TABLE 5

Civility and Professionalism

February 2, 2022

WRITTEN MATERIALS

HYPOTHETICAL #1
Requests for Extensions of Time

You represent a client who has just lost three employees to a competitor. All three have non-solicitation agreements. According to your client, the employees have contacted customers they worked with while at your client and asked them to move their business to the new employer. You send a cease and desist letter to the new employer and the former employees, and begin work on a complaint and motion for preliminary injunction. In support of the preliminary injunction motion you help draft an affidavit from one of your client's current employees detailing the former employees' solicitations of your client's customers.

Counsel for the new employer and former employees responds to the letter and you engage in settlement discussions, but they quickly fail. You file the complaint and motion for preliminary injunction and send it to opposing counsel with a request that they accept service. Opposing counsel responds to your request by informing you that she will be withdrawing from representing the employees, and copies new counsel for the employees on the correspondence. Between the time that your client initially contacted you and the date of filing suit, four weeks have passed. You are not aware of any additional solicitations by the former employees during that time. New counsel contacts you to request an extension of time to respond to the preliminary injunction motion. He explains that he has just been retained, he is still getting up to speed, and he has a vacation the following week. He asks for 30 additional days to respond to your motion for preliminary injunction.

You forward new counsel's request to your client. The client's CEO demands that you deny the request so that the defendants know you are serious about the case.

What do you do?

Materials to Consider:

- The third and sixth principles of the New Hampshire Lawyer Professionalism Creed
- New Hampshire Rule of Professional Conduct 1.2 addressing allocation of authority between lawyer and client.
- The NHBA Litigation Guidelines section on handling continuances and extensions of time.

HYPOTHETICAL #2
Calling Out Bad Behavior

In a hotly contested lawsuit, a lawyer for one of the parties is given the opportunity to review documents at opposing counsel's office. A paralegal shows her into a conference room and comes back a few minutes later with a box containing documents. The box contains files responsive to the discovery request and a file clearly marked "confidential attorney-client privileged material". With no one else in the room, counsel decides a quick peek couldn't hurt. She sees copies of emails in which a senior executive at the opposing company suggests to that company's in house lawyer that one of the factual allegations being made in the lawsuit has no support. She takes quick notes of the substance and returns the emails to the file.

Later, in a summary judgment pleading, she references the statement in support of her arguments and the opposing counsel cries foul. Opposing counsel moves to strike the filing and for sanctions against the counsel who looked at the email exchange and referenced a privileged statement in a court filing. The lawyer responds that she assumed all of the documents had been reviewed before they were given to her, that any privilege was waived by the disclosure and that the statement of the opposing client's executive goes directly to the issue before the court and should be considered. She also maintains that the only one acting unethically is the opposition and she asks the court to impose sanctions on them for making meritless allegations.

- Should opposing counsel report the behavior to the attorney discipline office? Is it misconduct? Does it matter that the statement suggests an executive at the opposition knew that certain factual allegations were unsupported?

- Does the Court have any obligation to report this behavior? Are sanctions warranted? If so, what sanctions are appropriate?

- Do the professionalism creed and/or litigation guidelines address this?

- Is this the end of a promising legal career for the sneaky lawyer?

HYPOTHETICAL #3
Pro Se "Party"

You are representing a New Hampshire architecture firm that is owed money for services provided to a wealthy landowner pursuant to a written agreement. Despite repeated efforts to contact Landowner, your client has not been paid and the outstanding amount owed to your client is significant. Recognizing that the statute of limitations is set to expire, you draft and file a complaint on behalf of your client in the New Hampshire Superior Court and take steps to cause service of process on Landowner. Landowner's responsive pleading deadline passes and no answer is filed. The trial court promptly enters default against Landowner.

A few days after the trial court enters default against Landowner and while working late in your office, you receive a telephone call from Landowner. Landowner, who you know from your client is an elderly individual, explains that she has been traveling the globe on her private jet while engaged in what she has described as a "two year party." Landowner is pleasant but somewhat confused on the telephone. Landowner asks what the lawsuit is about. You inform her that your client has initiated litigation against her for money owed to it. She asks what a "default" is and why the trial court would issue such an order. You explain that the default was entered because she failed to file a response to the lawsuit. Landowner presses further and explains that she is confused by the legal proceeding and asks you what she should do. You give her the name of legal counsel she can retain and further explain that given New Hampshire courts' desire to resolve cases on the merits, she or her legal counsel could simply file a motion to strike the entry of default against her and it would likely be granted. Landowner thanks you for all the help and hangs up. You begin to feel concerned about the telephone call….

- Have you violated any ethical rules in your conversation with Landowner?
    - If yes, what ethical rule(s) and why?
- What portion(s) of the professionalism creed are implicated by the above scenario?
- How do you reconcile concepts of civility with your ethical obligations to your own client when dealing with a pro se party?

TITLE XXX
OCCUPATIONS AND PROFESSIONS

CHAPTER 311
ATTORNEYS AND COUNSELORS

Section 311:6

311:6 Oath. – Every attorney admitted to practice shall take and subscribe the oaths to support the constitution of this state and of the United States, and the oath of office in the following form: You solemnly swear or affirm that you will do no falsehood, nor consent that any be done in the court, and if you know of any, that you will give knowledge thereof to the justices of the court, or some of them, that it may be reformed; that you will not wittingly or willingly promote, sue or procure to be sued any false or unlawful suit, nor consent to the same; that you will delay no person for lucre or malice, and will act in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the court as to your client. *So help you God or under the pains and penalty of perjury.* The supreme court shall have authority to determine by court rule the manner in which the oaths shall be administered.

Source. RS 177:5. CS 187:5. GS 199:5. GL 218:5. PS 213:5. PL 325:6. RL 381:6. RSA 311:6. 1995, 277:3. 2014, 204:46, eff. July 11, 2014.

The New Hampshire Lawyer Professionalism Creed

Revised & Adopted by the New Hampshire Board of Governors on January 21, 2016
New Hampshire lawyers are the custodians of the "rule of law," responsible for the maintenance and improvement of just and efficient legal institutions. In addition to the obligation to adhere to the Rules of Professional Conduct, they must be honest, competent, civil and ethical in providing prompt, cost-effective and independent counsel to their clients. As such, New Hampshire lawyers aspire to the following:

FIRST, a New Hampshire lawyer strives to improve the profession and promote the democratic rule of law. A New Hampshire lawyer:

- embraces the profession as a higher calling
- promotes the integrity of the legal profession
- is aware of his or her responsibility to the system of justice as an officer of the court and is an integral part of the administration of justice
- works to improve and strengthen the profession through mentoring, teaching and other public service activities.

SECOND, a New Hampshire lawyer is competent in the area of his or her own practice, but is also sufficiently knowledgeable in other areas of practice to be able to assist clients in obtaining appropriate representation in those areas. A New Hampshire lawyer:

- is learned in the law
- possesses the appropriate amount of knowledge, skill and expertise to competently represent the client
- offers the client thoughtful, lawful and practical advice
- is committed to providing cost-effective, efficient legal services

- is willing to refer the client to other competent counsel, when necessary.

THIRD, a New Hampshire lawyer is civil. Civility and self-discipline prevent lawsuits from turning into combat and keep organized society from falling apart. A New Hampshire lawyer:

- behaves in a courteous, decent and disciplined manner, and counsels clients to do likewise
- displays respect for clients, judges, court staff, opposing counsel and all participants in the process, including parties
- behaves with humility rather than arrogance
- understands differing viewpoints and has empathy for others.

FOURTH, a New Hampshire lawyer is reliable, responsible and committed. A New Hampshire lawyer:

- cares deeply about both the interests of the client and of the legal system
- keeps promises, because one's word is one's bond
- tempers zealousness on behalf of the client with his or her role and responsibility as an officer of the court.

FIFTH, a New Hampshire lawyer is honest and forthright. Lack of candor impedes justice and degrades the profession, and lying has no place in the practice of law. A New Hampshire lawyer:

- displays candor with the client, the court and all others
- does not mislead the client, the court or others.

SIXTH, a New Hampshire lawyer exercises independent critical judgment, and is willing to accept responsibility for his or her actions, decisions or counsel. A New Hampshire lawyer:

- exercises common sense and independent judgment
- is not a mere technician or hired gun, but a wise counselor
- endeavors to solve problems rather than merely winning
- knows when it is time to take a stand and when it is time to compromise
- considers the broader societal implications of his or her actions
- is willing to challenge the client's wishes or motives when such wishes or motives are not in the best interest of the client or are detrimental to the administration of justice.

