



**THE STATE OF NEW HAMPSHIRE  
ADVISORY COMMITTEE ON RULES  
SUPREME COURT**

Honorable Patrick E. Donovan, Chair  
Abigail Albee, Esquire  
Honorable Paul S. Berch  
Honorable R. Laurence Cullen  
John A. Curran, Esquire  
Honorable N. William Delker  
Honorable Daniel J. Feltes  
Honorable Michael H. Garner  
Sean P. Gill, Esquire  
Joshua L. Gordon, Esquire  
Jeanne P. Herrick, Esquire  
Derek D. Lick, Esquire  
Ari Richter  
Patrick W. Ryan, Esquire  
Janet L. Spalding, CPA  
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Carolyn Koegler, Secretary

February 8, 2019

Eileen Fox  
Clerk of Court  
New Hampshire Supreme Court  
One Charles Doe Drive  
Concord, NH 03301

Dear Clerk Fox:

Pursuant to Supreme Court Rule 51, I hereby submit on behalf of the Supreme Court Advisory Committee on Rules ("Committee") the Committee's **amended** February 2019 report, which contains the final draft of proposed rules and rule amendments recommended for adoption by the Committee between September 2018 and December 2018. The report also includes a proposal to amend the Supreme Court rules to change the type-volume limitations of Supreme Court briefs that has not been recommended by a majority of members of the Committee.<sup>1</sup>

The Committee held a public meeting on September 7, 2018 and a public hearing and meeting on December 7, 2018.

I present the Committee's recommendations in the order I typically do, according to the order in which the rules appear in the court rules online.

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<sup>1</sup> It has long been the Committee's practice to include recommendations supported by a minority in its reports to the Court.

Please note, however, that, as a result, the issue that attracted the greatest amount of attention from members of the bench, the bar, and the public is presented last. Although a majority of the Committee has recommended that the Court amend Rule of Professional Conduct 8.4(g), it is important to note that the proposal has generated an enormous number of comments, some of which have suggested that the proposal may be unconstitutional. Therefore, the Committee has also voted to recommend that the Court hold a hearing before the full Court on the proposal.

I. Supreme Court Rules – Gender Neutral Language.

2018-009. The Committee voted to recommend that the Court amend the Supreme Court Rules to make them gender neutral.

At its September 7, 2018 meeting, the Committee considered a September 4, 2018 memo from Carolyn Kogler explaining that staff attorney David Peck had submitted a memorandum proposing that the supreme court rules be amended to make them gender neutral.

Following some brief discussion of the issue, the Committee voted to recommend that the Court adopt the language changes suggested by attorney Peck, as set forth in Appendices A-Q. The Committee also recommended that the Court make the changes effective July 1, 2019, after LexisNexis issues a supplement but before LexisNexis prints the next volume of the rulebook.

II. Supreme Court Rules. Type-Volume Limitations For Supreme Court Briefs.

2018-006. The Committee considered, but voted 8-6 not to recommend, a proposal to amend Supreme Court Rules to change the type-volume limitations for Supreme Court briefs.

At its June 1, 2018 meeting, the Committee considered a May 30, 2018 memorandum from Committee member attorney Joshua Gordon. Attorney Gordon explained that the Court had recently changed the Supreme Court rules to facilitate the electronic filing of briefs. When it did so, it changed the page limits set forth in the rules type-volume limits. Attorney Gordon believes that in making this change, the Court may have made an arithmetical error and inadvertently reduced the permissible length of briefs. The Committee briefly discussed this issue, and asked attorney Gordon to provide some additional information to support his view that the type-volume limitations reduced the permissible length of briefs.

At the September meeting, the Committee considered this issue again. Attorney Gordon referred Committee members to a September 6, 2018 memo he had prepared and which he believes shows that “the 9,500 word limit does

not accurately reflect what appears to be the common practice when briefs are at or near the 35-page limit.” Justice Donovan reported that he had spoken with Supreme Court Clerk Eileen Fox and Deputy Clerk Tim Gudas about how they made a determination regarding word limit. There was some discussion about what the word limit in the federal courts is and a reference to the 2016 Federal Rules Advisory Committee notes.

Following some discussion and upon motion made and seconded the Committee voted to put out for public hearing in December a proposal to amend the relevant Supreme Court rules to change the 9,500 word limit to a 11,250 word limit.

At the December 7, 2018 public hearing, Deputy Clerk Tim Gudas addressed the Committee. He provided background regarding how the Court arrived at a 9,500 word limit for Supreme Court briefs. Attorney Gordon addressed the Committee and spoke in support of his proposal to change the word limit from 9,500 words to 11,250 words. Few details are provided in the meeting minutes regarding the testimony offered, *see* December 7, 2018 meeting minutes at [courts.state.nh.us/committees/adviscommrules/minutes.htm](https://courts.state.nh.us/committees/adviscommrules/minutes.htm), but a CD recording of the hearing is available at the Supreme Court.

Following the public hearing there was some discussion about the proposal regarding, among other things: (1) what percentage of the briefs filed with the Supreme Court are the long briefs attorney Gordon referred to in his comments; and (2) how burdensome it is for an attorney to file a request to extend the word limit. Attorney Gordon stated that filing the request is not burdensome, but the problem is that an attorney often does not know until the last minute that he or she is going to exceed the word limit, so the practice is usually to file the motion to extend along with the brief. This can be very nerve-racking because the attorney does not know what is going to happen if the motion is not granted.

The Committee voted 8-6 against recommending that the word limit in the supreme court rules be changed from 9,500 words to 11,250 words. The following members voted against recommending the change: Judge Cullen, attorney Curran, Judge Delker, Justice Donovan, attorney Gill, attorney Herrick, Mr. Richter and attorney Ryan. The following members voted to recommend the change: Attorney Albee, Representative Berch, Judge Garner, attorney Gordon, Ms. Spalding and Mr. Stewart.

Mr. Richter noted that attorney Gordon’s analysis seems correct. That is, it does appear that the 35 page limit was “flexible,” so that, in effect, the old limit gave the parties more room. So, if the Court believes that this change was not sufficiently aired and that there should be more discussion about the change, then it would not be unreasonable for the Court to seek comment on

that. Judge Cullen noted that it might be helpful for there to be a procedure in place for situations in which the limit is to be exceeded.

Justice Donovan noted that in setting the type-volume limitation, the Court took the federal number and rounded up, and that the rule put the New Hampshire limit in the middle of what all the other states are doing. Attorney Gordon acknowledged that this is true, but that his point is that the effect of this was to decrease the length from what was permissible under the prior rule.

The changes the Committee voted 8-6 to not recommend to the Court for adoption are set forth in Appendices R and S.

III. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

2018-004. The Committee voted to recommend that the Court amend Supreme Court Rule 36 to allow students who have completed a 9 hour training program for the DOVE project to start supervised practice right away, rather than wait until the end of the spring semester of their second year.

