrate to the committee that the applicant has made relevant and significant personal change for a meaningful period of time.]** ~~needs to show that he or she is no longer the same person who behaved so poorly in the past and needs to behave in an exemplary fashion for a meaningful period of time.~~

(XVI) **Recognition of disqualifying conduct.** Establishing sufficient rehabilitation will usually require the applicant to recognize, appreciate, show insight into, and have genuine remorse for the seriousness of his or her disqualifying conduct. Attempts to deny, rationalize, minimize or explain away disqualifying past behavior will usually result in the Committee finding insufficient rehabilitation.

(XVII) **When is rehabilitation sufficient.** Rehabilitation is sufficient when the applicant has established from all the facts that the public interest will not be jeopardized by his or her admission.

APPENDIX I

Amend Supreme Court Rule 51 by deleting it in its entirety and adopt in its place the following:

RULE 51 Rulemaking Procedures

(a) *Scope and Purpose.* These procedures are adopted to aid the Supreme Court in discharging its rulemaking responsibilities in the areas of procedure in all courts and shall apply to all amendments or additions to such rules. The purpose of court rules is to provide necessary governance of court procedure and practice and to promote justice by ensuring a fair and expeditious process. In discharging its rulemaking responsibility, the New Hampshire Supreme Court seeks to ensure that:

(1) Minimal disruption in court practice occurs, by limiting the frequency of rule changes;
(2) Rules are regularly reviewed to consider current developments, needs, and changes;
(3) The adoption and amendment of rules proceeds in an orderly and uniform manner;
(4) The public, the bench and the bar receive notice and an opportunity to comment on proposed rules;
(5) There is adequate notice of the adoption and effective date of new and revised rules;
(6) The rules of court are clear, definite in application and consistent with each other.

(b) *Definitions.*

(1) "Rule suggestion" is a suggestion for a rule change or a new rule that has been submitted to the Chair of the Advisory Committee on Rules.
(2) "Proposed rule" is a rule change or addition that the Advisory Committee on Rules has recommended to the Supreme Court and which the Supreme Court has ordered published for comment or hearing before the Advisory Committee on Rules or the Court.
(3) "Advisory Committee on Rules" is the Committee established by this rule to assist the Court in discharging its rulemaking responsibilities.

(c) *Initiation of Rules Change.*

(1) Any person or group may submit to the Supreme Court a suggestion to adopt, amend or repeal a court rule. The suggestion shall be directed to the secretary of the Advisory Committee on Rules and should include the following, to the extent possible:

(A) The text of the suggested rule. If the suggestion is to amend an existing rule, the text of the existing rule should be included and ~~strikethrough~~ should be used to indicate the suggestion to delete text, and **[bold and brackets]** should be used to indicate the suggestion to add text; and

(B) A letter or cover sheet providing the following information:

(i) *Name of Proponent*: the name of the person or group suggesting the rule change and the proponent's mailing address, telephone number and email address;

(ii) *Purpose*: the reason or necessity for the suggested rule, including whether it creates or resolves any conflicts with statutes, case law, or other court rules;

(iii) *Expedited consideration*: whether the proponent believes that exceptional circumstances justify expedited consideration of the suggested rule.

(iv) *Hearing*. Whether the proponent wishes to be heard by the Advisory Committee on Rules regarding the suggested rule.

(2) The Chair of the Advisory Committee on Rules shall review the request to determine whether it is clearly stated and provides sufficient information. If the Chair of the Committee determines that a request is unclear or is otherwise insufficient, the Chair may: (1) accept the rule suggestion notwithstanding its noncompliance; or (2) ask the proponent to submit additional information.

(3) If the Chair accepts the rule suggestion, he or she shall direct the Secretary of the Advisory Committee on Rules to add the suggestion to the agenda of the next meeting of the Committee. However, if the Chair determines that the suggestion calls for a technical change, would implement a change required by statute that permits no discretion in the drafting of the language of the rule or rule amendment, or concludes that exceptional circumstances justify expedited consideration of the suggestion, the Chair may submit the suggestion directly to the Court, and the Court shall follow the procedures set forth in section (f) of this rule.

(d) *The Advisory Committee on Rules*

(1) *Membership.*

(A) There shall be an Advisory Committee on Rules, which shall be composed of sixteen members as follows:
  (i) One active or retired judge of the Supreme Court shall be appointed by the Supreme Court and shall serve as the Chair of the Committee;
  (ii) One active or retired judge of the Superior Court shall be appointed by the Supreme Court;
  (iii) Two active or retired judges from the Circuit Court shall be appointed by the Supreme Court;
  (iv) Two attorneys shall be appointed by the Supreme Court.
  (v) Three laypersons shall be appointed by the Supreme Court.
  (vi) One member shall be appointed by the Governor.
  (vii) The president of the senate, or the president's designee.
  (viii) The speaker of the house, or the speaker's designee.
  (ix) One clerk or court administrator from the Superior Court shall be appointed by the Supreme Court.
  (x) One clerk or court administrator from the Circuit Court shall be appointed by the Supreme Court.
  (xi) One member of the New Hampshire Bar Association Board of Governors and one member of the Committee on Cooperation with the Courts shall be designated by the president of the New Hampshire Bar Association.

(B) Members, except for the member appointed by the Governor and the designees of the Senate President and Speaker of the House, shall serve three year terms, and shall be limited to a maximum of three full terms. Initial appointments shall be for staggered terms: one third of the members for three years; one third of the members for two years and one third of the members for one year. A member selected to fill a vacancy shall hold office for the unexpired term of his or her predecessor.

(C) The terms of the Governor's appointee, and of the Speaker of the House and the President of the Senate or their designees shall be coterminous with their terms of office.

(D) A vacancy on the committee shall occur:
  (i) When a member has served three full terms;
  (ii) When a member ceases to be a member by resignation or otherwise;
  (iii) When a clerk or administrator ceases to hold the office which he or she held at the time of appointment;
  (iv) When a lawyer ceases to be admitted to practice in the courts of this State or is appointed to judicial office;
  (v) When a layperson becomes a lawyer or a judge;

(vi) When a New Hampshire Bar Association Board of Governors member ceases to be a member of the Board of Governors or when the Committee on Cooperation with the Courts representative ceases to be a member of the Committee on Cooperation with the Courts.

(E) Members appointed by the Governor and the president of the New Hampshire Bar Association shall serve at the pleasure of the appointing authority.

(F) The secretary of the committee shall be the Clerk of the Supreme Court or any other person designated by the Supreme Court.

(2) *Responsibilities.* The Advisory Committee on Rules shall have the following responsibilities:

(A) To receive and assess all suggested rule and rule amendments referred by the Chair of the Committee;

(B) To identify, and solicit comment from, those who are likely to be most affected by, or interested in, a suggested rule or rule amendment;

(C) To hold at least two public meetings per year;

(D) To hold public hearings to receive comment from any member of the public, bench or the bar on the suggested rule and rule amendments when the Committee believes it is appropriate to obtain additional information beyond the input it received from interested persons pursuant to subsection (d)(2)(B);

(E) To consider the entire body of rules for which it is responsible by periodically reviewing each separate set of rules;

(F) To consider the impact of any suggested rule or rule amendment upon existing statutes or pending legislation, and to include in any submission to the Court of proposed rule changes a statement of the Committee's views on such impact;

(G) To submit a report to the Court on or before April 1 and on or before November 1 of each year on proposed rule and rule amendments, or to report to the Court on or before April 1 and on or before November 1 that it has determined that no changes are in its opinion necessary at that time;

(H) To include in any submission to the Court a report of any comments received by the Committee from the courts, judges, bar or the public;

(I) To retain for a minimum of three years, as matters of public record, all rule suggestions and all Committee reports, agendas, minutes and notices of public hearing;

(J) To maintain a webpage on the judicial branch website.

(3) *April 1 and November 1 Reports to the Court.*

(A) On or before April 1 and on or before November 1 of each year, the Advisory Committee on Rules shall submit to the Court a report of any proposed rules or amendments by filing them with the Clerk of the Supreme Court.

(B) Each report shall include a summary of the Committee's reasons for the proposed rule and rule amendments.

(C) For each proposed rule or rule amendment, the Committee shall advise the Clerk of the Supreme Court whether it recommends a hearing before the full Court.