SEVENTH, a New Hampshire lawyer has a social conscience and is dedicated to serve the public and society. A New Hampshire lawyer is willing to take up an unpopular cause or to engage in pro bono work, even when it is unpleasant or costly. A New Hampshire lawyer:

- serves his or her community as a volunteer leader;
- sees the practice of law first and foremost as a profession, and secondarily as a business
- recognizes and resists business pressures which interfere with sound professional judgment

- provides or supports legal services to those in need, at no cost or reduced cost.

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NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE (Rules 3.1 to 3.9)

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS (Rules 4.1 to 4.5)

LAW FIRMS AND ASSOCIATIONS (Rules 5.1 to 5.7)

PUBLIC SERVICE (Rules 6.1 to 6.5)

INFORMATION ABOUT LEGAL SERVICES (Rules 7.1 to 7.5)

MAINTAINING THE INTEGRITY OF THE PROFESSION (Rules 8.1 to 8.5)

NOTE: The rules as published herein are subject to revisions promulgated from time to time by the New Hampshire Supreme Court and published in the New Hampshire Bar News. *See* Supreme Court Rules 1 and 51.

Browse Previous Page | Table of Contents | Browse Next Page

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or institutionalization, may nevertheless so defend the proceeding as to require that every element of the case be established.

Ethics Committee Comment

Institutionalization is treated as comparable to incarceration for purposes of Rule 3.1.

2004 ABA Model Rule Comment
RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE

Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

2004 ABA Model Rule Comment
RULE 3.2 EXPEDITING LITIGATION

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know if its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Ethics Committee Comment

1. New Hampshire's Rule reverses the order of ABA Model Rules (c) and (d). This clarifies that a lawyer's disclosure obligation during an *ex parte* proceeding applies even if the information provided to the tribunal would otherwise be protected by Rule 1.6.

2. See Rule 3.9 regarding nonadjudicative proceedings.

3. Rule 3.3 as revised supersedes N.H. Ethics Opinion 1995-96/5, "Presentation of False Evidence to a Tribunal by a Third Party Non-client"; see http://nhbar.org/pdfs/FO95-96-5.pdf. Revised Rule 3.3 requires disclosure of falsity in circumstances where it was not required under the prior version of the rule. See N.H. Ethics Opinion 2008-09/3, "Remedial Measures Under Rule 3.3"; http://nhbar.org/uploads/pdf/EthicsOpinion2008-9-3.pdf .

2004 ABA Model Rule Comment
RULE 3.3 CANDOR TOWARD THE TRIBUNAL

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative

proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for

permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Browse Previous Page | Table of Contents | Browse Next Page

Professional Conduct Rules Table of Contents

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

2004 ABA Model Rule Comment
RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper

to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Browse Previous Page | Table of Contents | Browse Next Page

Professional Conduct Rules Table of Contents

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

2004 ABA Model Rule Comment
RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement referred to in paragraph (a) will more likely than not have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

a. the identity, residence, occupation and family status of the victim and the accused;

b. if the accused has not been apprehended, information necessary to aid in apprehension of that person;

c. the fact, time and place of arrest; and

d. the identity of investigating and arresting officers or agencies and the length of the investigation.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Ethics Committee Comment

New Hampshire's rule departs from the ABA Model Rule in several respects. First, New Hampshire's rule retains the categories of extrajudicial statements that would likely be subject to the general prohibition of subsection (a). *See N.H. R. Prof. Conduct* 3.6(b). Second, New Hampshire's rule does not include an exception to the general prohibition against certain extra-judicial statements allowing lawyers to reply to recent adverse publicity. *See* ABA Model Rule 3.6(c). Third, New Hampshire's rule retains a "safe harbor" for lawyer statements on the identity, residence, occupation and family status of the victim in a criminal case. *See N.H. R. Prof. Conduct* 3.6(c)(7)(a). In all other respects, New Hampshire's rule conforms to the ABA Model Rule, including the revisions to subsection (c) that are intended to address vagueness issues raised in *Gentile v. State of Nevada*, 501 U.S. 1030 (1991).

2004 ABA Model Code Comment
RULE 3.6 TRIAL PUBLICITY

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Browse Previous Page | Table of Contents | Browse Next Page

Professional Conduct Rules Table of Contents

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

2004 ABA Model Rule Comment
RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortuous misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.2. Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

Ethics Committee Comment

When an organization – a corporation, governmental body, or other entity – is represented by counsel, *ex parte* communications with certain personnel of that organization will be prohibited by the Rule. Other jurisdictions have adopted a variety of tests for determining which personnel are off-limits, which include the "control group", "managing/speaking", "alter ego", "balancing", and "blanket ban" tests. As of this writing, the New Hampshire Supreme Court has not clarified which test applies in this jurisdiction and trial court opinions conflict. *Compare Totherow v. Rivier College,* No. 05-C-296, 2007 WL 811734 (N.H. Super. Ct. Feb. 20, 2007) (applying the control group test) with *XTL-NH, Inc. v. New Hampshire State Liquor Commission,* No. 2013-CV-119 (N.H. Super. Ct. Dec. 31, 2013) (applying a modified managing/speaking test). ABA Comment 7, below, endorses a hybrid of the managing/speaking test and the alter ego test. Bear in mind that New Hampshire employs the control group test in applying the attorney-client privilege where an organization is the client. N.H. R. Evid. 502(a)(2).

2004 ABA Model Rule Comment
RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from

advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Browse Previous Page | Table of Contents | Browse Next Page

Professional Conduct Rules Table of Contents

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.3. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

2004 ABA Model Rule Comment
RULE 4.3 DEALING WITH UNREPRESENTED PERSON

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not take any action if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, delay or burden a third person.

(b) A lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.

Ethics Committee Comment

Paragraph (a) substantially differs from the ABA model rule by using the word "obvious" to set a higher objective standard.

Paragraph (b) differs from the ABA model rule in three respects: the broader term "materials" replaces "document;" the phrase "reasonably should know" is deleted setting an objective standard for "knowledge"; and a second sentence is added. The second sentence incorporates the New Hampshire Bar Association's Ethics Committee's June 22, 1994, Practical Ethics Article, "Inadvertent Disclosure of Confidential Materials." The Committee concluded that notice to the sender did not provide sufficient direct guidance to lawyers.

The term "materials" includes, without limitation, electronic data.

As to ABA Comments [2] and [3], see Ethics opinion 2008-9/4 discussing duties relating to "metadata"; www.nhbar.org/legal-links/Ethics-Opinion-2008-09_04.asp.

ABA Comment to the Model Rules
RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document" or electronically stored information includes in addition to paper documents, email and other forms of electronically stored information, including embedded data

(commonly referred to as "Metadata" that is subject to being read or put into readable form. Metadata in electronic documents creates and obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Browse Previous Page | Table of Contents | Browse Next Page

Professional Conduct Rules Table of Contents

NEW HAMPSHIRE BAR ASSOCIATION
LITIGATION GUIDELINES

Amended by the New Hampshire Bar Association Board of Governors March 3, 2016
Originally Adopted December 2, 1999

PREAMBLE:

The following is a revised set of the original Litigation Guidelines adopted by the Board of Governors of the New Hampshire Bar Association to serve as aspirational goals for attorneys who practice in New Hampshire. The guidelines represent a means of maintaining civility in New Hampshire trial practice and have been revised to reflect the evolution in practice and technology that has occurred since they were adopted in 1999. While certain of these Litigation Guidelines do not have the force of law or court rule, attorneys practicing in New Hampshire are encouraged to incorporate the spirit of the guidelines into their legal practices and communicate these guidelines to lawyers whom they are charged with training and mentoring so that the guidelines will be a familiar part of practice from one generation of New Hampshire lawyers to the next. The Board of Governors encourages New Hampshire judges to make these guidelines part of their expectations of attorneys' conduct in litigation in New Hampshire Courts and to commend to counsel unfamiliar with the guidelines, such as *pro hac vice* admittees, that they review and abide by them. These guidelines are intended to proclaim that conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive, impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct tends to delay and often to deny justice.

The guidelines set forth herein, which are aspirational only, are not to be used as a basis for litigation, liability, discipline, sanctions or penalties of any type.

1. CONTINUANCES AND EXTENSIONS OF TIME

A. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, automatic disclosures, discovery, or motions, should ordinarily be assented to as a matter of courtesy unless time is of the essence. A first extension should be allowed even if counsel requesting it has previously refused to grant an extension.

