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, December 12, 2014, 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 December 12, 2014 or may be submitted at the hearing on December 12, 2014. Comments may be e-mailed to the Committee on or before December 12, 2014, at:

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

(Telephone 271-2646). In addition, the changes being considered are available on the Internet (in the Appendix to the Public Hearing Notice) at:

http://www.courts.state.nh.us/committees/adviscommrules/notices.htm

The changes being considered concern the following rules:

I. Rules of Professional Conduct: ABA 20/20 Initiative

(The proposed amendments to the New Hampshire Rules of Professional Conduct are recommended by the New Hampshire Bar Association Ethics Committee ("Ethics Committee"). The proposed amendments 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. Although not all of the ABA updates have prompted a recommendation to amend the applicable New Hampshire rule, each New Hampshire rule potentially impacted by the ABA Model Rules of Professional Conduct updates is set forth here, along with the accompanying Ethics Committee comments and the ABA comments to the model rules. The Advisory Committee on Rules will accept comment on the proposed amendments to the New Hampshire Rules as well as the recommendation not to adopt certain amendments to the New Hampshire rules that have been made to the ABA Model Rules of Professional Conduct. The Advisory Committee on Rules does not recommend for adoption or amendment, and the Supreme Court does not adopt or amend the ABA Model Rules, ABA Comments or Ethics Committee Comments. Therefore, the Advisory Committee on Rules will not accept comment on any of these texts, which are provided below solely to help provide context to the proposed amendments. Input on the Ethics Committee Comments should be directed to the Ethics Committee.)

1. The Ethics Committee recommends amending Rule 1.0 ("Definitions") and the ABA has amended its comment to the model rule, as set forth in Appendix A.

2. The ABA has not amended Model Rule 1.1 ("Competence"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 1.1("Competence"), but both have amended the accompanying comments, as set forth in Appendix B.

3. The ABA has not amended Model Rule 1.4 ("Communications") and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 1.4 ("Client Communications"),

but the ABA has amended its comment to the model rule, as set forth in Appendix C.

4. The ABA has amended Model Rule 1.6 (“Confidentiality of Information”) and the accompanying comment and the Ethics Committee recommends amendments to Rule 1.6 (“Confidentiality of Information”) and the accompanying comment, as set forth in Appendix D.

5. The ABA has not amended Model Rule 1.17 (“Sale of Law Practice”), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 1.17 (“Sale of Law Practice”), but the ABA has amended its comment to the model rule, as set forth in Appendix E.

6. The ABA has not amended Model Rule 1.18 (“Duties to Prospective Client”), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 1.18 (“Duties to Prospective Client”), but the ABA has amended its comment to the model rule, as set forth in Appendix F.

7. The ABA has not amended Model Rule 4.4 (“Respect for Rights of Third Persons”), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 4.4 (“Respect for Rights of Third Persons”), but the ABA has amended its comment to the model rule and the Ethics Committee has amended its comment to the New Hampshire Rule, as set forth in Appendix G.

8. The ABA has not amended Model Rule 5.3 (“Responsibilities Regarding Nonlawyer Assistance), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 5.3 (“Responsibilities Regarding Nonlawyer Assistance”), but the ABA has amended its comment to the model rule, as set forth in Appendix H.

9. The ABA has amended Model Rule 5.5 (“Unauthorized Practice of Law; Multijurisdictional Practice of Law”) and its comment to the model rule, and the Ethics Committee recommends amendments to Rule 5.5 (“Unauthorized Practice of Law; Multijurisdictional Practice of Law”), as set forth in Appendix I.

10. The ABA has not amended Model Rule 7.1 (“Communications Concerning a Lawyer’s Services”), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 7.1 (“Communications Regarding a Lawyer’s Services”), but the ABA has amended its comment to the model rule, as set forth in Appendix J.

11. The ABA has not amended Model Rule 7.2 ("Advertising"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 7.2 ("Advertising"), but the ABA has amended its comment to the model rule, as set forth in Appendix K.

12. The ABA has amended Model Rule 7.3 ("Direct Contact With Prospective Clients") and its comment to the model rule, but the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 7.3 ("Direct Contact with Prospective Clients"), as set forth in Appendix L.

13. The ABA has not amended Model Rule 8.5 ("Disciplinary Authority; Choice of Law"), and the Ethics Committee does not recommend an amendment to New Hampshire Rule of Professional Conduct 8.5 ("Disciplinary Authority; Choice of Law; Application of Rules to Nonlawyer Representatives"), but the ABA has amended its comment to the model rule, as set forth in Appendix M.

II. Supreme Court Rule 7. References to "the clerk's written notice of the decision on the merits."

(This proposed amendment to Supreme Court Rule 7 would clarify the time within which an appeal in a criminal or juvenile delinquency proceeding must be filed.)

1. Amend Supreme Court Rule 7, regarding appeals from trial court decisions on the merits, as set forth in Appendix N.

III. Supreme Court Rules 37 and 37A. Attorney Discipline – Warnings

(These proposed amendments would eliminate the authority of the attorney discipline office general counsel, the complaint screening committee and the professional conduct committee to issue warnings when it is determined that an attorney acted in a manner which did not constitute a clear violation of the rules of professional conduct but which involved behavior requiring attention).

1. Amend Supreme Court Rule 37, regarding the attorney discipline system, as set forth in Appendix O.

2. Amend Supreme Court Rule 37A, regarding the rules and procedures of the attorney discipline system, as set forth in Appendix P.

IV. 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 to add a provision as subsection (m) which would allow a party to name as a deponent a public or private corporation, a partnership, an association, 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. An additional proposed amendment would amend Rule 26(f) to change the rule regarding altering a deposition transcript with respect to Rule 26(m) depositions).

1. Amend Rule 26 of the Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions, as set forth in Appendix Q.

V. Supreme Court Rule 47. Counsel Fees and Expenses-Indigent Criminal Cases

(This proposed amendment would raise the hourly rate for assigned counsel working on major crimes cases to $100 per hour).

1. Amend Supreme Court Rule 47, as set forth in Appendix R.

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

(These amendments would clarify that a trial court's ruling 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).

1. Amend Supreme Court Rule 12(2) regarding the procedure for requesting confidentiality of a case record or a portion of a case record in a supreme court case, and 12(3), regarding the procedure for seeking access to case records that have been determined to be confidential, as set forth in Appendix S.

New Hampshire Supreme Court
Advisory Committee on Rules

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

October 24, 2014

APPENDIX A

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 B

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 C

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 D

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 undertraining 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 E

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.

APPENDIX F

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" possible representation with an attorney. Similarly, ABA Model Rule 1.18(b) establishes a general rule for protection of information 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 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.

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.

~~2004 ABA Model Rule Comment~~
[ABA Comment to the Model Rules]
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 G

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]** document~~s~~ **[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 H

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 I

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.

APPENDIX J

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 K

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 L

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 M

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 N

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

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.

(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 imposed]**.

(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 imposed]**.

(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.

APPENDIX O

Amend Supreme Court Rule 37 (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 37. ATTORNEY DISCIPLINE SYSTEM

(1) ***Attorney Discipline in General:***

(a) Components: The attorney discipline system consists of the following component parts:

(1) professional conduct committee;
(2) hearings committee;
(3) complaint screening committee;
(4) attorney discipline office.

(b) *Jurisdiction:* Any attorney admitted to practice law in this State, and any attorney specially admitted by a court of this State for a particular proceeding, and any attorney not admitted in this State who practices law or renders or offers to render any legal services in this State, and any non-lawyer representative permitted to represent other persons before the courts of this State pursuant to RSA 311:1, is subject to the disciplinary jurisdiction of this court and the attorney discipline system.

Nothing herein contained shall be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt. Suspension or disbarment of an individual subject to the attorney discipline system shall not terminate jurisdiction of this court.

(c) *Grounds for Discipline*: The right to practice law in this State is predicated upon the assumption that the holder is fit to be entrusted with professional matters and to aid in the administration of justice as an attorney and as an officer of the court. The conduct of every recipient of that right shall be at all times in conformity with the standards imposed upon members of the bar as conditions for the right to practice law.

Acts or omissions by an attorney individually or in concert with any other person or persons which violate the standards of professional responsibility that have been and any that may be from time to time hereafter approved or adopted by this court, shall constitute misconduct and shall be grounds for discipline whether or not the act or omission occurred in the course of an attorney-client relationship.

(d) *Priority of Discipline Matters:* Matters relating to discipline of an attorney shall take precedence over all other civil cases in this court.

(e) *Professional Continuity Committee and New Hampshire Lawyers Assistance Program Exemption:* For the purposes of Rule 8.3 of the rules of professional conduct, information received by members of the New Hampshire Bar Association during the course of their work on behalf of the professional continuity committee or the New Hampshire Lawyers Assistance Program which is indicative of a violation of the rules of professional conduct shall be deemed privileged to the same extent allowed by the attorney-client privilege.

(2) ***Definitions:***

(a) *Appeal:* "Appeal" means an appeal to this court by a respondent or disciplinary counsel of a decision of the professional conduct committee. An appeal shall not be a mandatory appeal. *See* Rule 3. An appeal shall be based on the record before the professional conduct committee and shall be limited to issues of errors of law and unsustainable exercises of discretion.

(b) *Attorney:* Unless otherwise indicated, "Attorney," for purposes of this rule, means any attorney admitted to practice in this State, any attorney specially admitted to practice by a court of this State, any attorney not admitted or specially admitted in this State who provides or offers to provide legal services in this State or any non-lawyer representative permitted to represent other persons before the courts of this State pursuant to RSA 311:1.

(c) *Complaint:* "Complaint" means a grievance that, after initial review, has been determined by the attorney discipline office to be within the jurisdiction of the attorney discipline system and to meet the requirements for docketing as a complaint as set forth in Supreme Court Rule 37A, and that is docketed by the attorney discipline office, or a complaint that is drafted and docketed by the attorney discipline office after an inquiry by that office. If after docketing, the attorney discipline office or the complaint screening committee determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

(d) *Disbarment:* "Disbarment" means the termination of a New Hampshire licensed attorney's right to practice law in this State and automatic expulsion from membership in the bar of this State. A disbarred attorney may only apply for readmission to the bar of this State upon petition to this court, after having complied with the terms and conditions set forth in the disbarment order promulgated by the court which shall include all requirements applicable to applications for admission to the bar, including passing the bar examination

and a favorable report by the professional conduct committee and the character and fitness committee.

(e) *Disciplinary Counsel:* "Disciplinary Counsel" means the attorney or attorneys responsible for the prosecution of disciplinary proceedings before the court, the professional conduct committee and any hearings committee panel. Disciplinary counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, such part-time attorney or attorneys as may from time to time be deemed necessary, and such other attorneys of the attorney discipline office as may from time to time be designated to assist disciplinary counsel.

(f) *Grievance:* "Grievance" means a written submission filed with the attorney discipline office to call to its attention conduct that the grievant believes may constitute misconduct by an attorney. A grievance that is determined, after initial screening, not to be within the jurisdiction of the attorney discipline system and/or not to meet the requirements for docketing as a complaint shall not be docketed and shall continue to be referred to as a grievance. A grievance that is determined, after initial screening, to be within the jurisdiction of the attorney discipline system and to meet the requirements for docketing as a complaint shall be docketed as a complaint and shall be referred to thereafter as a complaint; provided, however, that if the attorney discipline office or the complaint screening committee later determines that the docketed complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

(g) *Public Censure:* "Public Censure" means the publication by the court or the professional conduct committee, in appropriate New Hampshire publications including a newspaper of general statewide circulation, and one with general circulation in the area of respondent’s primary office, as well as the New Hampshire Bar News, of a summary of its findings and conclusions relating to the discipline of an attorney, as defined in section (2)(b) of this rule.

(h) *Referral:* "Referral" means a grievance received by the attorney discipline office from any judge or from any member of the bar of New Hampshire, in which the judge or attorney indicates that he or she does not wish to be treated as a grievant.

(i) *Reprimand:* Reprimand" means discipline administered by the professional conduct committee after notice of charges and after a hearing before a hearings committee panel and the right to request oral argument to the professional conduct committee, in those cases in which misconduct in violation of the rules of professional conduct is found. A reprimand is

administered by letter issued by the chair of the professional conduct committee, subject to an attorney's right to appeal such discipline to the court.

(j) *Suspension:* "Suspension" means the suspension of an attorney's right to practice law in this State, for a period of time specified by the court or by the professional conduct committee. Suspension by the professional conduct committee may not exceed six (6) months. The suspended attorney shall have the right to resume the practice of law, after the expiration of the suspension period, upon compliance with the terms and conditions set forth in the suspension order promulgated by the court or the professional conduct committee and pursuant to the procedure set forth in section 14 regarding reinstatement.

~~(k) *Warning:* "Warning" means non-disciplinary action taken by the general counsel, the complaint screening committee or the professional conduct committee when it is determined that an attorney acted in a manner which involved behavior requiring attention although not constituting clear violations of the rules of professional conduct warranting disciplinary action.~~

(3) ***Professional Conduct Committee:***

(a) The court shall appoint a committee to be known as the professional conduct committee which shall consist of twelve members, one of whom shall be designated by the court as the chair. Two members of the professional conduct committee shall be designated by the court as vice chairs, to act in the absence or disability of the chair. One of the vice chairs must be an attorney, and the other must be a non-attorney. At least four of the members of the professional conduct committee shall be non-attorneys. The court shall attempt to appoint members of the professional conduct committee from as many counties in the State as is practicable; and one of the members shall be designated pursuant to section (3)(d), and shall have both the special term of office and the additional special responsibilities set forth therein.

In the event that any member of the professional conduct committee has a conflict of interest or is otherwise disqualified from acting with respect to any proceeding before the professional conduct committee, the court may, upon request or upon its own motion, appoint another person to sit on such proceeding and such temporary replacement, rather than the disqualified member, shall be considered a professional conduct committee member for quorum and voting purposes in connection with such investigation or proceeding.

(b) Initial appointments shall be for staggered terms: four members for three years; four members for two years; and four members, including the member designated pursuant to section (3)(d), for one year. Thereafter the regular term of each member, except the member designated pursuant to

section (3)(d), shall be three years. A member selected to fill a vacancy shall hold office for the unexpired term of his or her predecessor. A member shall not serve for more than three consecutive full terms but may be reappointed after a lapse of one year. The committee shall act only with the concurrence of a majority of its members present and voting, provided however, that six members shall constitute a quorum. The chair of the committee, or any member performing the duties of the chair, shall only vote on matters relating to specific complaints in the event of a tie among the members present and voting. No professional conduct committee member shall serve concurrently as a member of the hearings committee or the complaint screening committee.

