NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

PUBLIC HEARING NOTICE

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 12:30 p.m. on Friday, December 8, 2017, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before December 7, 2017 or may be submitted at the hearing on December 8, 2017. Comments may be e-mailed to the Committee on or before December 7, 2017 at:

rulescomment@courts.state.nh.us

Comments may also be mailed or delivered to the Committee at the following address:

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Any suggestions for rules changes other than those set forth below may be submitted in writing to the secretary of the Committee for consideration by the Committee in the future.

Copies of the specific changes being considered by the Committee are available on request to the secretary of the Committee at the N.H. Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301

(Telephone 271-2646). In addition, the changes being considered are available on the Internet (in the Appendix to the Public Hearing Notice) at:

http://www.courts.state.nh.us/committees/adviscommrules/notices.htm

The changes being considered concern the following rules:

I. 2017-006. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

(This proposed amendment to Supreme Court Rule 36(3)(a) would allow part-time law students interning for, and supervised by, a New Hampshire attorney to appear before the Court.)

1. Amend Supreme Court Rule 36(3)(a), as set forth in Appendix A.

II. 2017-005. Supreme Court Rule 37(12). Reciprocal Discipline.

(This proposed amendment would amend Supreme Court Rule 37(12) to include a procedure for determining final discipline in cases in which the court concludes that the imposition of discipline identical or similar to the discipline imposed in another jurisdiction is unwarranted.)

1. Amend Supreme Court Rule 37(12), as set forth in Appendix B.

III. 2015-011. Supreme Court Rules 37. Reinstatement and Readmission.

(This proposed amendment would delete and replace Supreme Court Rule 37(14). The proposed new rule sets out in three distinct sections the procedures to be followed in reinstatement and readmission cases, depending upon whether an attorney has been: (a) suspended for six months or less; (b) suspended for more than six months; or (c) has been disbarred.)

1. Amend Supreme Court Rule 37(14), as set forth in Appendix C.

IV. 2017-014. Supreme Court Rule 37(16). Dispositive Stipulations.

(This proposed amendment would address attorney discipline matters resolved by dispositive stipulation.)

1. Amend Supreme Court Rule 37(16), as set forth in Appendix D.

V. 2017-003. Supreme Court Rule 37A. Procedure After Receipt of a Grievance.

(These proposed amendments to Supreme Court Rule 37A would give the Attorney Discipline Office discretion not to docket a grievance if it determines that a hearing panel would be unlikely to find clear and convincing evidence that the respondent attorney violated the Rules of Professional Conduct.)

1. Amend Supreme Court Rule 37A(I)(c)("Definitions"), as set forth in Appendix E.

2. Amend Supreme Court Rule 37A(II)("Investigations and Informal Proceedings"), as set forth in Appendix F.

VI. 2016-014. Superior Court Rules and Supreme Court Rules. In Camera Review of Documents.

(The Committee requests comment on two different sets of proposed rules. Both sets of proposed rules would amend the Superior Court Rules to codify the procedure used by the Superior Court when conducting the in camera review of confidential records and would amend the Supreme Court Rules to codify the procedure for appellate review of rulings on these matters.

The proposal set forth in Appendix G is identical to the proposal set forth in a March 6, 2017 letter from Chief Appellate Defender Christopher M. Johnson and would apply in both civil and criminal cases. The proposal set forth in Appendix H establishes different in camera review procedures depending upon who is seeking access to the confidential records. One set of procedures would apply to civil litigants and the prosecution in criminal cases. A separate set of procedures would apply to cases in which a criminal defendant seeks access to confidential records.

For background regarding these proposals, please see the Advisory Committee on Rules minutes and materials (docket #2016-004), found at https://www.courts.state.nh.us/committees/adviscommrules/index.htm.)

1. Adopt Superior Court Rule 209, as set forth in Appendix G(1).

2. Adopt Supreme Court Rule 12-A, as set forth in Appendix G(2).

3. Adopt Superior Court Rule 209, as set forth in Appendix H(1).

4. Adopt Criminal Procedure Rule 54, as set forth in Appendix H(2).

5. Adopt Supreme Court Rule 12-A, as set forth in Appendix H(3).

VII. 2016-013. Superior Court Rule 12(g). Motions for Summary Judgment.

(This proposed amendment would delete and replace Superior Court Rule 12(g). The proposed amendment would require both sides in the context of a motion for summary judgment to submit a single document identifying any undisputed facts and any facts. The purpose of the proposed amendment is to make it easier for judge to determine what facts are in dispute and what are not.)

1. Amend Superior Court Rule 12(g), as set forth in Appendix I.

VIII. 2017-015. Superior Court (Civ.) Rule 7 and Criminal Procedure Rule 21. Motions.

(These proposed amendments would prohibit filers from combining multiple motions seeking separate and distinct relief into a single filing.)

1. Amend Superior Court (Civ.) Rule 7, as set forth in Appendix J.

2. Amend Criminal Procedure Rule 21, as set forth in Appendix K.

IX. 2017-011. New Hampshire Rule of Evidence 404(b).

(This proposed amendment would codify the three-part test adopted by the New Hampshire Supreme Court for admitting evidence under Rule 404(b), but would change the second prong of the test. The second prong currently requires "clear proof" that the person committed the other crime, wrong or act. This proposed amendment would change the second prong to adopt the federal standard.)

1. Amend New Hampshire Rule of Evidence 404(b), as set forth in Appendix L.

X. 2016-008. Rules of Professional Conduct and Conflicts Between State or Local Law and Federal Law.

(This proposed amendment to New Hampshire Rule of Professional Conduct 1.2 would address the application of Rule 1.2(d) to cases in which conduct expressly permitted by state or local law conflicts with federal law.)

1. Amend New Hampshire Rule of Professional Conduct 1.2, as set forth in Appendix M.

New Hampshire Supreme Court
Advisory Committee on Rules

By: Robert J. Lynn, Chairperson
and Carolyn A. Koegler, Secretary

October 23, 2017

APPENDIX A

Amend Supreme Court Rule 36(3)(a) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(3) In order to be eligible to appear:

(a) the student shall

(1) be enrolled **[at least 75% of]** full-time in a law school approved by the American Bar Association. The student shall be deemed to continue to meet this requirement as long as, following graduation, he or she is preparing to take and does take the next State bar examination of the State of his or her choice for which he or she is eligible or, having taken that examination, the student is awaiting publication of the results of, or admission to the bar after passing, that examination;

(2) have completed legal studies amounting to at least four **[full-time]** semesters, or the equivalent, or have completed two semesters and be enrolled in a law school clinical course with a classroom component geared to training the students for the work, and be of good moral character and fitness;

(3) be certified, by either the dean or a faculty member of his or her law school designated by the dean, as qualified to provide the legal representation permitted by this rule. This certification may be withdrawn by the dean or designated faculty member by mailing a notice of withdrawal to the clerk of this court at any time without notice or hearing and without any showing of cause. The loss of certification by action of this court shall not be considered a reflection on the character or ability of the student. The dean or a faculty member designated by the dean may recertify such a student for appearances under this rule;

APPENDIX B

Amend Supreme Court Rule 37(12) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(12) ***Reciprocal Discipline:***

(a) Upon being disciplined in another jurisdiction, an attorney admitted to practice in this State shall immediately notify the attorney discipline office of the discipline. Upon notification from any source that an attorney admitted to practice in this State has been disciplined in another jurisdiction, the attorney discipline office shall obtain a certified copy of the disciplinary order and shall file it with the court.

(b) Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this State has been disciplined in another jurisdiction, the court may enter a temporary order imposing the identical or substantially similar discipline or, in its discretion, suspending the attorney pending the imposition of final discipline. The court shall forthwith issue a notice directed to the attorney and to the ~~professional conduct committee~~ **[Attorney Discipline Office]** containing:

(1) A copy of the order from the other jurisdiction; and

(2) An order directing that the attorney or ~~professional conduct committee~~ **[Attorney Discipline Office]** inform the court within thirty (30) days from service of the notice, of any claim by the lawyer or professional conduct committee predicated upon the grounds set forth in subparagraph (d), that the imposition of the identical or substantially similar discipline in this State would be unwarranted and the reasons for that claim.

(c) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until the stay expires.