B. After a first extension, any additional reasonable requests should be assented to unless the need for expedition in light of the litigation schedule would not permit such accommodation. Deference should be given to an opponent's schedule of professional and personal engagements. Consideration also should be given to the reasonableness of the length of extension requested as it applies to the task, the opponent's willingness to grant reciprocal extensions, and whether it is likely a court would grant the extension if asked to do so.

C. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."

D. A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

E. A lawyer should not attach to extensions unfair and extraneous conditions. Reasonable conditions, such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions, are permissible.

2. CASE STRUCTURING PRINCIPLES

A. Upon receipt of an appearance and answer in any litigation, counsel should confer regarding the proposed scheduling order, considering what, within reason and given the issues, will be required for length of discovery, length of trial, and discussion of alternative dispute resolution. Every effort should be made to reach agreement for submission of a proposed schedule to the Court.

B. When relevant, counsel for the parties should confer prior to the start of discovery to discuss electronically stored information ("ESI") in order to establish parameters for ESI related discovery, limit the risk of future disputes after discovery has begun, and discuss document production format. When defining parameters, consideration should be given to the significance of the issues and the proportionality between cost and the necessity and likelihood of discovering relevant information.

3. SERVICE OF PAPERS

A. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

B. Whenever practicable, parties should agree to service by electronic mail. Parties should always serve copies of papers upon one another so that they are received simultaneously and concomitant with the posting or delivery – by mail, in person or otherwise – of the papers with the court.

C. Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

D. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a holiday.

E. Service should be made personally or by electronic mail when it is likely that service by mail, even when allowed, will prejudice the opposing party.

4. WRITTEN SUBMISSIONS TO A COURT, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS AND DECLARATIONS

A. Written briefs or memoranda of points and authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic, or sociological data if such data appear in or are derived from generally available sources.

B. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

5. COMMUNICATIONS WITH ADVERSARIES

A. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

B. Communications should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

C. Communications intended only to make a record should be used sparingly and only when thought to be necessary under the circumstances. When such confirmatory communications are used, they should be concise and accurately reflect the events/record.

D. Unless necessary to resolution of the issue, communications between counsel should not be sent to judges.

E. Counsel should not lightly seek court sanctions.

6. DEPOSITIONS

A. Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment, embarrassment, or to generate expense.

B. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

C. When a deposition is noticed by another party in the reasonably near future, counsel should not notice another deposition for an earlier date without the agreement of opposing counsel.

D. Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.

E. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

F. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.

G. Counsel at deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought or to enforce a limitation on depositions or evidence directed by the court or to present a motion pursuant to Fed.R.Civ.P. 30(d).

H. While a question is pending, counsel should not through objections or otherwise, coach the deponent or suggest answers.

I. Counsel should not direct a client to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass. Counsel shall not direct the deposition conduct of a non-client witness.

J. Counsel shall not make any objections or statements which might suggest an answer to a witness or which are intended to communicate caution to a witness with respect to a particular question. There should be no lengthy or narrative objections. Counsel's statements when making objections and any explanation of the objection, if any is necessary, shall be succinctly stated, without being argumentative and without attempting to suggest to the witness any particular or desired response. Further explanation of the objection should be provided only if opposing counsel requests clarification, and such further explanation should be succinctly and directly stated. Where more extensive discussion is required on the record, counsel should consider excusing the deponent during such discussion.

K. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. Parties and their counsel are expected to act reasonably, and to cooperate with and be courteous to each other and to deponents at all times during the deposition, and in making and attempting to resolve objections.

L. Opposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copy shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and his or her counsel do not have the right to discuss documents privately before the witness answers questions about them.

7. DOCUMENT REQUESTS

A. Requests for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

B. Requests for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.

C. In responding to document requests, counsel should strive to recognize New Hampshire's expansive view of discovery and to provide all materials that are or could be reasonably responsive to a request.

D. Counsel should encourage the client to act in good faith and with due diligence to locate the documents requested and to acquire them when to do so would not be overly burdensome and when the client has reasonable access to them.

E. Counsel should not interpret the requests for production in an artificially restrictive manner in order to avoid disclosure. Within reason, requests with subsections should be read as one unless the subsections clearly request documents of a different nature.

F. Documents withheld on the grounds of privilege should comply with local rule and current case law requirements of a detailed privilege log.

G. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents. Counsel are encouraged to include control numbers such as bates numbers on documents produced or some other manner of organization of responses.

H. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason. Regardless of the rule-imposed deadline, counsel should consider producing documents in a manner and at a time that allows the case to proceed efficiently and without unnecessary delay.

I. Counsel should attempt to resolve discovery disputes in the spirit of compromise. Discovery motion practice should be avoided.

8. INTERROGATORIES

A. Interrogatories should never be used to harass, embarrass, or impose undue burden or expense on adversaries.

B. Before propounding interrogatories, counsel should review discovery already received and avoid interrogatories with duplicate and redundant questions.

C. Counsel should strive to recognize New Hampshire's expansive view of discovery when assisting and counseling the client with responding to interrogatories so that the information is the product of good faith and due diligence and includes pertinent details.

D. Counsel should not interpret the interrogatories in an artificially restrictive manner in order to avoid disclosure of information. Within reason, interrogatories with subsections should be read as one unless the subsections clearly request information of a different nature.

E. Responses withheld on the grounds of privilege should comply with local rule and specify the basis for the invocation of the privilege.

F. Responses should not be delayed to prevent opposing counsel from being prepared for scheduled depositions or for any other tactical reason. Regardless of the rule-imposed deadline, counsel should consider providing answers in a manner and at a time that allows the case to proceed efficiently and without unnecessary delay.

G. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

H. Counsel should attempt to resolve discovery disputes in the spirit of compromise before engaging in motion practice. Discovery motion practice should be avoided.

9. MOTION PRACTICE

A. Before filing a motion other than concerning the merits of the case, and unless exigent circumstances prevent it, counsel should engage in a meaningful discussion of its purpose in an effort to resolve the issue.

B. A lawyer should not unreasonably withhold his or her assent so as to force his or her adversary to make a motion and then not oppose it.

10. DEALING WITH NON-PARTY WITNESSES

A. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition. (RSA 516:3)

B. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel. (RSA 517:4; RSA 516:4; RSA 516:5)

C. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made promptly available to the adversary at the adversary's reasonable expense even if the deposition is cancelled or adjourned.

D. Counsel should, whenever practicable, confer with opposing counsel on all aspects of the third party deposition, including on the scope of the document requests.

11. EX PARTE COMMUNICATIONS WITH THE COURT

A. A lawyer should avoid ex parte communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending. (Rule 3.5 N.H. Rules of Professional Conduct)

B. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application, except that where the rules permit an ex parte application or communication to the court in an emergency situation, a lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there are bona fide circumstances such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

12. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

A. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

B. Counsel should not falsely hold out the possibility of settlement as a means for delaying discovery or trial.

C. In every case, counsel should consider whether the client's interest could be best served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

13. TRIALS AND HEARINGS

A. Counsel should be punctual and prepared for any court appearance.

B. Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and judicial officers with courtesy and civility.

C. Counsel should confer and cooperate on pre-marking exhibits.

September 18, 2014

Civility as the Core of Professionalism

Jayne R. Reardon

Civil behavior is a core element of attorney professionalism. As the guardians of the Rule of Law that defines the American social and political fabric, lawyers should embody civility in all they do. Not only do lawyers serve as representatives of their clients, they serve as officers of the legal system and public citizens having special responsibility for the quality of justice. To fulfill these overarching and overlapping roles, lawyers must make civility their professional standard and ideal.

What Exactly Is "Civility"?

The concept of civility is broad. The French and Latin etymologies of the word suggest, roughly, "relating to citizens." In its earliest use, the term referred to exhibiting good behavior for the good of a community. The early Greeks thought that civility was both a private virtue and a public necessity, which functioned to hold the state together. Some writers equate civility with respect. So, civility is a behavioral code of decency or respect that is the hallmark of living as citizens in the same state.

It may also be useful at the outset to dispense with some widely held misconceptions about civility, likening it to: (1) agreement, (2) the absence of criticism, (3) liking a person, and (4) good manners. These are all myths.