(c) The professional conduct committee shall have the power and duty:

(1) To appoint a disciplinary counsel and a general counsel and such deputy and assistant disciplinary counsel and general counsel as may from time to time be required to properly perform the functions hereinafter prescribed. To appoint other professional staff, including auditors, and clerical staff whether full-time or part-time. To appoint independent bar counsel if needed.

(2) To consider hearing panel reports and written memoranda of disciplinary counsel and respondents. To conduct oral arguments in which disciplinary counsel and each respondent are given ten (10) minutes to address the findings and rulings contained in the hearing panel reports. After consideration of oral arguments, hearing panel reports, transcripts of hearings before hearing panels and memoranda, to determine whether there is clear and convincing evidence of violations of the rules of professional conduct. To remand complaints to hearing panels for further evidentiary proceedings. To dismiss grievances or complaints, ~~with or without a warning,~~ administer a reprimand, public censure or a suspension not to exceed six (6) months.

(3) To attach such conditions as may be appropriate to any discipline it imposes.

(4) To divert attorneys out of the attorney discipline system as appropriate and on such terms and conditions as is warranted.

(5) To institute proceedings in this court in all matters which the professional conduct committee has determined warrant the imposition of disbarment or of suspension for a period in excess of six (6) months.

(6) To consider and act upon requests by disciplinary counsel or respondents to review a decision by the complaint screening committee to refer a complaint to disciplinary counsel for the scheduling of a hearing.

(7) To consider and act upon requests from disciplinary counsel to dismiss a matter prior to a hearing if disciplinary counsel concludes that the development of evidence establishes that there is no valid basis for proceeding to a hearing.

(8) To consider and act upon requests for reconsideration of its own decisions.

(9) To consider and act upon requests for protective orders.

(10) To propose rules of procedure not inconsistent with the rules promulgated by this court.

(11) To be responsible for overseeing all administrative matters of the attorney discipline system.

(12) To require a person who has been subject to discipline imposed by the professional conduct committee to produce evidence of satisfactory completion of the multistate professional responsibility examination, in appropriate cases.

(13) To educate the public on the general functions and procedures of the attorney discipline system.

(14) Upon its approval of the annual report prepared by the attorney discipline office, to file a copy of the report with the chief justice of the supreme court and to make copies of the report available to the public.

(15) To issue discretionary monetary sanctions against a disciplined attorney in the form of the assessment of costs and expenses pursuant to Rule 37(19).

Any attorney aggrieved by a finding of professional misconduct or by a sanction imposed by the professional conduct committee shall have the right to appeal such finding and sanction to this court; disciplinary counsel shall have the right to appeal a sanction. Such appeals shall not be mandatory appeals. Such rights must be exercised within thirty (30) days from the date on the notice of the finding and sanction. In the event that a timely request for reconsideration pursuant to Supreme Court Rule 37A(VI) is filed, the right to appeal the finding of professional misconduct and/or the sanction shall be exercised within thirty (30) days from the date of the letter notifying the attorney of the professional conduct committee's decision on the request for reconsideration. Successive requests for reconsideration shall not stay the running of the appeal period. The manner of the appeal shall be based on the record before the professional conduct committee. The findings of the professional conduct committee may be affirmed, modified or reversed.

(d) *Board of Governor's Representative:* The vice president of the New Hampshire Bar Association, upon appointment by the court, shall represent the board of governors of the association as a member of the professional conduct committee for a one-year term commencing on August 1st following the election as such vice president and he or she shall have the following additional responsibilities:

(1) To render such assistance as the professional conduct committee directs in the preparation and review of the attorney discipline system budget.

(2) To assist in monitoring the financial affairs and budgetary process of the attorney discipline system during the fiscal year.

(3) To coordinate the assessment and collection of expenses to be reimbursed by disciplined attorneys.

(4) Consistent with the rule of confidentiality applicable to the work of the attorney discipline system, to serve as liaison between the professional conduct committee and the board of governors of the New Hampshire Bar Association.

(5) To assist in the communication to members of the New Hampshire Bar Association of a general understanding of the work of the professional conduct committee, consistent with the rule of confidentiality applicable to attorney discipline system proceedings.

If the vice president of the New Hampshire Bar Association has a conflict preventing his or her appointment to the professional conduct committee, the court shall appoint another member of the board of governors in his or her stead.

(4) ***Hearings Committee:***

(a) The court shall appoint an appropriate number of attorneys and non-attorneys to a committee known as the hearings committee of the attorney discipline system. One member of the committee shall be designated by the court as the chair and one member shall be designated as vice chair to act in the absence or disability of the chair.

(b) 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. Thereafter, the regular term of each member shall be three years. A member selected to fill a vacancy shall hold office for the unexpired term of his or her predecessor. A member shall not serve more than three consecutive full terms but may be reappointed after a lapse of one year.

No hearings committee member shall serve concurrently as a member of the professional conduct committee or the complaint screening committee.

(c) The hearings committee shall have the power and duty:

(1) To be appointed as necessary by the hearings committee chair to individual hearing panels to rule on pre-hearing motions, conduct hearings on formal charges and make findings of fact, conclusions and recommendations in written reports to the professional conduct committee for findings of misconduct and sanctions or for dismissal of the complaint with findings of no misconduct**[.]** ~~with or without a warning.~~ The individual hearing panels shall consist of a maximum of five (5) persons and a minimum of three (3) persons. There shall be no less than one public non-attorney member on each hearing panel.

(2) To conduct hearings in conformance with standards set forth in Rule 37A.

(3) To make all findings by clear and convincing evidence.

(4) To submit all written reports to the professional conduct committee no more than sixty (60) days after the close of each hearing.

(d) Appointment to each individual hearing panel shall be made by the chair of the hearings committee. Each panel shall consist of a maximum of five (5) hearings committee members and a minimum of three (3) members. Each hearing panel shall have at least one (1) non-attorney member. The chair of the hearings committee shall designate one member of each panel as the chair and a separate member of the panel as the reporter responsible for preparation of the report to the professional conduct committee.

(5) ***Complaint Screening Committee:***

(a) The court shall appoint a committee to be known as the complaint screening committee which shall consist of nine members, one of whom shall be designated by the court as chair and one of whom shall be designated by the court as vice chair to act in the absence or disability of the chair. Five of the members shall be attorneys and four of them shall be non-attorneys. The complaint screening committee shall act only with the consensus of a majority of its members present and voting provided, however, that three attorney members and two non-attorney members shall constitute a quorum. The chair of the committee, or any member performing the duties of the chair, shall only vote on matters relating to specific complaints in the event of a tie among the members present and voting. Initial appointments shall be for staggered terms: three members for three years; three members for two years; and three members for one year. Thereafter, the regular term of each member shall be

three years. A member selected to fill a vacancy shall hold office for the unexpired term of his or her predecessor. A member shall not serve more than three consecutive full terms but may be reappointed after a lapse of one year. No member of the complaint screening committee shall serve concurrently as a member of the professional conduct committee or the hearings committee.

(b) The complaint screening committee shall have the power and duty:

(1) To consider and act on requests for reconsideration filed by grievants following a decision by general counsel not to docket a matter, to divert attorneys out of the system, or to dismiss a complaint after investigation.

(2) To consider and act on reports by staff members of the attorney discipline office with respect to docketed complaints.

(3) To remove complaints from the docket if it determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing.

(4) To dismiss complaints with a finding of no professional misconduct**[.]**~~, with or without a warning.~~

(5) To dismiss complaints for any other reason**[.]**~~,~~ ~~with or without a warning.~~ If the committee determines that there is no reasonable likelihood that a complaint can be proven by clear and convincing evidence, the complaint should be dismissed.

(6) To divert attorneys out of the attorney discipline system when appropriate and subject to the attorney complying with the terms of diversion. All diversion would be public unless the complaint screening committee determined that a given matter should remain non-public based on one or more of the following issues: health, finances, family considerations or highly personal matters. If a respondent declines to accept diversion or violates the terms of a written diversion agreement, the complaint in such cases shall be acted upon as if diversion did not exist.

(7) To refer complaints to disciplinary counsel for the scheduling of a hearing only where there is a reasonable likelihood that professional misconduct could be proven by clear and convincing evidence.

(8) To consider and act upon requests for reconsideration of its own decisions, subject to the further right of disciplinary counsel or respondents to request that the professional conduct committee review a decision to refer a complaint to disciplinary counsel for the scheduling of a hearing.

(c) Meetings of the complaint screening committee shall be in the nature of deliberations and shall not be open to the public, respondents, respondents' counsel, disciplinary counsel or the complainant. Records and reports of recommendations made shall in all respects be treated as work product and shall not be made public or be discoverable. However, the decision of the committee shall be public.

(6) ***Attorney Discipline Office***:

(a) The professional conduct committee shall appoint:

(1) a disciplinary counsel and such deputy and assistants as may be deemed necessary whether full-time or part-time;

(2) a general counsel and such deputy and assistants as may be deemed necessary whether full-time or part-time; and

(3) other professional staff, including auditors, and clerical staff as may be necessary whether full-time or part-time.

(b) Disciplinary counsel shall perform prosecutorial functions and shall have the power and duty:

(1) To review complaints referred by the complaint screening committee for hearings.

(2) To contact witnesses, conduct discovery and prepare the complaints for hearings before a panel of the hearings committee.

(3) To try cases before panels of the hearings committee.

(4) To present memoranda to and appear before the professional conduct committee for oral argument.

(5) To represent the attorney discipline office and, in appropriate cases, the professional conduct committee in matters filed with the supreme court.

(c) General counsel shall perform a variety of legal services and functions and shall have the power and duty:

(1) To receive, evaluate, docket and investigate professional conduct complaints.

(2) To remove complaints from the docket if it determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing.

(3) To dismiss complaints with a finding of no professional misconduct**[.]**~~, with or without a warning.~~

(4) To dismiss complaints for other good cause**[.]**~~, with or without a warning.~~ If the general counsel determines that there is no reasonable likelihood that a complaint can be proven by clear and convincing evidence, the complaint should be dismissed.

(5) To divert attorneys out of the attorney discipline system when appropriate and subject to the attorney complying with the terms of diversion. All diversion would be public unless the general counsel determined that a given matter should remain non-public based on one or more of the following issues: health, finances, family considerations or highly personal matters. If a respondent declines to accept diversion or violates the terms of a written diversion agreement, the complaint in such cases shall be acted upon as if diversion did not exist.

(6) To present complaints to the complaint screening committee with recommendations for diversion, dismissal for any reason ~~(with or without a warning)~~ or referral to disciplinary counsel for a hearing.

(7) To assist disciplinary counsel in performing the duties of disciplinary counsel as needed.

(8) To perform legal services as required for the committees of the attorney discipline system.

(9) To oversee and/or perform administrative functions for the attorney discipline system including but not limited to maintaining permanent records of the operation of the system, preparation of the annual budget, and preparation of an annual report summarizing the activities of the attorney discipline system during the preceding year.

(7) ***Immunity:***

Each person shall be immune from civil liability for all statements made in good faith to any committee of the attorney discipline system, the attorney discipline office, the attorney general's office, or to this court given in connection with any investigation or proceedings under this rule pertaining to alleged misconduct of an attorney. The protection of this immunity does not exist as to: (a) any statements not made in good faith; or (b) any statements made to others. See sections (20)(j) and (21)(g). The committees' members, staff,

counsel and all others carrying out the tasks and duties of the attorney discipline system shall be immune from civil liability for any conduct arising out of the performance of their duties.

(8) ***Discovery and Subpoena Power:***

At any stage of proceedings before a panel of the hearings committee or in preparation for a hearing before a panel of the hearings committee, attorneys from the attorney discipline office, counsel for respondent attorneys and respondent attorneys representing themselves may conduct discovery, including interrogatories and depositions, and may issue subpoenas and subpoenas duces tecum to summon witnesses with or without documents.

(9) ***Attorneys Convicted of Serious Crime:***

(a) Upon the filing with the court of a certified copy of any court record establishing that an attorney has been convicted of a serious crime as hereinafter defined, the court may enter an order suspending the attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction.

(b) The term "serious crime" shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

(c) A certified copy of any court record establishing the conviction of an attorney for any "serious crime" shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.

(d) Upon the receipt of a certificate of conviction of an attorney for a "serious crime," the court may, and shall if suspension has been ordered pursuant to subsection (a) above, institute a formal disciplinary proceeding by issuing an order to the attorney to show cause why the attorney should not be disbarred as a result of the conviction. If the court determines that no such good cause has been shown, the court shall issue an order of disbarment, or such other discipline as the court shall deem appropriate. If the court determines that the attorney has shown cause why disbarment may not be appropriate, the court shall refer the matter to the professional conduct committee, in which the sole issue to be determined shall be the extent of the

final discipline to be imposed. Provided, however, that final discipline will not be imposed until all appeals from the conviction are concluded.

(e) Upon receipt of a certificate of conviction of an attorney for a crime not constituting a "serious crime," the court shall refer the matter to the attorney discipline office for such action as it deems appropriate. Referral to the attorney discipline office hereunder does not preclude the court from taking whatever further action it deems appropriate.

(f) An attorney suspended under the provisions of subsection (a) above may be reinstated upon the filing of a certificate demonstrating that the underlying conviction for a serious crime has been reversed but the reinstatement will not terminate any proceeding then pending against the attorney.

(g) The clerk of any court within the State in which an attorney is convicted of any crime shall, within ten (10) days of said conviction, transmit a certificate thereof to this court.

(h) Upon being advised that an attorney has been convicted of a crime within this State, the attorney discipline office shall determine whether the clerk of the court where the conviction occurred has forwarded a certificate to this court in accordance with the provisions of subsection (g) above. If the certificate has not been forwarded by the clerk or if the conviction occurred in another jurisdiction, it shall be the responsibility of the attorney discipline office to obtain a certificate of conviction and to transmit it to this court.

(i) Whenever an attorney is indicted or bound over for any felony, the court shall take such actions as it deems necessary, including but not limited to the suspension of the attorney.

(10) ***Proceedings Where An Attorney Is Declared To Be Incompetent Or Is Alleged To Be Incapacitated***:

(a) Whenever an attorney has been judicially declared incompetent or voluntarily or involuntarily committed to a mental health facility, the court, upon proper proof of the fact, may enter an order suspending such attorney from the practice of law until the further order of the court. A copy of such order shall be served upon such attorney, the attorney's guardian and such other persons and in such manner as the court may direct.

(b) Whenever any committee of the attorney discipline system or the attorney discipline office shall petition the court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental or physical infirmity or illness or because of addiction to drugs or

intoxicants, the court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the court shall designate. If, upon due consideration of the matter, the court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending the attorney on the ground of such disability for an indefinite period and until the further order of the court, and any pending disciplinary proceeding against the attorney may be held in abeyance.

The court shall provide for such notice to the respondent attorney of proceedings in the matter as it deems proper and advisable and shall appoint an attorney to represent the respondent if he or she is without adequate representation.