(d) Upon the expiration of thirty (30) days from service of the notice pursuant to subparagraph (b), the court shall issue an order of final discipline imposing the identical or substantially similar discipline unless the attorney or ~~professional conduct committee~~ **[Attorney Discipline Office]** demonstrates, or the court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) The imposition of the same or substantially similar discipline by the court would result in grave injustice; or

(3) The misconduct established warrants substantially different discipline in this State.

[(e) If the court determines that one of the factors set forth in paragraph (d) is present, the court shall refer the matter to the Professional Conduct Committee for its recommendation regarding the discipline to be imposed.]

APPENDIX C

Delete Supreme Court Rule 37(14) and replace it with the following:

(14) *Reinstatement and Readmission:*

(a) *Reinstatement Following Suspension of Six Months or Less*. An attorney who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated by the professional conduct committee following the end of the period of suspension upon the filing of a motion for reinstatement. The motion for reinstatement shall be filed with the professional conduct committee and served upon disciplinary counsel and shall be accompanied by:

(1) an affidavit stating that he or she has fully complied with the requirements of the suspension order and has paid any required fees and costs; and

(2) evidence that he or she has satisfactorily completed the Multistate Professional Responsibility Examination since his or her suspension.

(b) *Reinstatement Following Suspension of More Than Six Months.*

(1) An attorney suspended by the court for misconduct, other than for disability, for more than six months shall be reinstated only upon order of the court. No attorney may petition for reinstatement until the period of suspension has expired.

(2) *Petition.* An attorney who seeks reinstatement following suspension of more than six months shall file a petition for reinstatement with the court. The petition shall be accompanied by a completed reinstatement form and the requisite filing fee.[1] The petition shall be under oath and shall:

(A) specify with particularity the manner in which the petitioner has fully complied with the terms and conditions set forth in all prior disciplinary orders; and

(B) certify that the petitioner has taken the Multistate Professional Responsibility Examination after entry of the order of suspension, and has received a passing grade as established by the board of bar examiners.

[1] There currently is no fee for a petition for reinstatement after a disciplinary suspension. The subcommittee makes no recommendation as to whether a fee should be collected, and, if so, what the amount of the fee should be. It notes that there is a $250 filing fee for a petition for reinstatement after an administrative suspension, *e.g.*, suspension for failure to meet MCLE requirements. Unlike administrative suspension cases, however, an attorney suspended for disciplinary reasons typically is required to reimburse the PCC for the cost of the disciplinary proceeding prior to seeking reinstatement, and the amount required to be reimbursed may be substantial.

(3) *Initial Review of Petition and Reinstatement Form.* The court will review the petition and reinstatement form to determine whether the certifications required by subsection (2) of this rule have been provided and whether the reinstatement form is complete. If so, the court shall refer the petition and reinstatement form to the professional conduct committee, and shall provide a copy of the petition and reinstatement form to the attorney discipline office.

(4) *Publication of Notice of Petition.* If the court refers the petition to the professional conduct committee, the professional conduct committee shall cause a notice to be published in a newspaper with statewide circulation, and one with circulation in the area of the petitioner's former primary office, as well as the *New Hampshire Bar News* that the petitioner has moved for reinstatement. The notice shall also be posted on the court's website. The notice shall invite anyone to comment on the petition by submitting said comments in writing to the professional conduct committee within twenty (20) days. All comments shall be made available to the petitioner. Where feasible, the professional conduct committee shall give notice to the original complainant.

(5) *Hearing.* Upon receipt of the petition, the professional conduct committee may either recommend reinstatement or refer the petition to the hearings committee for prompt appointment of a hearing panel.

(A) The hearing panel chair shall conduct and hold a prehearing conference within thirty (30) days of the appointment of the hearing panel.

(B) The hearings committee shall conduct a hearing within 120 days of the appointment of the hearing panel.

(C) The petitioner shall bear the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competence, and learning in the law required for admission to practice law in this State and that the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive to the public interest.

(D) Attorneys from the attorney discipline office may participate in the hearing to present evidence and to cross-examine the applicant and any witnesses.

(E) At the conclusion of the hearing, the hearing panel shall promptly file with the professional conduct committee a report containing its findings and recommendations and the record of the proceedings.

(6) *Review by the Professional Conduct Committee*. Following receipt of the report, the professional conduct committee shall:

(A) review the report of the hearing panel and the record;

(B) allow the filing of written memoranda by disciplinary counsel and the respondent;

(C) review the hearing transcript;

(D) hold oral argument if requested by a party or ordered by the Committee; and

(E) file its own findings and recommendations with the court, together with the record, and provide a copy of the recommendations and findings to the petitioner.

(7) *Final Order by the Court.* Following receipt of the recommendation and the record from the professional conduct committee:

(A) the court shall notify the petitioner and disciplinary counsel that they must, within 30 days of the court's order, identify any legal or factual issues the parties wish the court to review;

(B) if neither party identifies an issue for review, the court may act upon the recommendations without further proceedings;

(C) if either party identifies an issue for review, the court may issue a scheduling order setting forth a briefing schedule;

(D) the court shall, after filing of any briefs and oral arguments, make such order as justice may require.

(c) *Readmission Following Disbarment or Resignation While Under Disciplinary Investigation.*

(1) *Timing and Other Restrictions.* The following restrictions apply to any New Hampshire licensed attorney who has been disbarred by the court or who has resigned while under disciplinary investigation and who wishes to apply for readmission:

(A) the attorney may not apply for readmission until the expiration of seven years from the effective date of the disbarment or resignation.

(B) If the attorney has been disbarred in New Hampshire as a result of having been disbarred in another jurisdiction, *see* Supreme Court Rule 37(12)("Reciprocal Discipline"), he or she must be readmitted to practice law in the other jurisdiction prior to applying for readmission in New Hampshire.

(C) An attorney applying for readmission following disbarment may not apply for admission by motion pursuant to New Hampshire Supreme Court Rule 42(XI).

(2) *Petition.* An attorney who seeks readmission following disbarment or resignation while under disciplinary investigation shall file a petition for readmission with the court. The petition shall be under oath and shall:

(A) specify with particularity the manner in which the petitioner has fully complied with all of the terms and conditions set forth in all prior disciplinary orders;

(B) certify, if the attorney was disbarred in New Hampshire as a result of having been disbarred in another jurisdiction, that he or she has been readmitted to practice law in the other jurisdiction prior to applying for readmission in New Hampshire;

(C) certify that the petitioner has taken the New Hampshire Bar Examination within one year of the filing of the petition and has received a passing grade as established by the Board of Bar Examiners; and

(D) certify that the petitioner has taken the Multistate Professional Responsibility Examination after entry of the order of disbarment, and has received a passing grade as established by the Board of Bar Examiners.

(3) *Initial Review of Petition.* The court will review the petition to determine whether the certifications required by subsection (2) of this rule have been provided. If so, the court shall refer the petition to the professional conduct committee and the office of bar admissions character and fitness committee for the formation of a special committee on readmission to consider the petition and to make a recommendation to the court. The court shall provide a copy of the petition for readmission to the attorney discipline office.

(4) The petitioner's application to take the bar examination, including the petition and questionnaire for admission to the New Hampshire Bar, and all non-privileged documents on file with the office of bar admissions relating to the petition and questionnaire, shall be provided to the attorney discipline office. All documents on file with the office of bar admissions relating to the petition and questionnaire for admission to the New Hampshire Bar shall remain confidential and not available for public inspection, subject to the exceptions listed in Supreme Court Rule 42(IV)(g), until they are submitted as exhibits at the hearing before the special committee on readmission.

(5) *The Special Committee on Readmission.* Upon receipt of the petition, the chair of the professional conduct committee and the chair of the character and fitness committee shall promptly select members of each committee to serve on the special committee on readmission. Three members of the professional conduct committee and three members of the character and fitness committee shall serve on the special committee. One of the six members of the special committee shall be a layperson. The special committee shall select a chair.

(6) *Publication of Notice of Petition.* The special committee on readmission shall cause a notice to be published in a newspaper with statewide circulation, and one with circulation in the area of the petitioner's former primary office, as well as the *New Hampshire Bar News*, that the petitioner has moved for readmission. The notice shall also be posted on the court's website. The notice shall invite anyone to comment on the petition by submitting said comments in writing to the professional conduct committee within twenty (20) days. All comments shall be made available to the applicant. Where feasible,

the special committee on readmission shall give notice to the original complainant.