Civility *is not the same as agreement*. The presence of civility does not mean the absence of disagreement. In fact, underlying the codes of civility is the assumption that people will disagree. The democratic process thrives on dialogue and dialogue requires disagreement. Professor Stephen Carter of Yale Law School has stated, in one of his many writings on civility, "[a] nation where everybody agrees is not a nation of civility but a nation without diversity, waiting to die."

Civility *is not the absence of criticism*. Respect for the other person or party may in fact call for criticism. For example, a law firm partner who fails to point out an error in a young lawyer's brief isn't being civil – that partner isn't doing his or her job.

Civility *is not the* same *as liking someone*. It is a myth that civility is more possible in small communities where everyone knows each other. Knowing or liking the other person is not a prerequisite for civility. Civility compels us to show respect even for strangers who may be sharing our space, whether in the public square, in the office, in the courtroom, or in cyberspace.

Civility *should not be equated with politeness or manners alone*. Although impoliteness is almost always uncivil, good manners alone are not a mark of civility. Politely refusing to serve someone at a lunch counter on the basis of skin color, or cordially informing a law graduate that the firm does not hire women, is not civil behavior.

Civility is a code of decency that characterizes a civilized society. But how is that code reflected in the practice of law?

Civil Conduct is a Condition of Lawyer Licensing

A civility imperative permeates bar admission standards. The legal profession is largely self-governing, with ultimate authority over the profession resting with the courts in nearly all states. Courts typically set the standards for who becomes admitted to practice in a state and prescribe the ethical obligations that lawyers are bound, by their oath, to fulfill.

Candidates for bar admission in every state must satisfy the board of bar admissions that they are of good moral character and general fitness to practice law. The state licensing authority's committee on character and fitness will recommend admission only where the applicant's record demonstrates that he or she meets basic eligibility requirements for the practice of law and justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. Those eligibility requirements typically require applicants to demonstrate exemplary conduct that reflects well on the profession.

Capacity to act in a manner that engenders respect for the law and the profession – in other words, civility – is a requirement for receiving a law license and, in some jurisdictions, for retaining

the privilege of practicing law. It follows that aspiring and practicing lawyers should be disabused of the notion that effective representation ever requires or justifies incivility.

Beyond Client Representation: Lawyer as Public Citizen

Notions of a lawyer's core civility duty also are rooted in ethical principles informing and defining the practice of law. Those principles, having evolved over the centuries to lend moral structure and a higher purpose to a life in the law today, speak plainly to a lawyer's dual duties as officer of the legal system and public citizen, beyond the role client advocate. At the very top of the lawyer's code of ethics – in the Preamble to the Model Rules of Professional Conduct – we read of those larger civic duties binding every practicing lawyer.

Civility concepts suffuse the hortatory language of the Preamble. For example, the Preamble makes clear that even in client dealings, counsel is expected to show respect for the legal system in his or her role as advisor, negotiator, or evaluator (Preamble Cmt. 5). In addition, lawyers should resolve conflicts inherent in duties owed to client, the legal system, and the lawyer's own interest through the exercise of discretion and judgment "while maintaining a professional, courteous, *and civil attitude* toward all persons involved in the legal system" (Preamble Cmt. 9, emphasis added).

Tension Between Zealous Advocacy and Civility

Even for the most ethically conscientious lawyers, there is seemingly ubiquitous tension between the duty of zealous advocacy and the duty to conduct oneself civilly at all times. Model Rule 1.2 compels zealous advocacy, and Comment 1 to the Rule speaks to the depth of that duty, noting that a lawyer

> should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to a lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. (Rule 1.2 Cmt. 1)

The distorted image in popular culture of lawyer as a partisan and combative zealot would seem to preclude civil behavior as the preferred approach to legal practice. Not so. That same comment

goes on to explain:

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. (Rule 1.3 Cmt. 1)

Thus, there are firm limits to the lawyer's duty to act with zeal in advocacy, but the precise location of those limits is not always easy to discern. Therein lies the tension. Appropriate zeal, however, never extends to offensive tactics or treating people with discourtesy or disrespect.

The individual lawyer is the guardian of the tone of interactions that will serve both the client and the legal system well. Clients may not understand these limits. Many clients are under the misconception that because they hired the lawyer, they have the power to dictate that lawyer's conduct. It falls to the lawyer to manage and correct that expectation and to let the client know the lawyer is more than a "hired gun." In practice, that often means refusing a client's demand to act uncivilly or to engage in sharp or unethical practices with other parties in a case or matter.

The rules themselves make it clear, of course, that the lawyer is not just a hired gun. Model Rule 1.16(b)(4) of the ABA Model Rules of Professional Conduct provides that a lawyer may withdraw if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has fundamental disagreement, and Rule 3.1 provides that a lawyer cannot abuse legal procedure by frivolously bringing or defending a proceeding, or asserting or defending an issue. Egregious forms of uncivil behavior in a court proceeding also may constitute conduct prejudicial to the administration of justice, within the meaning of Rule 8.4(d).

The Problem of Declining Civility in the Legal Profession

Although civility is central to the ethical and public-service bedrock of the American legal profession, substantial evidence points to a steady rise in incivility within the American bar. It is problematic to pin down the incidence of incivility and unprofessional conduct because incivility, without some associated violation of the ethical rules, historically has not been prosecuted by the regulatory authorities. Thus there is no good systemic data on incivility's prevalence. There have been countless writings, however, about widespread and growing dissatisfaction among judges and established lawyers who bemoan what they see as the gradual degradation of the practice of

law, from a vocation graced by congenial professional relationships to one stigmatized by abrasive dog-eat-dog confrontations.

Discussion of the problem tends to dwell on two areas: (1) examples of lawyers behaving horribly, from which most of us easily distinguish ourselves; and (2) possible causes and justifications of that behavior – rather than possible solutions. Traditional media and social media carry countless accounts of lawyers screaming, using expletives, or otherwise being uncivil. Lawyers who reflect on the trend generally pin the cause on any of a combination of factors, including the influence of outrageous media portrayals; inexperienced lawyers who increasingly start their own law practices without adequate mentoring; and the impact of modern technology that isolates lawyers and others behind their computers, providing anonymous platforms for digital expression.

The scattered data that is available tends to confirm that uncivil lawyer conduct is pervasive. A 2007 survey done by the Illinois Supreme Court Commission on Professionalism, for example, took a close look at specific behaviors of attorneys across the state and concluded that the vast majority of practicing lawyers experience unprofessional behavior by fellow members of the bar. Over the prior year, 71 percent had reported experiencing rudeness – described as sarcasm, condescending comments, swearing, or inappropriate interruption. An even higher percentage of respondents reported being the victim of a complex of more specific behaviors loosely described as "strategic incivility," reflecting a perception that opposing counsel strategically employed uncivil behaviors in an attempt to gain the upper hand, typically in litigation. The complained-of conduct included, for example, deliberate misrepresentation of facts, not agreeing to reasonable requests for accommodation, indiscriminate or frivolous use of pleadings, and inflammatory writing in briefs or motions.

Whatever the causes, the first step toward a real remedy to the incivility pandemic is recognition of the deeply destructive impact of uncivil conduct on individual lawyers who engage in it, on those subjected to it, on the bar as a whole, and ultimately on the American system of justice. It begins with recognition that civility is, and must be, the cornerstone of legal practice.

Benefits of Civility

Aside from the most obvious reasons that lawyers should act civilly – that is, that the profession requires it of them and it's just the right thing to do – a number of tangible benefits accrue from

civil conduct in terms of reputational gain and career damage avoidance, as well as strategic advantage in a lawyer's engagement.

Lawyers who behave with civility also report higher personal and professional rewards. Conversely, lawyer job dissatisfaction is often correlated with unprofessional behavior by opposing counsel. In the 2007 Survey on Professionalism of the Illinois Supreme Court Commission, 95 percent of the respondents reported that the consequences of incivility made the practice of law less satisfying.

Other research shows that lawyers are more than twice as likely as the general population to suffer from mental illness and substance abuse. Law can be a high-pressure occupation, and it appears that needless stress is added by uncivil behavior directed to counsel. "Needless" is used as a descriptor here because the consequences of incivility, as acknowledged by over 92 percent of the survey respondents, often add nothing to the pursuit of justice or to service of client interests. Consequences include making it more difficult to resolve our clients' matters, increasing the cost to our clients, and undermining public confidence in the justice system. They are the exact opposite of the goals we should strive to accomplish as lawyers.