(c) If, during the course of a disciplinary proceeding, the respondent attorney contends that he or she is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent attorney to adequately defend himself or herself, the court thereupon shall enter an order immediately suspending the respondent attorney from continuing to practice law until a determination is made of the respondent attorney's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of subsection (b) of this section.

If, in the course of a proceeding under this section or in a disciplinary proceeding, the court shall determine that the respondent attorney is not so incapacitated, it shall take such action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent attorney.

(d) Any attorney suspended under the provisions of this section may apply for reinstatement following the expiration of one year from the date of suspension or at such other time as the court may direct in the order of suspension or any modification thereof. Such application shall be granted by the court upon a showing by clear and convincing evidence that the attorney's disability has been removed and the attorney is fit to resume the practice of law. Upon such application, the court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed including a direction for an examination of the attorney by such qualified medical experts as the court shall designate. At its discretion, the court may direct that the expense of such an examination shall be paid by the attorney.

Whenever an attorney has been suspended by an order in accordance with the provisions of subsection (a) of this section and, thereafter, in proceedings duly taken, the attorney has been judicially declared to be competent, the court

may dispense with further evidence that the disability has been removed and may direct reinstatement upon such terms as it deems proper and advisable.

(e) In a proceeding seeking an order of suspension under this section, the burden of proof shall rest with the moving party. In a proceeding seeking an order terminating a suspension under this section, the burden of proof shall rest with the suspended attorney.

(f) The filing of an application for reinstatement by an attorney suspended for disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital by whom or in which the attorney has been examined or treated since the suspension and shall furnish to the court written consent to each to divulge such information and records as requested by the attorney discipline system or the court appointed medical experts.

(11) ***Resignation By Attorney Under Disciplinary Investigation:***

(a) An attorney who is the subject of an investigation into allegations of misconduct may file a request to resign by delivering to the professional conduct committee an affidavit stating that he or she desires to resign and that:

(1) the resignation is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; he or she is fully aware of the implications of submitting the resignation;

(2) he or she is aware that there is presently pending an investigation into allegations that he or she has been guilty of misconduct the nature of which shall be specifically set forth;

(3) he or she acknowledges that the material facts upon which the complaint is predicated are true; and

(4) he or she submits the resignation because he or she knows that if charges were predicated upon the misconduct under investigation they could not be successfully defended.

(b) Upon receipt of the required affidavit, the professional conduct committee shall file it with the court, along with its recommendation, and the court may take such action as it deems necessary.

(c) The contents of affidavit of an attorney filed in support of his or her resignation from the bar shall not be disclosed publicly or made available for use in any other proceeding except on order of the court.

(12) ***Reciprocal Discipline:***

(a) Upon being disciplined in another jurisdiction, an attorney admitted to practice in this State shall immediately notify the attorney discipline office of the discipline. Upon notification from any source that an attorney admitted to practice in this State has been disciplined in another jurisdiction, the attorney discipline office shall obtain a certified copy of the disciplinary order and shall file it with the court.

(b) Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this State has been disciplined in another jurisdiction, the court may enter a temporary order imposing the identical or substantially similar discipline or, in its discretion, suspending the attorney pending the imposition of final discipline. The court shall forthwith issue a notice directed to the attorney and to the professional conduct committee containing:

(1) A copy of the order from the other jurisdiction; and

(2) An order directing that the attorney or professional conduct committee inform the court within thirty (30) days from service of the notice, of any claim by the lawyer or professional conduct committee predicated upon the grounds set forth in subparagraph (d), that the imposition of the identical or substantially similar discipline in this State would be unwarranted and the reasons for that claim.

(c) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until the stay expires.

(d) Upon the expiration of thirty (30) days from service of the notice pursuant to subparagraph (b), the court shall issue an order of final discipline imposing the identical or substantially similar discipline unless the attorney or professional conduct committee demonstrates, or the court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) The imposition of the same or substantially similar discipline by the court would result in grave injustice; or

(3) The misconduct established warrants substantially different discipline in this State.

(13) ***Disbarred or Suspended Attorney:***

(a) A disbarred or suspended attorney may be ordered by the court, or by the professional conduct committee when an attorney is suspended by it for a period not to exceed six (6) months, to notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigated or administrative matters or proceedings pending in any court or agency, of the disbarment or suspension and consequent inability to act as an attorney after the effective date of the disbarment or suspension and shall advise said clients to seek other legal counsel.

(b) A disbarred or suspended attorney may be ordered by the court, or by the professional conduct committee when an attorney is suspended by it for a period not to exceed six (6) months, to notify, by registered or certified mail, return receipt requested, each client who is involved in litigated matters or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding, of the disbarment or suspension and consequent inability to act as an attorney after the effective date of the disbarment or suspension. The notice to be given to the client shall advise the prompt substitution of another attorney or attorneys.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended attorney to move pro se in the court or agency in which the proceeding is pending, for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(c) The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period between the entry date of the order and its effective date, the disbarred or suspended attorney may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(d) In addition, the court, or the professional conduct committee in cases where it issued a suspension order, may order that within thirty (30) days after

the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with the court an affidavit showing: (1) that he or she has fully complied with the provision of the order and with this section; and (2) that he or she has served a copy of such affidavit upon the professional conduct committee. Such affidavit shall also set forth the residence or other address of the disbarred or suspended attorney where communications may thereafter be directed, as well as a list of all other jurisdictions in which the disbarred or suspended attorney is a member of the bar.

(e) A disbarred or suspended attorney shall keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.

(14) ***Reinstatement and Readmission:***

(a) An attorney who has been suspended for a specific period may not move for reinstatement until the expiration of the period of suspension, and upon the completion of all terms and conditions set forth in the order of suspension.

(b) *General Rule*: A motion for reinstatement by an attorney suspended for misconduct by the court, rather than for disability, or an application for readmission by a New Hampshire licensed attorney who has been disbarred by the court or has resigned while under disciplinary investigation shall be referred to the professional conduct committee by the supreme court. An application for readmission shall also be referred to the character and fitness committee pursuant to Supreme Court Rule 42. A motion for reinstatement by an attorney suspended by the professional conduct committee shall be filed directly with that committee. Upon receipt of a motion for reinstatement or an application for readmission, the professional conduct committee shall refer the motion or application to a panel of the hearings committee. The attorney discipline office shall then cause a notice to be published in a newspaper with statewide circulation, and one with circulation in the area of the respondent's former primary office, as well as the New Hampshire Bar News that the respondent attorney has moved for reinstatement or applied for readmission. The notice shall invite anyone to comment on the motion or application by submitting said comments in writing to the attorney discipline office within twenty (20) days. All comments shall be made available to the respondent attorney. Where feasible, the attorney discipline office shall give notice to the original complainant. The hearing panel shall promptly schedule a hearing at which the respondent shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this State and that the resumption of the practice of law will be neither detrimental to the

integrity and standing of the bar or the administration of justice nor subversive to the public interest. At the conclusion of the hearing, the hearing panel shall promptly file a report containing its findings and recommendations and transmit same, together with the record, to the professional conduct committee. The professional conduct committee shall review the report of the hearing panel and the record, allow the filing of written memoranda by disciplinary counsel and the respondent, review the hearing transcript and hold oral argument. Thereafter, the professional conduct committee shall file its own recommendations and findings with the court, together with the record. Following the submission of briefs and oral argument to the court, if any, the court shall enter a final order.

(c) In all proceedings upon a motion for reinstatement or application for readmission, cross-examination of the respondent attorney's witnesses and the submission of evidence, if any, in opposition to the motion for reinstatement or application for readmission shall be conducted by disciplinary counsel.

(d) The court in its discretion may direct that expenses incurred by the attorney discipline system in the investigation and processing of a motion for reinstatement or application for readmission be paid by the respondent attorney.

(e) Motions for reinstatement by New Hampshire licensed attorneys suspended for misconduct shall be accompanied by evidence of the movant's satisfactory completion of the multistate professional responsibility examination. Applicants for readmission shall produce evidence of satisfactory completion of the multistate professional responsibility examination pursuant to the provisions of Supreme Court Rule 42.

(f) *Special Rule for Suspensions of Six Months or Less:* Notwithstanding the provisions of Rule 37(14)(b), a lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated by the court following the end of the period of suspension by filing with the court and serving upon disciplinary counsel a motion for reinstatement accompanied by: (1) an affidavit stating that he or she has fully complied with the requirements of the suspension order and has paid any required fees and costs; and (2) evidence that he or she has satisfactorily completed the Multistate Professional Responsibility Examination since his or her suspension.

(15) ***Readmission after Resignation:***

(a) A New Hampshire licensed attorney who has resigned, and who was not the subject of an investigation into allegations of misconduct at or subsequent to the time of resignation, may file a motion for readmission with the supreme court accompanied by evidence of continuing competence and

learning in the law, and evidence of continuing moral character and fitness. If the evidence of continuing competence and learning in the law, and evidence of continuing moral character and fitness, are satisfactory to the court, the court may order readmission effective upon payment by the applicant of all bar dues and other fees, including public protection fund fees, that the applicant would have been responsible for paying had the applicant remained an active member of the bar from the date of resignation until the date of readmission. In addition, the court may condition readmission upon completion of such continuing legal education as the court may order.

(b) If the evidence of continuing competence and learning in the law is not satisfactory to the court, the court shall refer the motion for readmission to the professional conduct committee for referral to a panel of the hearings committee. The hearing panel shall promptly schedule a hearing at which the attorney shall have the burden of demonstrating by a preponderance of the evidence that he or she has the competency and learning in law required for readmission. At the conclusion of the hearing, the hearing panel shall promptly file a report containing its findings and recommendations and transmit same, together with the record, to the professional conduct committee. The professional conduct committee shall review the report of the hearings committee panel, the record and the hearing transcript and shall file its own recommendations and findings, together with the record, with the court. Following the submission of briefs, if necessary, and oral argument, if any, the court shall enter a final order. No order of the court granting readmission shall be effective prior to payment by the applicant of all bar dues and other fees, including public protection fund fees, that the applicant would have been responsible for paying had the applicant remained an active member of the bar from the date of resignation until the date of readmission. In addition, the court may condition readmission upon completion of such continuing legal education as the court may order.

(c) If the evidence of continuing moral character and fitness is not satisfactory to the court, the court shall order the applicant to file with the committee on character and fitness and with the clerk of the supreme court the petition and questionnaire referred to in Supreme Court Rule 42(5)(e). Further proceedings shall be governed by Rule 42. No order of the court granting readmission shall be effective prior to payment by the applicant of all bar dues and other fees, including public protection fund fees, that the applicant would have been responsible for paying had the applicant remained an active member of the bar from the date of resignation until the date of readmission. In addition, the court may condition readmission upon completion of such continuing legal education as the court may order.

(16) ***Procedure:***

(a) Disciplinary proceedings requesting a discipline of greater than six (6) months shall be initiated in this court by the professional conduct committee by petition setting forth allegations of facts giving rise to the complaint and alleging the specific provisions of the rules of professional conduct which have been violated. The record of proceedings before the professional conduct committee shall be filed with the petition. There shall not be a de novo evidentiary hearing.

(b) Service shall be made to the respondent attorney in such manner as the court may direct. In all cases, however, service upon the respondent attorney at the latest address provided to the New Hampshire Bar Association shall be deemed to be sufficient.

(c) Respondent attorney shall answer each allegation specifically and shall file an answer within thirty (30) days after service of the petition. Should the respondent attorney fail to answer the petition, the allegations set forth therein shall be deemed to be admitted and no further hearing shall be required.

(d) The court may make such temporary orders as justice may require either with or without a hearing. Respondent attorney shall be entitled to be heard after any ex parte order.

(e) The court shall, after filing of briefs and oral arguments, make such order as justice may require.

(f) The court may suspend attorneys or disbar New Hampshire licensed attorneys or publicly censure attorneys upon such terms and conditions as the court deems necessary for the protection of the public and the preservation of the integrity of the legal profession. The court may remand the matter to the professional conduct committee for such other discipline as the court may deem appropriate.

(g) Either a respondent attorney or disciplinary counsel may appeal findings of the professional conduct committee and the imposition of a reprimand, public censure or a suspension of six (6) months or less by filing a notice of appeal with the supreme court. The appeal shall not be a mandatory appeal. If the appeal is accepted by the court, the court may affirm, reverse or modify the findings of the professional conduct committee.

The filing of an appeal by the respondent shall stay the disciplinary order being appealed unless the professional conduct committee orders otherwise. If the professional conduct committee orders otherwise, it shall set forth in its

order its reasons for doing so. In all cases, however, the supreme court may on motion for good cause shown stay the disciplinary order.

(h) In the event of suspension or disbarment, a copy of the court's order or the professional conduct committee's order, shall be sent to the clerk of every court in the State and to each State in which the respondent attorney is admitted to practice. The professional conduct committee shall continue to be responsible to insure respondent attorney's compliance with the order of suspension or disbarment, in the case of a New Hampshire licensed attorney, and to notify the court as to any violations for such action as the court deems necessary.

(i) In addition to the procedure described herein, the court may take such action on its own motion as it deems necessary.

(j) Appeals to the court shall be in the form prescribed by Rule 10, unless otherwise ordered by the court. Such appeals shall be based on the record and there shall not be a de novo evidentiary hearing.

(17) ***Appointment of Counsel to Protect Clients' Interests:***

(a) Whenever an attorney is suspended, disbarred, dies or whose whereabouts are unknown, and no partner, executor or other responsible party capable of conducting the attorney's affairs is known to exist, the court, upon proper proof of the fact, may appoint an attorney or attorneys to make an inventory of the files of said attorney and to take such action as seems indicated to protect the interests of clients of said attorney as well as the interest of said attorney.

(b) Any attorney so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order appointing the attorney to make such inventory.

(c) Any attorney so appointed shall be entitled to reasonable compensation and reimbursement for expenses incurred.

(18) ***Refusal of Grievant or Complainant to Proceed, Compromise, Etc.:***

Neither unwillingness nor neglect of the grievant or complainant to sign a grievance or complaint or to prosecute a charge, nor settlement, compromise or restitution shall by itself justify abatement of an investigation into the conduct of an attorney.

(19) ***Monetary Sanctions: Expenses Relating to Discipline Enforcement:***

(a) All expenses incurred by the attorney discipline system in the investigation and enforcement of discipline may, in whole or in part, be assessed to a disciplined attorney to the extent appropriate.

(b) Following any assessment, the professional conduct committee shall send a written statement of the nature and amount of each such expense to the disciplined attorney, together with a formal demand for payment. The assessment shall become final after 30 days unless the disciplined attorney responds in writing, listing each disputed expense and explaining the reasons for disagreement. If the parties are unable to agree on an amount, the professional conduct committee may resolve and enforce the assessment by petition to the superior court in any county in the state.

