

To: Supreme Court Rules Committee

From: David Peck

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Re: Supreme Court Rule 35

Supreme Court Rule 51(a) indicates that one function of the Rules Committee is to review current rules "to consider current developments, needs, and changes." Recently, in reviewing a draft of LexisNexis's new edition of New Hampshire Court Rules Annotated, I noticed that Supreme Court Rule 35 may be a candidate for such a review. Rule 35 is entitled "Guidelines for the Utilization by Lawyers of the Services of Legal Assistants Under the New Hampshire Rules of Professional Conduct." Section A of the rule purports to set forth the entirety of Rule 5.3 of the New Hampshire Rules of Professional Conduct and its related Comments. However, the version of Professional Conduct Rule 5.3 and its comments that is reproduced is not the current version -- in 2007 the Rules of Professional Conduct were repealed and replaced.

In addition, there are references in the Rule 35 Comments to various provisions of the New Hampshire Rules of Professional Conduct that are no longer accurate. For example, the Comment to Supreme Court Rule 35, Rule 1, states in part:

Similarly, Rule 5.5(b) of the New Hampshire Rules of Professional Conduct provides that a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

Current Rule 5.5(b), however, does not contain the quoted language. Rather, current Rule 5.5(a) states that "[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."

Other provisions of the Comments may need to be updated. For example, the Comment to Supreme Court Rule 35, Rule 9 states that the Bar Association presently has no authority to enforce directly rules of conduct for non-lawyers. However, in 2007 Professional Conduct Rule 8.5(c) was adopted,

which extends the disciplinary authority of the Rules to nonlawyers in some circumstances.

I believe the last time that Rule 35 was amended was in 1987. My suggestion is that the rule be reviewed to determine how it should be amended in light of the changes that have occurred since then. (Because it provides guidelines based upon the requirements of the Professional Conduct Rules, perhaps the Bar's Ethics Committee could be asked to review the rule and recommend possible amendments for the consideration of the Rules Committee?)