

**NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON  
RULES**

**PUBLIC HEARING NOTICE**

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 12:30 p.m. on Friday, June 17, 2011, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before June 16, 2011, or may be submitted at the hearing on June 17, 2011. Comments may be e-mailed to the Committee on or before June 16, 2011, at:

[rulescomment@courts.state.nh.us](mailto:rulescomment@courts.state.nh.us)

Comments may also be mailed or delivered to the Committee at the following address:

N.H. Supreme Court  
Advisory Committee on Rules  
1 Charles Doe Drive  
Concord, NH 03301

Any suggestions for rules changes other than those set forth below may be submitted in writing to the secretary of the Committee for consideration by the Committee in the future.

Copies of the specific changes being considered by the Committee are available on request to the secretary of the Committee at the N.H.

Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301 (Tel. 271-2646). In addition, the changes being considered are available on the Internet at:

<http://www.courts.state.nh.us/committees/adviscommrules/index.htm>

The changes being considered concern the following rules:

### **I. Rules of Professional Conduct**

*(This proposed amendment to Rule 1.10 of the Rules of Professional Conduct was submitted to the Advisory Committee on Rules by the Ethics Committee of the New Hampshire Bar Association. The proposed amendment focuses on the application of Rule 1.10's firm-wide imputation rule to conflicts of interest that can arise when a lawyer ("migrating lawyer") leaves one firm to take employment with another. The proposed amendment allows for "screening" of the migrating lawyer as a means of resolving conflicts that might otherwise arise due to the attorney's possession of confidential information regarding clients at his or her former firm.)*

1. Amend Rule 1.10 of the Rules of Professional Conduct, as set forth in Appendix A.

### **II. Supreme Court Rules – Minimum Continuing Legal Education (Late Fees and Suspension Process for Noncompliance)**

1. Adopt Supreme Court Rule 53.7(A), regarding sanctions for failure to comply with continuing legal education requirements, on a permanent basis, as set forth in Appendix B.

### **III. Mediator Fees**

1. Adopt Supreme Court Rule 48-B, regarding mediator fees in family cases, on a permanent basis, as set forth in Appendix C.

### **IV. Vital Statistics Reports -- Confidentiality**

1. Adopt Superior Court Rule 203, regarding vital statistics reports, on a permanent basis, as set forth in Appendix D.

2. Adopt Family Division Rule 2.25, regarding vital statistics reports, on a permanent basis, as set forth in Appendix E.

**V. District Court - Town Ordinance Violation Rules**

1. Adopt District Court Rules 6.1 to 6.7, regarding local ordinance citations, on a permanent basis, as set forth in Appendix F.

**VI. Code of Judicial Conduct**

*(This proposed amendment to Supreme Court Rule 38, Canon 3, Rule 3.1 clarifies that the 15% income limitation found in paragraph B(2) applies to all avocational activities and is not limited to specific avocational activities, such as teaching.)*

1. Amend Supreme Court Rule 38, Canon 3, Rule 3.1, as set forth in Appendix G.

New Hampshire Supreme Court  
Advisory Committee on Rules

By: Robert J. Lynn, Chairperson  
and Carolyn A. Koegler, Secretary

May 5, 2011

## APPENDIX A

Adopt the following amendment, proposed by the Ethics Committee of the New Hampshire Bar Association, to Rule 1.10 of the Rules of Professional Conduct, (new material is in **[bold and in brackets]**; deleted material is in ~~striketrough~~ format):

### Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) **[When a lawyer becomes associated with a firm, no lawyer in that firm shall knowingly represent a person in a matter in which the newly-associated lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is timely screened from any form of participation in the matter. For purposes of this rule, screening requires that:**

- (1) The personally disqualified lawyer shall provide the former client or the former client's counsel with an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter with any other firm member or employee. Promptly upon final disposition of the matter, if requested by the former client or former client's counsel, the personally disqualified lawyer shall provide a further affidavit describing the lawyer's compliance with these undertakings.**

**(2) At least one partner, officer or shareholder of the firm shall provide the former client or former client’s counsel with an affidavit attesting that all firm members and employees are aware of the requirement that the personally disqualified lawyer be screened from participation in and discussions about the matter, and describing the procedures being followed to screen the personally disqualified lawyer; and an agreement to respond promptly to any written inquiries or objections on behalf of the former client about the screening procedures adopted by the firm. Promptly upon termination of the matter, if requested by the former client or former client’s counsel, a partner, officer or shareholder of the firm shall provide an additional affidavit describing the firm’s compliance with procedures established for screening of the personally disqualified lawyer.**

**(3) Notwithstanding the foregoing, a personally disqualified lawyer can not be screened under the provisions of this rule if that lawyer had substantial involvement in, or received substantial material information about, a matter that is ongoing at the time of the firm transfer and that would be the focus of the screening procedures.]**

**[(d)]** A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

### **Ethics Committee Comment**

The disqualification of lawyers associated in a firm with former government lawyers is governed by Rule 1.11(b) and (c).