(c) A final assessment shall have the force and effect of a civil judgment against the disciplined attorney. The professional conduct committee may file a copy of the final assessment with the superior court in any county in the state, where it shall be docketed as a final judgment and shall be subject to all legally-available post-judgment enforcement remedies and procedures.

(d) The superior court may increase the assessment to include any taxable costs or other expenses incurred in the resolution or enforcement of any assessment. Such expenses may include reasonable attorney's fees payable to counsel retained by the committee to resolve or recover the assessment.

(e) Any monetary assessment made against a disciplined attorney shall be deemed to be monetary sanctions asserted by the professional conduct committee or the applicable court against such attorney.

(20) ***Confidentiality:***

Applicability Note: Section 20 shall apply to records and proceedings in all matters initiated on or after April 1, 2000.

(a) *Grievance outside the Jurisdiction of the Attorney Discipline System or Not Meeting the Requirements for Docketing as a Complaint:*

(1) A grievance against a person who is not subject to the rules of professional conduct shall be returned to the grievant. No file on the grievance will be maintained; however, the attorney discipline office shall retain a copy of

the letter to the grievant returning the grievance, which shall be available for public inspection in accordance with Supreme Court Rule 37A.

(2) All records and materials relating to a grievance determined by the attorney discipline office or the complaint screening committee not to meet the requirements for docketing as a complaint shall be available for public inspection (other than work product, internal memoranda, and deliberations) in accordance with Supreme Court Rule 37A after correspondence is sent to the respondent attorney who is the subject of the grievance and the respondent attorney has the opportunity to provide a reply to be filed in the public record.

(b) *Grievance Docketed as Complaint:* All records and proceedings relating to a complaint docketed by the attorney discipline system shall be available for public inspection (other than work product, internal memoranda, and deliberations) in accordance with Supreme Court Rule 37A upon the earliest of the following:

(1) When the Attorney Discipline Office general counsel, the complaint screening committee or the professional conduct committee finally disposes of a complaint;

(2) When disciplinary counsel issues a notice of charges;

(3) When the professional conduct committee files a petition with the supreme court, except as provided by section (11) regarding resignations; or

(4) When the respondent attorney, prior to dismissal of a complaint or the issuance of a notice of charges, requests that the matter be public.

(c) *Proceedings for Reinstatement or Readmission:* When an attorney seeks reinstatement or readmission pursuant to section (14), the records, with the exception of the bar application, and the proceedings before the hearing panel and the professional conduct committee shall be public (other than work product, internal memoranda, and deliberations).

(d) *Proceedings Based upon Conviction or Public Discipline*: If the investigation is predicated upon a conviction of the respondent for a crime or upon public discipline imposed upon the respondent in another jurisdiction, the entire file pertaining to the crime or the public discipline, other than the work product, internal memoranda, and deliberations of the attorney discipline system, shall be available for public inspection.

(e) *Proceedings Alleging Disability:* All proceedings involving allegations of disability on the part of a New Hampshire licensed attorney shall be kept confidential until and unless the supreme court enters an order suspending

said attorney from the practice of law pursuant to section (10), in which case said order shall be public.

(f) *Protective Orders:* Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise confidential or privileged information concerning the complainant, a witness, or the attorney. In order to protect the interests of the complainant, witness, or attorney, the professional conduct committee, may, upon request, or on its own initiative, issue a protective order prohibiting the disclosure of confidential, malicious, personal, privileged information or material submitted in bad faith. Any person aggrieved by a decision on a protective order may, within thirty (30) days of the decision, request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the court has acted or the period for requesting court review has expired.

(g) *Disclosure to Authorized Agency:* The attorney discipline office may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to authorized agencies investigating qualifications for admission to practice or fitness to continue practice, to law enforcement agencies investigating qualifications for government employment, and to law enforcement agencies authorized to investigate and prosecute violations of the criminal law. If the attorney discipline office decides to answer a request for relevant information, and if the attorney who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the attorney discipline office shall send to the attorney at his or her last known address, by certified mail, a notice that information had been requested and by whom, together with a copy of the information that the attorney discipline office proposes to release to the requesting agency. The attorney discipline office shall inform the subject attorney that the information shall be released at the end of ten (10) days from the date of mailing the notice unless the attorney obtains a supreme court order restraining such disclosure. Notice to the attorney, as provided in this section, shall not be required prior to disclosure of relevant information that is otherwise confidential to law enforcement agencies authorized to investigate and prosecute violations of the criminal law.

(h) *Disclosure to Supreme Court for Rule 36 Review:* The attorney discipline office shall disclose relevant information that is otherwise confidential to the supreme court, upon its request, in connection with the court's review of applications under Supreme Court Rule 36.

(i) *Disclosure to National Discipline Data Bank:* The clerk of the supreme court shall transmit notice of all public discipline imposed on an attorney by the supreme court or the professional conduct committee (upon notice from said committee), or the suspension from law practice due to disability of an

attorney, to the National Discipline Data Bank maintained by the American Bar Association.

(j) *Disclosure to Lawyers Assistance Program:* The Attorney Discipline Office shall have the power to disclose otherwise confidential information to the New Hampshire Lawyers Assistance Program whenever the Attorney Discipline Office determines that such disclosure would be in the public interest.

(k) *Duty of Participants:* All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this rule.

Nothing in this section prevents a grievant from disclosing publicly the conduct of an attorney which he or she believes violates the rules of professional conduct or is otherwise inappropriate. The immunity from civil liability provided by section (7) does not apply to such disclosures. This section does prohibit a grievant, however, from disclosing publicly the fact that a grievance or complaint against the attorney about the conduct had been filed with the attorney discipline system pending the grievance or complaint becoming public in accordance with the provisions of this section.

(l) *Violation of Duty of Confidentiality:* Any violation of the duty of confidentiality imposed by section (20) may result in action of the professional conduct committee at the request of the non-violating party or on its own motion. That action may consist of opening the file and the proceedings earlier than would have been the case under section (20), terminating the proceedings with or without public comment, or such other action as the professional conduct committee deems appropriate in the circumstances.

(21) ***Confidentiality:***

Applicability Note: Section 21 shall not apply to records and proceedings in matter initiated on or after April 1, 2000.

(a) *Proceedings Alleging Misconduct:* All records and proceedings involving allegations of misconduct by an attorney shall be confidential and shall not be disclosed except:

(1) When disciplinary counsel issues a notice of charges, in which case the notice, the file (other than work product and internal memoranda), the proceedings before the committees (other than deliberations), and the decision shall be public; or

(2) When the professional conduct committee files a petition with the supreme court in which case, except as provided in section (11) regarding

resignations, the pleadings, all information admitted at the proceedings, the proceedings themselves (other than deliberations of the supreme court), and the decision, shall be public; or

(3) When an attorney seeks reinstatement or readmission pursuant to section (14), in which case the proceedings before the hearings committee panel and the professional conduct committee and the court shall be conducted the same as prescribed in subsections (1) and (2); or

(4) When the respondent attorney, prior to the issuance of a notice of charges as prescribed in subsection (1), requests that the matter be public, in which case the entire file, other than the work product and internal memoranda, of the attorney discipline system, shall be public; or

(5) If the investigation is predicated upon a conviction of the respondent for a crime or upon public discipline imposed upon the respondent in another jurisdiction, in which case the entire file pertaining to the crime or the public discipline, other than the work product and internal memoranda, of the attorney discipline system shall be public.

(b) *Proceedings Alleging Disability:* All proceedings involving allegations of disability on the part of an attorney shall be kept confidential until and unless the supreme court enters an order suspending said attorney from the practice of law pursuant to section (10), in which case said order shall be public.

(c) *Protective Orders:* Proceedings involving allegations of misconduct by or the disability of an attorney frequently require the disclosure of otherwise confidential or privileged information concerning the complainant, a witness, or the attorney. In order to protect the interests of the complainant, witness, or attorney, the professional conduct committee, may, upon request, or on its own initiative, issue a protective order prohibiting the disclosure of confidential, malicious, personal, privileged information or material submitted in bad faith. Any person aggrieved by a decision on a protective order may, within thirty (30) days of the decision, request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the court has acted or the period for requesting court review has expired.

(d) *Disclosure to Authorized Agency:* The attorney discipline office may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to authorized agencies investigating qualifications for admission to practice or fitness to continue practice, to law enforcement agencies investigating qualifications of government employment, and to law enforcement agencies authorized to investigate and prosecute violations of the criminal law. If the attorney discipline office decides to answer a request for relevant information, and if the

attorney who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the attorney discipline office shall send to the attorney at his or her last known address, by certified mail, a notice that information has been requested and by whom, together with a copy of the information that the attorney discipline office proposes to release to the requesting agency. The attorney discipline office shall inform the subject attorney that the information shall be released at the end of ten (10) days from the date of mailing the notice unless the attorney obtains a supreme court order restraining such disclosure. Notice to the attorney, as provided in this section, shall not be required prior to disclosure of relevant information that is otherwise confidential to law enforcement agencies authorized to investigate and prosecute violations of the criminal law.

(e) *Disclosure to Supreme Court for Rule 36 Review:* The attorney discipline office shall disclose relevant information that is otherwise confidential to the supreme court, upon its request, in connection with the court's review of applications under Supreme Court Rule 36.

(f) *Disclosure to National Discipline Data Bank:* The clerk of the supreme court shall transmit notice of all public discipline imposed on an attorney by the supreme court or the professional conduct committee (upon notice from said committee), or the suspension from law practice due to disability of an attorney, to the National Discipline Data Bank maintained by the American Bar Association.

(g) *Duty of Participants*: All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this rule.

Nothing in the rule of confidentiality prevents a complainant from disclosing publicly the conduct of an attorney which he or she believes violates the rules of professional conduct or is otherwise inappropriate. The immunity from civil liability provided by section (7) does not apply to such disclosures. This rule does prohibit a complainant, however, from disclosing publicly the fact that a complaint against the attorney about the conduct has been filed with the attorney discipline system pending action on the complaint or pending the complaint becoming public in accordance with the provisions of this section.

If a complaint has been dismissed or otherwise disposed of by the attorney discipline system without discipline having been imposed, a complainant may make a public disclosure concerning the filing of the complaint, including the conduct complained of and the action of the attorney discipline system. The immunity from civil liability provided in section (7) does not apply to such disclosures.

(h) *Violation of Duty of Confidentiality:* Any violation of the duty of confidentiality imposed by section (21) may result in action of the professional conduct committee at the request of the non-violating party or on its own motion. That action may consist of opening the file and the proceedings earlier than would have been the case under section (21)(a), terminating the proceedings with or without public comment, or such other action as the professional conduct committee deems appropriate in the circumstances.

(22) ***Copy of Rule:***

A copy of Supreme Court Rules 37 and 37A shall be provided to all grievants, complainants, and respondent attorneys.

(23) ***Applicability to Pending Disciplinary Matters:***

The provisions of this rule, as amended effective January 1, 2004, shall not apply to any disciplinary matter pending before the supreme court on January 1, 2004. The provisions of this rule, as amended effective January 1, 2004, shall not apply to any disciplinary matter pending before the committee on January 1, 2004, in which prior to that date the committee has determined that formal proceedings shall be held and the hearing panel has concluded its evidentiary hearing. All such proceedings shall be governed by the provisions of Supreme Court Rule 37 that were in effect prior to January 1, 2004.

APPENDIX P

Amend Supreme Court Rule 37A (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 37A. RULES AND PROCEDURES OF ATTORNEY DISCIPLINE SYSTEM

(I) ***General Provisions***

(a) *Jurisdiction*: The jurisdiction of the attorney discipline system shall be as set forth in Supreme Court Rule 37(1)(b).

(b) *Construction:* This rule is promulgated for the purpose of assisting the grievant, complainant, respondent, counsel and the committees of the attorney discipline system to develop the facts relating to, and to reach a just and proper determination of matters brought to the attention of the attorney discipline system.

(c) *Definitions:* Subject to additional definitions contained in subsequent provisions of this rule which are applicable to specific questions, or other provisions of this rule, the following words and phrases, when used in this rule, shall have, unless the context clearly indicates otherwise, the meaning given to them in this section:

Answer: The response filed by, or on behalf of, the respondent to a complaint or a notice of charges.

Attorney: Unless otherwise indicated, "Attorney," for purposes of this rule, means any attorney admitted to practice in this State, any attorney specially admitted to practice by a court of this State, any attorney not admitted or specially admitted in this State who provides or offers to provide legal services in this State or any non-lawyer representative permitted to represent other persons before the courts of this State pursuant to RSA 311:1.

Complaint: A grievance that, after initial review, has been determined by the attorney discipline office to be within the jurisdiction of the attorney discipline system and to meet the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B) of this rule, and that is docketed by the attorney discipline office, or a complaint that is drafted and docketed by the attorney discipline office after an inquiry by that office. If after docketing, the attorney discipline office general counsel or the complaint screening committee determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing, it shall

be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

Court: The New Hampshire Supreme Court.

Disbarment: The termination of a New Hampshire licensed attorney's right to practice law in this State and automatic expulsion from membership in the bar of this State. A disbarred attorney may only apply for readmission to the bar of this State upon petition to the court, after having complied with the terms and conditions set forth in the disbarment order promulgated by the court which shall include all requirements applicable to applications for admission to the bar, including passing the bar examination and a favorable report by the professional conduct committee and the character and fitness committee.

Disciplinary Counsel: The attorney responsible for the prosecution of disciplinary proceedings before any hearings committee panel, the professional conduct committee and the supreme court. Disciplinary counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, such part-time attorney or attorneys as may from time to time be deemed necessary, and such other attorneys of the attorney discipline office as may from time to time be designated to assist disciplinary counsel.

Disciplinary Rule: Any provision of the rules of the court governing the conduct of attorneys or any rule of professional conduct.

Discipline: Any disciplinary action authorized by Rule 37(3)(c), in those cases in which misconduct in violation of a disciplinary rule is found warranting disciplinary action.

Diversion: Either a condition attached to discipline imposed by the professional conduct committee; or a referral, voluntary in nature, when conduct does not violate the rules of professional conduct; or non-disciplinary treatment by the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee as an alternative to discipline for minor misconduct.

Formal Proceedings: Proceedings subject to section (III) of this rule.

General Counsel: The attorney responsible for (a) receiving, evaluating, docketing and investigating grievances filed with the attorney discipline office; (b) dismissing or diverting complaints on the grounds set forth in Rule 37(6)(c) or presenting complaints to the complaint screening committee with recommendations for diversion, dismissal for any reason ~~with or without a~~

~~warning~~ or referral to disciplinary counsel for a hearing; (c) assisting disciplinary counsel in the performance of the duties of disciplinary counsel as needed; (d) performing general legal services as required for the committees of the attorney discipline system; and (e) overseeing and performing administrative functions for the attorney discipline system. General counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, and such part-time attorney or attorneys as may from time to time be deemed necessary.

