

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

JULY 21, 2006

Introduction: New Hampshire's Rule Revision Project

In September of 2001, at the request of the New Hampshire Supreme Court, the New Hampshire Bar Association's Ethics Committee ("Ethics Committee") began a comprehensive review of the State's rules of professional conduct - - the first such review since the rules were adopted in January of 1986.

At the outset, the focus of the Ethics Committee review was the work product of the American Bar Association's Ethics 2000 Commission (the "Ethics 2000 Report"). Generated through the efforts of a distinguished collection of jurists, law professors, private practitioners and professional responsibility lawyers, and one lay person, this Report was approved by the ABA's House of Delegates in August, 2001.

One month later, the Ethics Committee began its work under the careful supervision of Rolf Goodwin, then Chair of the Ethics Committee and, during the entire project, "Rules Revision Initiative Coordinator." The Committee's work was carried out through lengthy monthly meetings, occasional retreats, and specialized subcommittees. Every Committee member took on one or more rules for analysis and presentation to the group. Assistance was also sought from other members of the Bar when necessary to understand the practical impact of proposed changes. The Committee's methodical decision-making revisited and revisited several of the rules; and in the process overtook more than one aspirational "final deadline" before the work was complete and a product ready for the Supreme Court's review.

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The Committee's report was submitted to the Supreme Court on February 8, 2006. It will now be reviewed in the Court's Rules Committee and through public hearings. Whether the Court adopts the Committee's recommendations as presented, with refinements, or only with major revisions, this process ensures that New Hampshire attorneys will soon be governed by very different professional conduct rules.

The ABA's Ethics 2000 Project

Several reasons were given in 1997 for undertaking the ABA's Ethics 2000 project (the first review of the Model Rules since they were enacted in 1983). These included:

- growing disparity in state ethics rules
- lack of clarity in some existing rules
- new issues raised by a growing influence of technology in the delivery of legal services
- continuing need to expand access to legal services for low and moderate income persons
- changing organization and structure of modern law practice
- the need to enhance public trust and confidence in the legal profession; increased public scrutiny of lawyers
- special concerns of lawyers in nontraditional practice settings.

At the end of its work, the Ethics 2000 Commission had created new rules regarding an attorney's duty to a "prospective client" (Rule 1.18), the lawyer's role as third party neutral (Rule 2.4), and non-profit or court-sponsored programs for short-term limited legal services (Rule 6.5); and had addressed certain problem areas with strengthened provisions (client-lawyer sexual relations and the advanced payment of fees and expenses are two examples). The Commission's work also underscored a lawyer's duty to communicate effectively with clients on conflict issues by creating a consistent requirement for "informed consent"

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and by adding a writing requirement in key rules; and clarified or revised an array of rules that had generated confusion in application.

Most importantly, the Ethics 2000 Project reaffirmed the basic “core values” of the profession, and has sparked similar rule review/revision projects in virtually every state. Greater uniformity in state rules will almost certainly be the result.

While the issuance of the Ethics 2000 Report triggered the start of New Hampshire’s review, it did not mark the end of the Model Rule revision process within the ABA. Significant changes in the ethical obligations of corporate counsel, for example, occurred not as part of Ethics 2000, but as a result of the demise of Enron in 2002 and the creation of a separate ABA “Task Force on Corporate Responsibility.” Among other undertakings, this Group revised Rule 1.13 to expand the attorney’s duty to police and report misconduct within the company; and to extend this duty even to situations in which the lawyer withdraws, or is fired, due to such misconduct. Similarly important changes have followed the work of the ABA’s separate Multijurisdictional Practice Commission (Rules 5.5 and 8.5).

Because the Ethics 2000 Report was followed by these further major initiatives, the task of New Hampshire’s Ethics Committee was always something of a moving target . . . requiring analysis of a set of Model Rules that were in a regular state of flux. The Ethics Committee also responded to local initiatives that were not part of any ABA Model Rule project -- including our Court’s decision to modify New Hampshire’s rules of professional conduct (and related trial court procedural rules) to embrace “unbundled legal services,” or “limited representation,” as a means of providing improved legal representation for low and moderate income litigants.

Because the scope of its review encompassed all of these initiatives, the Ethics Committee has now made recommendations to the Supreme Court that include not only a large number of clarification/definitional changes, but also a significant number of more fundamental or far-reaching modifications.

This Advisory, and the two that will follow, focus only on the most important recommended changes. The entire package of recommended changes can be found on the New Hampshire Bar’s website at <http://www.nhbar.org/uploads/pdf/EthicsCommitteeSubmissionToAdvisoryCommitteeonRules.pdf>.

Key Changes in Rules Relating to the Client-Lawyer Relationship

Rule 1.5: Fees, Billing and Retainer Agreements

New Hampshire's current Rule 1.5 protects client interests by prohibiting "clearly excessive" fees; establishing the factors that should be considered in setting reasonable fees; requiring the lawyer to communicate the basis or rate upon which the fees will be charged; and mandating written contingent fee agreements when they are used. The Rule also limits the circumstances under which lawyers who are not in the same firm may split fees.