At its June 8, 2018 meeting the Committee briefly considered an April 13, 2018 memorandum and attached letter asking whether Supreme Court Rule 36 should be amended. The Committee took no action.

At the September 7, 2018 meeting, Justice Lynn reported that he had spoken with Professor John Garvey, the Director of the Daniel Webster Scholars Honors Program to ask about the details of the proposed change. Justice Lynn stated that he believes that the change that has been requested is minor and limited in scope. He explained that the change would allow students who complete the DOVE training program during the spring semester of their second year to start supervised practice right away, rather than wait until the end of the semester. Attorney Albee noted that it is only the Daniel Webster Scholars students who are doing this, and that the rule change is very narrowly tailored.

Following some discussion, and upon motion made and seconded, the Committee asked Carolyn Kogler to draft language to implement the proposal and voted to put the proposal out for public hearing in December.

No comments were offered about this proposal prior to, or during, the December 7, 2018 public hearing. At the meeting following the public hearing, upon motion made by attorney Albee and seconded by Judge Cullen the Committee voted to recommend that the Court amend Supreme Court Rule 36, as set forth in Appendix T.

IV. Rule of Professional Conduct 6.5. Nonprofit and Court-Annexed Legal Services Programs.

2018-008. The Committee voted to recommend that the Court adopt on a permanent basis a comment it had adopted on a temporary basis.

At the September 7, 2018 meeting, the Committee considered this Court's July 13, 2018 order adopting, on a temporary basis, a comment to follow New Hampshire Rule of Professional Conduct 6.5. The Court had referred the comment to the Committee for its recommendation as to whether the comment should be adopted on a permanent basis, or whether some other action should be taken. Justice Lynn explained that the Ethics Committee and the Access to Justice Committee had had a disagreement about what to do, but that the Court felt that it was important to adopt this comment. The Committee voted to put the comment out for public hearing in December.

No comments were offered about this proposal prior to, or during, the December 7, 2018 public hearing. Following some brief discussion and upon motion made by attorney Albee and seconded by attorney Gordon, the Committee voted to recommend that the Court adopt the comment on a permanent basis, as set forth in Appendix U.

V. Rule of Professional Conduct 8.4. Harassment and Discrimination.

2016-009. The Committee voted to recommend that the Court consider adding a provision (g) to Rule of Professional Conduct 8.4 which would make it professional misconduct for a lawyer to engage in harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. The Committee also voted to recommend that the Court hold a public hearing before the full court on the proposal.

At its March 17, 2017 meeting, the Committee considered a September 29, 2016 letter from the American Bar Association's Center for Professional Responsibility Policy Implementation Committee to Chief Justice Dalianis. See 9/29/16 letter to Chief Justice Dalianis, which can be found at [courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm](http://courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm). The letter reported that ABA Model Rule of Professional Conduct had recently been amended to add a new paragraph (g) establishing a black letter rule prohibiting harassment and discrimination in the practice of law, along with three new Comments related to paragraph (g). According to the Adopted Revised Resolution 109 cited in the letter, the ABA had amended Model Rule 8.4 to add a section (g) to make it professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion,

national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The Committee agreed that further study of this issue would be needed. Attorney Joshua Gordon agreed to chair a subcommittee to take a closer look at the issue.

At its June 16, 2017 meeting, the Committee considered a March 23, 2017 letter from attorney Rolf Goodwin stating that the Ethics Committee proposed that a variation of the ABA Model Rule be adopted in New Hampshire as follows (proposed additions to the ABA language are in **[bold and brackets]**; deletions are in ~~strikethrough~~ format):

(g) engage in conduct **[related to the practice of law]** that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, **[physical or mental]** disability, age, sexual orientation, ~~gender identity,~~ **[or]** marital status~~[,] or socioeconomic status in conduct related to the practice of law.~~ This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from representation in accordance with Rule 1.16. ~~This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.~~

Attorney Peter Imse addressed the Committee on behalf of the New Hampshire Bar Association Ethics Committee. Attorneys Rolf Goodwin and Maureen Smith were present at the meeting to answer questions. See June 16, 2017 public hearing and meeting minutes, which can be found at [courts.state.nh.us/committees/adviscommrules/minutes.htm](https://courts.state.nh.us/committees/adviscommrules/minutes.htm). Attorney Imse's presentation to the Committee addressed, among others, the following issues:

- The fact that that all other learned professions include in their codes language regarding discrimination and harassment.
- This proposal is not intended to limit the right of attorneys to represent clients or limit the right to free speech.
- The behavior being regulated is behavior "related to the practice of law."

- The rule does not simply make it attorney misconduct to engage in behavior that is a violation of federal law because federal law only applies to businesses of a certain size.
- The list of protected classes in the proposed New Hampshire rules is based on New Hampshire law.
- The Montana legislature has taken a strong position against the ABA proposal, apparently due to: (1) free speech concerns; and (2) the belief that the proposal would hamper the ability of lawyers to represent clients involved in this kind of behavior. Attorney Imse believes that the Montana legislature is wrong, but noted that the Texas Attorney General recently took the position that the rule violates free speech rights.
- The Ethics Committee had considered the Illinois rule, which would make it professional misconduct to engage in this kind of behavior, but only after a finding by a court or administrative agency that the lawyer has violated an anti-discrimination law. The Ethics Committee decided not to recommend the Illinois rule because there are many who would not be covered by the rule, for example, a secretary at a small firm.

Committee members inquired about the following:

- Justice Lynn asked attorney Imse to provide the Committee with copies of the rules that have been adopted in the other professions. Justice Lynn also noted that unlike other professions, lawyers are inherently involved in conflict.
- Representative Berch stated that it would be helpful to know whether there are jurisdictions in which this was determined to be a legislative matter.
- Justice Lynn noted that some jurisdictions have adopted a specific exemption related to *Batson* challenges.
- Mr. Stewart noted that concerns had been raised that investigating these claims will be burdensome to the Attorney Discipline Office.

Following some discussion, the Committee concluded that the proposal was in need of more work. Attorneys Gordon and Herrick agreed to work with the Ethics Committee on the proposal.

At its September 2017 meeting, see September 7, 2018 meeting minutes at [courts.state.nh.us/committees/adviscommrules/minutes.htm](https://courts.state.nh.us/committees/adviscommrules/minutes.htm), attorney Gordon reported that two people from the subcommittee would attend the

December meeting to speak about the issue. He noted that the subcommittee is wrestling with how to address the following concerns that have arisen regarding the proposal:

- The Ethics Rules are generally aimed at protecting clients. This proposed new rule aims to protect people other than clients; that is, law firm employees. Some question has arisen regarding whether the Statement of Purpose section of the Ethics Rules would need to be amended if this rule is adopted.
- Some difficulties have arisen regarding defining discrimination and harassment.
- Concerns have been expressed that, if adopted, the rule will complicate employment issues at law firms, might create a conflict of interest within a law firm, and might take away the ability of the law firm to deal with the employment issues they have. It is important to note that if a firm has over six employees, the civil rights laws apply to the firm.