Grievance: "Grievance" means a written submission filed with the attorney discipline office to call to its attention conduct that the grievant believes may constitute misconduct by an attorney. A grievance that is determined, after initial screening, not to be within the jurisdiction of the attorney discipline system and/or not to meet the requirements for docketing as a complaint shall not be docketed and shall continue to be referred to as a grievance. A grievance that is determined, after initial screening, to be within the jurisdiction of the attorney discipline system and to meet the requirements for docketing as a complaint shall be docketed as a complaint and shall be referred to thereafter as a complaint; provided, however, that if the attorney discipline office general counsel or complaint screening committee later determines that the docketed complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the requirements for docketing, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

Hearing Panel: A hearing panel comprised of members of the hearings committee.

Inquiry: A preliminary investigation of a matter begun by the attorney discipline office on its own initiative to determine whether a complaint should be docketed.

Investigation: Fact gathering by the attorney discipline office with respect to alleged misconduct.

Minor Misconduct: Conduct, which if proved, violates the rules of professional conduct but would not warrant discipline greater than a reprimand. Minor misconduct (1) does not involve the misappropriation of client funds or property; (2) does not, nor is likely to, result in actual loss to a client or other person of money, legal rights or valuable property rights; (3) is not committed within five (5) years of a diversion, reprimand, censure, suspension or disbarment of the attorney for prior misconduct of the same nature; (4) does not involve fraud, dishonesty, deceit or misrepresentation; (5) does not constitute the commission of a serious crime as defined in Rule 37(9)(b); and (6) is not part of a pattern of similar misconduct.

Notice of Charges: A formal pleading served under section (III)(b)(2) of this rule by disciplinary counsel.

Public Censure: The publication by the court or the professional conduct committee, in appropriate New Hampshire publications, including a newspaper of general statewide circulation, and one with general circulation in the area of respondent's primary office, as well as the New Hampshire Bar News, of a summary of its findings and conclusions relating to the discipline of an attorney, as defined in this section.

Referral: A grievance received by the attorney discipline office from any New Hampshire state court judge or from any member of the bar of New Hampshire, in which the judge or attorney indicates that he or she does not wish to be treated as a grievant.

Reprimand: Discipline administered by the professional conduct committee after notice of charges and after a hearing before a hearings committee panel and the right to request oral argument to the professional conduct committee in those cases in which misconduct in violation of the rules of professional conduct is found. A reprimand is administered by letter issued by the chair of the professional conduct committee, subject to an attorney's right to appeal such discipline to the court.

Suspension: The suspension of an attorney's right to practice law in this State, for a period of time specified by the court or by the professional conduct committee. Suspension by the professional conduct committee may not exceed six (6) months. The suspended attorney shall have the right to resume the practice of law, after the expiration of the suspension period, upon compliance with the terms and conditions set forth in the suspension order promulgated by the court or the professional conduct committee and pursuant to the procedure set forth in section (II)(d)(2) regarding reinstatement.

~~*Warning:* Non-disciplinary action taken by the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee when it is believed that an attorney acted in a manner which involved behavior requiring attention although not constituting clear violations of the rules of professional conduct warranting disciplinary action.~~

(d) *Grounds for Discipline:* The various matters specified in Supreme Court Rule 37(1)(c), the disciplinary rules or decisional law shall be grounds for discipline.

(e) *Types of Discipline and Other Possible Action*

(1) Misconduct under Supreme Court Rule 37(1)(c), the disciplinary rules or decisional law shall be grounds for any of the following:

(A) Disbarment - by the court.

(B) Suspension for more than six months - by the court.

(C) Suspension for six months or less - by the professional conduct committee or the court.

(D) Public Censure - by the professional conduct committee or the court.

(E) Reprimand - by the professional conduct committee.

(F) Monetary Sanctions Pursuant to Rule 37(19) – by the professional conduct committee or the court.

~~(2) The attorney discipline office general counsel, the complaint screening committee or the professional conduct committee may issue a warning to an attorney when it is deemed to be appropriate. The issuance of a warning does not constitute discipline.~~

[(2)] ~~(3)~~ The attorney discipline office general counsel, the complaint screening committee or the professional conduct committee may divert a matter involving minor discipline, in lieu of discipline, subject to compliance with the terms of a written agreement. The professional conduct committee may require an attorney to participate in a diversion program as a condition of discipline. Any component of the attorney discipline system may refer to a diversion program, on a voluntary basis, an attorney who engages in conduct that does not violate the rules of professional conduct but which should be addressed as a corrective matter.

(f) *Subsequent Consideration of Disciplinary Action ~~or of a Warning~~*

The fact that an attorney has been ~~issued a warning or has been~~ the subject of disciplinary action by the professional conduct committee, may (together with the basis thereof) be considered in determining the extent of discipline to be imposed, in the event additional charges of misconduct are subsequently brought and proven by clear and convincing evidence against the attorney.

(g) *Diversion*

Diversion may be either mandatory, a voluntary referral or a discretionary referral for minor misconduct.

(1) Mandatory diversion involving required participation in a diversion program may occur in some cases as part of discipline imposed by the professional conduct committee.

(2) Voluntary referral to a diversion program may occur when the conduct of an attorney may come to the attention of any of the committees or personnel involved in the attorney discipline system but the conduct does not violate the rules of professional conduct. The referral would be voluntary and may occur in situations where there is reason to believe that the attorney's conduct may lead to violations of the rules of professional conduct if corrective action is not taken by the attorney.

(3) Discretionary diversion as an alternative to a formal sanction for minor misconduct may occur if:

(A) The misconduct appears to the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee to be the result of poor office management, chemical dependency, behavioral or health-related conditions, negligence or lack of training or education; and

(B) There appears to the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee to be a reasonable likelihood that the successful completion of a remedial program will prevent the recurrence of conduct by the attorney similar to that which gave rise to the diversion.

(C) If the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee offers a written diversion agreement to an attorney, the attorney shall have thirty (30) days to accept and execute the diversion agreement.

(D) An attorney may decline to accept and execute a diversion agreement in which case the pending complaint shall be processed by the attorney discipline system in the same manner as any other matter.

(4) Diversion agreements shall be in writing and shall require the attorney to participate, at his or her own expense, in a remedial program acceptable to the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee which will address the apparent cause of the misconduct. Remedial programs may include but are not limited to: law office assistance; chemical dependency treatment; counseling; voluntary limitation of areas of practice for the period of the diversion agreement; or a prescribed course of legal education including attendance at legal education seminars. A diversion agreement shall require

the attorney to admit the facts of the complaint being diverted and to agree that, in the event the attorney fails to comply with the terms of the diversion agreement, the facts shall be deemed true in any subsequent disciplinary proceedings.

(5) The fact that a diversion has occurred shall be public in all matters. Written diversion agreements shall also be public unless the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee votes to make it non-public based on one or more of the following: health, personal finances, family considerations or other highly personal matters.

(6) If an attorney fails to comply with the terms of a written diversion agreement, the agreement shall be terminated and the complaint shall be processed by the attorney discipline system in the same manner as any other matter.

(7) If an attorney fulfills the terms of a written diversion agreement, the complaint shall be dismissed and written notice shall be sent to both the attorney and the complainant.

(8) The attorney discipline office shall a) prepare diversion agreements setting forth the terms determined by the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee; b) monitor the progress of the attorney participating in the diversion program to insure compliance; and c) notify the complaint screening committee or the professional conduct committee whenever there is a voluntary or involuntary termination of the written diversion agreement or upon successful completion of the diversion program.

(h) *Public Announcements*

The attorney discipline office may, from time to time, publicly announce the nature, frequency and substance of diversion (unless made non-public)~~,~~ ~~warnings~~ and sanctions imposed by the attorney discipline system. Unless a grievance or complaint has already been made available for public inspection in accordance with Supreme Court Rule 37, such announcements shall not disclose or indicate the identity of any respondent attorney without the prior approval of the supreme court and prior notice to the respondent (giving said attorney an opportunity to be heard thereon) or without a written waiver from the attorney.

(i) *Period of Limitation*

(1) Except as provided in subsection (3), no formal disciplinary proceedings shall be commenced unless a grievance is filed with the attorney

discipline office in accordance with section (II)(a) or a complaint is generated and docketed by the attorney discipline office under section (II)(a)(5)(B) of this rule:

(A) within six (6) years after the commission of the alleged misconduct when the alleged misconduct was committed before April 1, 2000;

(B) within two (2) years after the commission of the alleged misconduct when the alleged misconduct was committed on or after April 1, 2000; except when the acts or omissions that are the basis of the grievance were not discovered and could not reasonably have been discovered at the time of the acts or omissions, in which case, the grievance must be filed within two (2) years of the time the grievant discovers, or in the exercise of reasonable diligence should have discovered, the acts and omissions complained of.

(2) Misconduct will be deemed to have been committed when every element of the alleged misconduct has occurred, except, however, that where there is a continuing course of conduct, misconduct will be deemed to have been committed beginning at the termination of that course of conduct.

If the continuing course of conduct began before but terminated after April 1, 2000, continuing misconduct through March 31, 2000, will be subject to the six (6) year period of limitation while continuing misconduct for the period beginning April 1, 2000, will be subject to the two (2) year period of limitation.

(3) If a grievance is filed after the period prescribed in subsection (1) has expired, the attorney discipline office may elect to commence formal proceedings in the following cases:

(A) if based on charges which include commission of a "serious crime," as defined in Supreme Court Rule 37(9)(b), or conduct which would be a material element of a "serious crime," or

(B) if based on charges which do not include conduct described in (A) but which include as a material element fraud or fraudulent misrepresentation, dishonesty, deceit, or breach of a fiduciary duty, but only if commenced within one (1) year after actual discovery of the misconduct by the aggrieved party.

(4) The period of limitation does not run:

(A) during any time the attorney is outside this jurisdiction with a purpose to avoid commencement of proceedings, or wherein the attorney refuses to cooperate with an investigation into alleged misconduct, or

(B) during any period in which the attorney has engaged in active concealment of the alleged misconduct, provided that the period begins to run when the concealment is discovered by the aggrieved party or the attorney discipline office.

(5) If, while proceedings of any kind are pending against the attorney in any court or tribunal and arising out of the same acts or transactions that provide the basis for the allegations of misconduct, the limitations period prescribed in subsection (1) expires, formal disciplinary proceedings may be commenced within one year after final conclusion of those proceedings notwithstanding the expiration of the period of limitation.

(II) ***Investigations and Informal Proceedings***

(a) *Preliminary Provisions*

(1) *Responsibility of Attorney Discipline Office*

The attorney discipline office, through general counsel, shall investigate all matters involving alleged misconduct of attorneys which fall within the jurisdiction of the attorney discipline system and which satisfy the requirements of this rule.

(2) *Initiation of Investigation Process*

(A) *Grievance.* Any person may file a grievance with the attorney discipline office to call to its attention the conduct of an attorney that he or she believes constitutes misconduct which should be investigated by the attorney discipline office. If necessary, the general counsel or his or her deputy or assistant will assist the grievant in reducing the grievance to writing.

In accordance with a judge's obligation under canon 3 of the code of judicial conduct to report unprofessional conduct of any attorney of which the judge is aware, a judge of the supreme, superior, district or probate courts of New Hampshire, may refer any matter to the attorney discipline office which he or she believes may constitute misconduct by an attorney that should be investigated by the attorney discipline office. In accordance with an attorney's obligation under Rule 8.3 of the rules of professional conduct to report unprofessional conduct of an attorney of which he or she has knowledge, a member of the bar of New Hampshire, may refer any matter to the attorney discipline office which he or she believes may constitute misconduct by an attorney that should be investigated by the attorney discipline office. Except as otherwise provided, a referral from a court or attorney shall be treated as a grievance. Upon receipt of a referral, if the attorney discipline office shall determine that the referring judge or attorney does not wish to be treated as a

grievant, and, if it is determined after initial screening that the grievance is within the jurisdiction of the attorney discipline office and meets the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B), the attorney discipline office shall process the grievance as an attorney discipline office generated complaint.

(B) *Attorney Discipline Office-Initiated Inquiry.* The attorney discipline office may, upon any reasonable factual basis, undertake and complete an inquiry, on its own initiative, of any other matter within its jurisdiction coming to its attention by any lawful means. Unless the attorney discipline office later dockets a complaint against an attorney in accordance with section (II)(a)(5)(B), all records of such an inquiry shall be confidential.

(C) *Filing.* A grievance shall be deemed filed when received by the attorney discipline office.

(3) *Procedure after Receipt of Grievance*

(A) *Initial Screening of Grievance.* General counsel shall review each grievance upon receipt to determine whether the grievance is within the jurisdiction of the attorney discipline system and whether the grievance meets the requirements for docketing as a complaint.

When necessary, general counsel may request additional information or documents from the grievant. Except for good cause shown, failure of a grievant to provide such additional information and/or documents within twenty (20) days may result in general counsel processing the grievance based on the then existing file, or dismissing the complaint without prejudice.

Upon receipt of the above information, general counsel may allow a respondent thirty (30) days to file a voluntary response if it is deemed necessary to assist in the evaluation process.

Extensions of time are not favored.

(B) *Requirements for Docketing Grievance as a Complaint.* A grievance shall be docketed as a complaint if it is within the jurisdiction of the attorney discipline system and it meets the following requirements:

(i) *Violation Alleged.* It contains: (a) a brief description of the legal matter that gave rise to the grievance; (b) a detailed factual description of the respondent's conduct; (c) the relevant documents that illustrate the conduct of the respondent, or, if the grievant is unable to provide such documents, an explanation as to why the grievant is unable to do so; and (d)

whatever proof is to be provided, including the name and addresses of witnesses to establish a violation of a disciplinary rule.

(ii) *Standing.* With the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, it must be filed by a person who is directly affected by the conduct complained of or who was present when the conduct complained of occurred, and contain a statement establishing these facts.

(iii) *Oath or Affirmation.* It is typed or in legible handwriting and, with the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, signed by the grievant under oath or affirmation, administered by a notary public or a justice of the peace. The following language, or language that is substantially equivalent, must appear above the grievant's signature: "I hereby swear or affirm under the pains and penalties of perjury that the information contained in this grievance is true to the best of my knowledge."

(iv) *Limitation Period.* It was filed with the attorney discipline office within the period of limitation set forth in section (I)(i).

(C) *Treatment of Grievance Not Within Jurisdiction of Attorney Discipline System or Failing to Meet Complaint Requirements.* A grievance that is not within the jurisdiction of the attorney discipline system or that does not meet the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B) shall not be docketed and shall be dismissed in accordance with section (II)(a)(4).