The disqualification of lawyers associated in a firm with a lawyer-official is governed by Rule 1.11A(c).

**[Rule 1.10(c) is new and applies when a lawyer moves from one law firm to another law firm. The new provisions establish screening procedures similar although not identical to those that now exist in the Rules for former government lawyers, see Rule 1.11; and prospective clients, see Rule 1.18.**

**Rule 1.10(c) differs from the ABA Model Rule, and draws on more restrictive procedures that have been adopted in Massachusetts and Oregon. More specifically, unlike the ABA Model Rule, screening would not be available for “migrating” lawyers who had substantial involvement in, or acquired substantial material information about, a matter ongoing at the time of the transfer between firms. In addition, to ensure attention to the establishment of effective**

**screening procedures, the new provisions require that separate affidavits be prepared by the personally disqualified attorney and by a partner, officer or shareholder of the new firm. These affidavits would be prepared at the time of the attorney's transfer and implementation of screening procedures; and again, if requested by the former client or former client's counsel, at the time of termination of the matter that is the subject of the screening procedures. If a challenge is made to the availability, or implementation, of the screening procedures authorized under 1.10(c), the burden will be on the law firm carrying out the screening to demonstrate compliance with the Rule's requirements.**

**While perhaps more restrictive than rules in place in other jurisdictions, the new provisions seek to achieve a proper balance between the increasing mobility of attorneys between firms and the right of clients of the new firms to retain the law firms of their choice; and the equally-important interests of the former clients in assuring that confidential information relating to their representation will not be used against them by the migrating lawyer's new firm.]**

## APPENDIX B

Adopt on a permanent basis Supreme Court Rule 53.7(A), which was amended on a temporary basis by Supreme Court order dated May 11, 2010, as follows (no changes are being proposed to the temporary rule now in effect):

### **53.7.—Sanctions And Appeal**

#### *A. Delinquency –*

1. *Notice of Delinquency* - Following the annual reporting date, the NHMCLE Board shall send a notice of delinquency to each lawyer not in compliance with this rule. To the extent administratively possible, the notice shall be sent within fifteen (15) days of the annual reporting date. Within thirty (30) days of the date appearing on the notice of delinquency, the lawyer shall comply with this rule for the prior reporting period.

2. *Final Demand for Compliance* - After this thirty (30) day period, if the lawyer has not complied with the rule to permit retroactive compliance, or fails to certify that the lawyer is exempt from the requirements, and/or has not paid any outstanding delinquency fee, the NHMCLE Board shall so notify the lawyer by certified mail that it will seek an order of the New Hampshire Supreme Court suspending the lawyer from the practice of law.

3. *Sanctions* - Failure of a lawyer to meet the compliance requirements of this rule will result in the imposition of delinquency fees as set forth in the regulations adopted by the NHMCLE Board.

## APPENDIX C

Adopt on a permanent basis Supreme Court Rule 48-B, which was amended on a temporary basis by Supreme Court order dated August 10, 2010, as follows (no changes are being proposed to the temporary rule now in effect):

### **RULE 48-B. Family Mediator Fees**

(1) Scope. The provisions of this rule shall apply only to proceedings in which the parties are ordered to participate in mediation under RSA 461-A:7 and RSA 458:15-a, including brought-forward cases under either statute.

(2) Services. Mediators shall be paid for conducting mediation sessions, drafting mediated agreements, and performing necessary administrative tasks. “Administrative tasks” may include reviewing the file, screening for domestic violence, scheduling and rescheduling sessions, and having conferences with counsel. Except as provided below, mediators shall not be paid for travel time; see section (8) below for mileage reimbursement.

(3) Disclosure of Fees. Before mediation starts either the court or the mediator shall provide the parties a written agreement to mediate disclosing both the set fee, and in RSA 458:15-a cases and in RSA 461-A cases that do not qualify as indigent, the hourly fee for any time after the 5 hours. This disclosure of both fees shall be in at least size 12 font. Before mediation begins, the agreement to mediate shall be signed by the parties, the mediator, and if present, counsel.

(4) Time Records. Each mediator shall keep a record of time spent on each case clearly itemizing administrative, mediation, and drafting time.

(5) Fees in RSA 461-A Indigent Cases.

(a) If both parties are found to be indigent according to Family Division Administrative Order # 2005-4 (December 30, 2005), the mediator shall be paid a set fee of \$300.00 for his or her services if one or more sessions occur. The court may order each party to pay a proportional amount of this fee. The fee shall be paid from the special fund established pursuant to RSA 461-A:17 and repaid by the parties in accordance with RSA 461-A:18. Mediators have discretion to bill less than the set fee when warranted.