This issue was not discussed at the December meeting due to time constraints. The issue was next discussed at the March 2018 meeting. See March 9, 2018 meeting minutes at [courts.state.nh.us/committees/adviscommrules/minutes.htm](https://courts.state.nh.us/committees/adviscommrules/minutes.htm). At that meeting, the Committee considered three proposals to amend Rule of Professional Conduct 8.4: (1) the proposal recommended by the Ethics Committee; (2) the Ethics Committee proposal amended to include the language “against a client” following “harassment or discrimination; and (3) the Ethics Committee proposal amended to include the language “as defined by substantive state or federal law” following “harassment or discrimination.” Attorneys Imse and Smith were present at the meeting to answer any questions.

Justice Lynn explained that he had proposed adding the language “as defined by substantive state or federal law” following “harassment or discrimination” Justice Lynn stated that he would be inclined to delete the language in the comment which reads, “statutory or regulatory exemptions based upon the number of personnel in a law office, for example, shall not relieve a lawyer of the requirement to comply with this rule.” He believes that because the legislature has exempted small employers for policy reasons, small employers should be exempt from this as well. Senator Feltes expressed the view that because attorneys are a self-regulated profession, this is not an issue that needs to go through the legislature. Attorney Imse stated that he believes that this behavior should be treated the same way, regardless of a firm’s size. Judge Delker expressed concern that the language in Justice Lynn’s proposal,



“as defined by substantive law” would mean that the rule would not apply to, for example, behavior toward opposing counsel and court clerks.

Ultimately, the Committee voted to put all three proposals out for public hearing in June 2018. The Committee directed that the notice include language indicating that the Committee would consider the three proposals included in the public hearing notice, as well as any other language suggested at the public hearing.

A number of written comments were submitted regarding the proposals prior to, and during, the public hearing. Each of the following is available on the Advisory Committee on Rules webpage, under docket number 2016-009, at [courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm](https://courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm):

- 5/25/18 letter from David Nammo, CEO and Executive Director, Christian Legal Society;
- 5/28/18 letter from attorney Paul A. Dowd;
- 5/29/18 letter from Mr. Christopher Jay;
- 5/29/19 letter from attorney Michael J. Tierney;
- 5/29/18 letter and attachment from Josh Blackman, Associate Professor, South Texas College of Law, Houston;
- 5/29/18 email from attorney Neil B. Nicholson;
- 5/30/18 letter from attorney David A. Rardin;
- 5/30/18 email from attorney Michael Donnelly;
- 5/30/18 letter from attorney Fred Potter, JustLawNH.com;
- 5/30/18 letter from attorney David P. Crocker;
- 5/30/18 letter from attorney David A. Rardin (on behalf of New Hampshire Chapter of Christian Legal Society);
- 5/30/18 letter from Eugene Volokh, UCLA School Of Law;
- 5/30/18 letter from attorneys Andrew P. Cernota, Vernon C. Maine, and Mathew J. Curran;
- 5/31/18 email from attorney Sara B. Shirley;
- 5/31/18 letter from attorney James Q. Shirley;
- 05/31/18 letter from attorney Gilles Bissonette, Legal Director, New Hampshire ACLU;
- 05/31/18 letter from attorney Eugene M. Van Loan III;
- 05/31/18 letter from attorney Timothy L. Chevalier;
- 05/31/18 letter from Steven W. Fitschen, President, National Legal Foundation and Senior Legal Advisor, Congressional Prayer Caucus;
- 06/01/18 letter from eleven members of the NH Catholic Lawyers Guild;
- 06/01/18 letter from attorney Mark D. Attori;
- 06/01/18 letter from attorneys Quinlan and Cook, in-house counsel, Roman Catholic Bishop of Manchester;

- 06/01/18 letter from attorney Christina A. Ferrari, President-Elect, New Hampshire Women's Bar Association.
- Undated Proposed Amendment to Appendix M, submitted by the New Hampshire Bar Association Ethics Committee at the June 1 public hearing.

The June 1, 2018 public hearing was very well-attended. The bulk of the testimony offered at the public hearing related to the proposal to amend New Hampshire Rule of Professional Conduct 8.4. As has been noted, the Committee had requested comment on three different proposed amendments to Rule of Professional Conduct 8.4. Given the length of the public hearing, detailed minutes of the public hearing were not prepared. See June 1, 2018 meeting minutes at [courts.state.nh.us/committees/adviscommrules/minutes.htm](https://courts.state.nh.us/committees/adviscommrules/minutes.htm). However, a CD of the hearing is available at the New Hampshire Supreme Court. The names of the speakers who testified and a summary of their testimony follows:

- Peter Imse, an attorney at Sulloway and Hollis and a member of Bar Association Ethics Committee, stated that he was very involved in the subcommittee that worked on this proposal. He noted that the proposal set forth at Appendix K of the June 1 public hearing notice is the proposal made by the Bar Association, endorsed by the Ethics Committee and the Board of Governors. They support its adoption.
- Rolf Goodwin, an attorney at the McLane firm and a member of the Bar Association Ethics Committee, stated that he had participated in the Ethics Committee retreat in Concord in 2001 to review new Model Rules of Professional Conduct adopted by ABA. He provided some background about how the New Hampshire Rules of Professional Conduct differ from the ABA's Model Rules of Professional Conduct. He spoke in support of the proposal.
- Maureen Smith, an attorney at Orr and Reno who served on a subcommittee of the Ethics Committee relating to the proposal to adopt Rule 8.4(g) emphasized that the purpose of the attorney discipline system is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession and prevent misconduct in the future. She spoke in support of the proposal.
- Meredith Cook, Director of Public Policy and Vice Chancellor of the Roman Catholic Dioceses of Manchester, stated that she was appearing in her own capacity, and stated that when she was in private practice she was an employment attorney and in that role worked to prevent unlawful harassment and discrimination. She noted several concerns she had with all three versions of the rule, and submitted a letter urging

the Committee not to adopt any of the three versions of the proposed rule. She stated that she would be happy to assist the Committee if the Committee is going to continue to work on a proposal.

