

NEW HAMPSHIRE SUPREME COURT ADOPTS SWEEPING CHANGES TO RULES OF PROFESSIONAL CONDUCT

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On July 25, 2007, the New Hampshire Supreme Court issued an order adopting new Rules of Professional Conduct. The rules will be effective on January 1, 2008.

The rules as adopted are largely based on the work of the New Hampshire Ethics Committee. In September 2001, the Court asked the Ethics Committee to review the ABA's revisions to the Model Rules of Professional Conduct. The Committee spent the next five years reviewing each ABA proposal and drafting proposed rules for New Hampshire. The package of rules was submitted to the Advisory Committee on Rules in February 2006. The Rules Committee and Court then accepted comments on the rules and made several changes.

Most of the major changes to the existing rules had been proposed by the Ethics Committee and approved by the Advisory Rules Committee to the Court before final adoption by the Court. These changes are summarized below. A complete set of the new rules can be found on the Bar's website at <http://www.courts.state.nh.us/supreme/orders/20072507.pdf>.

A. Rules Relating to Client-Lawyer Relationship

1. Billing, Fees, and Retainer Agreements

- a. Prohibits unreasonable fees, and not only fees that are "clearly excessive." R. 1.5 (a).
- b. Adds prohibition against unreasonable expenses. R.1.5 (a).
- c. Requires that client sign the contingent fee agreement and that the agreement specify any expenses that are not contingent. R. 1.5(c).

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- e. Allows contingent fees in certain domestic matters. R. 1.5(d)(2).
 - f. Allows naked referral fees. R. 15(f)(1)(b).
 - g. Permits withdrawal of fees from client account only when “earned.” R. 1.15(d). May impact the treatment of “flat fees” especially in criminal defense work.
2. Client Confidentiality (R. 1.6)
- a. Expands grounds for discretionary disclosure from those in current rule.
 - b. Declines to adopt some additional discretionary disclosures recommended by the ABA following the Enron scandal.
 - c. Changes standard for client consent from “consent after consultation” to “informed consent.” This standard is used for client consent requirements throughout the new rules.
3. Conflicts of Interest
- a. Reorganizes general rule to be clearer, but makes no real substantive changes. R. 1.7(a).
 - b. Changes client consent standard to informed consent. R.1.7(b)(4).
 - c. Sets more demanding requirements for business transactions with client, including a requirement that the lawyer advise the client in writing to seek independent counsel. R.1.8(a)(2).
 - d. Bars a lawyer from having sexual relations with a client unless the personal relationship predated the client- lawyer relationship. R. 1.8(j). This disqualification is not imputed to the firm. R.1.8(k).
 - e. Removes the explicit provision prohibiting a lawyer from representing a client when the adverse party is represented by a family member. Defers such judgments to the general conflict rule.
 - f. Creates an exception to imputation allowing lawyers in a firm to represent a client, despite the personal interests of the prohibited lawyer, if there is no significant risk of material limitation by others in the firm. R.1.10(a).

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4. Representing a Business Entity

- a. Creates presumption that the organizational lawyer shall refer corporate misconduct up the chain of command. R.1.13(b).
- b. Creates limited discretion to reveal such misconduct outside the organization. R. 1.13(c).
- c. Requires lawyers to report withdrawal or discharge for complying with obligations in rule. R. 1.13(e).

5. Duties to Prospective Clients (R.1.18)

- a. Creates limited duties to prospective clients.
- b. Allows screening of disqualified lawyers so the firm can represent a client adverse to a former prospective client.

B. Rules Relating to Litigators

1. Candor to the Court

- a. Changes prohibition of misstatements to all statements and not just those that are material. R.3.3(a)(1).
- b. Adds a provision requiring lawyer to correct previously made false statements. R. 3.3(a)(1).
- c. Clarifies obligation to take remedial measures, including disclosure, upon discovering the falsity of certain evidence. R. 3.3(a)(3).
- d. Adds a provision requiring a lawyer who knows of fraudulent conduct relating to the proceeding to take remedial measures including, if necessary, disclosure. R.3.3(b).

C. Law-Related Business (R. 5.7)

- 1. Authorizes lawyers to provide law-related services.
- 2. Clarifies that the Rules of Professional Conduct will apply unless the services are provided in circumstances that are distinct from the provision of legal services.

D. Key Changes in Rules Relating to Advertising and Solicitation

1. Advertising (R. 7.2)

- a. Explicitly adds electronic communication to the rule.
- b. Eliminates the requirement that a copy of all ads be kept for 2 years.

2. Solicitation

- a. Creates a broad exception to the prohibitions of direct solicitation for “ business, non-profit or governmental organizations not known to need legal services in a particular matter....” R 7.3(a)(3).
- b. Creates another exception for solicitation of a person who regularly requires legal services in a commercial context and is not known to need legal services in a particular matter. R 7.3(a)(4).

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During the final review and adoption process - - after receiving the recommendations of the Rules Committee - - the Supreme Court made changes in three main areas: pro bono work (Rule 6.1), pre-trial publicity (Rule 3.6) and conduct of lawyer-officials (Rule 1.11A). In the pro bono rule, the Court departed from the proposal and stated that “lawyer[s] should aspire to render at least 30 hours of pro bono publico legal service each year.” The proposed rule had not contained a specific amount of time.

Though the language quoted above is aspirational, it follows the provision that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.” Although this could be read to suggest a mandatory duty, the ABA comment makes clear that the responsibility of the rule is not intended to be enforced through the disciplinary process. ABA Model Rule 6.1, Cmt. 12.

Second, the Court also largely retained the language of current Rule 1.11A, which addresses conduct of lawyers who also are members of governmental bodies. The Ethics Committee and Advisory Rules Committee had suggested a number of changes to the rule, which is unique to New Hampshire. However, the Court found no need to change the system that has been in place since 1986 in any significant regard.

Finally, the Court rejected the suggestion of both Committees and the ABA to allow attorneys to speak publicly “when required to protect a client from substantial undue prejudicial effect of recent publicity not initiated by the

lawyer or the lawyer's client." ABA Model Rule 3.6 (c). Lawyers in both civil and criminal cases thus remain limited in responding to adverse publicity coming from opponents and published in the press.

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Available Training: Members of Devine Millimet's Attorney Conduct & Liability Practice Group have provided extensive training on the proposed rules over the past eighteen months. If you or your firm wish to schedule training on the new rules between now and their effective date of January 1, 2008, you should contact either Professor Mitchell Simon (msimon@piercelaw.edu or 228-1541) or Peter Beeson (pbeeson@devinemillimet.com or 695-8517) to discuss the available 1, 2 and 3 hour programs. All training qualifies for MCLE credit for ethics training.

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.