(e) *Court Consideration of Recommended Rules Changes.*

(1) Upon receipt of a report from the Advisory Committee on Rules, the Clerk of the Supreme Court shall distribute copies of proposed rules and amendments or the Committee's summary thereof, together with an invitation for comments, as follows:

(A) Copies to the New Hampshire Bar Association and such publications as the Court deems appropriate;

(B) Copies to the President of the Senate, Speaker of the House and Chairpersons of the Senate and House Judiciary Committees;

(C) Copies to such other persons and places as the Chief Justice may direct.

(2) The invitation shall call for comment on the proposed rules or amendments from members of the bench, bar, and public to be filed with the Clerk of the Supreme Court. Unless the Court determines that a shorter period is necessary, a period of at least 30 days shall be allowed for comment. All comments shall be available for public review.

(3) The Court may, in its discretion, hold a hearing on a proposed rule at a time and in a manner specified by the court. If the Supreme Court orders a hearing, it shall set the time and place of the hearing and determine the manner in which the hearing will be conducted. The Supreme Court may designate one or more justices to conduct the hearing.

(f) *Special Cases.*

(1) The Chair of the Advisory Committee on Rules may, as set forth in paragraph (c)(3), refer a rule suggestion directly to the Court, rather than to the Advisory Committee on Rules.

(2) If the Chair of the Advisory Committee on Rules, upon review of a suggested rule or rule amendment, concludes that the change is technical, or would implement a change required by statute that permits no discretion in the drafting of the language of the rule or

rule amendment, the Chair may submit the suggested rule or rule amendment to the Court with a recommendation that it be adopted on a permanent basis.

(3) If the Chair of the Advisory Committee on Rules, upon review of a suggested rule or rule amendment, concludes that exceptional circumstances justify expedited consideration of the request, the Chair may submit the suggested rule or rule amendment to the Court.

(A) The submission shall include the Chair's reasons for believing that the Court should take immediate action on the request.

(B) If the Court agrees that circumstances justify expedited consideration of the request, the Court shall afford such notice and opportunity for comment and hearing as may be practicable. The Court shall distribute the suggested rule or rule amendment, together with an invitation for comments, as follows:

(i) Copies to the New Hampshire Bar News;

(ii) Copies to members of the Advisory Committee on Rules;

(iii) Copies to the President of the New Hampshire Bar Association; and

(iv) Copies to such other persons and places as the Chief Justice may direct.

(C) All comments on the suggested rule or rule amendment shall be submitted in writing to the Supreme Court by the deadline specified by the Court. All comments shall be available for public review.

(g) *Final Action by the Supreme Court, Publication and Effective Date*

(1) After considering any comments or written or oral testimony received regarding a proposed or suggested rule, the Supreme Court may adopt, amend or reject the rule change or take such other action as the Supreme Court deems appropriate.

(2) The effective date of all new rules or amendments shall be as ordered by the Supreme Court.

(3) Following adoption of new rules or amendments, the Clerk of the Supreme Court shall promptly cause copies thereof to be distributed.

(4) The adopted rules shall be posted on the internet sites of the Supreme Court, and an announcement of such publication shall be made in the New Hampshire Bar News.

APPENDIX J

Amend Rule 26 of the Rules of the Superior Court of the State of New Hampshire applicable in Civil Actions (new material is in **[bold and in brackets]**, deleted material is in ~~strikethrough~~ format) as follows:

Rule 26. Depositions

(a) A party may take as many depositions as necessary to adequately prepare a case for trial so long as the combined total of deposition hours does not exceed 20 unless otherwise stipulated by counsel or ordered by the court for good cause shown.

(b) No notice to the adverse party of the taking of depositions shall be deemed reasonable unless served at least 3 days, exclusive of the day of service and the day of caption, before the day on which they are to be taken. Provided, however, that 20 days' notice shall be deemed reasonable in all cases, unless otherwise ordered by the court. No deposition shall be taken within 30 days after service of the Complaint, except by agreement or by leave of court for good cause shown.

(c) Every notice of a deposition to be taken within the State shall contain the name of the stenographer proposed to record the testimony.

(d) When a statute requires notice of the taking of depositions to be given to the adverse party, it may be given to such party or the party's representative of record. In cases where the action is in the name of a nominal party and the Complaint or docket discloses the real party in interest, notice shall be given either to the party in interest or that party's attorney of record. Notices given pursuant to this rule may be given by mail or by service in hand. If a subpoena duces tecum is to be served on the deponent, the notice to the adverse party must be served before service of the subpoena, and the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment.

(e) The interrogatories shall be put by the attorneys or non-attorney representatives and the interrogatories and answers shall be taken in shorthand or other form of verbatim reporting approved by the court and transcribed by a competent stenographer agreed upon by the parties or their attorneys present at the deposition. In the absence of such agreements, the stenographer shall be designated by the court. Failure to object in writing to a

stenographer in advance of the taking of a deposition shall be deemed agreement to the stenographer recording the testimony.

(f) No deposition, as transcribed, shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies.

(g) The stenographer shall cause to be noted any objection to any interrogatory or answer without deciding its competency. If complaint is made of interference with any witness, the stenographer shall cause such complaint to be noted and shall certify the correctness or incorrectness thereof in the caption.

(h) Upon motion, the court may order the filing of depositions, and, upon failure to comply with such order, the court may take such action as justice may require.

(i) The signature of a person outside the State, acting as an officer legally empowered to take depositions or affidavits, with his or her seal affixed, where one is required, to the certificate of an oath administered by him or her in the taking of affidavits or depositions, will be prima facie evidence of his or her authority so to act.

(j) The deponent, on deposition or on written interrogatory, shall ordinarily be required to answer all questions not subject to privilege or excused by the statute relating to depositions, and it is not grounds for refusal to answer a particular question that the testimony would be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege.

(k) If any deponent refuses to answer any question propounded on deposition, or any party fails or refuses to answer any written interrogatory authorized by these rules, or fails to comply within 30 days after written request to comply, the party propounding the question may, upon notice to all persons affected thereby, apply by motion to the court for an order compelling an answer. If the motion is granted, and if the court finds that the refusal was without substantial justification or was frivolous or unreasonable, the court may, and ordinarily will, require the deponent or the party, attorney, or non-attorney representative advising the refusal, or both of them, to pay the examining or requesting party the reasonable expenses incurred in obtaining the order, including reasonable counsel fees.

If the motion is denied and if the court finds that the motion was made without substantial justification or was frivolous or unreasonable, the court may, and ordinarily will, require the examining party or the attorney advising the motion, or both of them, to pay to the witness the reasonable expenses incurred in opposing the motion, including reasonable counsel fees.

(l) Videotape Depositions.

(1) A party may, at such party's expense, record a videotape deposition, provided the party indicates the intent to record the videotape deposition in the notice of deposition. At the commencement of the videotape deposition, counsel representing the deponent should state whose deposition it is, what case it is being taken for, where it is being taken, who the lawyers are that will be asking the questions, and the date and the time of the deposition. Care should be taken to have the witnesses speak slowly and distinctly and that papers be readily available for reference without undue delay and unnecessary noise. Counsel and witnesses shall comport themselves at all times as if they were actually in the courtroom.

(2) If any problem arises as to the admissibility or inadmissibility of evidence, this should be handled in the same manner as written depositions.

(3) A party objecting to a question asked of, or an answer given by, a witness whose testimony is being taken by videotape shall provide the court at the Trial Management Conference with a transcript of the videotape proceedings that is sufficient to enable the court to act upon the objection before the trial of the case, or the objection shall be deemed waived.

[(m) Notice or Subpoena Directed to An Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (m) does not preclude a deposition by any other procedure allowed by these rules.]

Comment

Rule 26(a) is a major change from current New Hampshire deposition practice. This new limitation is warranted by the adoption of the Automatic Disclosure requirements of Rule 22, which itself tracks in part the provision of Fed. R. Civ. P. 26(a)(1). While the typical case ordinarily does not consume 20 hours of depositions, the rule recognizes that there are others for which 20 hours may not be adequate.

[The jurisprudence used by the federal courts interpreting cognate Federal Rule of Civil Procedure 30(b)(6) should be used as a guide in the interpretation of Rule 26(m).]

APPENDIX K

Amend Circuit Court – District Division Rule 2.18 (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 2.18. [Petition] ~~Application~~ to annul record of conviction and sentence.

A. Each such **[petition]** ~~application~~ shall specify in detail the facts relied on for the granting of the **[petition]** ~~application~~, and shall be signed and **[shall indicate in writing an understanding that making a false statement in the petition to annul may subject that party to criminal penalties.** ~~sworn to by the applicant.~~

B. The **[petition]** ~~application~~ shall bear the same name and number as the case in which the original sentence was entered and shall be filed therein.