- Christina Ferrari, an attorney at Bernstein Shur and a representative of the New Hampshire Women's Bar Association, stated that the New Hampshire Women's Bar Association supports the adoption of the proposal set forth in Appendix K.
- Fred Potter, an attorney at JustLawNH.com, PLLC, stated that he has practiced law since 1975, is a past president of the New Hampshire Bar Association, and former CEO and Executive Director of the Christian Legal Society. He expressed concern about all three proposals and stated that his biggest concern is the inclusion of speech in the rule. He is concerned that a single inappropriate comment could result in disciplinary action being taken against an attorney.
- Michael Tierney, an attorney Wadleigh, Starr & Peters, stated that he was appearing personally to offer comment on the proposal based on his 14 years of practice representing religious organizations and litigating free speech cases. He expressed concern about all three versions of the rule.
- Bob Dunn, an attorney at Devine Millimet, stated that he was appearing on his own behalf and on behalf of himself and ten other members of the New Hampshire Catholic Lawyers Guild, and not as a member of his firm. He stated that he understands the impetus behind the rule, but is concerned about unintended consequences. He expressed concern about what impact the adoption of a rule might have on lawyers participating in matters of public policy.
- Janet DeVito, General Counsel at the Attorney Discipline Office, stated that the lawyers at the Attorney Discipline Office are concerned about having to enforce anti-discrimination and anti-harassment rules. She also noted that she believes that there are rules of professional conduct that already exist that will address many behaviors that would be considered harassment or discrimination. She also noted that there are state and federal laws regarding harassment and discrimination that are subjects of "hugely complex litigation," and that for the ADO to determine those same issues that courts are struggling with all over the country would be really challenging.
- Mark Attori, an attorney at Devine Millimet, noted that he was speaking on his own behalf. He expressed concern that the adoption of a rule might keep lawyers from speaking out about issues at legislative

hearings, and in debates like this one. He inquired whether the benefits of this rule outweigh the detrimental effects on speech.

- Attorney Imse addressed the Committee again. He stated that he had today submitted a proposal to amend the Ethics Committee proposal set forth at Appendix M of the June 1 public hearing notice. The Ethics Committee proposed the following amendment (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~):

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination, as defined by substantive state or federal law, on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation or marital status.**[; however, statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule.]** This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16 **[nor does it infringe on a lawyer's First Amendment rights or a lawyer's right to advocate for a client in a manner that is consistent with these Rules.]**

Attorney Imse believes that the proposed amendment addresses many of the concerns that were raised by the speakers at the hearing. He also noted that many of the speakers agreed that harassment and discrimination are not acceptable and have criticized the proposed rules, but have not offered an alternative proposal to address the problematic behavior.

- James Q. Shirley, an attorney at Sheehan, Phinney Bass & Green addressed the Committee. He expressed a number of concerns about the proposals. He noted that there are remedies within the rules for this kind of behavior. He is concerned about opening the floodgates and asking the Attorney Discipline Office to engage in an analysis of federal statutory and constitutional law.
- Attorney Maureen Smith addressed the Committee again. She stated that the subcommittee of the Ethics Committee had looked throughout the country to see whether the floodgates have opened in other states. She stated that they did not see any rash of complaints being filed as a result of the adoption of rules like the ones proposed.

Following the close of the public hearing, given the late hour, the Committee did not have a substantive discussion about any of the proposals. Senator Feltes suggested, and Committee members agreed, that it would make

sense for members of the Ethics Committee and some of the people who spoke at the public hearing to meet and to try to agree on a compromise proposal. Attorneys Feltes and Herrick agreed to facilitate the working group discussions.

At the September 7, 2018 meeting, Senator Feltes reported that he and attorney Herrick had met with the working group three times over the course of the summer and had had extensive conversations about the concerns expressed about the proposals. See September 7, 2018 meeting minutes at [courts.state.nh.us/committees/adviscommrules/minutes.htm](https://courts.state.nh.us/committees/adviscommrules/minutes.htm). He stated that the working group included attorneys Gilles Bissonnette, Meredith Cook, Bob Dunn, Jim Shirley, Michael Tierney, Christina Ferrari and three members of the New Hampshire Bar Association Ethics Committee who had worked on the original proposal – attorneys Smith, Goodwin and Imse.

Senator Feltes informed the Committee that the working group was not able to reach consensus, but that he and attorney Herrick had submitted Feltes-Herrick Subcommittee Proposed Rule 8.4(g) to the Committee, which reads:

(g) engage in conduct while acting as a lawyer in any context that is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity; however, statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer’s right to advocate for a client.

Senator Feltes noted the following about the proposal:

- The language from the original proposal, “engage in conduct related to the practice of law” has been replaced with “engage in conduct while acting as a lawyer in any context.” He noted that comment 4 of the original proposal reads, “see ABA Comment 4 related to the intended scope of the phrase, ‘related to the practice of law.’” This language is not included in the Feltes-Herrick proposal. This is because he believes that the model comment is too specific.
- The Feltes-Herrick proposal includes gender identity as one of the protected classes because gender identity was recently added to the New Hampshire human rights statute.

- The Feltes-Herrick proposal makes clear in the rule itself that “statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule.” This statement was included in footnote three of the comments following the proposals that were put out for public hearing in June.
- The last sentence of the Feltes-Herrick proposal (“This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer’s right to advocate for a client.”) was not included in any of the proposals put out for public hearing in June. It provides exceptions to the general rule set forth in the first sentence. This is intended to address concerns raised at the public hearing.

Senator Feltes reiterated that, as is clear from the comments attached to the proposal he and attorney Herrick submitted, the subcommittee was unable to reach a broad consensus. A brief summary of the views expressed in each of the comments follows (the comments themselves are attached to the September 5, 2018 Subcommittee Submission, under docket # 2016-009, which can be found on the Advisory Committee on Rules webpage at [courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm](https://courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm))

- Attorneys Meredith Cook and Bob Dunn stated that they could not support the proposal because it “fails to define discrimination and harassment.”
- Attorney Bissonnette stated that the ACLU would not oppose the proposed language if there were language defining harassment or discrimination by reference to state or federal law. Attorney Bissonnette’s comment suggests adding the words “under state or federal law” following “that is harassment and discrimination.”
- Attorney Imse stated that the Ethics Committee urges that the revised proposal, with attorney Bissonnette’s amendment, be submitted to the Advisory Committee on Rules.
- The New Hampshire Women’s Bar Association expressed concern that including the language, “under state or federal law” would be too limiting, and prefers “guided by state or federal law.”
- Attorney James Q. Shirley does not support the Feltes-Herrick proposal. Attorney Shirley believes that even with a reference to state and federal law, the rule would be impermissibly vague.

- Attorney Tierney does not support the Feltes-Herrick proposal. He believes that the proposal “goes too far in seeking to limit speech and conduct ‘that is harassment or discrimination’ without properly defining these terms and limiting them to appropriate contexts.” He suggested that the rule make it “professional misconduct for a lawyer to: (g) in his or her capacity as a lawyer, make unwelcome sexual advances or requests for sexual favors, or engage in other unwelcome, verbal, non-verbal or physical conduct of a sexual nature.”

