

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

SEPTEMBER 22, 2006

In our previous Advisories issued on July 21st and August 18th, 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; rules relating to conflicts of interest (Rules 1.7 - 1.10); expanded responsibilities and liability for attorneys representing organizations (Rule 1.13); and a new rule governing relationships with prospective clients (Rule 1.18). If you do not have the prior Advisories regarding this series of rules changes, you can access them by clicking on this link <http://www.dmb.com/news-and-events/newsletter.asp?id=167>.

This Advisory will review selected proposed revisions to Rules relating to litigators; proposed revisions to Rule 5.5 relating to the unauthorized practice of law; a new proposed Rule 5.7 relating to lawyers' involvement in law-related businesses; and proposed changes to Rule 7.3 relating to the solicitation of clients.

Key Changes in Ruling Relating to the Litigator

The most significant recent change to the ethical rules governing litigators was the Court's adoption of a package of rule changes to accommodate "unbundled" or limited, legal representation in litigation matters.

In addition to this new initiative, which was adopted by the Court in an effort to reduce economic barriers to capable representation for disadvantaged litigants, the Ethics Committee report has now recommended a number of important changes to existing litigation-related rules, including:

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- elimination of the “materiality” element in the prohibition of false statements of law or fact to a court (Rule 3.3).
- a new provision requiring an attorney to correct subsequently-discovered false statements of material fact or law to a tribunal (Rule 3.3).
- a new provision requiring a lawyer representing a client in an adjudicative proceeding, who knows that any person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceedings, to take reasonable remedial measures including, if necessary, disclosure to the tribunal (Rule 3.3).
- a new, limited right of rebuttal in the media for the litigator encountering publicity that threatens “substantial undue prejudicial effect” for the lawyer’s client (Rule 3.6).
- the elimination of existing Rule 3.6(b). (Rule 3.6[b] lists a variety of public statements considered “substantially likely” to have a “material prejudicial” effect on litigation.)

Defining the Unauthorized Practice of Law in the Context of Cross-Border and Multijurisdictional Practice

Based on the work of the ABA’s Multijurisdictional Practice Commission and the resulting Model Rule changes, the Ethics Committee report now before the Supreme Court has recommended a wholesale revision to Rule 5.5. The recommended revisions expand upon the Rule’s current, simple prohibition of the unauthorized practice of law (“UPL”) and establish a variety of exceptions to the UPL prohibition in situations that are increasingly commonplace with the rapid expansion of regional practices.

More specifically, the recommended revisions to Rule 5.5:

- add a new provision barring lawyers not admitted in New Hampshire from establishing an office in this jurisdiction for the practice of law, or holding out to the public that the lawyer is admitted to practice in this jurisdiction; and
- add new provisions allowing out-of-state lawyers:
 - to practice in association with a New Hampshire licensed attorney;

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- to practice with court authorization;
- to practice in ADR proceedings reasonably related to that attorney's practice in jurisdiction(s) where he or she is licensed; or
- to practice in matters "reasonably related" to, or arising from, an attorney's practice in jurisdiction(s) where he or she is licensed.

Comment 14 to the ABA's model rule provides the following further guidance regarding matters that are "reasonably related" to an attorney's practice in the licensing jurisdiction(s):

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 jurisdiction, 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.

Finally, the recommended revisions to Rule 5.5 would add a new provision that allows licensed attorneys from other states to "provide services" in New Hampshire to the lawyer's employer that do not require *pro hac vice* admission.

When addressing UPL concerns, New Hampshire practitioners need to keep in mind that the recommended rule would apply only to

outside lawyers conducting business in this state; and that New Hampshire attorneys practicing in other states must comply with the UPL rules of those foreign jurisdictions. Until uniform rules are adopted on a national basis, this requires a state-by-state analysis.

An Ethical Context for Work in “Law-Related Businesses”

Proposed Rule 5.7 (“Responsibilities Regarding Law-Related Services”) would be another new rule for New Hampshire lawyers and reflects the growing acceptance of lawyers in ancillary or law-related businesses. This rule is an outgrowth of the legal profession’s expansion into areas that are not the exclusive province of the bar (investment management, environmental consulting, human resources counseling, lobbying, mediation, etc.). Among the array of revisions recommended by the Ethics Committee, this proposed new rule is perhaps the clearest “sign of the times,” if not the most significant adjustment of professional responsibilities.

The proposed rule clarifies that lawyers working in law-related fields will continue to be governed by the rules of professional responsibility (including most significantly rules relating to client confidentiality, conflicts of interest, marketing and advertising, and fee splitting with non-lawyers) unless protective measures are used that ensure that the “customers” of the law-related business know, and accept, that the protections and duties inherent in the lawyer-client relationship do not exist.

The proposed rule reads:

Proposed Rule 5.7: Responsibilities Regarding Law-Related Services

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
 - (1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or
 - (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the

services are not legal services and that the protections of the client-lawyer relationship do not exist.

- (b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

The proposed New Hampshire Comments to the new Rule note that even if all protective measures are in place so as to provide adequate separation from the law practice and disclosure to “customers,” certain “overarching” conduct rules will continue to apply to lawyers:

New Hampshire Comment

Rule 5.7 identifies the circumstances in which all of the Rules of Professional Conduct continue to apply to lawyers even when the lawyer is not providing legal services to the person, or customer, for whom the law-related services are performed. Even when those circumstances do not exist, however, the lawyer will remain subject to those overarching rules that apply generally to lawyers regardless of the context. This would include - - by way of example only - - Rule 8.4(c)'s prohibition of “conduct involving dishonesty, fraud, deceit or Misrepresentation” (Astles’ Case, 134 N.H. 602 (1991)); and Rule 1.9’s prohibition on the use against a former client of confidential information gained in the representation of the client. Wood’s Case, 137 N.H. 698 (1993).

Many believe that with increasing competition among lawyers for a small pool of clients able to afford regular legal representation, economics will drive lawyers in greater numbers into “law-related” businesses. Unless this process is managed carefully, this transition will create new areas of potential liability exposure to “customers” that may not fall within a law firm’s malpractice insurance policies.

Rule 7.3: A Modest Relaxation of Client Solicitation Rules

Rule 7.3 regulates the circumstances under which in-person and written or electronic client solicitation is allowed. As currently

drafted, the rule prohibits in-person or telephonic solicitation of professional employment unless the party approached is a family member or former client.

The underlying rationale for this strict restriction on face-to-face or telephonic solicitation is the “potential for abuse inherent in direct in-person . . . contact between a lawyer and a prospective client known to need legal services.” As further explained in Comments to ABA Model Rule 7.3:

The 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.

The Ethics Committee felt that “entities, or individuals in a commercial context,” will - - at least when not known to be in need of representation on a specific matter - - “hold a more favorable balance of sophistication and leverage relative to the lawyer,” and not require the protections of Rule 7.3’s broad prohibition of face-to-face solicitation. Accordingly, the recommended rule would carve out exceptions to that prohibition for the following groups of prospective clients:

- (1) . . . a lawyer;
- (2) . . . a (party with a) family, close personal, or prior professional relationship with the lawyer;
- (3) . . . 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; and
- (4) . . . 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.

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.

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.