Moreover, judges are not fond of being asked to decide disputes between opposing counsel extraneous to deciding the merits of the respective clients' case. Judges will tell you that mediating bickering between counsel is the least tasteful part of their job. Even if a judge avoids wading into a dispute between counsel, the fact that a lawyer was disrespectful or used bad behavior cannot help but register on the judge's consciousness. Then, if there is a close call on a motion or other issue, and the judge has a choice between ruling in favor of the client whose lawyer was civil and professional or in favor of the client whose lawyer has been a troublemaker, the Judges-Are-Human rule may well control. Similarly, juries also report being negatively affected by rude behavior exhibited by trial attorneys. In sum, lawyer conduct can and does affect the results lawyers deliver to their clients, and ultimately the success of their practices.

It naturally follows that a lawyer's reputation for professional conduct is part and parcel of his or her reputation for excellence in practice. Before the advent of the Internet, evaluations of attorneys were conducted and disseminated largely by and for lawyers and published yearly in books with entries listing an attorney's achievements by name, geographic region, and specialty. Now, any person who has contact with an attorney may rate and comment on the attorney's performance and professionalism on websites devoted to rating and ranking attorneys or through

general social media channels. In the realm of the Internet, one uncivil outburst may haunt an attorney for years; and reputations may be built and destroyed quickly. Even a cursory search of some of these websites shows that clients regularly comment (especially if they are displeased) about an attorney's communication style and respect for his or her clients and the system of justice.

Not surprisingly, research shows that clients evaluate a lawyer who exhibits civility and professionalism as a more effective lawyer. If clients evaluate their lawyers as being effective, they stay with them; if they see their lawyers as ineffective, they will go elsewhere for legal services, particularly in a climate in which the supply of lawyers exceeds the demand for legal services. Research also shows that superior service, in which relationship abilities are central, increases client retention rates by about one third. Effective client service and positive relationships, in turn, increase profit to the lawyers by about the same rate.

Bad Behavior/Bad Consequences

Historically, incivility per se has by and large not been prosecuted by attorney regulatory authorities. Since 2010, however, several attorneys have been suspended by their states' high courts for uncivil conduct implicating a lawyer's duty to uphold the administration of justice and other ethics rules.

The Supreme Court of South Carolina has disciplined several attorneys for incivility, citing not only ethics rules but that state's Lawyer's Oath, taken upon admission to the bar. The oath contains a pledge of civility. In Illinois, an attorney was prosecuted by disciplinary authorities for oral and written statements made to judges and an attorney that violated various ethical rules, including Illinois Rule 8.4(a) (modeled after the corresponding ABA Model Rule).

Outside of the courtroom, much of the uncivil arrow-slinging between counsel historically has occurred during discovery disputes in litigation. However, the growing influence of technology in litigation, with its potential for marshaling exponentially more information and data at trial than ever, and the commensurate need to control and limit that information to what is relevant and manageable, suggests courts will grow even less tolerant of lawyers trying to manipulate the pre-trial fact discovery process or engaging in endless, contentious discovery disputes. Moreover, while never wise or virtuous, it is no longer profitable to play "hide the ball" in litigation as clients demanding better results at reduced costs.

Movement Toward Systemic Solutions to Incivility

There have been programmatic efforts, largely led by judges, to address and curb spreading incivility in the legal profession. In 1996, the Conference of Chief Justices adopted a resolution calling for the courts of the highest jurisdiction in each state to take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism. In response, the supreme courts of 14 states have established commissions on professionalism to promote principles of professionalism and civility throughout their states.

Many more states have, either through their supreme courts or bar associations, formed committees that have studied professionalism issues and formulated principles articulating the aspirational or ideal behavior the lawyers should strive to exhibit. These professionalism codes nearly all state at the outset that they do not form the basis of discipline but are provided as guidance – attorneys and judges should strive to embody professionalism above the floor of acceptable conduct that is memorialized in the attorney rules of ethics. They also typically echo a theme found in the Preamble to the Model Rules of Professional Conduct: that lawyers have an obligation to improve the administration of justice.

In 2004, a relatively aggressive stance was taken by the Supreme Court of South Carolina. The South Carolina high court amended the oath attorneys take upon admission to the bar to include a pledge of civility and courtesy to judges and court personnel and the language "to opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." It also amended the disciplinary rules to provide that a violation of the civility oath could be grounds for discipline. Similar civility pledges were added to the lawyers' oath of admission by the Supreme Court of Florida in 2011 and by the Supreme Court of California in 2014.

Some jurisdictions, in states including New Jersey, Georgia, Illinois, Florida, Arizona, and North Carolina, have taken the voluntary aspirational codes further and have adopted an intermediary or peer review system to mediate complaints against lawyers or judges who do not abide by the aspirational code. It is challenging to implement an enforcement mechanism in a way that inspires voluntary compliance with an aspirational code and the success of these mechanisms has been inconsistent.

Without question, the most effective ways of addressing incivility entail bringing lawyers together for training and mentoring. Mentoring programs are being offered by an increasing number of state commissions and bar associations. The American Inns of Court, modeled after the apprenticeship training programs of barristers in England, brings seasoned and newer attorneys together into small groups to study, present, and discuss some of the pressing issues facing the profession.

Conclusion: A Time to Recommit to Civility

The needed rebirth of civility, at a critical juncture in the evolution of the legal profession, should be seen by lawyers not as pain, but as gain. Technology and globalization are facilitating greater client influence and requiring increased transparency; civil behavior is more important than ever. As the research conclusively bears out, (1) civil lawyers are more effective and achieve better outcomes; (2) civil lawyers build better reputations; (3) civility breeds job satisfaction; and (4) incivility may invite attorney discipline. Not only does our profession require us to be civil, and it is simply the right thing to do, but professionalism among lawyers is required by the larger American society in order to preserve a great profession and survive as a civil society bound to the Rule of Law.

Additional Resources

ther materials on this topic, please refer to the following.

Essential Qualities of the Professional Lawyer (Print or Ebook)

Product Code: 2150048

2013, 260 Pages, 6 x 9

This volume will help students and new lawyers meet the challenge of developing a sense of direction and competencies for navigating uncertainty, as well as a sense of purpose in identifying with the larger values of the profession, including access to justice and service to society.

Authors

Rule 4.3 and the Difficulties of Dealing with an Unrepresented Opponent

Ethics Corner Article

New Hampshire Bar News – June 18, 2014

Dear Ethics Committee: I am in private practice and occasionally encounter an opposing party who is not represented by counsel and has little knowledge of the law and procedure. I know that Rule 4.3 prohibits giving legal advice to an unrepresented opponent. Recently, an unrepresented opponent in a family matter asked me how many days she has to file an answer to my client's complaint. I responded that the rules require answers to be filed within 30 days but that I could not give her any further information because my client's interests are opposite to her own. Was this a proper response?

First, you are correct that Rule 4.3 applies in this situation. In pertinent part, it provides, "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." An unrepresented opposing party falls within the ambit of this rule, and therefore, a lawyer violates the rule if the lawyer provides legal advice to that party. The comments to the rule define the concern, noting that the rule protects "[a]n unrepresented person, particularly one not experienced in dealing with legal matters, [who] might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client." NHPRC 4.3, Comment [1].

Whether or not a particular communication is prohibited by Rule 4.3 depends on whether it constitutes "legal advice." Albeit in a different context than Rule 4.3, at least one ethics committee has defined legal advice as a recommendation "tailored to the facts of the consumer's particular situation." DC Bar Ethics Opinion 316 (2002).

Under this definition, legal advice is imparted when a lawyer applies a particular set of facts to the applicable law, including procedural and substantive rules, as well as statutory

and case law, and advises a person of that analysis. Accordingly, informing the unrepresented opponent that she had 30 days to file an answer in the context of the facts of your case may have constituted legal advice, because you had to apply the applicable court rules to determine the deadline in the complaint you filed in the case.

On the other hand, some practitioners interpret Rule 4.3 to permit a lawyer to offer "legal information," but not legal advice. In their view, legal information is a factual statement that requires no interpretation – what a particular statute states or what a court's procedural rules require.

Legal advice, on the other hand, is an opinion or an interpretation based upon the lawyer's knowledge, experience, and training. Paula J. Frederick, "Learning to Live with Pro Se Opponents," GPSolo Magazine – October/November 2005. Under such an interpretation, a lawyer does not violate Rule 4.3 by informing an unrepresented opponent of the existence of the 30-day rule for answers. Moreover, it could be argued that from a standpoint of navigating a complex court system and ensuring access to justice, the lawyer's decision to provide such information is both efficient and professional.