In addition to these comments, some members of the working group, and members of the public, filed formal written comments in anticipation of the September meeting. A brief summary of the comments is provided below (the comments themselves are available on the Advisory Committee on Rules webpage under docket # 2016-009 at [courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm](https://courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm)):

- September 4, 2018 letter from Christina A. Ferrari, President, New Hampshire Women’s Bar Association Board of Directors.
- September 5, 2018 letter from attorney Tierney asking the Committee to reject the Feltes-Herrick Proposed Rule 8.4(g), for the reasons stated in his May 29, 2018 letter to the Committee and his testimony at the June 1, 2018 public hearing and because he believes: (1) narrower language is both possible and constitutional; (2) the proposed language will have a disproportionate effect on solo practitioners and small firms; and (3) because the Ethics Committee’s proposed language is unconstitutional.
- September 6, 2018 letter from attorney Gilles Bissonnette, American Civil Liberties Union – New Hampshire, stating that the ACLU-NH would not oppose the Feltes-Herrick Proposed Rule 8.4(g) if there was language added defining harassment under state or federal law.
- September 6, 2018 letter from attorney Sara B. Shirley, stating that there are many legitimate reasons to oppose all proposed versions of Rule 8.4(g). Attorney Shirley believes that two important reasons have received insufficient attention: (1) the evidence supporting the need for the rule is flawed; and (2) the proposed rule does not include a scienter requirement.
- September 6, 2018 letter from attorney Maureen Smith, writing on behalf of the Rule 8.4(g) Subcommittee of the New Hampshire Bar Association Standing Committee on Ethics, stating that the Subcommittee opposes neither the September 5, 2018 Feltes-Herrick proposal nor the proposed ACLU-NH modification. The Ethics Subcommittee believes that the

addition of the definitional qualifier, “under state or federal law,” modifying the terms harassment and discrimination would expressly incorporate the definitions developed under substantive law, thereby fully addressing any potential objections on grounds of vagueness.

- September 6, 2018 letter from attorney Meredith Cook, employed as in-house counsel by the Roman Catholic Bishop of Manchester, stating her opposition to the Feltes-Herrick Proposal and expressing support for the proposal submitted by attorney Tierney.
- September 6, 2018 letter from David Nammo, CEO & Executive Director, Christian Legal Society, supplementing comments made in his May 25, 2018 submission to the Committee and bringing to the Committee’s attention: (1) the United States Supreme Court’s decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (U.S. June 26, 2018); and (2) the fact that the Arizona Supreme Court recently rejected adoption of ABA Model Rule 8.4(g) by order dated August 30, 2018.

Following Senator Feltes’ presentation, the Committee spent a great deal of time discussing the proposal and the comments submitted about the proposal. Provided in this report, below, is a brief summary of the major issues discussed at the meeting. Detailed notes about the issues discussed can be found in the September 7, 2018 meeting minutes at [courts.state.nh.us/committees/adviscommrules/minutes.htm](https://courts.state.nh.us/committees/adviscommrules/minutes.htm).

It was noted at the meeting that concern had been expressed in the comments about the removal of the language, “knows or reasonably should have known” from the proposal. Senator Feltes explained that here was discussion in the group about the fact that this may not be the actual standard. There was concern that if the standard set forth in the rule were different from the standard set forth in state and federal law, that this would add confusion to the process. Following some discussion, the Committee agreed that the language, “that the lawyer knew or reasonably should have known” should be added to the proposal.

In response to an inquiry from a member of the Committee, Senator Feltes stated that the working group did not seek input from the Attorney Discipline Office about the proposal. Justice Donovan reminded the Committee that according to Janet DeVito’s testimony at the public hearing, the Attorney Discipline Office does not support the adoption of a rule. Senator Feltes noted that the primary concerns expressed by the Attorney Discipline Office were that: (1) the rule would be difficult to enforce; and (2) enforcing the rule would require additional resources. Senator Feltes explained that he and attorney Herrick were not persuaded by the first concern because the rules of



professional conduct already make it misconduct for attorneys to engage in acts that are even more vaguely defined. For example, Rule 8.4 makes it professional misconduct for a lawyer to “engage in conduct involving dishonesty,” among other things.

There was discussion about whether the Committee should consider a rule similar to the rule adopted in Illinois, which states that a charge of professional misconduct cannot be brought pursuant to this paragraph until a court of competent jurisdiction has made a determination that the attorney has engaged in an act that constitutes an unlawful discriminatory practice. Senator Feltes explained that there are plenty of situations involving harassment and discrimination that do not become the subject of lawsuits. In light of this, he and attorney Herrick felt that it would make more sense to recommend the adoption of a rule that has been adopted in many other states.

Representative Berch stated that he is concerned about the constitutional issues. Even putting aside the First Amendment concerns, as he sees it, there are two issues:

(1) the lack of a definition of discrimination – we are talking about punishing behavior and then deliberately not defining that behavior. This constitutional issue is then magnified by:

(2) removing the scienter requirement and making attorneys strictly liable. We would be saying to someone, “you did it, you are in trouble,” but we are not going to tell you beforehand what the bad behavior is that you are not supposed to engage in is.” This is troublesome. Representative Berch believes that this would be held unconstitutional – it is a punishment for undefined acts.

Representative Berch agreed that the inclusion of the language, “as defined by state and federal law” would mitigate his concerns.

Judge Delker inquired whether there might be a way to draft the rule so that it does not refer to the entire body of law, but just to address the question: what does harassment mean? What does discrimination mean? Attorney Herrick stated that this had been considered, but that, unfortunately, it is not easy to come up with a definition.

Attorney Herrick noted that the concern regarding vagueness is a concern that was considered by the working group. The working group noted that there are other Professional Conduct Rules which are similarly “vague.” For example, Rule of Professional Conduct 8.4 states that “it is professional misconduct” for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” She noted that “dishonesty” and “deceit” are pretty vague.

Justice Lynn inquired whether, with respect to the discrimination issue, this could be applied to disparate impact cases. For example, suppose a law firm has a policy regarding the number of working hours that an attorney is required to put in, and suppose the firm is dominated by males. Would the lawyers in the firm potentially be subjected to discipline for this, even though the policy regarding hours is neutral on its face, and was not designed to achieve this effect? Senator Feltes stated that the Attorney Discipline Office would have discretion in deciding whether to pursue such a matter, but that because disparate impact is actionable under state and federal law, the situation described could potentially result in disciplinary action.

There was some discussion about whether the proposal should include the language, “statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule,” given that the legislature had decided, for policy reasons, to exempt employers with fewer than six employees. Justice Lynn inquired whether the Court would be going too far in overriding that policy decision in this context. Senator Feltes responded that it was the view of the subcommittee that all lawyers should be treated equally. To say to a small subset of lawyers, “these rules do not apply to you,” would send the wrong message. The professional conduct rules should apply to all lawyers.