C. The Clerk shall, within 7 days after filing of the **[petition]** ~~application~~, issue a copy thereof, as notification, ~~to the County Attorney for the county where the application is filed, and~~ to the arresting law enforcement agency **[or prosecutor for the arresting law enforcement agency]**. The Clerk shall charge the **[petitioner]** ~~applicant~~ the required fee for the entry; provided, however, that **[the clerk]** ~~he~~ shall waive such fee if there is filed with the **[petition]** ~~application~~ a proper affidavit proving the **[indigence]** ~~indigency~~ of the person previously sentenced. The Clerk shall send a copy of the **[petition]** ~~application~~ to the **[Department of Corrections]** ~~Probation Department~~, together with a request for the report that the statute requires from the Probation Officer.

D. The ~~County Attorney and/or~~ arresting law enforcement agency **[or prosecutor for the arresting law enforcement agency]** shall, within 30 days of the notice date, file a statement **[of]** ~~as to their~~ position with reference to the **[petition]** ~~application~~, specifying ~~their~~ reasons **[therefor]**, and stating whether or not **[a hearing is requested]** ~~they wish to be heard~~.

~~E. A hearing shall be scheduled on each such application at which the person previously sentenced, and if he is not the applicant, the applicant, must appear; provided, however, that the Court shall have the right to waive the presence of the applicant and/or the person previously sentenced, and grant the application without a hearing if there is no opposition.~~

[E. If the petitioner, the arresting law enforcement agency or prosecutor for the law enforcement agency indicates a desire to be heard, a hearing shall be scheduled on the petition. The petitioner shall be required to appear at the hearing. If the petitioner is not the person previously sentenced, the person previously sentenced must also appear at the hearing. The Court shall have the right to waive the presence of the petitioner (and/or person previously sentenced if not the petitioner) and grant the petition without a hearing if there is no opposition.]

APPENDIX L

Amend Rule 1.0 of the New Hampshire Rules of Professional Conduct and update the ABA Model Rule Comment to reflect changes that have been made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 1.0. Definitions

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and ~~e-mail~~ **[electronic communications]**. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

~~2004 ABA Model Code Comment~~
[ABA Comment to the Model Rules]
RULE 1.0 TERMINOLOGY

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume

consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~ **[information, including information in electronic form,]** relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ **[information, including information in electronic form,]** relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

APPENDIX M

Update the Ethics Committee Comment and ABA Model Rule Comment to Rule 1.1 to reflect changes that have been made to each (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 1.1. Competence

(a) A lawyer shall provide competent representation to a client.

(b) Legal competence requires at a minimum:

(1) specific knowledge about the fields of law in which the lawyer practices;

(2) performance of the techniques of practice with skill;

(3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;

(4) proper preparation; and

(5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

(c) In the performance of client service, a lawyer shall at a minimum:

(1) gather sufficient facts regarding the client's problem from the client, and from other relevant sources;

(2) formulate the material issues raised, determine applicable law and identify alternative legal responses;

(3) develop a strategy, in consultation with the client, for solving the legal problems of the client; and

(4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

Ethics Committee Comment

The New Hampshire Rule continues the prior New Hampshire Rule, expanding on the Model Rule to serve both as a guide and objective standard. The Model Rule standards of legal knowledge, skill, thoroughness, and preparation reasonably necessary are rejected as being too general.

[ABA comment [8] (formerly Comment [6]) requires that a lawyer should keep abreast of . . . the benefits and risks associated with relevant technology." This broad requirement may be read to assume more time and resources than will typically be available to many lawyers. Realistically, a lawyer should keep reasonably abreast of readily determinable benefits and risks associated with applications of technology used by the lawyer, and benefits and risks of technology lawyers similarly situated are using.]

~~2004 ABA Model Comment~~
[ABA Comment to the Model Rules]
RULE 1.1 COMPETENCE

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can

also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

[Retaining or Contracting With Other Lawyers

[[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a)(unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

~~[6]~~ **[[8]]** To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **[including the benefits and risks associated with relevant technology,]** engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

APPENDIX N

Amend Rule 1.4 of the New Hampshire Rules of Professional Conduct and update the ABA Model Rule Comment to Rule 1.4 to reflect changes that have been made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 1.4. Client Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter~~.~~**[;]**

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

Ethics Committee Comment

Attorneys seeking to determine the scope of the duty to communicate under this rule should also review ABA Comment 5 to Rule 2.1. That Comment states that when a matter is likely to involve litigation, Rule 1.4 may require a lawyer "to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." This comment may prove important given the overlap of Rules 2.1 and 1.4, the increasingly important

role of alternative dispute resolution in litigation, and the implications this duty might have for a lawyer's civil liability.

~~2004 ABA Model Code Comment~~
[ABA Comment to the Model Rules]
RULE 1.4 COMMUNICATION

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response

may be expected. ~~Client telephone calls should be promptly returned or acknowledged.~~ **[A lawyer should promptly respond to or acknowledge client communications.]**

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that

information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

APPENDIX O

Amend Rule 1.6 of the New Hampshire Rules of Professional Conduct and update the Ethics Committee Comment and ABA Model Rule Comment to reflect changes that have been made to each (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to secure legal advice about the lawyer's compliance with these Rules; or

(3) to establish a claim or defense on behalf of the lawyer in **[a]** controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order~~.~~**[; or]**

[(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.]

[(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.]

Ethics Committee Comment

[The New Hampshire Rule reorganizes and changes Rule 1.6(b).]

The New Hampshire Rule permits the disclosure of any criminal act involving death or bodily harm or substantial injury to the financial interest or property of another. Rule 1.6 should not be viewed as a departure from the general rule of client confidentiality, and should not be interpreted to encourage lawyers to disclose the confidences of their clients. The disclosure of client confidences is an extreme and irrevocable act. Hopefully no New Hampshire lawyer will be subject to censure for either disclosing or failing to disclose client confidences, as the lawyer's individual conscience may dictate.

[As to ABA Comments [18] (formerly Comment [16]) and [19](formerly Comment [17]), see Ethics Opinion 2008-9/4 discussing duties relating to "metadata;" www.nhbar.org/legal-links/Ethics-Opinion-2008-09_04.asp.] A lawyer is responsible for reasonably ensuring adequate protection of client confidences in data held or stored by others, including, e.g., offsite storage and "cloud" storage.]

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
RULE 1.6 CONFIDENTIALITY OF INFORMATION

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this

information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association

with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.]

~~[13]~~ **[[15]]** A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to

the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

~~[14]~~ **[[16]]** Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

~~[15]~~ **[[17]]** Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

~~[16]~~ **[[18]] Paragraph (c) requires a]** ~~A~~ lawyer ~~must~~ **[to]** act competently to safeguard information relating to the representation of a client against **[unauthorized access by third parties and against]** inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. **[The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not**

employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]].

~~[17]~~ **[[19]]** When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. **[Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these rules.]**

Former Client

~~[18]~~ **[[20]]** The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

APPENDIX P

Update the ABA Model Rule Comment to Rule 1.17 to reflect changes that have been made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 1.17. Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if each of the following conditions is satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, within the State of New Hampshire;

(b) The entire practice, or the entire area of practice (subject to the clients' rights under Rule 1.17(c)(2)), is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the active and inactive clients of the practice or practice area being sold regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

(d) The fees charged clients shall not be increased by reason of the sale;

(e) If a client cannot be given notice described in section (c), the representation of that client shall be transferred to the successor lawyer or law firm for the limited purpose of protecting the interests of that client as and to the same extent as the selling or prior lawyer was required to do by these Rules, and the successor lawyer or law firm shall have a continuing obligation to reasonably attempt to provide the client with such notice to the same extent as may be required by these Rules; and

(f) The successor lawyer or law firm shall take possession of all the inactive or archival files of the practice or practice area being sold, and shall

store, handle, or destroy them in accordance with the normal operating procedures of the successor lawyer or law firm and these Rules. Notice of the transfer of the inactive and archival files shall be published in an appropriate newspaper of local circulation and shall be provided to the New Hampshire Bar Association.

Ethics Committee Comment

Subsection (a) of the Rule permits the sale of a private practice or an area of private practice only if the seller ceases to engage in practice or in an area of practice within the State. Thus the requirements for sale are not met if the lawyer or law firm desires to relocate to another area of the State. The individual clients' files may be transferred to the successor lawyer or law firm as and when client consents are received. After the expiration of the 90 day notice period, the files of all clients who have been given notice, and who have not opted either to retain other counsel or to take possession of their files, shall be transferred to the successor lawyer or law firm.