To bring New Hampshire in line with the ABA Model Rules and the vast majority of states, the Ethics Committee first recommended replacement of the existing prohibition of "clearly excessive" fees with a prohibition of "unreasonable" fees and expenses.

Two other issues arose under this Rule, however, on which the Committee could not reach consensus: written retainer agreements and naked referral fees. Accordingly, the Ethics Committee's report asks the Supreme Court to determine whether the Rule should mandate written fee agreements, or simply state a preference for a writing; and whether "naked" referral fees will be allowed in New Hampshire. There has been substantial controversy in New Hampshire as to the practice of paying a fee for little more than referring a client. In 1996, the Ethics Committee issued a controversial opinion that bars naked referral fees and requires involvement of the referring attorney. New Hampshire Ethics Op. 1995/96-12 (May 16, 1996).

Fortunately, these two issues were the only situations in which a clear consensus could not be reached within the Ethics Committee.

Rule 1.6: Client Confidentiality

Rule 1.6 sets forth one of the basic fiduciary duties of a lawyer to a client: protection of confidential client information. However, the rule also strikes a balance between this client obligation and potentially conflicting public interests by identifying circumstances that give an attorney a discretionary right to disclose confidential information outside of the attorney-client relationship.

The Ethics Committee report to the Supreme Court expands the grounds for permissive, or discretionary, disclosure by:

- permitting a lawyer to reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm without regard to whether they will result from a criminal act.
- permitting disclosure to secure legal advice about the lawyer's compliance with the rules.
- permitting disclosure to comply with other law or a court order.

Interestingly, however, the Ethics Committee's report does not accept, or recommend adoption of, an additional, Enron-based ground for discretionary disclosure that had been adopted in the Model Rules on the recommendation of the ABA Task Force on Corporate Responsibility. The exception, found in Model Rule 1.6(b)(3), allows disclosure:

to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

"Informed Consent"

The Ethics Committee followed the recommendation of the Ethics 2000 Commission and adopted an "informed consent" standard for many key client decisions. In several of these situations, the revised rules would require written confirmation of informed consent.

"Informed Consent" is defined in the Ethics Committee report as:

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.

The requirement of "confirmation in writing" is also defined:

"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 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.

The “informed consent” requirement is part of Rules 1.2, 1.6, 1.7, 1.8 (several subsections), 1.9, 1.11, 1.18 and 2.3 -- as forwarded to the Supreme Court for review.

In the Model Rules, “informed consent” typically replaced language requiring only “consent after consultation.” In New Hampshire, our current rules frequently require “consent after consultation and with knowledge of the consequences.” (See current Rules 1.7(a)(2), 1.7(b)(2), 1.8(b), 1.9(a), 1.9(b)(2)). The new phrase “informed consent” will bring added clarity due to its more precise definition. Consistency with other Model Rules jurisdictions is another important objective. It is not clear, however, that the new standard strengthens New Hampshire’s existing standard.

Rules 1.7-1.10: The Conflict of Interest Rules

Conflict of interest rules are a reflection of the lawyer’s second, core fiduciary duty: client loyalty. As currently structured, New Hampshire’s rules address conflicts between two current clients (Rule 1.7(a)); between a current client and the attorney’s personal interests or responsibilities to another client or third person (Rule 1.7(b)); between current clients and the attorney’s personal interests in so-called “prohibited transactions” (Rule 1.8); and between a current client and a former client (Rule 1.9).

The Ethics Committee report now pending before the Supreme Court:

- adopts the ABA’s new terminology for Rule 1.7 conflicts (they would be “concurrent conflicts”);
- would make adverse litigation between current clients a *per se*, unwaivable “concurrent conflict”;
- would require that any waiver of a “concurrent conflict” be based on the “informed consent” of each client, and be confirmed in writing;

- would change the title of Rule 1.8 from “Conflict of Interest: Prohibited Transactions” to “Conflict of Interest: Current Clients: Specific Rules”;
- would strengthen the rule governing business transactions with clients with increased disclosure requirements, writing requirements, and a duty to advise the client of the “desirability of seeking . . . independent legal counsel”;
- would prohibit the settling of a potential malpractice claim with a current or former client without advising the client, in writing, of the desirability of seeking independent counsel;
- would add a provision that prohibits the initiation of sexual relations with a current client (if sexual relations exist before the attorney-client relationship, the prohibition does not apply);
- would add a provision that imputes to every lawyer in a firm prohibitions in Rule 1.8 that apply to any lawyer in the firm - - with the sole exception of the new rule relating to sexual relations with clients;
- would require that former client conflict waivers be based on “informed consent” and “confirmed in writing.”

Finally, the Ethics Committee report recommends an exception to the general rule for imputation of conflicts (Rule 1.10) for “personal interest” conflicts. Under this recommendation, the conflict created for an attorney due to his or her strong personal support for the cause of the opposing party would not be imputed to other attorneys in the firm if there is no “significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

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 practi-

tioners are urged to review all proposed amendments and participate in the Supreme Court's public hearings, and to remain educated on any changes the Court adopts.

In our next Advisory, we will discuss changes in Rule 1.13 governing the representation of corporations and other organizations; and the proposal for a new Rule 1.18 relating to "prospective clients".

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.