(b) If only one party qualifies as indigent, it shall be presumed that the person not qualifying as indigent shall pay the fee as set out in sections (6) and (7), below. However, the court may order that the special fund pay half of the fees, as justice requires.

(c) In indigent cases, if the parties, or either of them, fail to appear for the first session with the mediator, the mediator shall be paid \$120.00 from the special fund in lieu of the \$300.00 set fee. The court may allot the responsibility for reimbursing the state for fees for missed sessions between the parties, as justice requires.

(d) Only upon express, written finding for good cause and exceptional circumstances by the court will the maximum fees be exceeded or will additional fees be authorized. All motions to exceed the maximum fee must be approved prior to the \$300.00 fee being exceeded; provided, however, that the court may waive the requirement for prior approval when justice so requires. If a motion to exceed is granted, the hourly rate for payments to mediators exceeding the \$300.00 amount shall be based upon the sliding scale in section 7(a) below.

#### (6) Fees in Other Cases – Up to Maximum of 5 Hours

(a) In all RSA 458:15-a cases, and in RSA 461-A:15 cases that do not qualify as indigent, the fee shall be a set fee \$300.00 for mediation services up to a maximum of 5 hours. Actual time for any necessary administrative tasks (up to a maximum of 60 minutes for each case) and for any out-of-session time, drafting of mediated agreements shall be included in the 5 hours, except as otherwise provided.

(b) The set fee of \$300.00 for up to a maximum of 5 hours shall be a charge against the parties in a proportional amount as the court may determine. Mediators have discretion to bill less than the set fee when warranted.

(c) If the parties or either of them fail to appear for any session with the mediator, or cancel a mediation session less than 2 business days in advance, the scheduled hours shall count toward the 5 hour maximum.

(d) After 3 total hours or before any session that is scheduled to put the total number of hours beyond 5 hours, whichever occurs first, the mediator shall provide written notice of the change in hourly fees after 5 hours and an itemized bill to the clients. The notice shall disclose the change in fees after 5 hours in at least size 12 font. This notice will allow clients the option to continue mediation beyond 5 hours under the

fee schedule in section 7 below or have the case put back on the trial docket.

(7) Fees in Other Cases – After 5 Hours

(a) If the parties' combined annual gross income is less than \$100,000, the time beyond 5 hours shall be on a sliding scale hourly rate for each person based on his or her individual gross income, as follows:

INDIVIDUAL ANNUAL  
GROSS INCOME

\$ 10,000 and under	\$ 15 hour
\$ 10,001 – \$ 15,000	\$ 20 hour
\$ 15,001 – \$ 20,000	\$ 25 hour
\$ 20,001 – \$ 30,000	\$ 35 hour
\$ 30,001 – \$ 35,000	\$ 45 hour
\$ 35,001 – \$ 40,000	\$ 55 hour
\$ 40,001 – \$ 50,000	\$ 65 hour
over \$ 50,000	\$ 75 hour

Each party shall pay at his or her hourly rate unless the court orders either for one party to pay all or a portion of the other's fees or payment from an asset, as justice requires.

(b) If the parties' combined annual gross income is \$100,000 or more, time beyond 5 hours shall be on a sliding scale hourly rate for the case, based on their combined gross incomes, as follows:

COMBINED ANNUAL  
GROSS INCOME

\$ 100,000 – \$ 199,999	\$ 150 hour
\$ 200,000 or more	\$ 200 hour

The hourly fee shall be a charge against the parties in a proportional amount, or paid from assets, as the court may determine. If one party earns substantially more than the other, it shall be presumed that either the higher income party shall pay the entire fee or the fees will be allocated based on their respective incomes.

(c) Beyond the 5 hours, if the parties or either of them fail to appear for any session with the mediator, or cancel a mediation session less than 2 business days in advance, the mediator shall be paid for the scheduled time at the sliding scale rate for each party. The court may allot the responsibility for paying the mediator for fees for missed or cancelled sessions between the parties, as justice requires.

(8) Mileage. Upon the proper submission to the Administrative Office of the Courts mediators shall be reimbursed at a rate of 40 cents per mile round-trip for the first mediation appointment.

## **APPENDIX D**

Adopt on a permanent basis Superior Court Rule 203, which was amended on a temporary basis by Supreme Court order dated August 10, 2010, as follows (no changes are being proposed to the temporary rule now in effect):

203. VITAL STATISTICS REPORT. No divorce, legal separation, or annulment will be heard on its merits until there is on file with the court a typewritten vital statistics report, fully completed. Access to information contained in the vital statistics report shall be restricted to court personnel, the parties, and counsel.

