

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT OF NEW HAMPSHIRE

O R D E R

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51, the Supreme Court of New Hampshire adopts the following amendments to court rules.

1. Supreme Court Rule 37A(II)(a)(3) re procedure after receipt of grievances in attorney discipline system. The court amends this rule on a temporary basis as set forth in Appendix A.

2. Supreme Court Rule 37A(IV) re confidentiality and public access to records of the attorney discipline system. The court amends this rule on a temporary basis as set forth in Appendix B.

3. Supreme Court Rule 42(4)(a) re pre-legal education requirement for applicants who wish to take the bar exam. The court amends this rule on a temporary basis as set forth in Appendix C.

4. Supreme Court Rule 42(4)(c) re requirements for graduates of foreign law schools who wish to take the bar exam. The court amends this rule on a temporary basis as set forth in Appendix D.

5. Supreme Court Rule 42(5)(h) confidentiality of applications to take the bar exam. The court amends this rule on a temporary basis as set forth in Appendix E.

6. Superior Court Rule 42(5)(j) re character and fitness committee recommendations. The court amends this rule on a temporary basis as set forth in Appendix F.

7. Superior Court Rule 170-B re judge-conducted intensive mediation procedures. The court amends this rule on a temporary basis as set forth in Appendix G.

In addition, the court hereby gives notice that the 2004 ABA Model Code Comment and the New Hampshire Comment shall be appended to New Hampshire Rules of Professional Conduct, Rule 3.6 as set forth in Appendix H,

and the New Hampshire Comment to New Hampshire Rules of Professional Conduct, Rule 1.4 is amended as set forth in Appendix I.

**Effective Dates**

The temporary amendments to court rules in Appendices A, B, C, D, E, and F shall take effect on February 1, 2008. The temporary amendments to court rules in Appendix G and the amendments to the comments to the rules of professional conduct in Appendices H and I shall take effect on January 1, 2008. The amendments in Appendix G shall be referred to the Advisory Committee on Rules for its recommendation as to whether they should be adopted on a permanent basis.

Date: December 21, 2007

ATTEST: \_\_\_\_\_  
Eileen Fox, Clerk  
Supreme Court of New Hampshire

## APPENDIX A

Amend Supreme Court Rule 37A(II)(a)(3) on a temporary basis as follows (new material is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

### *(3) Procedure after Receipt of Grievance*

(A) *Initial Screening of Grievance.* General counsel shall review each grievance upon receipt to determine whether the grievance is within the jurisdiction of the attorney discipline system and whether the grievance meets the requirements for docketing as a complaint.

**[When necessary, general counsel may request additional information or documents from the grievant. Except for good cause shown, failure of a grievant to provide such additional information and/or documents within twenty (20) days may result in general counsel processing the grievance based on the then existing file, or dismissing the complaint without prejudice.]**

**Upon receipt of the above information, general counsel may allow a respondent thirty (30) days to file a voluntary response if it is deemed necessary to assist in the evaluation process.**

**Extensions of time are not favored.]**

(B) *Requirements for Docketing Grievance as a Complaint.* A grievance shall be docketed as a complaint if it is within the jurisdiction of the attorney discipline system and it meets the following requirements:

(i) *Violation Alleged.* ~~It contains a statement of facts which, if true, would establish a violation of a disciplinary rule.~~ **[contains: (a) a brief description of the legal matter that gave rise to the grievance; (b) a detailed factual description of the respondent's conduct; (c) the relevant documents that illustrate the conduct of the respondent, or, if the grievant is unable to provide such documents, an explanation as to why the grievant is unable to do so; and (d) whatever proof is to be provided, including the name and addresses of witnesses to establish a violation of a disciplinary rule.]**

(ii) *Standing.* With the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, it ~~was~~ **[must be]** filed by a person who is directly affected by the conduct complained of or who

was present when the conduct complained of occurred, and contains a statement establishing these facts.

(iii) *Oath or Affirmation.* It is typed or in legible handwriting and, with the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, signed by the grievant under oath or affirmation, administered by a notary public or a justice of the peace. The following language, or language that is substantially equivalent, must appear above the grievant's signature: "I hereby swear or affirm under the pains and penalties of perjury that the information contained in this grievance is true to the best knowledge."

(iv) *Limitation Period.* It was filed with the attorney discipline office within the period of limitation set forth in section (I)(i).

(C) *Treatment of Grievance Not Within Jurisdiction of Attorney Discipline System or Failing to Meet Complaint Requirements.* A grievance that is not within the jurisdiction of the attorney discipline system or that does not meet the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B) shall not be docketed and shall be ~~disposed of~~ **[dismissed]** in accordance with section (II)(a)(4).

## APPENDIX B

Amend Supreme Court Rule 37A(IV) on a temporary basis as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

### (IV) **Confidentiality and Public Access**

#### (a) *Confidentiality of and Public Access to Proceedings and Records.*

(1) *General Rule.* The confidentiality of and public access to records, files and proceedings shall be governed by Supreme Court Rule 37.

