

RULES OF ADVISORY COMMITTEE ON JUDICIAL ETHICS

PREFACE

The following rules are adopted under the authority of Rule 38-A of the Rules of the Supreme Court of New Hampshire, and were approved by that Court on July 18, 2002. The rules are intended to implement Supreme Court Rule 38-A. They describe the procedure for requesting an advisory opinion from the committee and for the committee's issuance of an opinion. The rules should be read and interpreted in conjunction with Supreme Court Rule 38-A.

JURISDICTION

1. Who May Request an Advisory Opinion. Any person whose conduct is subject to the Code of Judicial Conduct may request an advisory opinion about the propriety of his or her proposed conduct. See Supreme Court Rule 38-A (3)(a). Included persons are full-time and part-time judges, judges pro tempore, marital and other masters, judicial referees, court stenographers and reporters, clerks and deputy clerks of court, and registers and deputy registers of probate. See Addendum to Supreme Court Rule 38 entitled "Application of the Code of Judicial Conduct" and Supreme Court Rule 40 (2) defining the term "judge" for more precise identification of all such persons. The term "judge" as used herein shall have the same meaning as it has in Supreme Court Rule 40 (2).

2. Inquiries About Conduct of Persons Other Than Inquirer Not To Be Entertained; Exceptions. The Committee shall not render opinions regarding the proposed conduct of someone other than the person submitting the request, except that the Committee may respond to a request from a judge about a person subject to the judge's direction and control or over whom the judge has supervisory responsibilities, or from a judge about the judge's relatives. See Supreme Court Rule 38-A (3)(b).

3. Opinions Limited to Proposed Future Conduct. The Committee shall issue opinions addressing only contemplated or proposed future conduct and shall not issue opinions addressing past or current conduct unless the past or current conduct relates to future conduct or is continuing. In addition, the Committee shall not issue an opinion in response to a request when the facts are known to be the subject of past or pending litigation or disciplinary investigation or proceedings. See Supreme Court Rule 38-A (3)(c).

4. When Committee May Decline to Issue Opinion. The Committee may, in its discretion, decline to respond to a request for opinion if it determines that a response would be inappropriate or would not aid the judge, benefit the judiciary as a whole, or

serve the public interest. The Committee may decline to render opinions on hypothetical questions. See Supreme Court Rule 38-A (3)(d).

5. Committee's Authority Limited. The Committee's authority is limited to the interpretation of rules of court and statutes relating to the ethical and professional conduct of judges, and the Committee has no power to interpret any rule or statute not related to judicial ethics. See Supreme Court Rule 38-A (3)(e).

6. Effect of Advisory Opinion. An opinion issued by the Committee shall be advisory only, and no opinion shall be binding on the Committee on Judicial Conduct in the exercise of its judicial discipline responsibilities. However, the Committee on Judicial Conduct and the Supreme Court, may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be evidence of a good faith effort to comply with the Code of Judicial Conduct, provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially similar. See Supreme Court Rule 38-A (4)(c).

GENERAL PROVISIONS

7. Committee's Address. A request for an advisory opinion should be sent to the Committee at the following address:

Secretary, Advisory Committee on Judicial Ethics
New Hampshire Supreme Court
Frank Rowe Kenison Supreme Court Building
1 Noble Drive
Concord, New Hampshire 03301

8. Expenses. Members of the Committee shall serve without compensation for their services but shall be reimbursed for necessary expenses incurred in the performance of their duties.

9. Meetings. Meetings of the Committee shall be held at the call of the Chair or the Vice-Chair. The Committee may establish regular or stated meeting dates.

10. Conduct of Business. The business of the Committee, including the issuance of advisory opinions, may be transacted in person at meetings, by telephone conference call, by exchange of correspondence, or by informal poll.

11. Disqualification. No member of the Committee shall participate in any matter or business before the Committee in which his or her impartiality might reasonably be questioned.

12. Duties of Secretary. The person designated by the Supreme Court as Secretary to the Committee shall generally furnish administrative support to the Committee. He or she shall receive requests for advisory opinions, process the same under the direction and supervision of the Committee, and arrange for distribution and publication of the advisory opinions of the Committee. The Secretary shall have charge of the Committee's office, keep its members properly informed about its business, maintain the Committee's records, and prepare a draft annual report of the Committee's activities for review and approval by the Committee. The Secretary shall have and perform such other duties and responsibilities as the Committee may determine from time to time.

ADVISORY OPINION PROCESS

13. Form of Request for Advisory Opinion. Except in the case of an emergency request for an opinion, a request for an advisory opinion must be in writing, signed by the person submitting the same, and sent to the Committee's address. The request shall contain a statement describing in detail all relevant facts and circumstances pertaining to the conduct for which an opinion is being sought. It shall also include a clear and concise statement of the question of judicial ethics for which the opinion is being sought, with references to the relevant section or sections of the Code of Judicial Conduct and any case law or other authority already consulted by the inquirer.