## **APPENDIX E**

Adopt on a permanent basis Family Division Rule 2.25, which was amended on a temporary basis by Supreme Court order dated August 10, 2010, as follows (no changes are being proposed to the temporary rule now in effect):

**2.25 Vital Statistics Form.** No divorce, legal separation, or annulment shall be heard on its merits, or a final agreement approved, until a completed typewritten vital statistics report is filed with the court by the petitioner/attorney. Access to information contained in the vital statistics report shall be restricted to court personnel, the parties, and counsel.

## **APPENDIX F**

Adopt on a permanent basis District Court Rules 6.1 to 6.7 which were adopted on a temporary basis by Supreme Court order dated January 19, 2011, as follows (no changes are being proposed to the temporary rules now in effect):

### **TOWN ORDINANCE VIOLATION RULES**

**Rule 6.1.** A local official with authority to prosecute an offense under any municipal code, ordinance, bylaw, or regulation, if such offense is classified as a violation under applicable law, may issue and serve upon the defendant a Local Ordinance Citation and Summons. The form to be used shall be provided by the court.

**Rule 6.2.** A Local Ordinance Citation and Summons may be served upon the defendant by postpaid certified mail, return receipt requested. Return receipt showing that the defendant has received the citation and summons shall constitute an essential part of the service and shall be filed with the court prior to the arraignment. If service cannot be effected by certified mail, then the Court may direct that service on the defendant be completed as in other violation complaints.

**Rule 6.3.** The Local Ordinance Citation and Summons shall be filed with the court no less than five days prior to the date of arraignment. Absent a showing of accident, mistake or misfortune a complaint filed less than five days prior to the date of arraignment may be summarily dismissed by the Court.

**Rule 6.4.** Defendants who are issued a summons and local ordinance citation and who wish to plead guilty or nolo contendere shall enter their plea on the summons and return it with payment of the civil penalty, as set forth in the citation, to the Clerk of the Court prior to the arraignment date, or shall appear in court on the date of arraignment. A defendant who enters a plea of guilty or nolo contendere but who does not include payment of the civil penalty shall appear in court on the date of arraignment.

**Rule 6.5.** For cause, the Court in its discretion may refuse to accept a plea by mail and may impose a fine or penalty other than that

stated in the local ordinance citation. The Court may order the defendant to appear personally in court for the disposition of the defendant's case.

**Rule 6.6.** The prosecuting official may serve additional local ordinance citations, without giving additional written notice, if the facts or circumstances constituting the violation continue beyond the date or dates of any prior citation. A plea of guilty or nolo contendere to the prior citation shall not affect the rights of the defendant with respect to a subsequent citation.

**Rule 6.7.** These rules shall not apply to offenses that are subject to enforcement under RSA 676, or to motor vehicle offenses under title XXI or any local law enacted thereunder. These rules are not intended in any way to abrogate other enforcement actions or remedies in the district or superior court, nor to require written notice as a prerequisite to other types of actions or remedies for violations of local codes, ordinances, bylaws, or regulations.

Adopt the following amendment to Supreme Court Rule 38 (Code of Judicial Conduct), Canon 3, Rule 3.1, (new material is in **brackets**):

**CANON 3**

**A JUDGE SHALL CONDUCT THE JUDGE’S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.**

**Rule 3.1** *Extrajudicial Activities in General*

(A) A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (1) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (2) participate in activities that will lead to frequent disqualification of the judge;
- (3) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;
- (4) engage in conduct that would appear to a reasonable person to be coercive; or
- (5) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice.

**COMMENT**

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable,

fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

(B) Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

(1) A judge who intends to enter into a teaching contract shall obtain written approval, in advance, from the chief justice of the supreme court.

(2) A judge who is otherwise in compliance with the provisions of Canon 2 relating to the precedence of his or her judicial duties and the timely and competent disposition of the business of the court may, in any calendar year derive income from **[all]** such **[avocational]** activities not to exceed 15% of the judge's salary. For good cause shown and in extraordinary circumstances, exceptions to this limitation may be approved, in advance by formal and unanimous vote of the supreme court. Such approval shall be in writing and shall state the reasons for and terms of the exception.

## COMMENT

[1] As a judicial officer and person specifically learned in the law, a judge is in a unique position to contribute to the improvement of the law, the

legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

[2] The 15% income limitation is consistent with Title VI of the Ethics Reform Act of 1989, 5 U.S.C. app. 4, sections 501-505, which limits the income that federal judges may receive from quasi-judicial activities.

[3] In this and other sections of Canon 3, the phrase “subject to the requirement of this Code” is used, notably in connection with a judge’s governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.