Following some further discussion, and upon motion made and seconded, the Committee (attorney Albee, Judge Delker, Senator Feltes, Judge Garner, attorney Gill, attorney Herrick, Mr. Richter, Ms. Spalding, Mr. Stewart, Justice Lynn and Justice Donovan) voted to recommend that the Court amend Rule of Professional Conduct 8.4, as set forth in Appendix V. Justice Lynn noted that his vote to recommend that the Court adopt this provision does not mean that as a member of the Court he would necessarily support its adoption. Representative Berch, attorney Curran and attorney Gordon voted against recommending that the Court adopt this provision.

Committee also voted, upon motion made and seconded, to recommend that the Court hold a hearing before the full court on the proposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carolyn A. Koegler', written in a cursive style.

Carolyn A. Koegler, Secretary

## APPENDIX A

Amend Supreme Court Rule 5(2) as follows (additions are in **[bold and brackets]**; deletions are in ~~striketrough~~ format):

(2) The court may upon motion waive payment of the entry fee in exceptional circumstances. Such motion shall be filed at the same time the notice of appeal or other appeal form is filed.

In any criminal case where the defendant is indigent and wishes to ~~have counsel appointed to represent him~~ **[be represented by appointed counsel]**, a petition for assignment of counsel or for continued assignment of counsel and supporting affidavit of indigency shall be filed in this court at the same time the notice of appeal is filed. It is essential that Rule 32 be complied with.

## APPENDIX B

Amend Supreme Court Rule 7(4) as follows (additions are in **[bold and brackets]**; deletions are in ~~striketrough~~ format):

(4) All parties to the proceedings in the court from whose decision on the merits the appeal is being taken shall be deemed parties in this court, unless the moving party shall notify the clerk of this court in writing of ~~his~~ **[the moving party's]** belief that one or more of the parties below has no interest in the outcome of the transfer. The moving party shall mail a copy of the letter first class, or give a copy, to each party in the proceeding below. A party thus designated as no longer interested may remain a party in this court by notifying the clerk of this court, with notice mailed first class or given to the other parties, that ~~he~~ **[the designated party]** has an interest in the transfer. Parties supporting the position of the moving party shall meet the time schedule provided for that party.

## APPENDIX C

Amend Supreme Court Rule 15(3) as follows (additions are in **[bold and brackets]**; deletions are in ~~strikethrough~~ format):

(3) If the moving party intends to argue in the supreme court that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, ~~he~~ **[the moving party]** shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless otherwise ordered by the supreme court, the transcript shall contain all the oral proceedings except opening statements, medical testimony, arguments, and charge.

## APPENDIX D

Amend Supreme Court Rule 16 as follows (additions are in **brackets**; deletions are in ~~strikethrough~~ format):

Rule 16. Briefs.

(1) Briefs may be prepared using a printing, duplicating or copying process capable of producing a clear letter quality black image on white paper, but shall not include ordinary carbon copies. If briefs timely filed do not conform to this rule or are not clearly legible, the clerk of the supreme court may require that new copies be substituted, but the filing shall not thereby be deemed untimely.

Each brief shall be in pamphlet form upon good quality, nonclinging paper 8 ½ by 11 inches in size, with front and back covers of durable quality. Each brief shall have a minimum margin of one and one-half (1 ½) inch on all sides and shall be firmly bound at the left margin. Any metal or plastic spines, fasteners or staples shall be flush with the covers and shall be covered by tape. The covers shall be flush with the pages of the case. See also Rule 26(5).

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appealing party should be blue; that of the opposing party, red; that of an intervenor or amicus curiae, green; and that of any reply brief, including the answering brief in accordance with Rule 16(8), gray. The cover of the appendix, if separately printed, should be white.

The court will not accept any other method of binding unless prior approval has been obtained from the clerk of the supreme court.

(2) The front covers of the briefs and of appendices, if the appendices are separately produced, shall contain: (a) the name of this court and the docket number of the case; (b) the title of the case; (c) the nature of the proceeding in this court, e.g., appeal by petition pursuant to RSA 541: 6, and the name of the court or agency below; (d) the title of the document, e.g., brief for plaintiff; (e) the names, addresses and New Hampshire Bar identification numbers of counsel representing the party on whose behalf the document is filed; and (f) the name of counsel who is to argue the case. See form in appendix.

(3) So far as possible, the brief of the moving party on the merits shall contain in the order here indicated:

(a) A table of contents, with page references, and a table of cases listed alphabetically, a table of statutes and other authorities, with references to the pages of the briefs where they are cited.

(b) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. While the statement of a question need not be worded exactly as it was in the appeal document, the question presented shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in his **[the]** brief any question of law not listed in his **[the moving party's]** appeal document, but only if the supreme court has granted a motion to add such question, and he **[the moving party]** has presented a record that is sufficient for the supreme court to decide the questions presented. Motions to add a question may be filed only by a party who filed an appeal document (including a party who filed a cross-appeal), and shall be filed at least 20 days prior to the due date of the moving party's brief.

After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule.

(c) The constitutional provisions, statutes, ordinances, rules, or regulations involved in the case, setting them out verbatim, and giving their citation. If the provisions involved are lengthy, their citation alone will suffice at that point, and their pertinent text shall be set forth in an appendix.

(d) A concise statement of the case and a statement of facts material to the consideration of the questions presented, with appropriate references to the appendix or to the record.

(e) A summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(f) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon.

(g) A conclusion, specifying the relief to which the party believes himself entitled. **[sought by the party.]**

(h) A statement that the party waives oral argument or that the party requests oral argument. A party requesting oral argument may designate whether the party requests oral argument before a 3JX panel or the full court, and may set forth reasons why the party believes oral argument is necessary or will be helpful to the court in deciding the case. If a party requests oral argument before the full court, and if the party believes that more than 15 minutes to a side will be necessary for oral argument, the party may set forth why the party believes that good cause exists for granting additional time. The party shall designate the lawyer to be heard if there are two or more lawyers on the party's side.

(i) A copy of the decision(s) below that are being appealed or reviewed. If the appealed decision is in writing, a copy of that decision shall be included with the brief, and shall not be included in a separate appendix. The appealing party shall, immediately before the signature line on the brief, certify either that the appealed decision is in writing and is appended to the brief, or that the appealed decision was not in writing and therefore is not appended to the brief. Any brief not conforming with this rule may be rejected.

(4)(a) The brief of the opposing party shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and except that subsections (b), (c), and (h) of subsection (3) need not be included unless the opposing party is dissatisfied with their presentation by the other side.

(b) Instead of a brief, the opposing party in a mandatory appeal may file a memorandum of law not to exceed 4,000 words in length. A memorandum of law need not comply with the requirements for a brief set forth in this rule, including the requirements that briefs be bound in pamphlet form and have covers. A memorandum of law, however, shall contain: (i) the argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon; and (ii) a conclusion, specifying the relief ~~to which the party believes himself entitled.~~ **[sought by the party.]** A party who files a memorandum of law shall be deemed to have consented to the waiver of oral argument.