#### (2) *Public Access to Files.*

(A) *Grievance against Person Not Subject to Rules of Professional Conduct.* Correspondence to the grievant relating to a grievance against a person who is not subject to the rules of professional conduct shall be available for public inspection for a period of two years. After this two-year period, the correspondence shall be destroyed.

(B) *Grievance Not Docketed as a Complaint.* All records (other than work product, internal memoranda and deliberations) relating to a grievance filed against a person who is subject to the rules of professional conduct but which is not docketed as a complaint, shall be maintained at the attorney discipline office for two (2) years from the date of original filing, and it shall be available for public inspection during this period. After this two-year period, the records shall be destroyed.

(C) *Complaints.* All records (other than work product, internal memoranda and deliberations) relating to a complaint that is docketed shall be maintained at the attorney discipline office and shall be available for public inspection in accordance with the provisions of Supreme Court Rule 37. Paper records may be destroyed after:

(i) three years of the date of notice of dismissal, ~~with or without~~ **[without]** a caution; or

(ii) three years of the date of an annulment in accordance with section (V) of this rule; or

(iii) five years after the death of the attorney-respondent.

(D) *Index of Complaints.* The attorney discipline office shall maintain an index of complaints docketed against each attorney, which shall contain pertinent information, including the outcome of the complaint. No index of grievances that are not docketed as complaints shall be maintained.

(E) *Protective Order.* Any person or entity, at any point in the processing of a complaint, may request a protective order from the professional conduct committee, or the committee may issue on its own initiative, a protective order prohibiting the disclosure of confidential, malicious, personal, or privileged information or material submitted in bad faith, and directing that the proceedings be so conducted as to implement the order. Upon the filing of a request for a protective order, the information or material that is the subject of the request shall be sealed pending a decision by the professional conduct committee. The professional conduct committee shall act upon the request within a reasonable time. Within thirty (30) days of the committee's decision on a request for protective order, or of the committee's issuance of one on its own initiative, an aggrieved person or entity may request that the supreme court review the matter. The material in question shall remain confidential after the committee has acted upon the request for protective order until such time as the supreme court has acted, or the period for seeking supreme court review has expired. A motion for review of the professional conduct committee's decision about issuance of a protective order shall be filed as a confidential matter in the supreme court.

## APPENDIX C

Amend Supreme Court Rule 42(4)(a) on a temporary basis as follows  
(new language to be added is in **[bold and in brackets]**; current language to be  
deleted is in ~~striketrough mode~~):

(4)(a) Every such applicant must furnish satisfactory proof that before beginning the study of law the applicant successfully completed at least three (3) years of work required for a bachelor's degree in an accredited college **[or received an equivalent education in the opinion of the court. An applicant who has not successfully completed at least three (3) years of work required for a bachelor's degree in an accredited college shall have the burden of proving that the requirements of this paragraph have been met. In addition to filing the petition and questionnaire for admission, any such applicant must submit information sufficient for the court to determine that the requirements of this paragraph have been met].**

## APPENDIX D

Amend Supreme Court Rule 42(4)(c) on a temporary basis as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~striketrough mode~~):

(c) Notwithstanding the foregoing paragraph, a person who has graduated from a law school in an English-speaking, common law country and who has pursued a course of study substantially equivalent to that of a law school approved by the American Bar Association shall be eligible to apply for examination provided that such person is ~~(a)~~ a member in good standing of the bar of that country, ~~or (b)~~ **[and (a)]** the holder of a master's degree from a law school approved by the American Bar Association, or ~~(c)~~ **[(b)]** a member of the bar of one of the States of the United States who was admitted after examination and is in good standing. Any person who seeks admission to practice law in the State of New Hampshire who is a graduate of a law school in a foreign country shall have the burden of proving that the requirements of this paragraph have been met. In addition to filing the petition and questionnaire for admission, any foreign law school graduate seeking admission must file an affidavit, signed under oath, attesting that the requirements of this paragraph have been met and submitting information sufficient for the court to determine that the requirements have been met.

## APPENDIX E

Amend Supreme Court Rule 42(5)(h) on a temporary basis as follows  
(new language to be added is in **[bold and in brackets]**; current language to be  
deleted is in ~~striketrough mode~~):

(h) **[The petition and questionnaire filed by an applicant, with the exception of the applicant's name and address, all]** All matters referred to the committee for investigation**[, and all information relating to an applicant gathered by the committee]** shall be confidential. No member of the committee at any time, either while a member of the committee or thereafter, shall disclose any matter in any file, except at the request of the committee, or the supreme court or unless legally required to do so. All minutes or records circulated to members of the committee shall be kept confidential. All records relating to matters referred to the committee shall be retained in the committee's ~~permanent~~ files.