(7) *Hearing Before Special Committee on Readmission.*

(A) The special committee chair shall conduct and hold a prehearing conference within thirty (30) days of the appointment of the special committee on readmission.

(B) The special committee on readmission shall conduct a hearing within 120 days of the formation of the special committee.

(C) The applicant shall bear the burden of demonstrating by clear and convincing evidence that he or she has the competence and learning in the law required for admission to practice law in this State and that the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive to the public interest.

(D) The applicant shall also bear the burden of demonstrating by clear and convincing evidence that he or she has good moral character and fitness. *See* Supreme Court Rule 42B.

(E) The special committee on readmission shall hold a hearing on the record and, for good cause, may order that the hearing or portions of the hearing be closed to the public, and, for good cause, may order that exhibits be sealed.

(F) Attorneys from the attorney discipline office and/or the office of bar admissions may participate in the hearing to present evidence and to cross-examine the applicant and any witnesses.

(G) At the conclusion of the hearing, the special committee shall provide a copy of its written findings and recommendation to the petitioner. Unless the petitioner withdraws the petition within thirty days of the date of the written findings and recommendations, the report together with the record, shall be filed with the court.

(8) *Final Order by the Court.* Following receipt of the recommendation and the record from the special committee on readmission:

(A) the court shall notify the petitioner and disciplinary counsel that they must, within 30 days of the court's order, identify any legal or factual issues the parties wish the court to review;

(B) if neither party identifies issues for review, the court may act upon the recommendations without further proceedings;

(C) if either party identifies an issue for review, the court may issue a scheduling order setting forth a briefing schedule and any other matters as shall be deemed desirable or necessary;

(D) the court shall, after filing of any briefs and oral arguments, make such order as justice may require.

APPENDIX D

Amend Supreme Court Rule 37(16) as follows (new material is in **[bold and brackets]**):

(16) *Procedure*:

(a) Either a respondent attorney or disciplinary counsel may appeal findings of the professional conduct committee and the imposition of a reprimand, public censure or a suspension of six (6) months or less by filing a notice of appeal with the supreme court. The appeal shall not be a mandatory appeal. If the appeal is accepted by the court, the court may affirm, reverse or modify the findings of the professional conduct committee.

The filing of an appeal by the respondent shall stay the disciplinary order being appealed unless the professional conduct committee orders otherwise. If the professional conduct committee orders otherwise, it shall set forth in its order its reasons for doing so. In all cases, however, the supreme court may on motion for good cause shown stay the disciplinary order.

(b) The professional conduct committee shall initiate disciplinary proceedings requesting a discipline of greater than six (6) months in this court by filing the professional conduct committee's recommendation and the record of the proceedings with this court.

(c) Following receipt of the recommendation and the record, this court shall serve the respondent attorney with the recommendation at the latest address provided to the New Hampshire Bar Association. Simultaneously, the court shall notify the parties that the parties must, within 30 days of this court's order thereon, identify any legal or factual issues the parties wish this court to review. Thereafter, this court may issue a scheduling order setting forth a briefing schedule and any other matters as shall be deemed desirable or necessary. There shall not be a de novo evidentiary hearing. **[In matters resolved by dispositive stipulation, this paragraph shall not apply, though the court retains discretion to reject any dispositive stipulation in whole or in part, or to identify legal or factual issues it wishes the parties to address.]**

(d) The court may make such temporary orders as justice may require either with or without a hearing. Respondent attorney shall be entitled to be heard after any ex parte order.

(e) The court shall, after filing of any briefs and oral arguments, make such order as justice may require.

(f) The court may suspend attorneys or disbar New Hampshire licensed attorneys or publicly censure attorneys upon such terms and conditions as the court deems necessary for the protection of the public and the preservation of the integrity of the legal profession. The court may remand the matter to the professional conduct committee for such other discipline as the court may deem appropriate.

(g) In the event of suspension or disbarment, a copy of the court's order or the professional conduct committee's order, shall be sent to the clerk of every court in the State and to each State in which the respondent attorney is admitted to practice. The professional conduct committee shall continue to be responsible to insure respondent attorney's compliance with the order of suspension or disbarment, in the case of a New Hampshire licensed attorney, and to notify the court as to any violations for such action as the court deems necessary.

(h) In addition to the procedure described herein, the court may take such action on its own motion as it deems necessary.

(i) Appeals to the court shall be in the form prescribed by Rule 10, unless otherwise ordered by the court. Such appeals shall be based on the record and there shall not be a de novo evidentiary hearing.

APPENDIX E

Amend Supreme Court Rule 37A(I)(c) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(c) *Definitions*: Subject to additional definitions contained in subsequent provisions of this rule which are applicable to specific questions, or other provisions of this rule, the following words and phrases, when used in this rule, shall have, unless the context clearly indicates otherwise, the meaning given to them in this section:

Answer: The response filed by, or on behalf of, the respondent to a complaint or a notice of charges.

Attorney: Unless otherwise indicated, "Attorney," for purposes of this rule, means any attorney admitted to practice in this State, any attorney specially admitted to practice by a court of this State, any attorney not admitted or specially admitted in this State who provides or offers to provide legal services in this State or any non-lawyer representative permitted to represent other persons before the courts of this State pursuant to RSA 311:1.

Complaint: A grievance that, after initial review, has been determined by the attorney discipline office to be within the jurisdiction of the attorney discipline system and to meet the **[prerequisites]** ~~requirements~~ for docketing as a complaint as set forth in section (II)(a)(3)(B) of this rule, and that is docketed by the attorney discipline office, or a complaint that is drafted and docketed by the attorney discipline office after an inquiry by that office. If after docketing, the attorney discipline office general counsel or the complaint screening committee determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the **[prerequisites]** ~~requirements~~ for docketing **[set forth in sections II(a)(3)(B)(i)-(iv) of this rule]**, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

Court: The New Hampshire Supreme Court.

Disbarment: The termination of a New Hampshire licensed attorney's right to practice law in this State and automatic expulsion from membership in the bar of this State. A disbarred attorney may only apply for readmission to the bar of this State upon petition to the court, after having complied with the terms and conditions set forth in the disbarment order promulgated by the court which shall include all requirements applicable to applications for admission to the bar, including passing the bar examination and a favorable report by the professional conduct committee and the character and fitness committee.

Disciplinary Counsel: The attorney responsible for the prosecution of disciplinary proceedings before any hearings committee panel, the professional conduct committee and the supreme court. Disciplinary counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, such part-time attorney or attorneys as may from time to time be deemed necessary, and such other attorneys of the attorney discipline office as may from time to time be designated to assist disciplinary counsel.

Disciplinary Rule: Any provision of the rules of the court governing the conduct of attorneys or any rule of professional conduct.

Discipline: Any disciplinary action authorized by Rule 37(3)(c), in those cases in which misconduct in violation of a disciplinary rule is found warranting disciplinary action.

Diversion: Either a condition attached to discipline imposed by the professional conduct committee; or a referral, voluntary in nature, when conduct does not violate the rules of professional conduct; or non-disciplinary treatment by the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee as an alternative to discipline for minor misconduct.

Formal Proceedings: Proceedings subject to section (III) of this rule.

General Counsel: The attorney responsible for (a) receiving, evaluating, docketing and investigating grievances filed with the attorney discipline office; (b) dismissing or diverting complaints on the grounds set forth in Rule 37(6)(c) or presenting complaints to the complaint screening committee with recommendations for diversion, dismissal for any reason or referral to disciplinary counsel for a hearing; (c) assisting disciplinary counsel in the performance of the duties of disciplinary counsel as needed; (d) performing general legal services as required for the committees of the attorney discipline system; and (e) overseeing and performing administrative functions for the attorney discipline system. General counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, and such part-time attorney or attorneys as may from time to time be deemed necessary, and such other attorneys of the attorney discipline office as may from time to time be designated to assist general counsel.