Subsection (e) departs from the ABA Model Rule by requiring the successor lawyer or law firm to take possession of the files of clients for whom consent could not be obtained, and by eliminating the need for prior court authorization. Such files shall be transferred for the limited purposes of attempting to effect actual written notice and protecting the clients' interests. Such file transfers are considered to be in the clients' best interests, and are not considered to violate Rule 1.6.

New subsection (f) clarifies that the successor lawyer's obligations with respect to inactive or archival files of the prior lawyer mirror the duties owed to the successor's own clients and former clients.

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
RULE 1.17 SALE OF LAW PRACTICE

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the

lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. **[See Rule 1.6(b)(7)].** Providing the purchaser access to ~~client-specific~~ **[detailed]** information relating to the representation**[,]** ~~and to~~ **[such as]** the **[client's]** file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Update the Ethics Committee Comment and ABA Model Rule Comment to Rule 1.18 to reflect changes that have been made to each (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 1.18. Duties to Prospective Client

(a) A person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has received and reviewed information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received and reviewed information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received and reviewed disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received and reviewed the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

a. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

b. written notice is promptly given to the prospective client.

Ethics Committee Comment

1. The New Hampshire rule expands upon the ABA Model Rule in one area. The ABA Model Rule 1.18(a) defines a prospective client as one who ~~"discusses"~~ **["consults" with a lawyer about]** possible representation**[;] [the New Hampshire Rule defines prospective client as one who "provides information to a lawyer" about possible representation."** ~~with an attorney. Similarly,~~ ABA Model Rule 1.18(b) establishes a general rule for protection of information **["learned" by a lawyer from a prospective client; the New Hampshire Rule clarifies the scope of that protection so that it applies to information "received and reviewed" by a lawyer from a prospective client.]** ~~received in "discussions" or "consultations".~~

In its version of ~~these provisions~~ **[Rule 1.18]**, New Hampshire's rule eliminates the terminology of ~~"discussion" or~~ "consultation" **[and learning]** and extends the protections of the rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection. **[This change further recognizes that receipt and review are likely to be more objective standards than learning.]**

2. Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a "prospective client" within the meaning of paragraph (a).

3. New Hampshire has concerns with ABA Comment 5, which purports to allow an attorney to secure prior "informed consent" from a prospective client that information provided in initial consultations would not preclude subsequent representation of another client in the matter. Unlike the more detailed analysis contemplated by Comment 22 to Rule 1.7, a prospective client's prior consent may be made more quickly and less likely to be "informed" as to the potential adverse consequences of such an agreement.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ **[consultations]** with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule.~~ **[A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice and contact information, or provides legal information of general interest. Such a person]** ~~A person who~~ communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, **[and]** is **[thus]** not a "prospective client**[.]**" ~~within the meaning of paragraph (a).~~ **[Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."]**

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial **[consultation]** ~~interview~~ to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~ **[a consultation]** with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties

when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

APPENDIX R

Update the Ethics Committee Comment and ABA Model Rule Comment to Rule 4.4 to reflect changes that have been made to each (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not take any action if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, delay or burden a third person.

(b) A lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.

Ethics Committee Comment

Paragraph (a) substantially differs from the ABA model rule by using the word "obvious" to set a higher objective standard.

Paragraph (b) differs from the ABA model rule in three respects: the broader term "materials" replaces "document;" the phrase "reasonably should know" is deleted setting an objective standard for "knowledge"; and a second sentence is added. The second sentence incorporates the New Hampshire Bar Association's Ethics Committee's June 22, 1994, Practical Ethics Article, "Inadvertent Disclosure of Confidential Materials." The Committee concluded that notice to the sender did not provide sufficient direct guidance to lawyers.

[The term "materials" includes, without limitation, electronic data.

As to ABA Comments [2] and [3], see Ethics opinion 2008-9/4 discussing duties relating to "metadata"; www.nhbar.org/legal-links/Ethics-Opinion-2008-09_04.asp.]

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive **[a]** documents **[or electronically stored information]** that **[was]** ~~were~~ mistakenly sent or produced by opposing parties or their lawyers. **[A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.]** If a lawyer knows or reasonably should know that such a document **[or electronically stored information]** was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the **[document or electronically stored information]** ~~original document,~~ is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document **[or electronically stored information]** has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document **[or electronically stored information]** that the lawyer knows or reasonably should know may have been ~~wrongfully~~ **[inappropriately]** obtained by the sending person. For purposes of this Rule, "document" **[or electronically stored information]** includes **[in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata" that is** ~~e-mail or other electronic modes of transmission~~ subject to being read or put into readable form. **[Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.]**

[3] Some lawyers may choose to return a document **[or delete electronically stored information]** unread, for example, when the lawyer learns before receiving **[it]** ~~the document~~ that it was inadvertently sent**[.]** ~~to the wrong address.~~ Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document **[or delete electronically**

stored information] is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

APPENDIX S

Amend the title of Rule 5.3 of the New Hampshire Rules of Professional Conduct and update the ABA Model Rule Comment to Rule 5.3 to reflect changes that have been made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 5.3. Responsibilities Regarding Nonlawyer Assistan[ce]~~ts~~

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) Each partner, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) Each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Ethics Committee Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of "each" for "a" in sections (a) and (b). The change is intended

to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTAN[CE]~~TS~~

~~[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.~~

~~[2]~~ **[[1]]** Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ **[to ensure that the firm has in effect measures giving]** reasonable assurance that nonlawyers in the firm **[and nonlawyers outside the firm who work on firm matters]** ~~will~~ act in a way compatible with the **[professional obligations of the lawyer.]** ~~Rules of Professional Conduct.~~ See Comment ~~[1]~~ **[[6]]** to Rule 5.1 **[(retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm)]**. Paragraph (b) applies to lawyers who have supervisory authority **[over such nonlawyers within or outside the firm.]** ~~over the work of a nonlawyer~~. Paragraph (c) specifies the circumstances in which a lawyer is responsible for **[the]** conduct of ~~a nonlawyer~~ **[such nonlawyers within or outside the firm]** that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work

product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a)(unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of the responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.]

APPENDIX T

Amend Rule 5.5 of the New Hampshire Rules of Professional Conduct and update the ABA Model Rule Comment to reflect changes made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction **[or in a foreign jurisdiction]**, and not disbarred or suspended from practice in any jurisdiction **[or the equivalent thereof]**, may provide legal services **[through an office or other systematic and continuous presence]** in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates**[;]** ~~and~~ are not services for which the forum requires pro hac vice admission; **[and, when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice;]** or

(2) are services that the lawyer is authorized ~~to provide~~ by federal ~~law~~ or ~~rule~~ other law **[or rule to provide in]** ~~of~~ this jurisdiction.

[(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.]

Ethics Committee Comment

1. New Hampshire has adopted ABA Model Rule 5.5.

2. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult Supreme Court Rule 60, which governs the provision of legal services following determination of major disaster.

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. **[For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.]**

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)**[(1)]** if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of

their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a **[U.S. or foreign]** lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. **[Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction.]** The word "admitted" in paragraph**[s]** (c)**[, (d) and (e)]** contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction

in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation

survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.*

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction **[or a foreign jurisdiction]**, and is not disbarred or suspended from practice in any jurisdiction~~,~~ **[or the equivalent thereof,]** may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law**[.]** ~~as well as~~ **[Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U. S. jurisdiction may also]** provide legal services **[in this jurisdiction]** on a temporary basis. **[See also *Model Rules on Temporary Practice by Foreign Lawyers.*]** Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another **[United States or foreign]** jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a **[U.S. or foreign]** lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. **[To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction, or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.]**

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. **[See *Model Rules for Registration of In-House Counsel.*]**

[18] Paragraph (d)(2) recognizes that a **[U.S. or foreign]** lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. **[See, e.g., *The ABA Model Rule on Practice Pending Admission.*]**

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a)

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

Update the ABA Model Rule Comment to Rule 7.1 to reflect changes made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:):

Rule 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. Without limiting the generality of the foregoing, a communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement, considered in light of all of the circumstances, not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Ethics Committee Comment

The 2002 version of ABA Model Rule 7.1 eliminated subsections (a)-(c) of the former version of the Model Rule in favor of a more general prohibition on false or misleading communications. The New Hampshire rule retains subsections (a)-(c) because of the specific guidance they provide to the practitioner. At the same time, the New Hampshire rule adopts the general prohibition on false or misleading communications and provides explicitly that the subsections of the rule are illustrative, not limiting. New Hampshire Rule 7.1(a) also maintains the provision of the predecessor New Hampshire rule that a determination of whether a communication is materially misleading must be made "in light of all the circumstances."