(5) Reply briefs shall conform to such parts of this rule as are applicable to the briefs of an opposing party, but need not contain a summary of argument, regardless of their length, if appropriately divided by topical headings.

(6) Briefs and memoranda of law must be compact, logically arranged with proper headings, concise and free from burdensome, irrelevant, and immaterial matter. Briefs and memoranda of law not complying with this section may be disregarded and stricken by the supreme court.



(7) Unless specially ordered otherwise, the original and 8 copies of the opening brief shall be filed with the clerk of the supreme court, in addition, 2 copies with counsel for each party separately represented, 2 copies with each self-represented party, and like distribution shall be made of the opposing brief, opposing memorandum of law, or any other brief, all within the times specified in the applicable scheduling order.

The party filing the opening brief may similarly file, and make like distribution of, a reply brief, which shall be filed by the earlier of 20 days following the submission of the opposing brief or opposing memorandum of law, or 10 days before the date of oral argument. A reply brief may be filed after the expiration of the applicable time period only by leave of court. Responses to a reply brief shall not ordinarily be allowed. No response to a reply brief may be filed except by permission of the court received in advance.

Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in ~~his~~ **[the party's]** brief, ~~he~~ **[the party]** may similarly file, and make like distribution of, such new matters up to and including the day of oral argument, or by leave of the supreme court thereafter.

The court shall not consider any brief or memorandum of law after a case has been argued or submitted, unless the court has granted to the party offering to file the brief or memorandum of law special leave to do so in advance.

(8) If a cross-appeal is filed, the clerk shall determine which party shall be deemed the moving party for the purposes of this rule, unless the parties agree and so notify the court. The brief of the opposing party shall contain the issues and argument involved in ~~his~~ **[the opposing party's]** appeal as well as the answer to the brief of the moving party. The moving party may file an answering brief within the time specified in the scheduling order.

(9) All references in a brief or memorandum of law to the appendix or to the record must be accompanied by the appropriate page number. See Rule 17.

(10) The party filing a brief or memorandum of law shall conclude the pleading with a certification that the party has hand-delivered or has sent by first class mail two copies of the pleading to the other counsel in the case.

The name of the party filing the brief or memorandum of law and the name of the lawyer representing the party shall appear in type at the conclusion of the pleading, and the lawyer shall sign the pleading. Names of persons not members of the bar or not parties shall not appear on the notice of appeal, the brief, the memorandum of law, or in the appendix unless they have

complied with Rule 33 and received prior written approval of the court. See Rule 33(2).

If an attorney provided limited representation to an otherwise unrepresented party by drafting a brief or memorandum of law to be filed by such party in a proceeding in which the attorney is not entering any appearance or otherwise appearing in the case in the supreme court, the attorney is not required to disclose the attorney's name on such pleading to be used by that party; any pleading drafted by such limited representation attorney, however, must conspicuously contain the statement "This pleading was prepared with the assistance of a New Hampshire attorney." The unrepresented party must comply with this required disclosure.

(11) Each brief and memorandum of law shall consist of standard sized typewriter characters or size 13 font produced on one side of each leaf only. The lines of text shall be spaced at a setting of 1.5. The text shall be left-aligned only. The pages of the brief shall be sequentially numbered, beginning with the cover page as page 1 and using only Arabic numerals for page numbers (e.g. 1, 2, 3), including for the table of contents and table of authorities. The page number may be suppressed and need not appear on the cover page.

Except by permission of the court received in advance, no reply brief (or response thereto) shall exceed 3,000 words, and, except in a case with a cross-appeal, no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters. If a cross-appeal is filed, the opening brief and answering brief of the moving party shall not exceed 9,500 words, and the opposing brief of the cross-appellant shall not exceed 14,000 words, exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters. The cross-appellant may file a reply brief, which shall not exceed 3,000 words.

(12) Failure of the appealing party to file a brief shall constitute a waiver of the appeal and the case shall be dismissed.

## APPENDIX E

Amend Supreme Court Rule 17 as follows (additions are in **bold and brackets**]; deletions are in ~~strikethrough~~ format):

Rule 17. Appendix to Brief.

(1) The court will not ordinarily review any part of the record that has not been provided to it in an appendix or transmitted to it. See Rule 13(3).

If there is to be an appendix of relevant documents or pleadings, the parties are encouraged to agree on its contents as an addendum to the moving party's brief or as a separate submission, if voluminous. If the moving party's appendix is not deemed to be sufficient, the opposing party may prepare and file an appendix of such additional parts of the record as an addendum to ~~his~~ **[the opposing party's]** brief or memorandum of law or, if voluminous, as a separate submission.

(2) The original and 8 copies of an appendix meeting the requirements of Rule 6(2) shall be filed in the office of the clerk of the supreme court and its pages shall be sequentially numbered, beginning with the cover page as page 1 and using only Arabic numerals for page numbers (*e.g.*, 1, 2, 3), including for the table of contents. The page number may be suppressed and need not appear on the cover page. The cover of the appendix should be white.

(3) The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matter to be included in the appendix unnecessarily, such as the full text of decisions of this court or irrelevant pleadings, the supreme court may impose the cost of producing such parts on that party, even though he **[or she]** may be the prevailing party.

(4) At the beginning of the appendix there shall be inserted a table of contents with references to the page of the appendix at which each item listed in the table of contents begins. When matter contained in the transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter that is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters, *e.g.*, captions, subscriptions, acknowledgments, shall be omitted.

(5) To facilitate reading multi-volume appendices in electronic form:

(a) Each volume of the appendix shall be designated by a Roman numeral on the cover and shall be separately paginated, beginning with the cover page as page 1. All subsequent pages shall be numbered consecutively,

including the table of contents, with Arabic numerals only. Page numbering shall not continue across multiple volumes. For example, a brief with a two-volume appendix would cite to both the particular appendix volume and its page number as "Apx. I at 117" and "Apx. II at 24."

(b) The first volume of the appendix shall include a complete table of contents referencing all volumes of the appendix, and each individual volume shall include a table of contents for that volume.

## APPENDIX F

Amend Supreme Court Rule 26(2) as follows (additions are in **[bold and brackets]**; deletions are in ~~striketrough~~ format):

(2) Copies of all documents filed by any party shall, at or before the time of filing, be served by a party or person acting for him **[or her]** on all other parties to the case. Service on a party represented by counsel shall be made on counsel. Copies of motions to extend time to file an appeal document, appeal documents, and motions for rehearing or reconsideration shall be filed with the clerk of the court or agency from which the appeal or transfer is taken, and (in the case of an appeal from an administrative agency) with the attorney general, as specified in rules 5, 21, or 22.