## APPENDIX F

Amend Supreme Court Rule 42(5)(j) on a temporary basis as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

(j) **[If the recommendation of the committee on character and fitness is in favor of admission, the court may accept the recommendation and grant the application for admission or decline to accept the recommendation. If the court determines that the recommendation of the committee should not be accepted, it shall either remand the matter to the committee for further investigation and consideration or refer the matter to a referee for an evidentiary hearing during which the applicant shall have the burden of proving his or her good moral character and fitness.]** If the recommendation of the committee on character and fitness is against admission, the report of the committee shall set forth the facts upon which the adverse recommendation is based and its reasons for rendering an adverse recommendation. The committee shall promptly notify the applicant about the adverse recommendation and shall give the applicant an opportunity to appear before it and to be fully informed of the matters reported to the court by the committee, and to answer or explain such matters.

## APPENDIX G

Amend Superior Court Rule 170-B on a temporary basis as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

### 170-B. *Judge-Conducted Intensive Mediation of Certain Cases.*

(A) For purposes of this rule only, the term “complex case” shall mean: (1) with respect to any case in which the relief sought is monetary damages, a case wherein there is a realistic possibility the damages awarded could exceed \$250,000.00; and (2) with respect to any case in which relief other than monetary damage is sought, a case wherein the trial can reasonably be expected to last more than five trial days.

(B) Upon agreement of the parties, the presiding justice may assign a complex case for intensive mediation. Such assignment may be made at or at any time after the initial Rule 62 conference but shall not be made later than 90 days before the trial date except for good cause shown. Assignment of a case to intensive mediation shall not stay, alter, suspend, or delay pretrial discovery, motions, hearings, conferences or trial unless the presiding justice so orders.

(C) The mediator for intensive mediation conducted under this rule shall be an active, senior active or retired superior court justice other than the justice to whom the case has been assigned for trial or who has presided over any pretrial hearings or ruled upon any pretrial motions. The justice who serves as mediator and all persons who participate in the mediation shall have no communication with the justice to whom the case is assigned for trial concerning the mediation or any matter pertaining to the merits of the case. All justices who serve as mediators pursuant to this rule shall have completed an approved mediation training program. The provisions of Rule ~~170(D)(2), 170(E) and 170(J)~~ **[170(C)(3)]** shall apply to all superior court justices who serve as mediators under this rule.

**[The litigants and counsel must recognize that the neutrals will not be acting as legal advisors or legal representatives. They must further recognize that, because the neutrals are performing quasi-judicial functions and are performing under the auspices of the Court, each such neutral has immunity from suit, and shall not be called as a witness in any subsequent proceeding relating to the parties' negotiations and/or his/her participation, except as set forth in Rule 170(F).]**

(D) The parties shall be provided at least 30 days advance notice of the date, time and location of the mediation session and of the name of the justice who will be serving as the mediator. Any party claiming grounds to recuse the justice assigned as mediator, shall file a motion for such relief within 10 days after the date of the notice scheduling the mediation. Any such motion shall be referred for ruling to the justice assigned as the mediator and said justice's ruling on the motion shall be final and not subject to further review. In the event the justice assigned as mediator grants the motion to recuse, the case shall be reassigned to another justice for mediation. Mediation sessions shall be held at a court facility but, subject to the availability of facilities, normally shall be held in a location other than the court wherein the case will be tried.

(E) Mediation under this rule shall be conducted in accordance with the procedures specified in Rule **[170(D) and 170(F),]** ~~170(G)(1), 170(H) and 170(I)~~, except that (1) the summaries submitted by the parties may be up to 10 pages in length ~~and (2) in addition to the materials listed in Rule 170(G)(1)(a), the parties at the same time also shall provide the mediator with an estimate of the time needed to properly mediate the case. Normally cases assigned under this rule shall be allotted one full day for mediation, but the mediator has the discretion to reduce or increase the time as s/he deems appropriate. The mediator also may schedule a pre-mediation conference if, in his or her discretion, such a conference will facilitate the speedy and efficient conduct of the mediation or resolution of the case.~~

## APPENDIX H

Append the 2004 ABA Model Code Comment and New Hampshire

Comment to Professional Conduct Rule 3.6 as follows:

### **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).

#### **New Hampshire 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.

## **APPENDIX I**

Amend the New Hampshire Comment to Professional Conduct Rule 1.4 by substituting "2.1" for "2.2" wherever it appears, so that said Comment, as amended, shall state as follows:

### **New Hampshire Comment**

Attorneys seeking to determine the scope of the duty to communicate under this rule should also review ABA Comment 5 to Rule 2.1. That Comment states that when a matter is likely to involve litigation, Rule 1.4 may require a lawyer "to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." This comment may prove important given the overlap of Rules 2.1 and 1.4, the increasingly important role of alternative dispute resolution in litigation, and the implications this duty might have for a lawyer's civil liability.