(4) *Disposition of Grievance after Initial Screening.*

(A) *Lack of Jurisdiction.* If the attorney discipline office determines that the person who is the subject of the grievance is not a person subject to the rules of professional conduct, general counsel shall return the grievance to the grievant with a cover letter explaining the reason for the return and advising the grievant that the attorney discipline office will take no action on the grievance. The person who is the subject of the grievance shall not be notified of it. No file on the grievance will be maintained, however, the attorney discipline office shall retain a copy of the cover letter to the grievant, which shall be available for public inspection in accordance with section (IV)(a)(2)(A). The attorney discipline office may bring the matter to the attention of the authorities of the appropriate jurisdiction, or to any other duly constituted body which may provide a forum for the consideration of the grievance and shall advise the grievant of such referral.

(B) *Failure to Meet Complaint Requirements.* If the attorney discipline office determines that a grievance fails to meet the requirements for docketing as a complaint, it shall so advise the grievant in writing. The attorney who is the subject of the grievance shall be provided with a copy of the grievance and the response by general counsel, and shall be given an opportunity to submit a reply to the grievance within thirty (30) days from the date of the notification or such further time as may be permitted by general counsel. The attorney's reply shall be filed in the record, which shall be available for public inspection in accordance with section (IV)(a)(2)(B).

(C) *Reconsideration of Attorney Discipline Office's Decision.* A grievant may file a written request for reconsideration of the attorney discipline office's decision that the grievance is not within the jurisdiction of the attorney discipline system or does not meet the requirements for docketing as a complaint, but said request must be filed within ten (10) days of the date of the written notification. A request for reconsideration of the attorney discipline office's decision shall automatically stay the period in which the attorney may file a reply as provided for by section (II)(a)(4)(B). Any such request for reconsideration that is timely filed shall be presented by general counsel to the complaint screening committee which shall affirm the decision of the attorney discipline office or direct that the grievance be docketed as a complaint and processed in accordance with the following paragraph. If the decision of the attorney discipline office is affirmed, the attorney who is the subject of the grievance shall be given the opportunity to submit a reply to the grievance within thirty (30) days from the date of the complaint screening committee's action on the request for reconsideration or such further time as may be ordered by that committee.

(5) *Docketing of Grievance as Complaint; Procedure Following Docketing of Complaint.*

(A) *Docketing of Grievance as Complaint.* If general counsel determines that a grievance is within the jurisdiction of the attorney discipline office and meets the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B), he or she shall docket it as a complaint.

(B) *Drafting and Docketing of Attorney Discipline Office-generated Complaint.* If, after undertaking and completing an inquiry on its own initiative, the attorney discipline office determines that there is a reasonable basis to docket a complaint against a respondent, a written complaint shall promptly be drafted and docketed.

(C) *Request for Answer to Complaint*. After a complaint is docketed, general counsel shall promptly forward to the respondent a copy of the complaint and a request for an answer thereto or to any portion thereof

specified by the general counsel. Unless a shorter time is fixed by the general counsel and specified in such notice, the respondent shall have thirty (30) days from the date of such notice within which to file his or her answer with the attorney discipline office. The respondent shall serve a copy of his or her answer in accordance with section (VII) of this rule. If an answer is not received within the specified period, or any granted extension, absent good cause demonstrated by the respondent, general counsel may recommend to the complaint screening committee that the issue of failing to cooperate be referred to disciplinary counsel who shall prepare a notice of charges requiring the respondent to appear before a panel for the hearings committee and to show cause why he or she should not be determined to be in violation of Rules 8.1(b) and 8.4(a) of the rules of professional conduct for failing to respond to general counsel's request for an answer to the complaint.

(6) *Investigation.*

Either prior to or following receipt of the respondent's answer, general counsel and his or her deputies and assistants shall conduct such investigation as may be appropriate.

Upon completion of the investigation, general counsel may (1) dismiss or divert a complaint on the grounds set forth in Rule 37(6)(c); or (2) present the complaint to the complaint screening committee with recommendations for diversion as provided in section (I)(g), dismissal for any reason ~~(with or without a warning)~~ or referral to disciplinary counsel for a hearing.

At any time while general counsel is investigating a docketed complaint, the respondent may notify general counsel that the respondent waives the right to have the matter considered by the complaint screening committee and consents to the matter being referred to disciplinary counsel for a hearing. Agreement by the respondent to referral for a hearing shall not be considered an admission of misconduct or a waiver of any defenses to the complaint.

Meetings of the complaint screening committee shall be in the nature of deliberations and shall not be open to the public, respondents, respondents' counsel, disciplinary counsel or the complainant. Records and reports of recommendations made shall in all respects be treated as work product and shall not be made public or be discoverable. However, the decision of the complaint screening committee shall be public.

(7) *Action By the Attorney Discipline Office General Counsel or the Complaint Screening Committee.*

(A) *Diversion.* In any matter in which the attorney discipline office general counsel or the complaint screening committee determines that

diversion is appropriate, it shall be structured consistent with the provisions of section (I)(g).

(B) *Dismissal For Any Reason*. In any matter in which the Attorney Discipline Office General Counsel or the complaint screening committee determines that a complaint should be dismissed, either on grounds of no professional misconduct or any other reason, general counsel or the committee shall dismiss the complaint and it shall notify the complainant and the respondent in writing and the attorney discipline office shall close its file on the matter.

~~(C) *Dismissal With A Warning.* If the Attorney Discipline Office General Counsel or the complaint screening committee determines that the complaint should be dismissed and that a warning should issue, general counsel or the committee shall notify the complainant and the respondent of such disposition in writing and shall notify the respondent of his or her rights, if any, pursuant to section (II)(b)(1)(B) of this rule.~~

[(C)]~~(D)~~ *Formal Proceedings.* If the respondent agrees with the recommendation of the Attorney Discipline Office General Counsel to refer a complaint to disciplinary counsel, or the complaint screening committee determines that formal proceedings should be held, the complaint shall be referred to disciplinary counsel for the issuance of notice of charges and the scheduling of a hearing on the merits before a panel of the hearings committee.

~~(b) *Final Disposition With A Warning.*~~

~~(1) *Warning.*~~

~~(A) A written record shall be made of the fact of and basis for a dismissal with a warning.~~

~~(B) In the case of a warning, the respondent shall be advised of:~~

~~(i) the respondent's right to submit a written response, which shall be maintained with the file relating to the complaint.~~

~~(ii) the fact that the issuance of the warning does not constitute discipline; and~~

~~(iii) the fact that the record of such warning may be considered (a) by the Attorney Discipline Office General Counsel or the complaint screening committee to determine whether diversion may be appropriate in the event charges of minor misconduct are subsequently brought against the~~

~~respondent; or (b) by the professional conduct committee in the event findings of misconduct are subsequently found against the respondent.~~

[(b)]~~(c)~~ *Abatement of Investigation.*

(1) *Refusal of Grievant/ Complainant or Respondent to Proceed, Etc.*

Neither unwillingness nor neglect of the grievant or complainant to prosecute a charge, nor settlement, compromise, or restitution, nor failure of the respondent to cooperate, shall, by itself, justify abatement of an investigation into the conduct of an attorney or the deferral or termination of proceedings under this rule.

(2) *Complaint Related to Pending Civil Litigation or Criminal Matter.*

(A) *General Rule.* The processing of a complaint involving material allegations which are substantially similar to the material allegations of pending criminal or civil litigation need not but may be deferred at any stage pending determination of such litigation.

(B) *Effect of Determination.* The acquittal of a respondent on criminal charges or a verdict or judgment in the respondent's favor in civil litigation involving substantially similar material allegations shall not, by itself, justify termination of a disciplinary investigation predicated upon the same material allegations.

[(c)]~~(d)~~ *Resignation, Reinstatement, Conviction of Crime.*

(1) *Resignation by a New Hampshire Licensed Attorney under Disciplinary Investigation.*

(A) *Recommendation to the Court.* Upon receipt by any component part of the attorney discipline system of an affidavit from a New Hampshire licensed attorney who intends to resign pursuant to the rules of the court, it shall refer the matter to the professional conduct committee, to review the affidavit and such other matters as it deems appropriate to determine either (i) to recommend to the court that the resignation be accepted and to recommend any terms and conditions of acceptance it deems appropriate, or (ii) to recommend to the court that the resignation not be accepted with the reasons therefore. The professional conduct committee shall submit the affidavit and its recommendation to the court, and the proceedings, if any, before the court shall be conducted by disciplinary counsel.

(B) *Notification of Grievant.* In the event the court accepts the resignation of a respondent and removes the respondent on consent, the

professional conduct committee by means of written notice shall notify the grievant of such action.

(2) *Application for Reinstatement or Readmission.*

(A) *Timeliness after Suspension.* An attorney who has been suspended for a specific period, whether by the court or the professional conduct committee, may not move for reinstatement until the expiration of the period of suspension, and upon the completion of all the terms and conditions set forth in the order of suspension.

(B) *Procedure.* A motion for reinstatement by an attorney suspended by the court for misconduct rather than disability or an application for readmission by a New Hampshire licensed attorney who has been disbarred or has resigned while under disciplinary investigation shall be referred to the professional conduct committee by the supreme court. A motion for reinstatement by an attorney suspended by the professional conduct committee shall be filed directly with the professional conduct committee.

Upon receipt of a motion for reinstatement or an application for readmission, the professional conduct committee shall refer the motion or application to the hearings committee for appointment of a hearing panel. The attorney discipline office shall then cause a notice to be published in a newspaper with statewide circulation, and one with circulation in the area of respondent's former primary office, as well as the New Hampshire Bar News that the respondent has moved for reinstatement or applied for readmission. The notice shall invite anyone to comment in writing to the attorney discipline office within twenty (20) days. All comments shall be made available to the respondent and shall be part of the public file. Where feasible, the attorney discipline office shall give notice to the original complainant. The hearing panel shall promptly schedule a hearing at which the respondent shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this state and that the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration for justice nor subversive to the public interest. The attorney discipline system shall be represented at the hearing by disciplinary counsel. At the conclusion of the hearing, the hearing panel shall promptly file a report containing its findings of fact, conclusions and recommendations in written reports, along with the record, to the professional conduct committee. Following receipt of written memoranda by disciplinary counsel and respondent, the hearing transcript and oral argument, the professional conduct committee shall review the record in its entirety and shall file its own recommendations and findings with the court, together with the record. After the submission of briefs and oral arguments to the court, if any, the court shall enter a formal order.

(C) *Readmission after Resignation.* Upon receipt of a referral from the supreme court, pursuant to Rule 37(15), of a motion for readmission after resignation, the professional conduct committee shall further refer the motion to the hearings committee for the appointment of a hearing panel. The hearing panel shall promptly schedule a hearing at which the attorney shall have the burden of demonstrating by a preponderance of the evidence that he or she has the competency and learning in law required for readmission. At the conclusion of the hearing, the hearing panel shall promptly file a report containing its findings and recommendations and transmit same, together with the record, to the professional conduct committee. Following receipt of written memoranda of disciplinary counsel and the attorney, review of the hearing transcript, and oral argument, the professional conduct committee shall review the record in its entity, and shall file its own recommendations and findings, together with the record, with the court. Following the submission of briefs, if necessary, and oral argument to the supreme court, if any, the court shall enter a final order.

(D) *Special Rule for Suspensions of Six Months or Less.* Notwithstanding the provisions of Rule 37A(II)(d)(2)(B), a lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated by the court following the end of the period of suspension by filing with the court and serving upon disciplinary counsel a motion for reinstatement accompanied by: (1) an affidavit stating that he or she has fully complied with the requirements of the suspension order and has paid any required fees and costs; and (2) evidence that he or she has satisfactorily completed the Multistate Professional Responsibility Examination since his or her suspension.

(3) *Conviction of Crime; Determination of Serious Crime.*

Upon receipt by any component part of the attorney discipline system of a certificate by the clerk of any court demonstrating that an attorney has been convicted of a crime in the State of New Hampshire or in any other state, territory or district, it shall determine whether the crime is a "serious crime" as defined in Supreme Court Rule 37(7)(b). Upon a determination that the crime is a serious crime, it shall file the certificate of conviction with the Court.

(III) **Formal Proceedings**

Preface

As good cause appears and as justice may require, the professional conduct committee may waive the application of any rule under this section.

(a) *Preliminary Provisions.*

(1) *Representation of Respondent.*

When a respondent is represented by counsel in a formal proceeding, counsel shall file with the hearings committee and disciplinary counsel a written notice of such appearance, which shall state such counsel's name, address, and telephone number, the name and address of the respondent on whose behalf counsel appears, and the caption of the subject proceedings. If the appearance is filed after a hearing panel has submitted its reports and recommendations to the professional conduct committee, the notice of the appearance shall be filed with the professional conduct committee rather than the hearings committee. In any proceeding where counsel has filed a notice of appearance pursuant to this section, any notice or other written communication required to be served on or furnished to the respondent shall also be served on or furnished to the respondent's counsel (or one of such counsel if the respondent is represented by more than one counsel) in the same manner as prescribed for the respondent, notwithstanding the fact that such communication may be furnished directly to the respondent.

(2) *Format of Pleadings and Documents.*

Pleadings or other documents filed in formal proceedings shall comply with and conform to the rules from time to time in effect for comparable documents in the court.

(3) *Avoidance of Delay.*

All formal proceedings under this rule shall be as expeditious as possible. In any matter pending before the hearings committee, only the chair of the panel assigned to hear the matter may grant an extension of time, and only upon good cause shown. In any matter pending before the professional conduct committee, only the chair of the committee may grant an extension of time, and only upon good cause shown. Application for such an extension shall be made, in advance, and in writing where practicable, to the appropriate chair.

(4) *Additional Evidence.*

Whenever, in the course of any hearing under this rule, evidence shall be presented upon which another charge or charges against the respondent might be made, it shall not be necessary to prepare or serve an additional notice of charges with respect thereto, but the hearing panel may, after reasonable notice to the respondent and disciplinary counsel and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if they had been made and served at the time for service of the notice of charges, and may render its decision upon all such charges as may be justified by the evidence in the case.

(b) *Institution of Proceedings.*

(1) *General.*

Upon receipt of a file referred by the attorney discipline office general counsel or the complaint screening committee, disciplinary counsel may engage in such additional preparation to allow counsel to formalize allegations into a notice of charges. The notice of charges shall be served on the respondent by certified mail, return receipt requested, unless some other type of service is authorized upon application to the chair of the professional conduct committee. Throughout the proceedings, disciplinary counsel shall exercise independent professional judgment. Nevertheless, disciplinary counsel shall keep the complainant apprised of developments in the matter and consider input from the complainant.

