

NEW HAMPSHIRE'S RULES OF PROFESSIONAL CONDUCT UNDERGO A COMPLETE OVERHAUL (PART TWO)

AUGUST 18, 2006

The single most important current development in the law of lawyering in New Hampshire is the Supreme Court's pending overhaul of the Rules of Professional Conduct for New Hampshire-licensed lawyers. Following a four year review, the New Hampshire Bar Association's Ethics Committee forwarded comprehensive revisions to New Hampshire's Rules to the Supreme Court earlier this year. These recommendations are now being reviewed by the Court's Rules Committee; public hearings are expected to occur before the end of the year.

This is the second in a three-part series of Advisories relating to the Supreme Court's comprehensive review. In our last Advisory issued on July 21, 2006, we reviewed the major changes in rules relating to fees, billing and retainer agreements (Rule 1.5); client confidentiality (Rule 1.6); the concept of "informed consent" that would be used in many of the revised rules; and rules relating to conflicts of interest (Rules 1.7 - 1.10). If you do not have the prior Advisory, you can access it by clicking on this link <http://www.dmb.com/news-and-events/newsletter.asp?id=167>. This Advisory will review the proposed revisions to Rules 1.13 (representation of organizations) and proposed Rule 1.18 (a new rule outlining duties to "prospective clients"). In each case, a substantial modification in the duties relating to the client-lawyer relationship is now under consideration by the Court.

Rule 1.13: Expanded Responsibilities and Liability for Attorneys Representing Organizations

Model Rule 1.13, which governs the work of attorneys on behalf of business entities, was changed substantially as a result of the work of the ABA's Task Force on Corporate Responsibility.

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The Task Force on Corporate Responsibility was formed on March 28, 2002 by ABA President Robert Hirshon with the following charge:

The Task Force on Corporate Responsibility shall examine systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations which have shaken confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States. The Task Force will examine the framework of laws and regulations and ethical principles governing the roles of lawyers, executive officers, directors, and other key participants. The issues will be studied in the context of the system of checks and balances designed to enhance the public trust in corporate integrity and responsibility. The Task Force will allow the ABA to contribute its perspectives to the dialogue now occurring among regulators, legislators, major financial markets and other organizations focusing on legislative and regulatory reform to improve corporate responsibility.

Rule 1.13 emphasizes that an attorney representing an organization owes his or her professional loyalty to the entity, rather than the organization's constituents (managers, employees, directors, etc.). Accordingly, corporate lawyers have always been required to act in the best interests of the organization when confronted with misconduct by individual employees or managers that is likely to injure the organization. However, substantial revisions have been made to the ABA model rule (and in New Hampshire's recommended revised rule) due to heightened concerns about corporate misconduct that have emerged in the wake of recent corporate scandals. These changes also clarify and underscore the attorney's responsibility to act when confronted with misconduct of a corporate employee -- and increase the lawyer's exposure when he or she fails to act.

The Ethics Committee report, which recommends changes identical to those already made in the ABA Model Rules:

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- would clarify that the single, all-encompassing duty of corporate counsel confronted with corporate misconduct¹ is to “proceed as is reasonably necessary in the best interest of the organization.”
- would require the organization’s lawyer to refer organizational misconduct “up the ladder,” including, if warranted by the circumstances, to the entity’s highest authority, unless the lawyer reasonably believes that referral to higher authorities is not necessary in the best interest of the organization.
- would reaffirm the attorney’s discretionary right to disclose confidential client information outside of the organization under carefully-circumscribed circumstances (including a “reasonable certainty” of “substantial injury to the organization”).
- would exempt from this right of discretionary disclosure those attorneys who are retained to investigate or defend corporate misconduct.
- would require lawyers who reasonably believe they have been discharged, or who withdraw from representation, due to their efforts to deal with corporate misconduct or to comply with their duty to the organization, to take steps to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

One practical result of these changes - - and particularly the increased emphasis on “up-the-ladder reporting” to remedy misconduct - - is to increase the attorney’s exposure to negligence or breach of fiduciary duty claims by the entity when misconduct is not disclosed to higher authorities, and thereafter causes injury to the organization. When the attorney continues to work with the company, he or she also runs the risk that regulators or prosecutors who learn of the attorney’s proximity to misconduct will consider the possibility of “aiding and abetting” claims.

¹ While we use the terms “corporate counsel” and “corporate misconduct,” Rule 1.13 applies broadly to a wide range of organizations, including partnerships, LLCs, unincorporated associations, government agencies or units, joint ventures, etc.

**Proposed
Rule 1.18: A New Rule Governing Relationships with
Prospective Clients**

Proposed Rule 1.18, which does not exist under the current New Hampshire Rules of Professional Conduct, would define a lawyer's duties to prospective clients, thereby underscoring that certain professional duties can arise even when no lawyer-client relationship exists. Under the rule, values such as protection of confidential client information and loyalty to the client through avoidance of conflicts would now be applied as a matter of rule to interactions with prospective clients.

The Ethics Committee has recommended adoption of new Model Rule 1.18 with minor revisions. The new rule:

- would define a “prospective client” as one who “provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter.”
- would prohibit use or disclosure of information received from prospective clients and reviewed by the lawyer, except as permitted by Rule 1.9 with respect to former clients.
- would prohibit subsequent representation adverse to a prospective client in the same or a substantially related matter by an attorney if that attorney “received and reviewed information from the prospective client that could be significantly harmful to that person.”
- would impute such disqualification to the lawyer's firm unless:
 - both the affected (current) client and the prospective client give “informed consent, confirmed in writing”; or
 - the “disqualified” lawyer took reasonable measures to avoid acquiring more disqualifying information than reasonably necessary; the disqualified lawyer is screened from participation and fee sharing; and written notice is promptly given to the prospective client.

Rule 1.18, as recommended, represents the only situation in which New Hampshire's rules would accept "screening" of a conflicted or disqualified lawyer who was not previously a public official or government lawyer as a means of avoiding imputed disqualification of an entire law firm. Because a meaningful distinction exists between "prospective clients" and clients who enter into contractual, ongoing and sometimes permanent relationships with firms, the Ethics Committee considered screening appropriate in this situation.

CONCLUSION

The changes to the Professional Rules of Conduct as recommended by the Ethics Committee reflect a balance between professionalism and ethics and the changing nature of the profession. The changes briefly summarized above are only a fraction of those contained in the entire Ethics Committee report. New Hampshire practitioners are urged to review the proposed amendments and participate in the Supreme Court's public hearings, and to remain educated on any changes the Court adopts.

In our next and final edition in this three-part series, we will address key revisions to rules relating to litigators, a new rule governing lawyers' involvement in law-related businesses, and modest revisions to the solicitation rules.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct & Liability Practice Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.