It should be apparent that there is no bright-line rule on what constitutes impermissible legal advice. The comments to the rule provide some guidance when an attorney communicates about a matter with an unrepresented opponent.

Comment [2] states: "So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the [unrepresented opponent], the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations."

Thus, although Rule 4.3 prohibits a lawyer from dispensing legal advice to an unrepresented opponent, Comment [2] allows the lawyer to communicate with the unrepresented opponent about the positions of that lawyer's client, or the lawyer's views of the opponent's legal rights and duties. In taking advantage of this provision, a lawyer must make it clear to the unrepresented opponent that the lawyer represents a party with adverse interests, and that the lawyer is expressing his or her view of legal rights, duties or obligations, rather than offering an authoritative or disinterested statement of the law. It is also advisable that the lawyer preface and/or follow up any such view or observation with a recommendation that the unrepresented opponent retain counsel.

Ultimately, the scope and content of communications with an unrepresented party, and the risk that such communications may be interpreted as legal advice by that party, will vary based on the sophistication, knowledge, and training of the unrepresented opponent. Put differently, because the comments to Rule 4.3 note that "one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client," a lawyer must be mindful of whether the unrepresented opponent is likely to construe a communication as legal advice or as something other than the view or opinion of the lawyer on behalf of the lawyer's client.

Additionally, if a lawyer has reason to believe that it would be contrary to the interests of the lawyer's client to engage in communications with the opponent about an inquiry posed by that opponent, the lawyer should refrain from such communications, even if such communications do not constitute legal advice, and instead advise the unrepresented opponent to retain counsel.

Returning to your question, you may have violated Rule 4.3 to the extent that you gave legal advice, i.e., a response that required you to apply the facts of your case to the procedural rules of court. Whether or not you violated the rule could depend on other considerations, such as whether or not it was contrary to the interests of your client for you to engage in such communications, and whether, given the circumstances of the case and the sophistication of the unrepresented opponent, he or she was likely to accept your response as a disinterested, definitive statement of the law.

Under the circumstances of this question, the better practice might have been simply to instruct the unrepresented opponent to retain her own counsel to obtain an answer to her question.

The Ethics Committee provides general guidance on the NH Rules of Professional Conduct with regard to a lawyer's own prospective conduct. New Hampshire lawyers may contact the Ethics Committee for confidential and informal guidance by emailing Robin E. Knippers. Brief ethics commentaries based upon member inquiries and suggestions will be published monthly in the NH Bar News.

A Note About Ethics Materials from the NH Bar Association Ethics Committee

Care should be exercised in determining which version of a given Rule applies as of a given date, and the extent to which the interpretation of a given opinion or article will apply to such version. Many interpretations of New Hampshire ethics law (including many ethics opinions, practical ethics articles, and ethics corner articles issued by the NHBA Ethics Committee) have been published under the prior version of the Rules of Professional Conduct or predecessor rules. Read more.

General Ethics Guidance

Brief *Bar News* articles by the Ethics Committee examine frequently asked questions on ethics. View Ethics Corner and Practical Ethics articles.

How to Obtain Answers

Can't Find an NHBA Ethics Opinion on Point?

The Ethics Committee provides several services for members of the Bar. New Hampshire lawyers may contact the Committee for confidential and informal guidance on their own prospective conduct or suggest topics for Ethics Corner.

Members are encouraged to ask the NHBA Ethics Committee questions pertaining to New Hampshire practice. Inquiries and requests for opinions should be directed to staff liaison to the Ethics Committee Robin E. Knippers, 603-715-3259. Learn more.

NH Rules of Professional Conduct

The Rules of Professional Conduct constitute the disciplinary standard for New Hampshire lawyers. Together with law and other regulations governing lawyers, the Rules establish the boundaries of permissible and impermissible lawyer conduct. View the rules.

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New Hampshire Supreme Court

Attorney Discipline System

2020 Annual Report

I. OVERVIEW

In 2020, the Attorney Discipline Office (ADO) consisted of five attorneys, one paralegal, three legal assistants, and one part-time bookkeeper. Additionally, 36 attorney volunteers and 20 lay-member volunteers participated in the three committees that process attorney discipline complaints: Complaint Screening Committee (CSC), Hearings Committee (HC) and Professional Conduct Committee (PCC).

Brian R. Moushegian (BRM) continued to serve as General Counsel with Mark P. Cornell (MPC) serving as the Deputy General Counsel and Andrea Q. Labonte (AQL) serving as the Assistant General Counsel. They are referred to collectively as General Counsel or GC in this report. Sara S. Greene (SSG) and Elizabeth M. Murphy (EMM) continued to serve as Disciplinary Counsel and Assistant Disciplinary Counsel, respectively. They are referred to collectively in this report as Disciplinary Counsel or DC.

II. ATTORNEY DISCIPLINE OFFICE OPERATIONS

A. Informal Proceedings

The rules and procedures that govern the attorney discipline system are set forth in Supreme Court Rules 37 and 37A. Grievances must be filed under oath and must certify that a copy has been sent to the attorney against whom the grievance was filed. Upon request, the ADO sends potential grievants the forms that fulfill those requirements. There is no form for the grievance itself. Some grievants obtain the forms from the ADO website, www.nhattyreg.org. Referrals are received from attorneys who are complying with their obligation under Rule of Professional Conduct (Rule) 8.3, and from judges, marital masters and court clerks who bring attorney behavior to the ADO's attention. In addition, the ADO receives a copy of each Overdraft Notice (ODN) that banking institutions send to attorneys or firms holding Client Trust Accounts, and a copy of lawsuits that are filed against attorneys. On March 13, 2020 the Governor declared a State of Emergency and closed all State Offices to the public. The New Hampshire Supreme Court subsequently issued a series of emergency orders closing the ADO to the public. In these orders, the court allowed grievances to be filed online through the ADO website. In total, the ADO received 169 grievances, ODNs and referrals in 2020.

General Counsel conduct an initial review of the grievances to determine if they should be docketed. After reviewing the 169 matters received in 2020, and the grievances remaining from 2019, 18 grievances were docketed as complaints requiring further investigation. Three other cases were docketed as complaints later, after the CSC granted requests for reconsideration. General Counsel non-docketed 147 of the remaining grievances received and pending. Non-docketed grievances do not appear on attorneys' discipline records and are not

indexed. After two years, they are destroyed.[1]

After a case is docketed, grievances are called complaints. All docketed cases are indexed and, once they reach certain procedural milestones, are available to the public at the ADO. The respondent (attorney) is required to answer the complaint after docketing. General Counsel gathers sufficient information pertinent to the conduct in question in order to dismiss the matter, forward the matter to DC for further action, or report to the Complaint Screening Committee. By rule, the work product and reports, as well as the deliberations of the CSC, are not public.

The CSC is comprised of five attorneys and four lay members appointed by the Supreme Court. The CSC met 11 times in 2020. Hon. Peter H. Fauver served as CSC Chair in 2020 and Peter J. Kiriakoutsos, CPA, served as Vice-Chair.

The CSC is tasked with considering and acting on requests for reconsideration of General Counsel's decisions not to docket grievances. Out of the 148 grievances non-docketed in 2020, and four grievances non-docketed in late 2019, the CSC reviewed 40 requests for reconsideration. Three requests for reconsideration were granted and were subsequently docketed for further investigation. When the CSC denies a request for reconsideration of GC's non-docket decision, the matter is closed. Pursuant to the New Hampshire Supreme Court's opinion in *Petition of Sanjeev Lath, et. al.*, 169 NH 616 (2017), grievants do not have standing to appeal the CSC's decision to uphold a non-docket decision.

The CSC also considers the reports of General Counsel's investigation of docketed complaints. In 2020, the CSC referred 13 docketed cases to Disciplinary Counsel for further action, finding that there was a reasonable likelihood that a hearing panel could find clear and convincing evidence of a violation of the Rules of Professional Conduct. The CSC dismissed five docketed cases with a finding of no professional misconduct, with two of those dismissals occurring after completion of a diversion. There were eight cases in which a request for reconsideration was pending at the end of the year and one other case that was pending at the CSC at the end of the year.

B. Formal Proceedings

When a matter is referred to Disciplinary Counsel (DC), it is carefully reviewed to determine what best serves the goals of the discipline process, namely protecting the public and preserving the integrity of the legal profession. As part of the assessment, DC generally meets with respondents, their counsel, witnesses (including the complainants), and New Hampshire Lawyers Assistance Program (NH LAP) representatives if issues of mental health or substance abuse are present. DC also gathers documentation from courts, banks, and third parties, as well

[1] As a result of the ADO offices being closed to the public and a pending request from a member of the public to review these files, the ADO has temporarily suspended destruction of these files.

as from the respondent.