Grievance: "Grievance" means a written submission filed with the attorney discipline office to call to its attention conduct that the grievant believes may constitute misconduct by an attorney. A grievance that is determined, after initial screening, not to be within the jurisdiction of the attorney discipline system and/or not to meet the **[prerequisites]** ~~requirements~~ for docketing as a complaint shall not be docketed and shall continue to be referred to as a grievance. A grievance that is determined, after initial screening, to be within the jurisdiction of the attorney discipline system and to meet the **[prerequisites]** ~~requirements~~ for docketing as a complaint shall be docketed as a complaint and shall be referred to thereafter

as a complaint; provided, however, that if the attorney discipline office general counsel or complaint screening committee later determines that the docketed complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the **[prerequisites]** ~~requirements~~ for docketing **[set forth in sections II(a)(3)(B)(i)-(iv) of this rule]**, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

Hearing Panel: A hearing panel comprised of members of the hearings committee.

Inquiry: A preliminary investigation of a matter begun by the attorney discipline office on its own initiative to determine whether a complaint should be docketed.

Investigation: Fact gathering by the attorney discipline office with respect to alleged misconduct.

Minor Misconduct: Conduct, which if proved, violates the rules of professional conduct but would not warrant discipline greater than a reprimand. Minor misconduct (1) does not involve the misappropriation of client funds or property; (2) does not, nor is likely to, result in actual loss to a client or other person of money, legal rights or valuable property rights; (3) is not committed within five (5) years of a diversion, reprimand, censure, suspension or disbarment of the attorney for prior misconduct of the same nature; (4) does not involve fraud, dishonesty, deceit or misrepresentation; (5) does not constitute the commission of a serious crime as defined in Rule 37(9)(b); and (6) is not part of a pattern of similar misconduct.

Notice of Charges: A formal pleading served under section (III)(b)(2) of this rule by disciplinary counsel.

Public Censure: The publication by the court or the professional conduct committee, in appropriate New Hampshire publications, including a newspaper of general statewide circulation, and one with general circulation in the area of respondent's primary office, as well as the *New Hampshire Bar News*, of a summary of its findings and conclusions relating to the discipline of an attorney, as defined in this section.

Referral: A grievance received by the attorney discipline office from any New Hampshire state court judge or from any member of the bar of New Hampshire, in which the judge or attorney indicates that he or she does not wish to be treated as a grievant.

Reprimand: Discipline administered by the professional conduct committee after notice of charges and after a hearing before a hearings committee panel and the right to request oral argument to the professional conduct committee in those cases in which misconduct in violation of the rules of professional conduct is found. A reprimand is administered by letter issued by the chair of the professional conduct committee, subject to an attorney's right to appeal such discipline to the court.

Suspension: The suspension of an attorney's right to practice law in this State, for a period of time specified by the court or by the professional

conduct committee. Suspension by the professional conduct committee may not exceed six (6) months. The suspended attorney shall have the right to resume the practice of law, after the expiration of the suspension period, upon compliance with the terms and conditions set forth in the suspension order promulgated by the court or the professional conduct committee and pursuant to the procedure set forth in section (II)(c)(2) regarding reinstatement.

APPENDIX F

Amend Supreme Court Rule 37A(II) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(II) ***Investigations and Informal Proceedings***

(a) *Preliminary Provisions*

(1) *Responsibility of Attorney Discipline Office.*

The attorney discipline office, through general counsel, shall investigate all matters involving alleged misconduct of attorneys which fall within the jurisdiction of the attorney discipline system and which satisfy the requirements of this rule.

(2) *Initiation of Investigation Process.*

(A) *Grievance*. Any person may file a grievance with the attorney discipline office to call to its attention the conduct of an attorney that he or she believes constitutes misconduct which should be investigated by the attorney discipline office**[, subject to section II(a)(3)(B)(ii)]**. If necessary, the general counsel or his or her deputy or assistant will assist the grievant in reducing the grievance to writing.

In accordance with a judge's obligation under canon 3 of the code of judicial conduct to report unprofessional conduct of any attorney of which the judge is aware, a judge of the supreme, superior, district or probate courts of New Hampshire, may refer any matter to the attorney discipline office which he or she believes may constitute misconduct by an attorney that should be investigated by the attorney discipline office. In accordance with an attorney's obligation under Rule 8.3 of the rules of professional conduct to report unprofessional conduct of an attorney of which he or she has knowledge, a member of the bar of New Hampshire, may refer any matter to the attorney discipline office which he or she believes may constitute misconduct by an attorney that should be investigated by the attorney discipline office. Except as otherwise provided, a referral from a court or attorney shall be treated as a grievance. Upon receipt of a referral, if the attorney discipline office shall determine that the referring judge or attorney does not wish to be treated as a grievant, and, if it is determined after initial screening that the grievance is within the jurisdiction of the attorney discipline office and meets the **[prerequisites]** ~~requirements~~ for docketing as a complaint as set forth in section (II)(a)(3)(B), the attorney discipline office shall process the grievance as an attorney discipline office generated complaint.

(B) *Attorney Discipline Office-Initiated Inquiry*. The attorney discipline office may, upon any reasonable factual basis, undertake and complete an inquiry, on its own initiative, of any other matter within its jurisdiction coming to its attention by any lawful means. Unless the attorney discipline office later

dockets a complaint against an attorney in accordance with section (II)(a)(5)(B), all records of such an inquiry shall be confidential.

(C) *Filing*. A grievance shall be deemed filed when received by the attorney discipline office.

(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 **[prerequisites]** ~~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 **[up to]** 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) **[Prerequisites]** ~~*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 **[prerequisites]** ~~requirements~~:

(i) *Violation Alleged*. It 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 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 contain 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 of my knowledge."

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

[(v) *Sufficiency of Allegations.* The attorney discipline office may decide not to docket a grievance as a complaint if it determines, based on its evaluation of the grievance, that a hearing panel would be unlikely to find clear and convincing evidence that the respondent attorney violated the rules of professional conduct.]

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

(4) *Disposition of Grievance after Initial Screening*.

(A) *Lack of Jurisdiction*. If the attorney discipline office determines that the person who is the subject of the grievance is not a person subject to the rules of professional conduct, general counsel shall return the grievance to the grievant with a cover letter explaining the reason for the return and advising the grievant that the attorney discipline office will take no action on the grievance. The person who is the subject of the grievance shall not be notified of it. No file on the grievance will be maintained. The attorney discipline office may bring the matter to the attention of the authorities of the appropriate jurisdiction, or to any other duly constituted body which may provide a forum for the consideration of the grievance and shall advise the grievant of such referral.

(B) *Failure to Meet Complaint* ***[Prerequisites]*** ~~*Requirements*~~. If the attorney discipline office determines that a grievance fails to meet the **[prerequisites]** ~~requirements~~ for docketing as a complaint, it shall so advise the grievant in writing. The attorney who is the subject of the grievance shall be provided with a copy of the grievance and the response by general counsel, and shall be given an opportunity to submit a reply to the grievance within thirty (30) days from the date of the notification or such further time as may be permitted by general counsel. The attorney's reply shall be filed in the record, which shall be available for public inspection in accordance with Rule 37(20).

(C) *Reconsideration of Attorney Discipline Office's Decision*. A grievant may file a written request for reconsideration of the attorney discipline office's decision that the grievance is not within the jurisdiction of the attorney discipline system or does not meet the **[prerequisites]** ~~requirements~~ for docketing as a complaint, but said request must be filed within ten (10) days of the date of the written notification. A request for reconsideration of the attorney discipline office's decision shall automatically stay the period in which the attorney may file a reply as provided for by section (II)(a)(4)(B). Any such request for reconsideration that is timely filed shall be presented by general counsel to the complaint screening committee which shall affirm the decision of the attorney discipline office or direct that the grievance be docketed as a complaint and processed in accordance with the following paragraph. If the decision of the attorney discipline office is affirmed, the attorney who is the

subject of the grievance shall be given the opportunity to submit a reply to the grievance within thirty (30) days from the date of the complaint screening committee's action on the request for reconsideration or such further time as may be ordered by that committee.

(5) *Docketing of Grievance as Complaint; Procedure Following Docketing of Complaint.*

(A) *Docketing of Grievance as Complaint.* If general counsel determines that a grievance is within the jurisdiction of the attorney discipline office and meets the **[prerequisites]** ~~requirements~~ for docketing as a complaint as set forth in section (II)(a)(3)(B), he or she shall docket it as a complaint.

(B) *Drafting and Docketing of Attorney Discipline Office-generated Complaint.* If, after undertaking and completing an inquiry on its own initiative, the attorney discipline office determines that there is a reasonable basis to docket a complaint against a respondent, a written complaint shall promptly be drafted and docketed.