~~2004 ABA Model Rule Comment~~

[ABA Comment to the Model Rules]

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead **[the public]** ~~a prospective client.~~

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

APPENDIX V

Update the ABA Model Rule Comment to Rule 7.2 to reflect changes made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 7.2. Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay a fee charged by an organization that is recognized by the Internal Revenue Service as exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code; and

(3) purchase a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Ethics Committee Comment

The New Hampshire Rule differs from both the prior New Hampshire Rule and the Model Rule. Section (b)(2) limits the class of nonprofit entities to which referral fees may be paid to those that have obtained tax recognition of exemption. Model Rule (b)(4) is deleted.

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
RULE 7.2 ADVERTISING

[1] To assist the public in **[learning about and]** obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address**[, email address, website]** and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television **[and other forms of]** advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television**[, the Internet, and other forms of electronic communication are]** ~~is~~ now ~~one of~~ **[among]** the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television**[, Internet, and other forms of electronic]** advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against ~~the~~ **[a]** solicitation ~~of a prospective client~~ through a real-time electronic exchange **[initiated by the lawyer]** ~~that is not initiated by the prospective client.~~

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] **[Except as permitted under paragraphs (b)(1)-(b)(4),]** ~~L~~**[l]**awyers are not permitted to pay others for ~~channeling professional work~~ **[recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character or other professional qualities.]** Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads,~~ **[Internet-based advertisements,]** and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. **[Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer) and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral.** See **[also]** Rule 5.3 ~~for the~~ **[(]**duties of lawyers and law firms with respect to the conduct of nonlawyers**[; Rule 8.4(a) (duty to avoid violating the Rules through the acts of another.)]** ~~who prepare marketing materials for them.~~

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists **[people who seek]** ~~prospective clients~~ to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by ~~laypersons~~ **[the public]** to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule

only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for **[the public]** ~~prospective clients~~. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of **[the public]** ~~prospective clients~~; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not **[make]** refer**[rals]** ~~prospective clients~~ to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with **[the public]** ~~prospective clients~~, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead **[the public]** ~~prospective clients~~ to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

APPENDIX W

Update the ABA Model Rule Comment to Rule 7.3 to reflect changes made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:):

Rule 7.3. Direct Contact With Prospective Clients

(a) A lawyer shall not initiate, by in-person, live voice, recorded or other real-time means, contact with a prospective client for the purpose of obtaining professional employment, unless the person contacted:

(1) is a lawyer;

(2) has a family, close personal, or prior professional relationship with the lawyer;

(3) is an employee, agent, or representative of a business, non-profit or governmental organization not known to be in need of legal services in a particular matter, and the lawyer seeks to provide services on behalf of the organization; or

(4) is an individual who regularly requires legal services in a commercial context and is not known to be in need of legal services in a particular matter.

(b) A lawyer shall not communicate or knowingly permit any communication to a prospective client for the purpose of obtaining professional employment if:

(1) the prospective client has made known to the lawyer a desire not to receive communications from the lawyer;

(2) the communication involves coercion, duress or harassment; or

(3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the word "Advertising" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in subsection (a).

(d) The following types of direct contact with prospective clients shall be exempt from subsection (a):

(i) participation in a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live voice or other real-time contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

(ii) initiation of contact for legal services by a non-profit organization.

(iii) contact of those the lawyer is permitted under applicable law to seek to join in litigation in the nature of a class action, if success in asserting rights or defenses of the litigation is dependent upon the joinder of others; and

(iv) requests by a lawyer or the lawyer's firm for referrals from a lawyer referral service operated, sponsored or approved by a bar association, or cooperation with any other qualified legal assistance organization.

Ethics Committee Comment

New Hampshire Rule 7.3 differs from the Model Rule primarily in that:

1. It broadens the scope of potentially regulated contact to include initiation of any contact with a prospective client for the purpose of obtaining professional employment. The occurrence of actual "solicitation" raises evidentiary issues that are not necessary to reach.

2. It reinstates recorded contact as a regulated conduct, recognizing the growth of interactive recording technologies that may cause the prospective client to feel immediate pressure to respond.

3. It allows that motivators other than pecuniary gain may account for abusive conduct.

4. It assumes that entities, or individuals in a commercial context, will generally hold a more favorable balance of sophistication and leverage relative to the lawyer than will individuals acting outside of a commercial context, and so will generally need less protection against the "private importuning of the trained advocate." However, that balance is assumed to be negated for entities or individuals in a commercial context if they are known to be in need of legal services in a particular matter. This negation is intended to prohibit such activities as trolling through lists of new lawsuits and contacting defendants to solicit representation in the lawsuit.

5. Initiation of contact on behalf of class action and non-profit groups enjoy limited exemptions recognizing that such contact may be constitutionally protected.

6. Participation in a qualified legal services referral program is exempted.

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

[[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a bill board, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to internet searches.]

~~[1]~~ **[[2]]** There is a potential for abuse **[when a solicitation involves]** ~~inherent in~~ direct in-person, live telephone or real-time electronic contact by a lawyer with **[someone]** ~~a prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject **[a person]** ~~the layperson~~ to the private importuning of the trained advocate in a direct interpersonal encounter. The **[person]** ~~prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

~~[2]~~ **[[3]]** This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since lawyer**[s have]** ~~advertising and written and recorded communication permitted under Rule 7.2 offer~~ alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ **[In particular,]** communications **[can]** ~~which may~~ be mailed ~~or autodialed~~ **[or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations]** make it possible for **[the public]** ~~a prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the prospective client~~ **[the public]** to direct in-person, telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ **[a person's]** judgment.

~~[3]~~ **[[4]]** The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to **[the public]** ~~prospective client~~, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic **[contact]** ~~conversations between a lawyer and a prospective client~~ can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

~~[4]~~ **[[5]]** There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or **[a person]** with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ **[their]** members or beneficiaries.

~~[5]~~ **[[6]]** But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with **[someone]** ~~a prospective client~~ who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the **[recipient of the communication]** ~~prospective client~~ may violate the provisions of Rule 7.3(b).

~~[6]~~ **[[7]]** This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to **[people who are seeking legal services for themselves.]** ~~a prospective client.~~ Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

~~[7]~~ **[[8]]** The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

~~[8]~~ **[[9]]** Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships

in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

APPENDIX X

Update the ABA Model Rule Comment to Rule 8.5 to reflect changes made (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 8.5. Disciplinary Authority; Choice of Law; Application of Rules to Nonlawyer Representatives

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer admitted in another jurisdiction but not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

(c) Application of Rules to Nonlawyer Representatives. Rules 1.2, 1.3, 1.4, 1.14, 1.15, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, 4.2, 4.3, 4.4, 8.2(a), and 8.4 of the Rules of Professional Conduct shall apply to persons who, while not lawyers, are permitted to represent other persons before the courts of this jurisdiction pursuant to RSA 311:1. The committee on professional conduct shall have jurisdiction to consider grievances alleging violations of these Rules of Professional Conduct by nonlawyer representatives.

Ethics Committee Comment

Section (c) is added to extend the disciplinary authority of the Rules to nonlawyers acting as legal representatives pursuant to New Hampshire law.

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as

straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. **[With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.]**

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

APPENDIX Y

Amend Supreme Court Rule 1 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

The Supreme Court of New Hampshire, pursuant to its constitutional, statutory, and common law powers, N.H. CONST. pt. II, art. 73-a; RSA 490:4; *Boody v. Watson*, 64 N.H. 162 (1886), promulgates the following rules of practice and procedure.

Publication in New Hampshire Bar News will constitute official publication and notification of any changes in rules regulating practice in the New Hampshire courts or governing membership in the New Hampshire Bar Association or standing as a member of the New Hampshire Bar, as well as of any other Supreme Court orders of general application.

Rules of the supreme court and all other New Hampshire courts shall be available in the offices of all clerks of court ~~and registers of probate~~ and shall also be printed by a commercial publisher and made available for purchase by attorneys, law libraries and the public. Further information as to obtaining copies of the New Hampshire Bar News or binders of Court Rules may be obtained from the New Hampshire Bar Association or the Supreme Court's Clerk's office.

In the interest of expediting a decision, or for other good cause shown, the supreme court or a single justice thereof may suspend the requirements or provisions of any of these rules in any instance on application of a party or on the court's or a single justice's motion, and may order proceedings in accordance with that direction.