(2) *Notice of Charges.*

The notice of charges shall set forth the allegations of misconduct against the respondent and the disciplinary rules alleged to have been violated. The notice shall also advise the respondent that the respondent is entitled to be represented by counsel and to present evidence in respondent's own behalf.

(3) *Answer.*

(A) *General Rule.* The respondent shall answer the notice of charges by serving and filing an answer with disciplinary counsel within thirty (30) days after service of the notice of charges. Should the respondent fail to file an answer, the allegations set forth in the notice of charges shall be deemed to be admitted.

(B) *Contents of Answer.* The answer shall be in writing, and shall respond specifically to each allegation of the notice of charges and shall assert all affirmative defenses.

(4) *Assignment for Hearing.*

Upon receiving an answer from the respondent, or the expiration for the thirty (30) day period for a respondent to file an answer, it shall be the duty of disciplinary counsel to request that the chair of the hearings committee appoint a hearing panel.

Once a hearing panel has been appointed, disciplinary counsel shall forward the panel a copy of the file, other than work product, deliberations and internal correspondence and memoranda of the component parts of the

attorney discipline system. To the extent not already provided, disciplinary counsel shall also provide the respondent with the same documents provided to the hearing panel.

(5) *Discovery.*

(A) Discovery shall be available to the disciplinary counsel. Discovery shall also be available to the respondent, provided that an answer has been filed. All such requests shall be in writing.

(B) On written request the following information, if relevant or reasonably calculated to lead to the discovery of admissible evidence in the matter, and if within the possession, custody or control of the disciplinary counsel, the respondent or respondent's counsel, is subject to discovery and shall be made available for inspection and copying as set forth in this rule:

(i) A writing or any other tangible object, including those obtained from or belonging to the respondent;

(ii) Signed written statements, or taped statements, if any, by any witness, including the respondent;

(iii) Results or reports of mental or physical examinations and of scientific tests or experiments made in connection with the matter;

(iv) Names, addresses and telephone numbers of all persons known to have relevant information based on personal knowledge about the matter, including a designation by the disciplinary counsel and respondent as to which of those persons will be called as witnesses;

(v) Police reports and any investigation reports generated by any agency other than the attorney discipline office;

(vi) Names and address of each person expected to be called as an expert witness, the expert's qualifications, the subject matter on which the expert will testify, a copy of all written reports submitted by the expert or, if none, a statement of facts and opinions to which the expert will testify and a summary of the grounds for each opinion; and

(vii) If disciplinary counsel or the respondent are unable to agree on discovery issues, a request must be made for a pre-hearing conference.

(C) This rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or that party's attorney or agents in connection with a disciplinary proceeding.

Nor does it require discovery of statements, signed or unsigned, made by respondent to respondent's attorney or that attorney's agents. This rule does not authorize discovery of any internal materials or documents prepared by the attorney discipline office.

(D) Depositions shall be permitted in any matter to preserve the testimony of a witness likely to be unavailable for hearing due to death, incapacity or if otherwise agreed to by the parties. If disciplinary counsel or the respondent deem it necessary to take any other depositions, a request must be made for a pre-hearing conference.

(E) Discovery shall be made available within thirty (30) days after receipt of a written request therefor. A party's obligation to provide discovery is a continuing one. If, subsequent to compliance with a request for discovery, a party discovers additional names or statements of witnesses or other information reasonably encompassed by the initial request for discovery, the original discovery response shall be promptly supplemented accordingly. In any case in which a pre-hearing conference has been held, the case management order shall set forth the time period within which all discovery shall be completed.

(F) Any discoverable information which is not timely furnished either by original or supplemental response to a discovery request may, on application of the aggrieved party, be excluded from evidence at hearing. The failure of the disciplinary counsel or respondent to disclose the name and provide the report or summary of any expert who will be called to testify in accordance with prior agreement of the parties or as provided in the case management order at least twenty (20) days prior to the hearing date shall result in the exclusion of the witness, except on good cause shown.

(6) *Pre-Hearing Conference.*

(A) A pre-hearing conference shall be held at the request of any party or the trier of fact. The pre-hearing conference shall be held by the hearing panel chair. Unless for good cause shown, the request for a pre-hearing conference must be made within thirty (30) days of the date of the hearing panel appointment. At least fourteen (14) days written notice of the date of the conference shall be given. Attendance is mandatory by all parties at the conference. A pre-hearing conference may be held by telephone call where appropriate. No transcript shall be made of the pre-hearing conference.

(B) At the pre-hearing conference, the hearing panel chair shall address the following matters:

(i) The formulation and simplification of issues;

(ii) Admissions and stipulations of the parties with respect to allegations, defenses and any aggravation or mitigation;

(iii) The factual and legal contentions of the parties;

(iv) The identification and limitation of witnesses, including character and expert witnesses;

(v) Rulings on discovery disputes, deadlines for the completion of discovery, including the timely exchange of expert reports, and a ruling on any requests to take depositions;

(vi) The hearing date and its estimated length;

(vii) Deadline for the pre-marking of all exhibits to which the parties consent; and

(viii) Any other preliminary issues or matters which may aid in the disposition of the case.

(C) Within fourteen (14) days following the pre-hearing conference, the hearing panel chair shall issue a case management order, designated as such in the caption, memorializing any agreements by the parties and any determinations made respecting any matters considered at the conference. The case management order, which constitutes part of the record, shall be sent to the disciplinary counsel and the respondent.

(D) At the pre-hearing conference the hearing panel chair shall schedule a date for the hearing of the case within sixty (60) days after the date of the conference, except for good cause shown.

(7) *Matters in Which a Pre-hearing Conference Has Not Been Held.*

(A) In any matter in which a pre-hearing conference is not requested, both disciplinary counsel and respondent shall be responsible for compiling and pre-marking all documentary evidence, to which the parties consent, to be considered by the hearing panel;

(B) In such matters, both disciplinary counsel and respondent shall also be responsible for preparing lists of names, addresses and telephone numbers of persons who will be called as witnesses, and, in the case of expert witnesses, the experts' qualifications, the subject matter upon which each will testify, a copy of the written reports submitted by such experts, or if none, a statement of the facts and opinions to which each expert will testify and a summary of the grounds for each such opinion.

(C) Also, in such matters, both disciplinary counsel and respondent shall be responsible for preparing requests for findings of fact and rulings of law.

(D) Copies of pre-marked exhibits, witnesses lists and expert witness disclosures, shall be filed by disciplinary counsel and respondent with the attorney discipline office at least ten (10) days prior to the date of the hearing. Five (5) copies shall be provided. Copies shall be also provided to the opposing party concurrent with the submission to the attorney discipline office. Requests for findings of fact and rulings of law shall be filed at the beginning of the hearing.

(8) *Further Review.*

If at any point prior to the hearing on the merits, disciplinary counsel concludes that the development of evidence establishes that there is no valid basis for proceeding to a hearing, he or she shall submit a written report to the professional conduct committee requesting that the matter be dismissed either with a finding of no professional misconduct or on some other basis.

(c) *Conduct of Hearings.*

(1) *General Rule.*

The hearing panel chair shall conduct the hearing. A record shall be required and a transcript provided to the respondent, disciplinary counsel and the professional conduct committee. A transcript may be provided to the complainant if requested. A copy of the transcript may be obtained from the stenographer by anyone else at the expense of the person requesting it, and it shall thereafter be provided within a reasonable time. The respondent may have the right to be represented by counsel, and respondent and disciplinary counsel shall present their evidence. The hearing shall be public.

(2) *Limiting Number of Witnesses.*

The hearing panel may limit the number of witnesses who may be heard upon any issue before it to eliminate unduly repetitious or cumulative evidence.

(3) *Additional Evidence.*

At the hearing the hearing panel may, if it deems it advisable, authorize either the respondent or disciplinary counsel to file specific post-hearing documentary evidence as part of the record within such time as shall be fixed by the hearing panel chair.

(4) *Oral Examination.*

Witnesses shall be examined orally by disciplinary counsel or the respondent calling the witnesses as well as by the members of the hearing panel. Witnesses whose testimony is to be taken, including the complainant and the respondent, shall be sworn, or shall affirm, before their testimony shall be deemed evidence in any proceeding or any questions are put to them. Cross-examination of witnesses, including the complainant and respondent, shall be allowed but may be limited by the hearing panel chair if such cross-examination is not assisting the hearing panel in developing facts relating to, or reaching a just and proper determination of, the matters before the hearing panel.

(5) *Presentation and Effect of Stipulations.*

Disciplinary counsel and the respondent may stipulate as to any relevant matters of fact or the authenticity of any relevant documents. Such stipulations may be received in evidence at a hearing, and when so received shall be binding with respect to matters therein stipulated.

(6) *Admissibility of Evidence.*

(A) *General Rule*. All evidence which is deemed by the hearing panel chair to be relevant, competent and not privileged shall be admissible in accordance with the principles set out in section (I)(b) of this rule. Except as provided above, the formal rules of evidence shall not apply.

(B) *Pleadings.* The notice of charges and answer thereto shall, without further action, be considered part of the record.

(7) *Reception and Ruling on Evidence.*

When objections to the admission or exclusion of evidence are made the grounds shall be stated concisely. Formal exceptions are unnecessary. The hearing panel chair shall rule on the admissibility of all evidence.

(8) *Copies of Exhibits.*

When exhibits of a documentary character are received in evidence, copies shall, unless impracticable, be furnished to each member of the hearing panel present at the hearing, as well as to opposing counsel or the other party. Legible copies shall be admissible, unless otherwise required by the hearing panel chair.

(9) *Photographing, Recording and Broadcasting.*

(A) The hearing panel should permit the media to photograph, record and broadcast all proceedings that are open to the public. The hearing panel may limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequence. Except as specifically provided in this rule, or by order of the hearing panel, no person shall within the hearing room take any photograph, make any recording, or make any broadcast by radio, television or other means in the course of any proceeding.

(B) Reporters hired by the hearings committee to record hearings pursuant to this rule and authorized recorders are not prohibited by this rule from making voice recordings for the sole purpose of discharging their official duties.

(C) *Proposed Limitations on Coverage by the Electronic Media.* Any party to a formal proceeding – or any other interested person – shall notify the hearings committee at the inception of a matter, or as soon as practicable, if that person intends to ask the hearing panel to limit electronic media coverage of any proceeding that is open to the public. Failure to notify the hearings committee in a timely fashion may be sufficient grounds for the denial of such a request. In the event of such a request, the hearings committee or hearing panel shall either deny the request or issue an order notifying the parties to the proceeding and all other interested persons that such a limitation has been requested, establish deadlines for the filing of written objections by parties and interested persons, and order an evidentiary hearing during which all interested persons will be heard. The same procedure for notice and hearing shall be utilized in the event that the hearing panel sua sponte proposes a limitation on coverage by the electronic media. A copy of the order shall, in addition to being incorporated in the case docket, be sent to the Associated Press, which will disseminate the order to its members and inform them of upcoming deadlines/hearing.

(D) *Advance Notice of Requests for Coverage.* Any requests to bring cameras, broadcasting equipment and recording devices into a hearing room for coverage of any proceedings shall be made as far in advance as practicable. If no objection to the requested electronic coverage is received by the hearings committee or hearing panel, coverage shall be permitted in compliance with this rule. If an objection is made, the media will be so advised and the panel will conduct an evidentiary hearing during which all interested parties will be heard to determine whether, and to what extent, coverage by the electronic media or still photography will be limited.

(E) *Pool Coverage.* The hearing panel retains discretion to limit the number of still cameras and the amount of video equipment in the hearing room at one time and may require the media to arrange for pool coverage. The

panel will allow reasonable time prior to a proceeding for the media to set up pool coverage for television, radio and still photographers providing broadcast quality sound and video.

(1) It is the responsibility of the news media to contact the attorney discipline office in advance of a proceeding to determine if pool coverage will be required. If the hearing panel has determined that pool coverage will be required, it is the sole responsibility of the media, with assistance as needed from the attorney discipline office, to determine which news outlet will serve as the "pool." Disputes about pool coverage will not be resolved by the hearing panel. Access may be curtailed if pool agreements cannot be reached.

(2) In the event of multiple requests for media coverage, because scheduling renders a pool agreement impractical, the attorney discipline office retains the discretion to rotate media representatives into and out of the courtroom.

(F) *Live Feed.* Except for good cause shown, requests for live coverage should be made at least five (5) days in advance of a proceeding.

(G) *Exhibits.* For purposes of this rule, access to exhibits will be at the discretion of the hearing panel. The panel retains the discretion to make one "media" copy of each exhibit available in the attorney discipline office.

(H) *Equipment.* Exact locations for all video and still cameras, and audio equipment within the hearing room will be determined by the hearing panel. Movement in the hearing room is prohibited, unless specifically approved by the panel.

(1) Placement of microphones in the hearing room will be determined by the hearing panel. An effort should be made to facilitate broadcast quality sound. All microphones placed in the hearing room will be wireless.

(2) Video and photographic equipment must be of professional quality with minimal noise so as not to disrupt the proceedings; flash equipment and other supplemental lighting or sound equipment is prohibited unless otherwise approved by the hearing panel.

(I) *Restrictions.* Unless otherwise ordered by the hearing panel, the following standing orders shall govern.

(1) No flash or other lighting devices will be used.

(2) Set up and dismantling of equipment is prohibited when the proceedings are in session.

(3) No camera movement during the proceedings.

(4) No cameras permitted behind the respondent's table.

(5) Broadcast equipment will be positioned so that there will be no audio recording of conferences between attorney and client or among counsel and the hearing panel at the bench. Any such recording is prohibited.

(6) Photographers and videographers must remain a reasonable distance from parties, counsel tables, alleged victims, witnesses and families unless the hearing participant voluntarily approaches the camera position.

(7) All reporters and photographers will abide by the directions of the hearing room officers at all times.

(8) Broadcast or print interviews will not be permitted inside the hearing room before or after a proceeding.

(9) Photographers, videographers and technical support staff covering a proceeding shall avoid activity that might distract participants or impair the dignity of the proceedings.

(10) Appropriate dress is required.

(d) *Concluding Procedures*

(1) *Report of Hearing Panel*. After hearing the evidence, the hearing panel shall make a written report of its findings of fact which shall be signed by the hearing panel chair. The hearing panel shall include its recommendations whether its factual findings support a conclusion that the rules of professional conduct were violated by clear and convincing evidence and, if so, an appropriate sanction. The report shall be submitted to the professional conduct committee no more than sixty (60) days after the close of each hearing. If the hearing panel is not unanimous in any recommendations it may make, a minority report may also be submitted to the professional conduct committee. Copies of all hearing panel reports shall be sent to disciplinary counsel, the complainant and the respondent at the same time they are sent to the professional conduct committee.