If DC determines after her investigation that there is not a likelihood of clear and convincing evidence of a Rule violation, she files a Motion to Dismiss with the PCC. DC filed two motions to dismiss cases that had been referred by the CSC, but that DC determined did not have clear and convincing evidence of a Rule violation.

When DC concludes there is sufficient evidence to prosecute a matter, she prepares a Notice of Charges (NOC) and requests the appointment of a Hearing Panel by the Hearings Committee Chair. When a NOC is issued, the file becomes public. In 2020, DC issued eight Notices of Charges involving six attorneys. One attorney had three Notices of Charges issued against him for a total of eight docketed matters.

In lieu of a contested hearing, Respondents and Disciplinary Counsel may stipulate to all or part of the facts, rule violations, and sanction. Disciplinary Counsel negotiated one stipulation to facts and rules and requested that a hearing panel be appointed to decide the sanction. In five cases, the respondents signed stipulations as to facts, rule violations, and sanction *prior to* the issuance of a NOC, and the cases were considered directly by the PCC instead of proceeding to a hearing. There was one attorney that requested he be allowed to resign while under investigation, which was forwarded to the PCC. Disciplinary Counsel requested Diversion in one case, but it was denied. Subsequently, a Notice of Charges was issued.

At the hearings level, DC participated in nine pre-hearing conferences, and one hearing on a Stipulation as to Facts, Rule Violations, and Sanction. DC also participated in three hearings on sanction after a hearing panel found a rule violation after the respondents defaulted and did not participate in the merits hearing.

The Hearings Committee Chair, Attorney Philip H. Utter, appoints a Hearing Panel from members of the Committee, which is comprised of 22 attorney members and 12 lay members. Although a Hearing Panel quorum consists of two attorneys and one non-attorney, the Chair generally appoints three attorneys and two non-attorneys to each panel. After hearing evidence in a contested hearing or reviewing stipulations that are filed after a NOC is issued, the Hearing Panel submits a written report to the PCC, making findings of fact by clear and convincing evidence; issuing rulings of law, *i.e.*, which Rules were violated; and making recommendations as to sanction. These reports are public.

The final outcome of a case is the responsibility of the PCC, subject to approval by the Supreme Court (Court) as described below. The PCC, which is comprised of eight attorney members and four lay members, met seven times in 2020. The PCC Chair is Attorney David M. Rothstein; the Vice-Chairs are Attorney Heather E. Krans and lay member Elaine Holden. By Court Rule, the New Hampshire Bar Association Vice President serves on the PCC during his or her term as Vice President. Attorney Richard C. Guerriero, Jr. completed his term on the PCC on July 31, 2020. Bar Vice President Attorney Sandra L. Cabrera started her term on the PCC on

August 1, 2020.

The PCC has the power and authority to accept diversion agreements, approve stipulations, issue protective orders, dismiss matters, and issue reprimands, public censures or suspensions not exceeding six months. In 2020 the PCC issued protective orders in three matters and denied two requests for a protective order. In addition, the PCC denied a motion to terminate proceedings, granted two requests for annulment of records, denied one request for an annulment, dismissed one case after denying approval of a diversion agreement, and denied two requests for reconsideration. The PCC considers Hearing Panel Reports, as well as the entire record, in disciplinary matters. In some cases, it hears oral arguments as to whether the Hearing Panel's recommendations should be affirmed and determines whether there is clear and convincing evidence of violations of the Rules of Professional Conduct. The PCC heard oral argument in one case in 2020.

The PCC dismissed three cases at the request of DC and issued three reprimands in 2020. When the PCC determines that a sanction greater than a six-month suspension is warranted, it submits its recommendation to the Supreme Court. During 2020, the Committee submitted three recommendations for disbarment on three lawyers, two recommendations for a one-year suspension, one recommendation for a one-year stayed suspension and one recommendation to deny a resignation request.

Some outcomes determined by the PCC or the Court involve monitoring the respondent attorney for a time certain following the resolution of a case. Among their other responsibilities, Disciplinary Counsel and staff track compliance with CLE requirements, office management improvement parameters, mental health therapy, and substance abuse treatment, and alert the PCC to any non-compliance with the terms of the conditions.

III. THE STATISTICS

As of January 1, 2021, there were 26 grievances and 27 docketed complaints pending at the ADO. Eight grievances in which the grievant filed a request for reconsideration were pending with the CSC at the end of the year.

Of the docketed complaints, four were in the investigation stage with General Counsel, one was pending before the CSC, eight cases were pending with Disciplinary Counsel, five cases were pending with the Hearings Committee, two cases involving one lawyer were pending at the PCC, four cases involving two lawyers were pending with the Supreme Court and three docketed cases were being monitored by the ADO for compliance with conditions in previous orders issued or as part of a diversion.

Figure A illustrates the types of underlying legal matters giving rise to docketed complaints in the past three years.

FIGURE A

Underlying Legal Matters	2020	Percentage in 2020	Percentage in 2019	Percentage in 2018
Family Law	4	18.2%	37%	29.7%
Civil Suit/Litigation	4	18.2%	27%	5.4%
Criminal	2	9.1%	7%	16.2%
Trust Account Issues	0	0%	7%	8.1%
Patent/Trademark Law	3	13.6%	7%	0%
Overdraft Notification	0	0%	3%	5.4%
Probate/Estate Planning	3	13.6%	3%	13.5%
Real Estate/Loan Modification	1	4.5%	3%	2.7%
Bankruptcy	0	0%	3%	0%
Other	2	9.1%	3%	2.7%
Employment/Workers Compensation	0	0%	0%	5.4%
Personal Injury	0	0%	0%	2.7%
Collection/Consumer Protection	0	0%	0%	2.7%
Unauthorized Practice of Law	1	4.5%	0%	2.7%
Criminal Charge against Attorney	0	0%	0%	2.7%
Landlord/Tennant	2	9.1%	0%	0%
Total	**22**			

Note: There were twenty-one matters docketed in 2020. Of the twenty-one matters, one docketed matter included two types of underlying legal matters (resulting in a total of 22 types of matters in 2020).

Figure B shows the distribution of the sources of the matters docketed in 2020. Referrals from clients became the most common source of complaints in 2020.

FIGURE B

Docketed Complaint Filed By	2020	Percentage In 2020	Percentage in 2019	Percentage in 2018
Client	7	33.3%	23%	40.5%
Opposing Party	5	23.8%	20%	10.8%
Court Referral	4	19.0%	20%	18.9%
Attorney Referral	3	14.3%	13%	10.8%
Self-report	1	4.8%	10%	8.1%
ADO Generated	0	0%	7%	0%
Bank Referral/ODN	0	0%	4.8%	5.4%
Other	1	4.8%	3.5%	5.4%
Total	**21**			

Figure C shows the number of years the respondent was admitted to practice in New Hampshire at the time the complaint was docketed.

FIGURE C

	2020	Percentage In 2020	Percentage in 2019	Percentage in 2018
1 – 5 years in practice	2*	11.8%	14%	5.4%
6 – 10 years in practice	1	5.9%	5%	10.8%
11 – 15 years in practice	3	17.6%	14%	16.2%
16 – 20 years in practice	4**	23.5%	5%	8.1%
21 – 25 years in practice	1	5.9%	19%	16.2%
26 – 30 years in practice	0	0%	5%	13.5%
31 – 35 years in practice	4**	23.5%	19%	5.4%
36+ years in practice	2	11.8%	19%	24.3%
Total Attorneys	**17**			

*One attorney had 3 cases docketed against him but is only counted once.
** Two attorneys had 2 cases docketed against them but are only counted once.

The CSC considered 68 matters in 2020 with the outcomes shown in **Figure D**.

FIGURE D

	2020	2019	2018
Requests to Reconsider Matters Not Docketed (denied)	40	34	20
Matters Docketed upon Reconsideration of Non-docket	3	2	1
Requests to Reconsider CSC Dismissals (denied)	1	1	3
Matters Referred to Disciplinary Counsel	13	18	24
Dismissals with no Professional Misconduct	5	5	12
Diversion Proposed	3	1	0
Diversion Completed, Case Closed	3	4	2
Total	**68**	**65**	**62**

Figure E is a listing of the Rules of Professional Conduct violations found in 2020. Some matters resulted in multiple Rule violations and two lawyers had discipline imposed in three and six different complaints respectively. These complaints were consolidated. All matters necessarily also include a violation of Rule 8.4(a).