References in court rules to the district court shall be deemed to include the circuit court – district division; references to the probate court shall be deemed to include the circuit court – probate division; and references to the judicial branch family division shall be deemed to include the circuit court – family division.

APPENDIX Z

Amend Supreme Court Rule 3, definition of "clerk," as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

> "Clerk": Where the context refers to the clerk of a trial court, "clerk" includes a clerk of a trial court~~, a register of probate,~~ or the administrative agency official who is the equivalent of a clerk of court or who is charged with performing the duties associated with a clerk of court, and their respective assistants and deputies; where the context refers to the clerk of the supreme court, "clerk" includes his or her assistants and deputies.

APPENDIX AA

Amend Circuit Court – Family Division Rule 2.29, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

A. *Uncontested Matters.* Decrees in uncontested cases where the parties have filed a permanent agreement shall become final on the date signed by the judge**[, or countersigned by a judge]** pursuant to RSA 490-D:9, unless otherwise specified by the Court.

APPENDIX BB

Amend on a permanent basis Supreme Court Rule 42(IV), which was amended on a temporary basis by Supreme Court Order dated December 29, 2014 as follows (no changes are being proposed to the temporary rule now in effect):

IV. **General Requirements for Admission to Bar**

(a) **Eligibility.** Every applicant for admission to the New Hampshire bar shall be required:

(1) to comply with all provisions of this rule;

(2) to file all application forms prescribed by the board, respond to all requests of the board, the committee, their designees, and the staff of the Office of Bar Admissions, for information deemed relevant to the application for admission, and to pay all prescribed fees related to the application for admission;

(3) to meet one of the following requirements:

(A) to pass the bar examination; or

(B) to satisfy the requirements for admission by transferred UBE score set forth in paragraph X; or

(C) to satisfy the requirements for admission without examination set forth in Rule 42(XI); or

(D) to satisfy the requirements for admission after successful completion of the Daniel Webster Scholar Honors Program set forth in Rule 42(XII);

(4) to pass the Multistate Professional Responsibility Examination;

(5) to be at least 18 years of age;

(6) to satisfy the educational requirements set forth in Rule 42(V); and

(7) to establish his or her character and fitness to practice law to the committee and to the court.

(b) **Determination of eligibility.** An applicant's eligibility to take the bar examination, to be admitted by transferred UBE score, or to be admitted by motion without examination, shall be determined in the first instance by the bar admissions administrator or a member of the board. If the bar admissions administrator or board member determines that the applicant is ineligible for admission, the applicant may seek reconsideration from the board or a subcommittee thereof, in accordance with procedures established by the board.

(c) **Petition for Review.**

(1) If the board or subcommittee determines that an applicant is ineligible for admission, the applicant may seek review by the supreme court of the board or subcommittee's final decision by filing with the supreme court an original and eight copies of a petition for review within twenty days of the date of the notice of final decision. If no such petition is filed within the twenty-day period, the board or subcommittee's determination shall not be subject to review. The petition for review shall:

(A) specify the name and address of the person seeking review of the final decision and of counsel, including counsel's bar identification number;

(B) contain a copy of the final decision sought to be reviewed, a copy of a motion for reconsideration, if any, and a copy of any order on the motion for reconsideration;

(C) specify the questions presented for review;

(D) specify the provisions of the constitutions, statutes, rules, regulations or other law involved in the matter, setting them out verbatim, and giving their citation. If the provisions to be set out verbatim are lengthy, their pertinent text shall be annexed to the petition for review;

(E) set forth a concise statement of the case containing the facts material to the consideration of the questions presented, with appropriate references to the transcript, if any;

(F) set forth all claims of error and reasons for challenging the board or subcommittee's determination;

(G) include a statement that every issue raised has been presented to the board or subcommittee below; and

(H) contain a certification that a copy of the complete petition for review has been delivered, mailed, or served on the Office of Bar Admissions.

(2) Upon notification that a petition for review has been filed, the board shall transmit to the supreme court the complete record in the case, including a transcript of any hearing before the board or subcommittee of the board. The petitioner, and not the board, is responsible for paying the cost of preparing the transcript.

(3) Unless the court orders otherwise, no response to the petition for review will be required and the petition shall be deemed submitted for the court's review based upon the record. The court shall review the petition for review in the normal course and, after consideration of the petition for review and the record, the court shall make such order as justice may require.

(d) **Time Limitation.** If an applicant does not satisfy the requirements for admission to the bar set forth in Rule 42 (IV)(a) above and take the oath of admission within two years of the date of the notice of successfully passing the bar examination, or within two years of the date of the notice that his or her motion for admission without examination, or motion for admission by transferred UBE score has been granted, the applicant's application or motion for admission to the bar shall be denied, and he or she shall be required to retake and pass the bar examination, or file a new motion for admission without examination, or a new motion for admission by transferred UBE score, unless the board grants a request for an extension of the deadline for good cause shown. Any such applicant shall be required to once again establish his or her good moral character and fitness to the satisfaction of the committee and the supreme court.

(e) **Readmission to the bar.** The application process for a person seeking readmission to the bar is governed by Rule 37.

(f) **Applicant's duty to cooperate.** An applicant for admission to the New Hampshire bar has a duty to cooperate with the board, the committee, their designees, and the staff of the Office of Bar Admissions. Any person who seeks admission to the New Hampshire bar agrees to waive all rights of privacy with reference to any and all documentary material filed or secured in connection with his or her application or motion for admission. The applicant also agrees that any documentation submitted by the applicant may be offered into

evidence, without objection, by the board or committee, in any proceeding relating to the applicant's admission to the practice of law.

(g) **Confidentiality.** All documents submitted by an applicant for admission to the New Hampshire bar, all information relating to an applicant gathered by the board, committee, or staff of the Office of Bar Admissions, and all minutes and records circulated to members of the board or committee, shall be confidential and shall not be disclosed or open to the public for inspection except for the following permitted disclosures. The board, committee and staff of the Office of Bar Admissions are authorized to:

1. disclose the names and addresses of applicants to the New Hampshire bar;
2. publish the names of applicants who have passed the bar examination;
3. publish statistical information about bar examination results;
4. provide name-specific pass-fail results to any law school regarding graduates of that law school, which may include an applicant's prior names, date of birth, the date that the applicant's law degree was conferred, and whether the applicant was a first-time or repeat taker. The information will be released to the law schools on condition that no information other than the names of those who passed the exam will be further disseminated.
5. upon receipt of a request and duly executed release from an applicant, provide copies of material in an applicant's file to admissions authorities from other jurisdictions;
6. investigate the character and fitness of an applicant, and disclose any information necessary to the investigation, pursuant to an authorization and release signed by the applicant as part of the petition and questionnaire for admission;
7. disclose relevant information that is otherwise confidential to agencies authorized to investigate complaints of attorney misconduct, or to law enforcement agencies authorized to investigate and prosecute violations of the criminal law;
8. release information regarding an applicant pursuant to a court order;
9. release name and score information to the National Conference of Bar Examiners;
10. release a copy of an applicant's bar admission application upon a written request executed by the applicant and submission of the appropriate fee;
11. publish an applicant's answer to a question on the bar examination as a representative sample of an answer, provided that the identity of the applicant is not disclosed.

APPENDIX CC

Adopt on a permanent basis Supreme Court Rule 40(11)(j), which was amended on a temporary basis by Supreme Court Order dated April 4, 2014 as follows (no changes are being proposed to the temporary rule now in effect):

(j) *Photographing, Recording and Broadcasting*

(1) Except as otherwise provided by this rule or by other provisions of law, any person, whether or not a member of an established media organization, shall be permitted to photograph, record and broadcast all proceedings that are open to the public, provided that such person provides advance notice to the committee in accordance with section (3) of this rule that he or she intends to do so. No person shall photograph, record or broadcast any proceeding without providing advance notice to the committee that he or she intends to do so. In addition to giving any parties in interest an opportunity to object, the purpose of the notice requirement is to allow the committee to ensure that the photographing, recording or broadcasting will not be disruptive to the proceedings and will not be conducted in such a manner or using such equipment as to violate the provisions of this rule.

(2) Official court reporters, court monitors and other persons employed or engaged by the committee to make the official record of any proceeding may record such proceeding by video and/or audio means without compliance with the notice provisions of section (1) of this rule.