(2) *Professional Conduct Committee*. Within fifteen (15) days of the date of the hearing panel report or reports, disciplinary counsel and respondent may file stipulations with proposed resolutions for the committee’s review and

approval and may submit memoranda addressing any issues in the hearing panel reports or raised during the hearings.

(A) Whether memoranda are filed or not, either disciplinary counsel or respondent may during the same fifteen (15) day period request oral argument before the professional conduct committee.

(B) Unless waived, oral arguments will be conducted to allow disciplinary counsel and each respondent ten (10) minutes to address the findings and rulings contained in the hearing panel reports.

(C) After consideration of oral arguments, hearing panel reports and memoranda, if any, and transcripts of hearings before the hearing panel, the professional conduct committee shall determine whether there is clear and convincing evidence of violations of the rules of professional conduct. The professional conduct committee may:

(i) dismiss complaints, ~~with or without a warning,~~ administer a reprimand, public censure or a suspension not to exceed six (6) months;

(ii) attach such conditions as may be appropriate to any discipline it imposes;

(iii) divert attorneys out of the attorney discipline system as appropriate and on such terms and conditions as is warranted; and

(iv) initiate proceedings in the supreme court, through disciplinary counsel, on all matters in which the professional conduct committee has determined warrant the imposition of disbarment or of suspension for a period in excess for six (6) months;

(v) assess to a disciplined attorney to the extent appropriate, in whole or in part, expenses incurred by the attorney discipline system in the investigation and enforcement of discipline. An assessment made under this section shall have the same force, effect and characterization and shall be subject to the same procedures for finalization, resolution and enforcement as an assessment under Rule 37(19).

(D) If neither disciplinary counsel nor the respondent requests oral argument, the professional conduct committee shall make its decision based on the hearing panel report, the hearing transcript, and any memoranda that may be filed.

(3) *Form of Sanctions.*

In the event that the professional conduct committee determines that the proceeding should be concluded by reprimand, public censure or a suspension of six (6) months or less, it shall give written notice thereof to the respondent, disciplinary counsel and the complainant.

The reprimand, public censure or suspension shall state the charges that were sustained, any charges that were dismissed and the respondent's right to appeal to the supreme court.

Any public censure or suspension issued by the professional conduct committee that becomes final and not subject to further appeal shall be sent to newspapers of general circulation, one with statewide circulation, and one with circulation in the area of respondent's primary office, as well as to the New Hampshire Bar News for publication.

In the event the professional conduct committee finds a violation of the rules of professional conduct but determines that a petition should be filed with the supreme court for a sanction of greater than a six (6) month suspension, it shall give notice of its findings and its intent to file a petition to the respondent, disciplinary counsel and the complainant.

(4) *Appeal of Sanction.*

(A) A respondent shall be entitled to appeal a finding of professional misconduct or a sanction, and disciplinary counsel shall be entitled to appeal a sanction, issued by the professional conduct committee by filing a written appeal in accordance with Rule 10, unless otherwise ordered by the court. The appeal shall not be a mandatory appeal. The appeal shall be public.

(B) The filing of an appeal by the respondent shall stay the disciplinary order being appealed unless the professional conduct committee orders otherwise. If the professional conduct committee orders otherwise, it shall set forth in its order its reasons for doing so. In all cases, however, the supreme court may on motion for good cause shown stay the disciplinary order.

(IV) ***Confidentiality and Public Access***

(a) *Confidentiality of and Public Access to Proceedings and Records.*

(1) *General Rule.* The confidentiality of and public access to records, files and proceedings shall be governed by Supreme Court Rule 37.

(2) *Public Access to Files.*

(A) *Grievance against Person Not Subject to Rules of Professional Conduct.* Correspondence to the grievant relating to a grievance against a person who is not subject to the rules of professional conduct shall be available for public inspection for a period of two years. After this two-year period, the correspondence shall be destroyed.

(B) *Grievance Not Docketed as a Complaint.* All records (other than work product, internal memoranda and deliberations) relating to a grievance filed against a person who is subject to the rules of professional conduct but which is not docketed as a complaint, shall be maintained at the attorney discipline office for two (2) years from the date of original filing, and it shall be available for public inspection during this period. After this two-year period, the records shall be destroyed.

(C) *Complaints.* All records (other than work product, internal memoranda and deliberations) relating to a complaint that is docketed shall be maintained at the attorney discipline office and shall be available for public inspection in accordance with the provisions of Supreme Court Rule 37. Paper records may be destroyed after:

(i) three years of the date of notice of dismissal**[;]** ~~with or without a caution;~~ or

(ii) three years of the date of an annulment in accordance with section (V) of this rule; or

(iii) five years after the death of the attorney-respondent.

(D) *Index of Complaints.* The attorney discipline office shall maintain an index of complaints docketed against each attorney, which shall contain pertinent information, including the outcome of the complaint. No index of grievances that are not docketed as complaints shall be maintained.

(E) *Protective Order.* Any person or entity, at any point in the processing of a complaint, may request a protective order from the professional conduct committee, or the committee may issue on its own initiative, a protective order prohibiting the disclosure of confidential, malicious, personal, or privileged information or material submitted in bad faith, and directing that the proceedings be so conducted as to implement the order. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the professional conduct committee. The professional conduct committee shall act upon the request within a reasonable time. Within thirty (30) days of the committee's decision on a request for protective order, or of the committee's issuance of one on its own

initiative, an aggrieved person or entity may request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the supreme court has acted, or the period for seeking supreme court review has expired.

(V) ***Annulment.***

(a) *When Annulment May Be Requested.*

A person who has been issued an admonition (under prior rules), or reprimand may at any time after five (5) years from the date of the admonition or reprimand apply to the professional conduct committee for an order to annul the admonition or reprimand. A person against whom a complaint has been filed which has resulted in a finding of no misconduct ~~, with or without a warning,~~ may also apply to the professional conduct committee for an order to annul the record at any time after five (5) years from the date of the finding of no misconduct.

(b) *Matters Which May Not Be Annulled.*

Notwithstanding the foregoing, an order of annulment will not be granted except upon order of the supreme court if respondent's misconduct included conduct which constitutes an element of a felony or which included as a material element fraud, fraudulent misrepresentation, dishonesty, deceit, or breach of fiduciary duty.

(c) *Consideration of Other Complaints.*

When application has been made under subsection (a), the professional conduct committee may consider any other complaints filed against the respondent and any other relevant facts.

(d) *Effect of Annulment.*

Upon entry of the order, the respondent shall be treated in all respects as if any admonition, ~~warning,~~ or reprimand had not been rendered, except that, upon conviction of any other violation of the rules of professional conduct after the order of annulment has been entered, the previous admonition, ~~warning,~~ or reprimand may be considered by the professional conduct committee or the supreme court in determining the discipline to be imposed.

(e) *Sealing of Records of Annulment.*

Upon issuance of an order of annulment, all records or other evidence of the existence of the complaint shall be sealed, except that the attorney discipline office may keep the docket or card index showing the names of each respondent and complainant, the final disposition, and the date that the records relating to the matter were sealed.

(f) *Disclosure of Annulled Matter.*

Upon issuance of an order of annulment, the component parts of the attorney discipline systems shall not thereafter disclose the record of the complaint which resulted in a finding of no misconduct, admonition, ~~warning,~~ or reprimand, except as permitted by section (V)(d) of this rule, and the respondent shall be under no obligation thereafter to disclose the admonition ~~,~~ ~~warning,~~ or reprimand.

(g) *Denial of Request for Annulment.*

Upon denial of an order of annulment, the respondent may appeal to the supreme court within thirty (30) days of the date of receipt of the denial. The appeal shall not be a mandatory appeal. Upon such appeal, the burden shall be upon the respondent to show that the professional conduct committee's exercise of its discretion in denying the order of annulment is unsustainable.

(VI) ***Request for Reconsideration.***

(a) *Request.* A request for reconsideration shall be filed with the committee that issued the decision within ten (10) days of the date on that committee chair's written confirmation of any decision of the committee; provided, however, that a request for reconsideration of a decision of the attorney discipline office general counsel shall be filed with the complaint screening committee within ten (10) days of the date on the decision. The request shall state, with particular clarity, points of law or fact that have been overlooked or misapprehended and shall contain such argument in support of the request as the party making such request desires to present.

(b) *Answer.* No answer to a request for reconsideration shall be required unless specifically ordered by the committee considering the matter, but any answer or response must be filed within ten (10) days of the date on the notification of the request.

(c) *Committee Action.* If a request for reconsideration is granted, the committee considering the request, may reverse the decision or take other appropriate action, with or without a hearing.

(d) *Effect of Request*. The filing of an initial request for reconsideration of a sanction issued by the professional conduct committee shall stay the thirty (30) day period for filing an appeal pursuant to Supreme Court Rule 37(3)(c).

(VII) ***Service of Copies.***

(a) Copies of all pleadings filed and communications addressed to the attorney discipline office or any committee of the attorney discipline system by the grievant or complainant shall be furnished forthwith to each respondent who is the subject of the grievance or complaint. All such pleadings and communications shall contain a statement of compliance herewith.

(b) Copies of all pleadings filed and communications addressed to the attorney discipline office or any committee of the attorney discipline system by the respondent who is the subject of the grievance or complaint shall be furnished forthwith to the grievant or complainant and to any other attorney who is the subject of the grievance or complaint. All such pleadings and communications shall contain a statement of compliance herewith.

(c) Copies of all pleadings filed and communications addressed to the hearings committee or any panel thereof or to the professional conduct committee by disciplinary counsel shall be furnished forthwith to the grievant or complainant and to the respondent who is the subject of the grievance or complaint. All such pleadings and communications shall contain a statement of compliance herewith. The requirements of this section shall not apply in any matter in which the disciplinary counsel is representing the professional conduct in the supreme court or elsewhere.

(d) Service on a person who is personally represented by counsel shall be made on counsel. This section does not prohibit that service also be made on the person represented by counsel. Service may be personal or by first class mail.

(VIII) ***Applicability to Pending Disciplinary Matters.***

The provisions of this rule, as amended effective January 1, 2004, shall not apply to any disciplinary matter pending before the supreme court on January 1, 2004. The provisions of this rule, as amended effective January 1, 2004, shall not apply to any disciplinary matter pending before the committee on January 1, 2004, in which prior to that date the committee has determined that formal proceedings shall be held and the hearing panel has concluded its evidentiary hearing. All such proceedings shall be governed by the provisions of Supreme Court Rule 37A that were in effect prior to January 1, 2004.

APPENDIX Q

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, **[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.]

(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.

APPENDIX R

Amend Supreme Court Rule 47 (new material is in **[bold and in brackets],** deleted material is in ~~strikethrough~~ format) as follows:

Rule 47. Counsel Fees And Expenses-Indigent Criminal Cases.

The provisions of this rule shall apply only to preparation for and proceedings in all courts in which assigned counsel is appointed to represent indigent criminal defendants.

(1) *Itemization of Bills.* All bills related to fees and expenses must be itemized as to the time spent and expenses incurred on each case, and there shall be no separate charge for overhead. A copy of the Notice of Appointment of Counsel order on appointment or other supporting document must be attached to the bill with each submission.

(2) *Fees.* Maximum compensation is limited as follows:

(a) Time properly chargeable to case: **[$100 per hour for major crime cases, (capital murder, homicide, aggravated felonious sexual assault, and first degree assault), and]** $60 per hour **[for all other cases]**. The paralegal hourly rate shall not exceed $35.00 and shall be included with fees of counsel for the purposes of determining the maximum fee on any case. Travel time to and from meetings with an incarcerated defendant shall be compensable; otherwise, travel time is not a compensable event unless expressly authorized by the court in advance for exceptional circumstances.

(b) Maximum fee for misdemeanors: $1,400.

(c) Maximum fee for felonies: $4,100.

(d) Maximum fee (per co-counsel) for homicides under RSA 630:1-2: $20,000.

(e) Maximum fee for Supreme Court appeal: $2,000.

Only upon an express, written finding of good cause and exceptional circumstances by the court will the maximum fees be exceeded or will additional fees be authorized. All petitions to exceed the maximum fee guidelines must be approved prior to the guidelines being exceeded; provided, however, that the court may waive the requirement for prior approval when justice so requires.

When counsel represents more than one client on any particular day, the hours spent shall be allocated accordingly. Representation of more than one client on the same day and in the same court shall be noted on the bills submitted. All bills shall be reviewed by the judge who presided over the case, if practicable.

When assigned counsel is appointed in district court, that counsel shall continue as counsel of record for all purposes (such as motions to reduce bail, waiver of indictments, etc.) until and unless new counsel is appointed by superior court. The appointment of counsel shall occur in accordance with RSA 604-A:2, II. The public defender shall be appointed if that office is available. In the event that the public defender program is not available, the appointment of a contract attorney shall occur, if such an attorney is available. Lastly, in the event that neither the public defender nor a contract attorney is available, the appointment of a qualified attorney under RSA 604-A:2, I, shall occur.

The adequacy of the rates prescribed by this rule may, upon request of the supreme court, be reviewed periodically by the advisory committee on rules.

(3) Expenses - Reimbursable. Investigative, expert, or other necessary services may be compensated only upon a finding of necessity and reasonableness by a justice of the appropriate court in accordance with RSA 604-A:6, made prior to said expense being incurred.

(a) Except for those services for which rates are established by the supreme court, the presiding justice may consider, but shall not be bound by, the prevailing rates or any rates established by a licensing agency or professional association in approving fees for services specified above.

(b) Rates for stenographers and deposition services shall be established by the supreme court. The cost of copies of depositions and transcripts shall be fifty cents (.50) per page.

(c) Rates for the services of interpreters for all parties and the court shall be established by the supreme court.

(d) No cost for investigative, expert, or other necessary services as initially approved may be exceeded prior to a subsequent finding of necessity by a justice of the appropriate court.

(e) All bills for investigative, expert, or other necessary services shall be reviewed by the judge who presided over the case, if practicable.

(f) Attorneys shall be reimbursed for the mileage expenses incurred in representing their client at the standard mileage reimbursement rate currently

allowed by the Internal Revenue Service. Requests for reimbursement of mileage expenses shall specify the actual number of miles traveled.

(g) The expense of telephone calls shall not be reimbursed.

(h) In cases appealed to the supreme court, attorneys shall be reimbursed for the actual reasonable costs (not including labor) of reproducing and binding the notice of appeal or other appeal document, any appendix and briefs, whether done in-house or by an outside printer.

(i) No reimbursement will be paid for overhead expenses including photocopies (other than as provided in subdivision (3)(h) of this rule), postage, fax and secretarial services.

(4) Deadline for Filing Bills with Court. All bills related to fees and expenses must be submitted no later than sixty days after the close of the case. The court may allow late filing for good cause shown, when justice so requires.

APPENDIX S

Amend Supreme Court Rule 12 as follows (new material is in **[bold and in 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.