(C) *Request for Answer to Complaint.* After a complaint is docketed, general counsel shall promptly forward to the respondent a copy of the complaint and a request for an answer thereto or to any portion thereof specified by the general counsel. Unless a shorter time is fixed by the general counsel and specified in such notice, the respondent shall have thirty (30) days from the date of such notice within which to file his or her answer with the attorney discipline office. The respondent shall serve a copy of his or her answer in accordance with section (VII) of this rule. If an answer is not received within the specified period, or any granted extension, absent good cause demonstrated by the respondent, general counsel may recommend to the complaint screening committee that the issue of failing to cooperate be referred to disciplinary counsel who shall prepare a notice of charges requiring the respondent to appear before a panel for the hearings committee and to show cause why he or she should not be determined to be in violation of Rules 8.1(b) and 8.4(a) of the rules of professional conduct for failing to respond to general counsel's request for an answer to the complaint.

(6) *Investigation.*

Either prior to or following receipt of the respondent's answer, general counsel and his or her deputies and assistants shall conduct such investigation as may be appropriate.

Upon completion of the investigation, general counsel may (1) dismiss or divert a complaint on the grounds set forth in Rule 37(6)(c); or (2) present the complaint to the complaint screening committee with recommendations for diversion as provided in section (I)(g), dismissal for any reason or referral to disciplinary counsel for a hearing.

At any time while general counsel is investigating a docketed complaint, the respondent may notify general counsel that the respondent waives the right to have the matter considered by the complaint screening committee and consents to the matter being referred to disciplinary counsel for a hearing.

Agreement by the respondent to referral for a hearing shall not be considered an admission of misconduct or a waiver of any defenses to the complaint. Meetings of the complaint screening committee shall be in the nature of deliberations and shall not be open to the public, respondents, respondents' counsel, or the complainant. Records and reports of recommendations made shall in all respects be treated as work product and shall not be made public or be discoverable. However, the decision of the complaint screening committee shall be public.

(7) *Action By the Attorney Discipline Office General Counsel or the Complaint Screening Committee.*

(A) *Diversion.* In any matter in which the attorney discipline office general counsel or the complaint screening committee determines that diversion is appropriate, it shall be structured consistent with the provisions of section (I)(g).

(B) *Dismissal For Any Reason.* In any matter in which the Attorney Discipline Office General Counsel or the complaint screening committee determines that a complaint should be dismissed, either on grounds of no professional misconduct or any other reason, general counsel or the committee shall dismiss the complaint and it shall notify the complainant and the respondent in writing and the attorney discipline office shall close its file on the matter.

(C) *Formal Proceedings*. If the respondent agrees with the recommendation of the Attorney Discipline Office General Counsel to refer a complaint to disciplinary counsel, or the complaint screening committee determines that formal proceedings should be held, the complaint shall be referred to disciplinary counsel for the issuance of notice of charges and the scheduling of a hearing on the merits before a panel of the hearings committee or, alternatively, for waiver of formal proceedings by respondent and the filing of stipulations as to facts, rule violations and/or sanction.

APPENDIX G(1)

Adopt Superior Court Rule 209 as follows:

Rule 209. Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records.

(a) *Triggering in camera review of confidential records.*

(1) A party seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is material to the party's case.

(2) Upon finding that a party has made the requisite showing, the court shall order the custodian of the records in question to produce them to the court for an *in camera* review.

(3) Unless the court orders otherwise, the moving party, or the prosecution in a criminal case, is required:

(A) to serve the order on the custodian of the records; and

(B) to obtain the records for *in camera* review from the custodian of records and deliver them to the court in a sealed envelope or container. The party delivering the records is prohibited from opening the sealed records.

(4) the custodian of the records shall certify that the records produced are a complete and accurate copy of the documents which are the subject of the court order for *in camera* review.

(b) *Procedure for in camera review of confidential records.*

(1) Upon receiving records ordered produced under paragraph (a), the court shall review the records in order to determine whether, in fact, they contain any information that is essential and reasonably necessary to the requesting party's case.

(2) The parties may provide the court with memoranda describing the kinds of information that would be essential and reasonably necessary to the case. However, in conducting its review of the records for such information, the court shall maintain the confidentiality of the records, and not disclose them to the parties or their counsel. Nothing in this paragraph shall prevent the court from enlisting the assistance of court staff in the review of the records.

(3) To the extent that the court finds that the records, or parts of the records, contain information that is not essential and reasonably necessary to the case, the court shall, without revealing the content of such information, notify the parties of that finding. In order to preserve such records for potential appellate review, the court shall maintain a copy of the records under seal, not subject to review by the public, the parties, or counsel.

(4) If the court finds that the records, or parts of the records, contain information that is essential and reasonably necessary to the requesting party's case, the court shall disclose that information to the parties, and it shall, subject to the Rules of Evidence, be available for use at trial.

APPENDIX G(2)

Adopt New Hampshire Supreme Court Rule 12-A (and reletter the subsequent Supreme Court rules) as follows:

Rule 12-A: Procedure in Appeals Alleging Error in Connection with *In Camera* Review of Privileged Records.

In all cases in which relief is sought in the Supreme Court on the ground that the trial court erred in failing to disclose information contained in confidential records reviewed *in camera* by the trial court and held under seal pursuant to Superior Court Rule 209(b)(3), the trial court shall transfer to the Supreme Court such records held under seal. Such records shall be held under seal in the Supreme Court, not subject to examination by the parties, counsel or the public. Nothing in this paragraph shall prevent the Court from enlisting the assistance of court staff in the review of the records.

APPENDIX H(1)

Adopt Superior Court Rule 209 as follows:

Rule 209. Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records In Non-Criminal Cases.

(a) *Triggering in camera review of confidential records.*

(1) A party seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is material to the party's case.

(2) Upon finding that a party has made the requisite showing, the court shall order the custodian of the records in question to produce them to the court for an *in camera* review.

(3) Unless the court orders otherwise, the moving party is required:

(A) to serve the order on the custodian of the records, unless the custodian waives service; and

(B) to obtain the records for *in camera* review from the custodian of records and deliver them to the court in a sealed envelope or container. The party delivering the records is prohibited from opening the sealed records.

(4) the custodian of the records shall certify that the records produced are a complete and accurate copy of the documents which are the subject of the court order for *in camera* review.

(b) *Procedure for in camera review of confidential records.*

(1) Upon receiving records produced under paragraph (a), the court shall review the records *in camera* in order to determine whether, in fact, they contain any information that is reasonably necessary to the requesting party's case. Information that is "reasonably necessary" means information that would: (1) constitute compelling evidence supporting the requesting party's position in the litigation; and (2) is not reasonably available from other non-privileged sources.

(2) The parties may provide the court with memoranda describing the kinds of information that would be reasonably necessary to the case. However, in conducting its review of the records for such information, the court shall maintain the confidentiality of the records, and not disclose them to the parties or their counsel. Nothing in this paragraph shall prevent the court from enlisting the assistance of court staff in the review of the records.

(3) To the extent that the court finds that the records do not contain information that is reasonably necessary to the requesting party's case, the court shall, without revealing the content of such information, notify the parties of that finding. In order to preserve such records for potential appellate review, the court shall maintain a copy of the records under seal, not subject to review by the public, the parties, or counsel.

(4) If the court finds that the records, or parts of the records, contain information that is reasonably necessary to the requesting party's case, the court shall disclose one copy of such records to each party in the case and such records shall, subject to the Rules of Evidence, be available for use at trial.

(5) If the court orders disclosure of any records under Rule 209(b)(4), the court shall preserve in its file, under seal and not subject to public disclosure, one complete copy of all the records submitted for in camera review and a separate copy of all records it has ordered disclosed to the parties.

(c) *Protective Orders*. Whenever the court orders disclosure of records pursuant to Rule 209(b)(4), the court shall issue a protective order that provides as follows:

(1) no party may make any further copies of the single copy disclosed to that party without express prior written approval of the court;

(2) the parties may use such records only for the prosecution or defense of the litigation in connection with which they were disclosed;

(3) no party shall disclose such records to any other person except as necessary in connection with the prosecution or defense of the litigation. Any person to whom disclosure is made shall acknowledge in writing prior to the disclosure that s/he has been made aware of and agrees to comply with the protective order; and

(4) at the conclusion of the litigation, each party shall return to the court that party's copy of the records, whereupon the court shall destroy said records.