FIGURE E

	2020	**2019**	**2018**
Rule 1: Client-Lawyer Relationship			
1.1 Competence	8	5	6
1.2 Scope of Representation	1	1	1
1.3 Diligence	8	3	6
1.4 Communication	7	3	8
1.5 Fees	1	2	2
1.6 Confidentiality	0	1	1
1.7 Conflict	0	1	4
1.8 Other Conflict	1	1	0
1.9 Conflict – Former Client	0	0	1
1.14 Client with Diminished Capacity	0	0	0
1.15 Safekeeping Property	6	9	7
1.16 Terminate Relationship with Client	4	0	0
1.19 Disclosure of Information to the Client	0	0	0
Rule 3: Advocate			
3.1 Meritorious Claims and Contentions	0	2	1
3.2 Expediting Litigation	0	0	0
3.3 Candor to Court	6	3	5
3.4 Fairness to Opposing Party	6	2	1
3.5 Impartiality and Decorum of the Tribunal	1	1	0
Rule 4: Transactions with Persons other than Clients			
4.1 Truthfulness in Statements to Others	0	1	2
4.4 Respect for Rights of Third Persons	0	0	0
Rule 5: Law Firms and Associations			
5.3 Responsibilities Regarding Non-lawyer Assistants	1	1	0
5.4 Professional Independence of a Lawyer	0	0	0
5.5(a) Unauthorized Practice	1	2	0
Rule 8: Integrity of the Profession			
8.1(a) False Statement of Material Fact	0	0	1
8.1(b) Failure to Correct a Misapprehension	1	1	0
8.1(c) Failure to Attend Disciplinary Hearing	9	0	0
8.4(b) Criminal Act	0	1	1
8.4(c) Dishonesty, Fraud, Deceit, or Misrepresentation	1	4	6
8.4(d) Influence of Government Official	0	0	0
Supreme Court Rule 50	3	6	3
Total Violations	**65**	**50**	**56**

The PCC made the determinations and findings shown in **Figure F**. The PCC considers the Rule(s) violated, and balances mitigating and aggravating factors, when deciding the outcome of a case. If an attorney had findings in multiple docketed matters, he/she is only counted once. Effective July 1, 2018, the PCC no longer acts on requests for reciprocal discipline. Those matters are now handled directly by the Supreme Court.

FIGURE F

	2020	2019	2018
Closed Without Prejudice	0	2	3
Dismissal	3	2	6
Remand Case to Hearing Panel for Sanction Hearing	0	0	1
Reject Stipulation and Remand Case to Disciplinary Counsel	0	2	2
Approved Diversion by Agreement	0	1	4
Rejected Diversion by Agreement	1	1	0
Approved Stipulation to Facts, Rules and Reprimand	2	6	5
Approved Stipulation to Facts, Rules and Public Censure	0	0	2
Approved Stipulation to Facts, Rules and Public Censure Stayed	0	1	0
Approved Stipulation to Facts, Rules and 6 Mo. Suspension	0	0	0
Approved Stipulation to Facts, Rules and 1 Yr. Suspension	1	0	0
Approved Stipulation to Facts, Rules and 1 Yr. Suspension Stayed	1	0	0
Approved Stipulation to Facts, Rules and 2 Yr. Suspension	0	1	0
Approved Stipulation to Facts, Rules and 2 Yr. Suspension Stayed	0	1	0
Approved Stipulation to Facts, Rules and 3 Yr. Suspension	0	0	0
Approved Stipulation to Facts, Rules and Disbarment	0	1	3
Sanction issued after Motion to Impose Stayed Sanction:			
Reprimand	0	1	0
3 Mo. Suspension Stayed	0	1	0
6 Mo. Suspension	0	0	0
Recommend Disbarment	0	0	0
Sanction issued after a Hearing:			
Reprimand	1	2	1
Public Censure	0	1	1
6 Mo. Suspension	0	0	0
Recommend 1 yr. Suspension	1	0	0
Recommend 2 yr. Suspension	0	1	1
Recommend 3 yr. Suspension	0	1	0
Recommend Disbarment	3	0	1
Recommendation to Approve Request to Resign Under Discipline	0	1	0
Recommendation to Deny Request to Resign Under Discipline	1	0	1
Grant Motion for Protective Order	3	2	1
Deny Motion for Protective Order	2	1	0
Deny Motion to Terminate Proceedings	1	0	0
Grant Motion for Alternate Service	0	1	0
Deny Request for Reconsideration	2	1	1
Extension of Stayed Sanction	0	0	0
Dismissal\Closed Following Diversion or Monitoring	2	5	10

	2020	2019	2018
Annulment Denied	1	1	0
Annulment Granted	2	0	0
Request for reinstatement forwarded to Hearings Committee	0	0	1
Recommendation to approve reinstatement with conditions	0	1	0
Total	**27**	**38**	**46**

IV. OTHER

When a solo practitioner is disbarred, suspended, incapacitated or dies, the ADO will recommend to the Supreme Court the appointment of an attorney to inventory the solo practitioner's files and IOLTA accounts. The ADO then locates and provides to the Supreme Court the names of attorneys who have agreed to be considered for appointment. If the Supreme Court appoints an attorney, the ADO provides guidance to the appointed attorney on how to conduct the inventory. The ADO has begun to conduct inventories in-house. In 2020, the ADO was appointed to conduct inventories in two matters. In addition, the ADO continued to inventory the client files in a matter in which it was appointed in 2019.

Staff attorneys served as faculty in a variety of educational programs in 2020. These programs included New Hampshire Bar Association CLEs: Best Practices for Closing a Law Practice (MPC); 14th Annual Ethics CLE (EMM); and How NHLAP Works (BRM). In addition, ADO staff attorneys served as guest lecturers at the UNH Law School Professional Responsibility classes in the spring (MPC) and fall (SSG & MPC) semesters. Finally, the ADO also presented a CLE on Common Issues with IOLTA Accounts to the Inns of Court (MPC) and an ethics CLE for state workers (SSG & MPC).

ADO attorneys are also active in the New Hampshire Bar Association. General Counsel Brian Moushegian serves on the Committee for the Cooperation with the Courts. Currently, Disciplinary Counsel Sara Greene sits on the Rules Advisory Committee as the ADO designee. Deputy General Counsel Mark Cornell is on the Committee on Lawyer Referral Services and Assistant General Counsel Andrea Labonte is a member of the governing board for the New Hampshire Pro Bono Referral Program.

V. ATTORNEY DISCIPLINE MATTERS AT THE SUPREME COURT

Pursuant to Supreme Court Rule 37(9), General Counsel must notify the Court when lawyers have been indicted or convicted of serious crimes and may file petitions for interim suspension or disbarment as appropriate in those cases. In 2020, the ADO did not receive any notifications that an attorney had been convicted of a serious crime. No interim suspensions were requested in 2020.

General Counsel also filed two requests for reciprocal discipline stemming from

discipline in other jurisdictions. The Supreme Court issued public censures in both matters.

After reviewing matters filed by the PCC, the Supreme Court disbarred one lawyer, suspended two lawyers for one year each, issued a stayed one-year suspension in another matter, suspended one lawyer for two years, and suspended one lawyer for three years (with part of the term of suspension stayed). The Court denied one request to resign while a disciplinary case was pending. The Court also issued reciprocal discipline in three cases and reinstated one attorney that had previously been suspended in a reciprocal case. Finally, the Court dismissed an appeal of the Professional Conduct Committee's denial of a request for a protective order.

Two matters involving PCC recommendations and one Petition for Original Jurisdiction were pending with the Court at year's end.

VI. CONCLUSION

As of December 31, 2020, there were 26 grievances and 27 docketed matters pending at the ADO. Of the docketed matters, four were in the investigation stage with General Counsel and one docketed matter awaiting a decision by the CSC. Eight requests for reconsideration of matters not docketed by GC were pending with the CSC at the end of the year.

There were eight docketed matters involving seven lawyers pending with Disciplinary Counsel, five docketed matters were pending with the Hearings Committee, two docketed matters involving one lawyer were pending at the PCC, four docketed matters involving two lawyers were pending with the Supreme Court and three docketed matters were being monitored by the ADO for compliance with conditions in previous orders issued or as part of a diversion.