

2021-002



May 16, 2022

Board of Governors  
New Hampshire Bar Association  
2 Pillsbury Street, Suite 300  
Concord, NH 03301-3502

**RE: NH Supreme Court Rule 35 Recommendations**

Dear Board of Governors,

Last fall, the Ethics Committee was asked to review and update NH Supreme Court Rule 35, "Guidelines for the Utilization by Lawyers of the Services of Legal Assistants Under the New Hampshire Rules of Professional Conduct". Specifically, Rule 35 contains a pre-2007 version of Professional Conduct Rule 5.3 and related comments and so was viewed as needing to be updated.

After reviewing Rule 35, its nine sub-rules, and related history, including the current Rules of Professional Conduct (RPC), the Ethics Committee would like to recommend to the Supreme Court Rules Committee that Rule 35 be repealed.

Simply put, Rule 35 is the product of a different time where the unauthorized practice of law (UPL) was a major concern and the RPC had not yet been adopted. As such, it contains concepts now covered clearly covered by the RPC and developed by case law and ethics opinions over the nearly 40 years since adoption by the ABA in 1983.

In the early 1980s, there were great battles over UPL in the legislature and the bar. One lawyer described it this way:

Over the last few years, the NH court system, the legislature, and the NH Bar Association have been struggling with exactly whom should be allowed to represent someone in a courtroom[...] A NH legislative committee tried to come up with a definition, but failed.

[The NH Supreme Court upheld] RSA 311:7, which provides: "No person shall be permitted commonly to practice as an attorney in court unless he has been admitted by the court and taken the oath prescribed in RSA 311:6."

Also at that time, the Code of Professional Responsibility was just giving way to the Model Rules, which accounts for why the Rule 35 comments use the old Code language in many places. The Model Rules effectively clarified many of these ambiguous issues from the Code and placed disciplinary consequences on lawyers for violations. In light of that, Rule 35 has limited relevance to the current period.

This rule is unique in the Supreme Court's rules since it governs lawyer conduct outside of the RPC. So, at the very least, it would need to be updated to use the applicable rules and then, if retained, moved to the RPC or adopted as a separate set of standards for guidance of the Bar as it has done with other materials - e.g., the Professionalism Standards. The reason not to do that is that the concepts in the current Rule 35 are either covered in the RPC or not important enough to be singled out in this fashion. A better solution, should any of the included concepts need to be reinforced, might be to do an Ethics Corner or two on those practices.

Described in broad terms below is what each of the Rule 35 sub-rules does. (This does not cover all of the language in the rules with specificity as this is not being written as a brief, but rather to propose repeal as a logical step.)

Rule 1 essentially says a lawyer must take steps to prevent UPL, which is covered now by RPC 5.5(a).

Rule 2 prohibits an assistant from doing actual representation unless allowed by other law. This concept is now fairly well settled by administrative rules and custom. If someone identifies some NH proceedings where this is particularly unclear, the Ethics Committee could do an Ethics Corner. Members of the Ethics Committee have not seen much controversy in practice, though, and note the effort in the General Court this year to broaden the use of non-lawyers, something other states have also been pursuing.

Rule 3 sets out what type of actions it is proper for an assistant to take, which might be helpful. But again, this would better be the subject of an Ethics Corner, where members of the Bar, or at least some of them, are likely to see it, rather than in a Supreme Court rule that few know exists or would think to examine because of the unusual placement in the Court rules.

Rule 4 mandates that the lawyer take steps to insure client confidentiality. This is covered by RPC Rule 1.6 and 5.3. See also Cmt. 2 to Rule 5.3.

Rule 5 bars partnerships with a non-lawyer, which is now covered by RPC Rule 5.4(b).

Sub-rule 6 bars fee sharing, which is now covered by RPC 5.4(a).

Rule 7 provides some explanation to the bar on putting paralegal names on the letterhead. There are ABA opinions on this. It might be a good point to raise with the bar if we believe it is prohibited, even with appropriate disclaimers, and that it is a problem in NH.

Rule 8 requires disclosure of non-lawyer status by assistants. This might be a helpful point to possibly include in a Corner on this overall topic.

Rule 9 basically covers exactly the substance of RPC 5.3. In fact, the Comment to this Rule reads: "This Rule simply summarizes and restates the requirements of Rule 5.3 of the New Hampshire Rules of Professional Conduct set forth in the Introduction to these Guidelines, to which the lawyer and legal assistant should refer for amplification."

For these reasons, the Ethics Committee requests that the Board of Governors authorizes the Ethics Committee to recommend repeal of Rule 35.

Very truly yours,



Stephanie K. Burnham  
Chair, Ethics Committee