The court may modify the foregoing terms of a protective order, or impose such additional terms, as may be necessary in a particular case. A violation of the protective order may be sanctioned as contempt of court.

APPENDIX H(2)

Adopt New Hampshire Rule of Criminal Procedure 54 as follows:

Rule 54. Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records In Criminal Cases.

(a) *Cases in Which Access To Confidential Records is Sought by the Prosecution in a Criminal Case.*

(1) *Triggering in camera review of confidential records.*

(A) A prosecutor seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is material to the prosecution's case.

(B) Upon finding that the prosecutor has made the requisite showing, the court shall order the custodian of the records in question to produce them to the court for an *in camera* review.

(C) Unless the court orders otherwise, the prosecutor is required:

(i) to serve the order on the custodian of the records, unless the custodian waives service; and

(ii) to obtain the records for *in camera* review from the custodian of records and deliver them to the court in a sealed envelope or container. The prosecutor or his or her agent delivering the records is prohibited from opening the sealed records.

(D) the custodian of the records shall certify that the records produced are a complete and accurate copy of the documents which are the subject of the court order for *in camera* review.

(2) *Procedure for in camera review of confidential records.*

(A) Upon receiving records ordered produced under paragraph (1), the court shall review the records *in camera* in order to determine whether, in fact, they contain any information that is reasonably necessary to the prosecution's case. Information that is "reasonably necessary" means information that would: (1) constitute compelling evidence supporting the prosecutor's position in the litigation; and (2) is not reasonably available from other non-privileged sources.

(B) The parties may provide the court with memoranda describing the kinds of information that would be reasonably necessary to the case. However, in conducting its review of the records for such information, the court shall maintain the confidentiality of the records, and not disclose them to the parties or their counsel. Nothing in this paragraph shall prevent the court from enlisting the assistance of court staff in the review of the records.

(C) To the extent that the court finds that the records do not contain information that is reasonably necessary to the prosecutor's case, the court shall, without revealing the content of such information, notify the parties of that finding. In order to preserve such records for potential appellate review,

the court shall maintain a copy of the records under seal, not subject to review by the public, the parties, or counsel.

(D) If the court finds that the records, or parts of the records, contain information that is reasonably necessary to the prosecutor's case, the court shall disclose one copy of such records to each party in the case and such records shall, subject to the Rules of Evidence, be available for use at trial.

(E) If the court orders disclosure of any records under Rule 54(a)(2)(D), the court shall preserve in its file, under seal and not subject to public disclosure, one complete copy of all the records submitted for *in camera* review and a separate copy of all records it has ordered disclosed to the parties.

(3) *Protective Orders*. Whenever the court orders disclosure of records pursuant to Rule 54(a)(2)(D), the court shall issue a protective order that provides as follows:

(A) no party may make any further copies of the single copy disclosed to that party without express prior written approval of the court;

(B) the parties may use such records only for the prosecution or defense of the litigation in connection with which they were disclosed;

(C) no party shall disclose such records to any other person except as necessary in connection with the prosecution or defense of the litigation. Any person to whom disclosure is made shall acknowledge in writing prior to the disclosure that s/he has been made aware of and agrees to comply with the protective order; and

(D) at the conclusion of the litigation, each party shall return to the court that party's copy of the records, whereupon the court shall destroy said records.

The court may modify the foregoing terms of a protective order, or impose such additional terms, as may be necessary in a particular case. A violation of the protective order may be sanctioned as contempt of court.

(b) *Cases in Which Access To Confidential Records is Sought by the Defendant in a Criminal Case.*

(1) *Triggering in camera review of confidential records.*

(A) A criminal defendant seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is material to the defendant's case.

(B) Upon finding that the defendant has made the requisite showing, the court shall order the custodian or possessor of the records in question to produce them to the court for an *in camera* review.

(C) Unless the court orders otherwise, the prosecutor is required:

(i) to serve the order on the custodian of the records, unless the custodian waives service; and

(ii) to obtain the records for *in camera* review from the custodian of records and deliver them to the court in a sealed envelope or container. The party delivering the records is prohibited from opening the sealed records.

(D) the custodian of the records shall certify that the records produced are a complete and accurate copy of the documents which are the subject of the court order for *in camera* review.

(2) *Procedure for initial in camera review of confidential records.*

(A) Upon receiving records ordered produced under paragraph (1), the court shall review the records *in camera* in order to determine whether, in fact, they contain any exculpatory information.

(B) The parties may provide the court with memoranda describing the kinds of information that would be exculpatory. However, in conducting its review of the records for exculpatory information, the court shall maintain the confidentiality of the records, and not disclose them to the parties or their counsel. Nothing in this paragraph shall prevent the court from enlisting the assistance of court staff in the review of the records.

(C) To the extent that the court finds that the records do not contain information that is exculpatory, the court shall, without revealing the content of the information in the records, notify the parties of that finding. In order to preserve such records for potential appellate review, the court shall maintain a copy of the records under seal, not subject to review by the public, the parties, or counsel.

(D) If the court finds that the records, or parts of the records, contain information that is exculpatory, the court shall disclose that information to the parties, subject to a protective order as specified in Rule 54(a)(3).

E) If the court orders disclosure of any records under Rule 54(b)(2)(D), the court shall preserve in its file, under seal and not subject to public disclosure, one complete copy of all the records submitted for in camera review and a separate copy of all records it has ordered disclosed to the parties.

(3) *Determination regarding the availability for use at trial of information contained in privileged or confidential records.*

(A) After disclosing to the parties the information found to be exculpatory, the court, at an appropriate time prior to or at trial, shall permit the parties to be heard on the question of whether the disclosed content of the records shall be available for use at trial. The hearing may be held *in camera*, but a record of the hearing shall be made.

(B) A party seeking to have information in the records made available for use at trial shall bear the burden of showing that such information is reasonably necessary to that party's case at trial. "Reasonably necessary" has the same meaning here as it does in Rule 54(a)(2)(A).

(C) To the extent that the court finds that the disclosed records, or parts thereof, are not reasonably necessary to the party's case, the court shall order that such records will not be available for use at trial. Records subject to such a ruling shall remain subject to the protective order entered pursuant to Rule 54(b)(2)(D). In order to enable appellate review of the court's decision, the court shall maintain a copy of such records in the file under seal, not subject to review by the public. Such records shall be maintained separately from any records maintained under seal in accordance with Rule 54(b)(2)(E).

(D) To the extent that the court finds that the records, or parts of the records, contain information that is reasonably necessary to a party's case at trial, the court shall direct that such information shall, subject to the Rules of Evidence, be available for use at trial.

APPENDIX H(3)

Adopt New Hampshire Supreme Court Rule 12-A (and reletter the subsequent Supreme Court rules) as follows:

Rule 12-A: Procedure in Appeals Alleging Error in Connection with *In Camera* Review of Privileged Records.

(1) In all cases in which relief is sought in the Supreme Court on the ground that the trial court erred in failing to disclose information contained in confidential records reviewed *in camera* by the trial court and held under seal pursuant to Rule 54(a)(2)(C) or Rule 54(b)(2)(C) of the Rules of Criminal Procedure or Rule 209(b)(3) of the Superior Court Civil Rules, the trial court shall transfer to the Supreme Court such records held under seal. Such records shall be held under seal in the Supreme Court, not subject to examination by the parties, counsel or the public. Nothing in this paragraph shall prevent the Court from enlisting the assistance of court staff in the review of the records.

(2) In all cases in which relief is sought in the Supreme Court on the ground that the trial court erred in failing to make available for use at trial information contained in confidential records reviewed *in camera* by the court and held under seal pursuant to Rule 54(b)(3)(C) of the Rules of Criminal Procedure, the trial court shall transfer to the Supreme Court such records held under seal. Such records shall be held under seal in the Supreme Court, not subject to examination by the public. However, to the extent that the parties had access to the records for the purpose of arguing their availability for use at trial, the parties shall be permitted to discuss the content of the sealed information in their briefs on appeal and in oral argument. Briefs containing references to materials held under seal in the Supreme Court shall likewise be filed under seal. Nothing in this paragraph shall prevent the Court from enlisting the assistance of court staff in its review of the records.