(3) Any person desiring to photograph, record or broadcast any proceeding, or to bring equipment intended to be used for these purposes into a hearing room, shall submit a written request to the committee before commencement of the proceeding, or, if the proceeding has already commenced, at the first reasonable opportunity during the proceeding, so the committee before commencement of the proceeding, or at an appropriate time during the proceeding, may give all interested parties a reasonable opportunity to be heard on the request.

(4) Any party to a proceeding or other interested person who has reason to believe that a request to photograph, record or broadcast a proceeding will be made and who desires to place limitations beyond that specified by this rule upon these activities may file a written request seeking such relief. The request shall be filed as far in advance of the proceeding as is practicable. Upon the filing of such a request, the committee may schedule a hearing as expeditiously

as possible before the commencement of the proceeding and, if a hearing is scheduled, the committee shall provide as much notice of the hearing as is reasonably possible to all interested parties and to the Associated Press, which shall disseminate the notice to its members.

(5) The committee shall not establish notice rules, requirements or procedures that are different than those established by this rule.

(6) At any hearing conducted pursuant to subsections (3) or (4) of this rule, the party or person seeking to prohibit or impose restrictions beyond the terms of this rule on the photographing, recording or broadcasting of a proceeding that is open to the public shall bear the burden of demonstrating: (1) that the relief sought advances an overriding public interest that is likely to be prejudiced if the relief is not granted; (2) that the relief sought is no broader than necessary to protect that interest; and (3) that no reasonable less restrictive alternatives are available to protect the interest. Any order prohibiting or imposing restrictions beyond the terms of this rule upon the photographing, recording or broadcasting of a proceeding that is open to the public shall be supported by particularized findings of fact that demonstrate the necessity of the committee's action.

(7) The committee retains discretion to limit the number of cameras, recording devices and related equipment allowed in the hearing room at one time. In imposing such limitations, the committee may give preference to requests to photograph, record or broadcast made by a representative of an established media organization that disseminates information concerning court proceedings to the public. The committee also may require representatives of the media to arrange pool coverage.

(8) It is the responsibility of representatives of media organizations desiring to photograph, record or broadcast a proceeding to contact the executive secretary in advance of a proceeding to ascertain if pool coverage will be required. If the committee has determined that pool coverage will be required, it is the sole responsibility of such media representatives, with assistance as needed from executive secretary, to determine which media organization will provide the coverage feed. Disputes about pool coverage will not ordinarily be resolved by the committee, and the committee may deny media organizations' requests to photograph, record or broadcast a proceeding if pool agreements cannot be reached. It also is the responsibility of said person to make arrangements with the executive secretary sufficiently in advance of the proceeding so that the set up of any needed equipment in the hearing room, including equipment for pool coverage, can be completed without

delaying the proceeding. The court shall allow reasonable time prior to a proceeding for the set up of such equipment.

(9) The committee shall make all documents and exhibits filed with the commitee, and not sealed, available for inspection by members of the public in a reasonably timely fashion, it being recognized that the committee's need to make use of documents and exhibits for official purposes must take precedence over their availability for public inspection. The committee may elect to make one "public" copy of an exhibit available.

(10) The exact location of all recording, photographing and broadcasting equipment within the hearing room shall be determined by the committee. Once established, movement of such equipment within the hearing room is prohibited without the express prior approval of the committee. The committee may prohibit the use of any equipment which requires the laying of cords or wires that pose a safety hazard or impair easy ingress and egress from the hearing room. All equipment used must operate with minimal noise so as not to disrupt the proceedings.

(11) Unless otherwise ordered by the committee, the following standing orders shall apply to all recording, photographing or broadcasting of proceedings within any hearing room:

(a) No flash or other artificial lighting devices shall be used.

(b) Set up and dismantling of equipment in a disruptive manner while committee is in session is prohibited.

(c) No recording, photographing or broadcasting equipment may be moved into, out of, or within the hearing room while the hearing is in session.

(d) Recording, photographing or broadcasting equipment must remain a reasonable distance from the parties, counsel tables, alleged victims and their families and witnesses, unless such person(s) voluntarily approach the position where such equipment is located. No such equipment shall be used or set up in a location that creates a risk of picking up confidential communications between lawyer and client or conferences held at the bench among committee members and counsel or the parties.

(e) All persons using recording, photographing or broadcasting equipment must abide by the directions of the committee at all times.

(f) Interviews within the hearing room are not permitted before or after a proceeding.

(g) A person who has been granted permission to record, photograph or broadcast a hearing shall not engage in any activity that distracts the participants or impairs the dignity of the proceedings.

With respect to subsection (3) of this rule, it is contemplated that such requests will be deemed timely if they are filed enough in advance of the proceeding that the committee has an opportunity to read and consider the request, to orally notify all interested parties of its existence, and to conduct a brief hearing in the event that any interested party objects to the request. Given the strong presumption under New Hampshire law that photographing, recording and/or broadcasting judicial conduct committee proceedings that are open to the public is allowable, this subsection is not intended to impose lengthy or onerous advance notice requirements; instead, it recognizes that frequently such requests will be filed only shortly before the proceeding in question is to begin.

APPENDIX DD

Adopt on a permanent basis Rule 98 of the Rules of the Superior Court of the State of New Hampshire Applicable in Criminal Cases Filed in Superior Court, which was amended on a temporary basis by Supreme Court Order dated February 20, 2014 as follows (no changes are being proposed to the temporary rule now in effect):

98. The following discovery and scheduling provisions shall apply to all criminal cases in the Superior Court unless otherwise modified by the presiding justice in accordance with paragraph J hereof.

A. *Pretrial Disclosure by the State.*

(1) Within ten (10) calendar days after the entry of a not guilty plea by the defendant, the state shall provide the defendant with the materials specified below:

(i) A copy of all statements, written or oral, signed or unsigned, made by the defendant to any law enforcement officer or his agent which are intended for use by the state as evidence at trial or at a pretrial evidentiary hearing.

(ii) Copies of all police reports; statements of witnesses; results or reports of physical or mental examinations, scientific tests or experiments, or any other reports or statements of experts, as well as a summary of each expert's qualifications.

(iii) The defendant's prior criminal record.

(iv) Copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the state as evidence at trial or at a pretrial evidentiary hearing.

(v) All exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995).

(vi) Notification of the state's intention to offer at trial pursuant to N.H. Rule of Evidence 404(b) evidence of other crimes, wrongs or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the state will rely on to prove the commission of such other crimes, wrongs or acts.

B. *Pretrial Disclosure by the Defendant.*

(1) If the defendant intends to rely upon an alibi or any other defense specified in the Criminal Code, the defendant shall within thirty (30) calendar days after the entry of a plea of not guilty file a notice to this effect with the court and the prosecution as provided in Superior Court Rules 100 and 101.

(2) If a defendant in a case to which Superior Court Rule 100-A applies intends to offer evidence of prior sexual activity of the victim with a person other than the defendant, the defendant shall not less than forty-five (45) calendar days prior to jury selection file a motion in conformance with the requirements of said rule.

(3) Not less than thirty (30) calendar days prior to jury selection or, in the case of a pretrial evidentiary hearing, not less than three (3) calendar days prior to such hearing, the defendant shall provide the state with copies of or access to (i) all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the defendant as evidence at the trial or hearing and (ii) all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by experts which the defendant anticipates calling as a witness at the trial or hearing, as well as a summary of each such expert's qualifications.

C. *Dispositional Conferences.*

The state shall provide a written offer for a negotiated plea, in compliance with the Victim's Rights statute, RSA 21-M:8-k, to the defense no less than fourteen (14) days prior to the dispositional conference. The defense shall respond to the state's offer no later than ten (10) days after receipt.

D. *Exchange of Information Concerning Trial Witnesses.*

(1) Not less than twenty (20) calendar days prior to final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than three (3) calendar days prior to such hearing, the state shall provide the defendant with a list of the names of the witnesses it anticipates calling at the trial or

hearing. Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to paragraph A(ii) of this rule the state shall also provide the defendant with all statements of witnesses the state anticipates calling at the trial or hearing. At this same time, the state also shall furnish the defendant with the results of New Hampshire criminal record checks for all of the state's trial or hearing witnesses other than those witnesses who are experts or law enforcement officers.

For each expert witness included on the list of witnesses, the state shall provide a brief summary of the expert's education and experience relevant to his area of expertise, state the subject matter on which the expert is expected to testify, state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.

(2) Not later than ten (10) calendar days before the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than two (2) calendar days prior to such hearing, the defendant shall provide the state with a list of the names of the witnesses the defendant anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the defendant shall also provide the state with all statements of witnesses the defendant anticipates calling at the trial or hearing. Notwithstanding the preceding sentence, this rule does not require the defendant to provide the state with copies of or access to statements of the defendant.