14. Initial Review of Requests by Chair and Committee. Upon receipt of a request for an advisory opinion, the Secretary shall send a copy to the Chair, who shall review it for compliance with these Rules. If the Chair finds that the request complies with the Rules, the Chair shall direct the Secretary to distribute it to the members of the Committee. If the Chair finds that the request does not comply with the Rules, e.g., the facts and circumstances or the statement of the question are unclear or deficient, the Chair may request supplemental information from the inquirer. If, however, the Chair finds a failure to comply with these Rules that is not reasonably susceptible to rectification, or if, after supplemental information has been provided, the Chair determines that there is not a satisfactory factual basis on which to ground an opinion, the Chair shall inform the inquirer that the Committee will not render an advisory opinion and assign the reason therefor. The Committee may also request supplemental information from the inquirer after a request for advisory opinion is distributed to and reviewed by the members of the Committee. If the inquirer fails to provide supplemental information requested by either the Chair or Committee within a reasonable time, the inquirer will be informed that an advisory opinion will not be rendered.

15. Opinion Drafting and Approval. As soon as practicable after receipt of a request for an opinion, the Committee shall confer regarding the request. The Chair shall then assign the responsibility for drafting the opinion to a member of the Committee. Such assignments shall generally be made on a rotating basis. The draft

opinion shall be circulated to the other members for review and comment. The Committee shall then confer regarding approval of the opinion to be issued. At least three members shall be required to concur in the opinion issued. Any member may dissent from the opinion of the majority, and may issue a minority opinion. The drafting, review, and issuance of the opinion shall be accomplished as expeditiously as possible.

16. Form of Advisory Opinions. Advisory opinions shall set out the facts upon which the opinion is based and provide advice only with respect to those facts. Usually they shall contain a discussion section that analyzes the issues and provides the rationale for the advice given. If the opinion responds to more than one issue, each issue shall be addressed. Opinions shall quote the applicable provisions of the Code of Judicial Conduct, and shall cite cases and other authorities bearing upon the advice given.

17. Emergency Requests and Opinions. To offer guidance to judges faced unexpectedly with questions within the Committee's jurisdiction that require an immediate response, the Chair, or the Vice-chair if the Chair is unavailable, with the concurrence of one other member of the Committee, may give advice on an emergency basis. Whenever possible, the request for advice shall be in writing and submitted to the Secretary. The emergency advice may be given orally or in writing, as deemed appropriate. Emergency advice shall be submitted to the full Committee for review and action. If the Committee agrees with the advice given, it will issue a written confirming opinion to the inquirer. If the Committee disagrees, it will issue a written opinion to the inquirer setting forth the emergency advice that had been given so that the judge will have whatever protection Section (4) (c) of Supreme Court Rule 38-A may afford as to conduct undertaken in reliance on that advice, but such opinion will also set forth the view of the full Committee on the issue presented. The opinion of the full Committee will supersede all inconsistent emergency advice.

18. Modification. At any time, a majority of the Committee may modify or reverse any advisory opinion. The modification of an opinion shall not have a retroactive effect on the protection that section 4(c) of Supreme Court Rule 38-A may afford as to conduct undertaken in reliance on the opinion. The Committee shall periodically review all of its opinions to determine whether any are obsolete.

PUBLICATION AND DISSEMINATION OF OPINIONS

19. Advisory Opinions of General Interest to be Published in Redacted Form. The Committee shall arrange for the publication of those of its advisory opinions that are of general interest and continuing concern to the judiciary or the public. Such opinions shall be published in redacted form, with the name of the requesting judge and any other identifying information deleted therefrom unless the judge consents to its inclusion.

20. Publication Methods. The Committee shall arrange for publication of its advisory opinions by various means that assure wide dissemination to the judiciary and public, such as inclusion in publications of the New Hampshire Bar Association in full text or synoptic form, or by delivery over an electronic on-line service or news service.

CONFIDENTIALITY

21. Confidentiality of Records and Proceedings Relating to Advisory Opinions. Except for redacted opinions that are published, and except as may otherwise be required by law, all opinions, inquiries, replies, circulated drafts, records, documents, files, internal communications and proceedings of the Committee shall be confidential. Except as required by Supreme Court Rule 38, Canon 3D, or by other law, no member of the Committee or its staff shall publicly disclose the identity of an individual whose inquiry or conduct was the subject of an advisory opinion.

22. Waiver of Confidentiality. Notwithstanding the provisions of Section 21 hereof, confidentiality shall not apply (a) if the person making the request for an advisory opinion waives confidentiality in writing; or (b) if, when the request is made on behalf of another person, the person about whom the request is made expressly waives confidentiality in writing; or (c) if a judge who requested an opinion relies on that opinion in judicial disciplinary proceedings. Notwithstanding any such waiver, Committee deliberations shall be confidential.