APPENDIX I

Delete Superior Court (Civ.) Rule 12(g) and replace it with the following:

(g) *Motions for Summary Judgment*.

(1) *Motion for Summary Judgment*. Motions for summary judgment shall be filed, defended and disposed of in accordance with the provisions of RSA 491:8-a as amended. Such motions and responses thereto shall provide specific page, paragraph, and line references to any pleadings, exhibits, answers to interrogatories, depositions, admissions, and affidavits filed with the court in support of or in opposition to the Motion for Summary Judgment. Only such materials as are essential and specifically cited and referenced in the Motion for Summary Judgment, responses, and supporting memoranda shall be filed with the court. In addition, except by permission of the court received in advance of filing the memoranda, no such motion, response, or supporting memorandum of law shall exceed 20 double-spaced pages. The purpose of this rule is to avoid unnecessary and duplicative filing of materials with the court. Excerpts of documents and discovery materials shall be used whenever possible.

(2) *Statement of Material Facts.*

(a) *Content*. Every motion for summary judgment shall be accompanied by a separate statement of the material facts as to which the moving party contends there is no genuine issue to be tried, set forth in consecutively numbered paragraphs, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Failure to include the foregoing statement shall constitute grounds for denial of the motion.

(b) *Additional Service of Electronic Form of Statement of Material Facts to other Parties*. At the time the motion and separate statement of materials are filed with the court, the statement of material facts shall also be contemporaneously sent in electronic form by email to all parties against whom summary judgment is sought in order to facilitate the requirements of the following paragraph. The statement of material facts in electronic form shall be sent as an attachment to an email and shall be in a Microsoft Word document (or a document convertible to Word) unless the parties agree to use another word processing format. The requirement to email the statement of material facts to the opposing party does not alter the date or method of service. The requirement for transmission by email of the statement of material facts in electronic form shall be excused if (A) the moving or any opposing party is appearing pro se, (B) the attorney for the moving party certifies in an affidavit that he or she does not have access to email, (C) the attorney for the moving party certifies in an affidavit that an opposing party's attorney has no email address or has not disclosed his or her email address, or (D) the parties believe that the process outlined herein will be unworkable due to particular

circumstances in their case and receive advance approval from the Court for filing separate documents.

(3) *The Non-Moving Party*.

(a) *Response to the Motion and the Statement of Material Facts*. The non-moving party shall have 30 days to object to a motion for summary judgment, unless another deadline is established by order of the court. An objection to a motion for summary judgment shall include a response to the moving party's statement identifying the facts the moving party contends are material and undisputed. In its response, the nonmoving party shall indicate which, if any, of the purported undisputed facts identified in the moving party's statement the nonmoving party contends are in dispute. The form of the nonmoving party's response shall be consistent with the requirements of paragraph b. For purposes of summary judgment, any fact set forth in the moving party's statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.

(b) *Filing a Single Document Containing all Parties' Positions*. To permit the court to have in hand a single document containing the parties' positions as to material facts in easily comprehensible form, the opposing party shall save the moving party's statement of material facts as a new document and shall set forth a response to each directly below the appropriate numbered paragraph, including, if the response relies on opposing evidence, page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Where the obligation to send the statement of material facts in electronic form has been excused, the response to the statement of material facts may be in a separate document.

(c) *Statement of Additional Material Facts*. Along with its response to the moving party's statement of facts, the nonmoving party may assert an additional statement of material facts with respect to the claims on which the moving party seeks summary judgment, each to be supported with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents.

(d) *Filing a Single Document with Additional Material Facts*. Such an additional statement shall be a continuation of the opposing party's response described in Paragraph (g)(3)(a), with an appropriate heading, and shall not be a separate document. Where the party opposing summary judgment includes such an additional statement in its response, the response, including the additional statement, also shall be sent in electronic form by email to the moving party, unless excused as provided in Paragraph (g)(2).

(4) *The Moving Party's Reply to Additional Material Facts*. The moving party shall reply to the opposing party's additional statement of material facts within 20 days and in the manner required by Paragraph (g)(3), resulting in a final, single consolidated document for the court's consideration, unless the obligation to send the additional statement of material facts in electronic form

has been excused. For purposes of summary judgment, any fact set forth in the opposing party's additional statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.

(5) *Page Limits*. Neither the statement of material facts as to which there is no genuine issue to be tried nor the response thereto shall be subject to the 20-page limitation in paragraph (g)(1) of this rule.

(6) *Cross-Motions*. Cross-motions for summary judgment and oppositions thereto shall comply with the requirements of Paragraph (g)(3), with the result that there shall be a single consolidated document for both motions for summary judgment (multiple documents may only be filed with advance leave of court) containing the respective statements of material facts and responses thereto, unless excused as provided in Paragraph (g)(2).

(7) *Partial Summary Judgment*. Where a plaintiff successfully moves for summary judgment on the issue of liability or a defendant concedes liability and the case proceeds to trial by jury, the parties must provide the trial judge with a statement of agreed facts sufficient to explain the case to the jury and place it in a proper context so that the jurors might more readily understand what they will be hearing in the remaining portion of the trial. The court shall present the jury with the agreed statement of facts. Absent such an agreement on facts, the court shall provide such a statement.

(8) *Sanctions for Noncompliance*. The court need not consider any motion or opposition that fails to comply with the requirements of this rule and may deny or grant a motion for summary based on the failure of the moving party or the non-moving party to comply with this rule.

APPENDIX J

Amend Superior Court (Civ.) Rule 7 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 7. Pleadings, Motions and Objections, General

(a) Every Complaint shall contain in the caption, or in the body of the Complaint, the names and addresses of all parties to the proceedings.

(b) No filing which is contained in a letter, will be accepted by the clerk, as such, or acted on by the court. All pleadings, motions, objections and forms filed shall be in the format of 8 1/2 x 11 inch documents either typewritten or printed double spaced, on one side of the paper, so they are clearly legible.

(c) All pleadings, motions and objections shall set forth the factual allegations in numbered paragraphs.

(d) All pleadings, motions, objections and the Appearance and Withdrawal of counsel shall be signed by the attorney of record, authorized non-attorney representative, or by a self-represented party. Names, street addresses, mailing addresses, New Hampshire Bar Association member identification numbers, and telephone numbers shall be typed or stamped beneath all signatures or papers to be filed or served. No attorney, non-attorney representative, or self-represented party will be heard until his or her Appearance is so entered.

(e) The signature of an attorney, non-attorney representative, or self-represented party to a pleading, motion, or objection constitutes a certificate by him or her that he or she has read the filing; that to the best of his or her knowledge, information and belief there is a good ground to support it; and that it is not interposed for delay. If a filing is not signed, or is signed with an intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though it had not been filed.

(f) No attorney, non-attorney representative or party to litigation shall directly address himself or herself by pleading, motion, or objection to any judge but shall file such pleading, motion, or objection with the clerk.

[(g). All motions must contain the word "motion" in the title. Filers shall not combine multiple motions seeking separate and distinct relief into a single filing. Separate motions must be filed. Objections to pending motions and affirmative motions for relief shall not be combined in one filing.]

~~(g)~~**[(h)]** The court may in all cases order either party to plead and also to file a statement in sufficient detail to give to the adverse party and to the Court reasonable knowledge of the nature and grounds of the action or defense.

~~(h)~~**[(i)]** Documents shall not be withdrawn from the court files except by leave of court and upon the filing of a receipt therefor.

APPENDIX K

Amend Criminal Rule of Procedure 21 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 21. Trial by the Court or Jury; Right to Appeal

(a) *Circuit Court-District Division*

(1) *Trial*. A defendant shall be tried in the circuit court-district division by a judge unless otherwise provided by law. In all prosecutions for misdemeanors in which appeal for trial de novo is allowed, the court, in its discretion, may allow the defendant, upon advice of counsel, to plead not guilty and to waive the presentation of evidence by the State, and the presentation of a defense. The court shall require the prosecution to make an offer of proof. The court may find the defendant guilty and impose sentence. The defendant may appeal to the superior court. The court's sentence is vacated pending appeal except as otherwise provided by statute.