For each expert witness included on the list of witnesses, the defendant shall provide a brief summary of the expert's education and experience relevant to his area of expertise, state the subject matter on which the expert is expected to testify, state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.

(3) For purposes of this rule, a "statement" of a witness means: (i) a written statement signed or otherwise adopted or approved by the witness; (ii) a stenographic, mechanical, electrical or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement; and (iii) the substance of an oral statement made by the witness and memorialized or summarized within any notes, reports or other writings or recordings, except that, in the case of notes personally prepared by the attorney representing the state or the defendant at trial, such notes do not constitute a "statement" unless they have been adopted or approved by the

witness or by a third person who was present when the oral statement memorialized or summarized within the notes was made.

E. *Protection of Information Not Subject to Disclosure.*

To the extent either party contends that a particular statement of a witness otherwise subject to discovery under this rule contains information concerning the mental impressions, theories, legal conclusions or trial or hearing strategy of counsel, or contains information that is not pertinent to the anticipated testimony of the witness on direct or cross examination, that party shall at or before the time disclosure hereunder is required submit to the opposing party a proposed redacted copy of the statement deleting the information which the party contends should not be disclosed, together with (i) notification that the statement or report in question has been redacted and (ii) (without disclosing the contents of the redacted portions) a general statement of the basis for the redactions. If the opposing party is not satisfied with the redacted version of the statement so provided, the party claiming the right to prevent disclosure of the redacted material shall submit to the court for *in camera* review a complete copy of the statement at issue as well as the proposed redacted version, along with a memorandum of law detailing the grounds for nondisclosure.

F. *Motions Seeking Additional Discovery.*

Subject to the provisions of paragraph J, the discovery mandated by paragraphs A, B and D of this rule shall be provided as a matter of course and without the need for making formal request or filing a motion for the same. No motion seeking discovery of any of the materials required to be disclosed by paragraphs A, B, and D of this rule shall be accepted for filing by the clerk of court unless said motion contains a specific recitation of (i) the particular discovery materials sought by the motion, (ii) the efforts which the movant has made to obtain said materials from the opposing party without the need for filing a motion and (iii) the reasons, if any, given by the opposing party for refusing to provide such materials.

Nonetheless, this rule does not preclude any party from filing motions to obtain additional discovery. Except with respect to witnesses or information first disclosed pursuant to paragraph D, all motions seeking additional discovery, including motions for a bill of particulars and for depositions, shall be filed within forty-five (45) calendar days after the defendant enters a plea of not guilty. Motions for additional discovery or depositions with respect to trial witnesses first disclosed pursuant to paragraph D shall be filed no later than seven (7) calendar days after such disclosure occurs.

G. *Other Pretrial Motions.*

The parties shall file all pretrial motions other than discovery related motions, including but not limited to motions to dismiss, motions to suppress and motions to sever charges or defendants, not more than sixty (60) calendar days after entry of a plea of not guilty or within such other time in advance of trial as the Court may order for good cause shown or may provide for in a pretrial scheduling order.

H. *Motions in Limine.*

The parties shall file all motions in limine no less than five (5) calendar days prior to the final pretrial conference. For purposes of this paragraph, a motion which seeks to exclude the introduction of evidence on the ground that the manner in which such evidence was obtained was in violation of the constitution or laws of this state or any other jurisdiction shall be treated as a motion to suppress and not a motion in limine.

I. *Continuing Duty to Disclose.*

The parties are under a continuing obligation to supplement their discovery responses on a timely basis as additional materials covered by this order are generated or as a party learns that discovery previously provided is incomplete, inaccurate or misleading.

J. *Protective and Modifying Orders.*

Upon a sufficient showing of good cause, the court may at any time order that discovery required hereunder be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing of good cause, in whole or in part, in the form of an ex parte written submission to be reviewed by the court *in camera.* If the court enters an order granting relief following such an ex parte showing, the written submission made by the party shall be sealed and preserved in the records of the court to be made available to the supreme court in the event of an appeal.

K. *Sanctions for Failure to Comply.*

If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court

may take such action as it deems just under the circumstances, including but not limited to: (i) ordering the party to provide the discovery not previously provided, (ii) granting a continuance of the trial or hearing, (iii) prohibiting the party from introducing the evidence not disclosed, (iv) assessing costs and attorneys fees against the party or counsel who has violated the terms of this rule

APPENDIX EE

Adopt on a permanent basis Circuit Court – Probate Division Rule 96-A, which was adopted on a temporary basis by Supreme Court Order dated December 29, 2014 as follows (no changes are being proposed to the temporary rule now in effect):

Rule 96-A. PROOF OF VALIDITY OF WILL/TRUST

(a) **Proof of Will**

(1) At the time that the Petition to Prove Will is filed the petitioner shall also file the original will sought to be validated. The petitioner shall certify that the will filed with the petition is the petitioner's current will and that no subsequent wills or codicils are in existence.

(2) The petitioner shall certify that a copy of the petition and a copy of the attached will have been sent to all interested parties as defined in RSA 552:18, III. The court may order that notice be given to other persons.

(3) Upon filing of the petition, the court shall schedule a hearing within 30 days and shall cause notice of the hearing to be sent via first class U.S. mail to all interested parties listed on the petition as well as any other parties deemed by the court to be interested parties per RSA 552:18, V.

(4) At the conclusion of the hearing, the court shall issue an order declaring the will to be valid or invalid and may include any findings of fact or conclusions of law that it deems appropriate or necessary.

(5) Thirty days following the issuance of the court's order or of the clerk's written notice of decision, whichever is later, if the court has not received notice that an appeal has been filed with the New Hampshire Supreme Court, notice shall be provided to the petitioner or to the petitioner's attorney that the original will must be retrieved from the Probate Division within 10 days. The court shall cause a certified copy of the will to be placed in the court's file prior to delivery to the petitioner or to the petitioner's attorney, and said copy shall become part of the court's official record of the proceeding. If the original will is not retrieved, the court shall maintain the original will in the court's file pending notification of the decease of the petitioner.

(6) If, subsequent to the proceeding but prior to the delivery of the original will to the petitioner, the court receives reliable information that the petitioner is deceased, the court shall cause the original will to be filed in the Probate Division located in the county of residence of the petitioner pursuant to RSA 552:2. If the Probate Division holding the original will is the Probate Division located in the county of residence of the petitioner, the court shall cause a new file to be created as if the original will had been filed pursuant to RSA 552:2.

(b) **Proof of Trust by Settlor**

(1) At the time that a Petition is filed, the Petitioner shall certify that a copy of the Petition and a copy of the trust have been sent to all interested parties as defined in RSA 564-B;4-406 (d)(3) and (4). The court may order that notice be given to other persons.

(2) The court shall schedule a hearing on the Petition and shall cause notice to be sent to all interested persons via first class U.S. mail.

(3) At the conclusion of the hearing, the court shall issue an order declaring the trust to be valid or invalid and may include any findings of fact or conclusions of law that it deems appropriate or necessary.

APPENDIX FF

Adopt on a permanent basis Circuit Court – Probate Division Rule 94, which was adopted on a temporary basis by Supreme Court Order dated December 29, 2014 as follows (no changes are being proposed to the temporary rule now in effect):

Rule 94. GESTATIONAL CARRIER AGREEMENTS – PARENTAGE ORDERS

(a) For the purpose of a Petition for Parentage Order, the parties requiring notice shall be the parties to the gestational carrier agreement and shall include:

(1) The intended parent or parents;
(2) The gestational carrier, and
(3) The spouse of the gestational carrier.

In addition to the parties listed above and in the discretion of the court, the non-spousal partner of the gestational carrier, if any, may be included as a party if not a party to the gestational carrier agreement.

(b) The petitioner, at the time of filing the Petition for Parentage Order, shall file a copy of the gestational carrier agreement with the court.

(c) The petitioner shall attach to the petition any sworn affidavits intended to demonstrate substantial compliance with RSA Ch. 168-C.

(d) The petitioner shall cause notice of the filing to be provided to all parties to the gestational carrier agreement and shall certify on the petition that said notice has been provided. Any responsive pleading shall be filed with the court within 10 days of the filing of the petition.

(e) In the event that the court determines that a hearing on the petition is necessary, notice shall be provided to the parties in paragraph A by first class mail. Any hearing shall be scheduled within 30 days of the date of filing of the petition.