(2) *Appeal for Trial De Novo in the Superior Court*. When permitted by statute or required by the New Hampshire Constitution, an appeal to the superior court may be taken by the defendant by giving notice in open court after the court pronounces sentence, or by filing written notice with the clerk of the circuit court-district division within three days of the verdict. A defendant who was prevented from appealing through mistake, accident, or misfortune, and not from neglect, may, within thirty days of the imposition of sentence by the circuit court – district division, request the superior court to allow an appeal. The motion shall set forth the reason for appealing and the cause of the delay. The court shall make such order thereon as justice may require. In the event of an appeal, the court may review the defendant's bail status, at the request of either party. If, upon appeal to the superior court, the defendant waives the right to a jury trial, the court shall remand the matter to the circuit court-district division for imposition of the originally imposed sentence. An appeal may not be withdrawn after the record of appeal has been sent to the superior court. Such withdrawals must be made in the superior court.

(3) *Appeal to Supreme Court*. A person sentenced by a circuit court-district division for a class A misdemeanor may, if no appeal for a jury trial in superior court is taken, appeal therefrom to the Supreme Court at the time the sentence is declared or within thirty days after the sentence is declared. When the defendant has been convicted of a violation, or in any case where an appeal for a trial de novo in superior court is not permitted, the defendant may likewise appeal to the Supreme Court at the time the sentence is declared or within thirty days after the sentence is declared. The Supreme Court's review in such cases shall be limited to questions of law.

(4) *Transcripts*. Whenever a party desires to use a sound recording of circuit court-district division proceedings on appeal, a written transcript of the sound recording will be required.

(b) *Superior Court*

Trial shall be before a jury of twelve persons unless the defendant, on the record, waives this right. If two or more defendants are to be tried together, the trial shall be before a jury unless all defendants waive the right to a jury trial. The consent of the State is not necessary for the defendant to waive the right to trial by jury.

[(c) *Motions.* All motions must contain the word "motion" in the title. Filers shall not combine multiple motions seeking separate and distinct relief into a single filing. Separate motions must be filed. Objections to pending motions and affirmative motions for relief shall not be combined in one filing.]

Comment

In *State v. Thompson*, 165 N.H. 779 (2013), the New Hampshire Supreme Court clarified the choice between appealing a misdemeanor conviction by seeking a trial *de novo* and appealing directly to the Supreme Court on an issue of law. The Court stated: "we reiterate that RSA 502–A:12 'absolutely guarantees trial by jury to persons' convicted in circuit court of a class A misdemeanor, and dictates, as 'the manner ... specified for exercising this right' that the defendant may not also—either prior to, concurrently, or after his appeal to superior court—appeal that same circuit court conviction to this court. *Ludwig v. Massachusetts*, 427 U.S. 618, 630 (1976). In essence, RSA 502–A:12 limits a defendant to one bite at the apple. Should he choose the *de novo* jury trial in superior court and again be convicted there, he may of course appeal that conviction to this court." *Thompson*, 165 N.H. at 788.

APPENDIX L

Amend New Hampshire Rule of Evidence 404 as follows (new material is in **[bold and brackets]**):

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) *Character Evidence Generally*. - Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused*. - Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim*. - Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness*. - Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *Other Crimes, Wrongs, or Acts*. –

[(1)] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[(2) Evidence of other crimes, wrongs or acts is admissible under this subsection only if:

(A) it is relevant for a purpose other than proving the person's character or disposition;

(B) there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them; and

(C) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.]

2016 NHRE Update Committee Note

No change was made to New Hampshire Rule of Evidence 404 to mirror the federal rule. The current New Hampshire rule mirrors the language of Federal Rule 404 as it existed in 1985. Federal Rule of Evidence 404 has been amended four times since New Hampshire adopted the rule. The 1987 amendment to Federal Rule of Evidence 404 was technical, but the three subsequent amendments were substantive. The 1991 amendment added a pretrial notice requirement to 404(b). The 2000 amendment provides that when the accused attacks the character of an alleged victim the door is open to an attack on the same character trait of the accused. The 2006 amendment was added to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. Because New Hampshire has a body of case law that has clarified and limited this rule as applied in New Hampshire, the changes made to Federal Rule 404 have not been made to New Hampshire Rule of Evidence 404.

APPENDIX M

Amend New Hampshire Rule of Professional Conduct 1.2 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent In providing limited representation, the lawyer's responsibilities to the client, the court and third parties remain as defined by these Rules as viewed in the context of the limited scope of the representation itself; and court rules when applicable.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent**[, except as stated in paragraph (e)**, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by state or local law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.]

~~(e)~~**[(f)]** It is not inconsistent with the lawyer's duty to seek the lawful objectives of a client through reasonably available means, for the lawyer to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client, avoid the use of offensive or dilatory tactics, or treat opposing counsel or an opposing party with civility.

~~(f)~~**[(g)]** In addition to requirements set forth in Rule 1.2(c),

(1) a lawyer may provide limited representation to a client who is or may become involved in a proceeding before a tribunal (hereafter referred to as litigation), provided that the limitations are fully disclosed and explained, and the client gives informed consent to the limited representation. The form set forth in section (g) of this Rule has been created to facilitate disclosure and

explanation of the limited nature of representation in litigation. Although not prohibited, the provision of limited representation to a client who is involved in litigation and who is entitled as a matter of law to the appointment of counsel is discouraged.

(2) a lawyer who has not entered an applicable limited appearance, and who provides assistance in drafting pleadings, shall advise the client to comply with any rules of the tribunal regarding participation of the lawyer in support of a pro se litigant.

~~(g)~~**[(h)]** Sample form.

Ethics Committee Comment

1. This rule differs from the ABA Model Rule by:
   Deleting the last two sentences of ABA Model Rule 1.2 (a).
   Adding a second sentence to Rule 1.2(c).
   Adding a new 1.2(e).
   Adding a new 1.2(f).
   Adding a new 1.2(g).

2. The deleted sentences of ABA Model Rule 1.2 (a) provide as follows: "A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

The particular binding client decisions articulated in the third sentence of Rule 1.2(a) are by no means exclusive. There will obviously be other important client decisions that will be binding upon the lawyer depending upon the fact specific circumstances of any representation. The Model Rule sentences correctly state those particular client decisions that are binding upon the lawyer. However, specifically including these in the Rule may be wrongly construed by a lawyer to be the only binding decisions that can be made by a client. A lawyer must always carefully consider all client requests or decisions, in light of all relevant factors, including but not limited to, the particular fact pattern, type of representation, a client's social and economic considerations, and the scope of representation and earlier decisions reached during the representation. *See, e.g.*, Restatement Third, The Law Governing Lawyers § 21 ("Allocating the Authority to Decide Between a Client and a Lawyer"), § 22 ("Authority Reserved to a Client"), and § 23 ("Authority Reserved to a Lawyer") (2000).

3. The second sentence of Rule 1.2(c) confirms that lawyers providing limited representation are bound by all professional responsibility rules. The Rule also recognizes that these ethical obligations will need to be interpreted, or analyzed, within the context of the limited representation. One example of such an obligation could be the duty, under Rule 1.1(c)(3), to "develop a strategy, in collaboration with the client, for solving the legal problems of the client." A client who retains an attorney for limited purposes may simply want

the lawyer to research and provide the applicable law in a specific area, thereby making Rule 1.1(c)(3) inapplicable. Conversely, the lawyer's duty pursuant to Rule 4.1(a) not to make false statements to third persons is the type of fundamental obligation that would remain applicable regardless of the limits placed on the scope of representation.

4. The added provision in Rule 1.2 (e), restates a rule revision that has been adopted (in various forms) in several other states. Especially in light of a growing concern by New Hampshire practicing lawyers for the professionalism of lawyers, it is appropriate to make a distinction between following client objectives during representation, and the general civility and professionalism expected by all practicing New Hampshire attorneys. The lawyer should also be guided by The New Hampshire Lawyer Professional Creed, adopted April 4, 2001, by the New Hampshire Bar Association Board of Governors (which can be found under “NH Practice Guidelines” on the Bar’s website, www.nhbar.org).

5. A new section (f) is added to apply specific rules for the limited representation of a client in a litigation setting, which would require full disclosure and informed consent. A recommended written Consent to Limited Representation form for compliance with this provision, while not mandated, is provided in section (g). Subsection (f)(2) requires the lawyer to advise the client to comply with whatever applicable court rules may apply, with respect to any "ghost written" pleadings prepared by that lawyer who is not actually involved, by appearance, in the particular litigation.