## APPENDIX G

Amend Supreme Court Rule 28(2) as follows (additions are in **[bold and brackets]**; deletions are in ~~striketrough~~ format):

(2) Unless the supreme court expressly orders differently, cases in which the State, a State agency, or a State official is a party, the State's name shall be listed as "The State of New Hampshire"; the name of the State agency shall be preceded by the words "New Hampshire", *e.g.*, "New Hampshire Department of Health and Welfare"; the name of a State division shall be preceded by the words "New Hampshire" but shall not mention the parent agency, *e.g.*, "New Hampshire Division of Human Services"; and the title of a State official, but not ~~his~~ **[the official's]** name, shall be listed, *e.g.*, "Secretary of State". If the title of a State official is identical to that of a municipal or county official, the State official's title shall be preceded by the words "New Hampshire".

## APPENDIX H

Amend Supreme Court Rule 29 as follows (additions are in **bold and brackets**; deletions are in ~~striketrough~~ format):

Rule 29. Substitution of Parties.

(1) If a party dies after a case has been entered in this court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the supreme court. If the deceased party has no representative, any party may mention the death on the record, and proceedings shall then be had as the supreme court may direct.

(2) When a public officer in his **[or her]** official capacity is a party to an appeal or other proceeding in the supreme court and during the pendency of the case he dies, resigns, or ceases to hold office, ~~his~~ **[the officer's]** successor shall be automatically substituted as a party.

## APPENDIX I

Amend Supreme Court Rule 31 as follows (additions are in **[bold and brackets]**; deletions are in ~~striketrough~~ format):

Rule 31. Cases in Which the State is Not a Party, But Which Involve the State's Interests.

A party who intends to draw in question the constitutionality of any State statute, any State administrative procedure or regulation, and any State official conduct in any proceeding in the supreme court to which the State, or any agency thereof, or any officer or employee thereof as such officer or employee, is not a party, shall, upon entry of the case in the supreme court, give immediate notice in writing to the clerk of the supreme court and the attorney general, and shall at the same time send the attorney general a copy of ~~his~~ **[the party's]** notice of appeal, transfer statement, or petition.



## APPENDIX J

Amend Supreme Court Rule 33(2) as follows (additions are in **[bold and brackets]**; deletions are in ~~strikethrough~~ format):

(2) Without the prior written approval of the court, no person who is not a lawyer may represent a person other than himself **[or herself]** or be listed on the notice of appeal or other appeal document, or on the brief, or sit at counsel table in the courtroom or present oral argument. Request for such written approval shall be made in writing at the time of filing the appeal or, if it relates to briefing or oral argument, not later than 15 days before the date scheduled for filing the brief or for oral argument. The request must contain: (a) a power of attorney signed by the party, and witnessed and acknowledged before a justice of the peace or notary public, constituting another person as his or her attorney to appear in the particular action; and (b) an affidavit under oath in which said other person discloses (i) all of said other person's misdemeanor and felony convictions (other than those in which a record of the conviction has been annulled by statute), (ii) all instances in which said other person has been found by any court to have violated a court order or any provision of the rules of professional conduct applicable to nonlawyer representatives, (iii) all prior proceedings in which said other person has been permitted to appear, plead, prosecute or defend any action for any party, other than himself or herself, in any court, (iv) all prior proceedings in which said other person has not been permitted to appear, plead, prosecute or defend any action for any party, other than himself or herself, in any court, and (v) all prior proceedings in which said other person's permission to appear, plead, prosecute or defend any action for any party, other than himself or herself, in any court has been revoked. Any person who is not a lawyer who is permitted to represent any other person before any court of this State must comply with the Rules of Professional Conduct as set forth in Professional Conduct Rule 8.5, and shall be subject to the jurisdiction of the committee on professional conduct.

## APPENDIX K

Amend Supreme Court Rule 36(2) as follows (additions are in **[bold and brackets]**; deletions are in ~~strikethrough~~ format):

(2) The supervising attorney shall be a member of the bar of this State and, with respect to the law student or graduate's proposed appearances in any court, shall file with the clerk of this court the attorney's written consent to:

(a) supervise the student or graduate;

(b) assume personal professional responsibility for the student's or graduate's work and consider purchasing professional liability insurance coverage to include such law student or graduate;

(c) assist the student or graduate to the extent necessary;

(d) appear with the student or graduate in courts in this State when, in the supervising attorney's judgment, the nature of the case requires the supervising attorney's presence; and

(e) participate with the student or graduate in all settlement or plea negotiations and remain available at all times for consultation with opposing counsel without the participation of the student or graduate.

The supervising attorney shall waive the right to the confidentiality of proceedings resulting from complaints to the Committee on Professional Conduct, for the limited purpose of permitting disclosure of such proceedings by said committee to this court in connection with the court's review of a filing under this rule.

The presence of the supervising attorney in the superior court shall be required in all contested civil cases and in all criminal cases, and in district ~~and municipal~~ courts at probable cause hearings. Practicing members in good standing of the bar of another State for at least two years may on application to this court be exempt from the provisions of this rule relating to appearances in superior court and at probable cause hearings in district ~~and municipal~~ courts, provided that they prepare to take and do take the next bar examination in this State for which they are eligible or, having taken that examination, they are awaiting publication of the results of, or admission to the bar after passing, that examination. The presence of the supervising attorney shall be required in all cases in this court provided, however, that a student or graduate may appear in this court only in cases heard under Rule 12-D and with prior approval of this court.

The attorney shall file his **[or her]** written consent immediately upon his consenting to supervise a law student or graduate. Following such initial written consent, in every instance in which an attorney consents to continue ~~his supervision of the~~ **[supervising]** law students and graduates under this rule, the attorney shall annually refile his **[or her]** written consent with the clerk of the supreme court in the month of October. The attorney shall file a withdrawal of ~~his~~ written consent immediately upon the termination of his **[or her]** supervision of any such student or graduate.

## APPENDIX L

Amend subsection 7(c) of Supreme Court Rule 40 as follows (additions are in **[bold and brackets]**; deletions are in ~~striketrough~~ format):

(c) Request for Answer to Complaint. After a complaint is docketed, the executive secretary shall promptly forward to the judge a copy of the complaint and a request for an answer thereto or to any portion thereof specified by the committee. Unless a shorter time is fixed by the committee and specified in such notice, the judge shall have 30 days from the date of such notice within which to file his or her answer with the committee. Such answer shall be filed with the executive secretary, who shall, upon receipt of a written request from the reporter, provide to the reporter a copy of the judge's response. In addition to the required answer, the judge may submit to the committee such other matters as ~~he~~ **[the judge]** may choose.

Whenever the executive secretary provides a judge with a copy of a complaint against such judge, the executive secretary shall at the same time send a copy of the complaint to the chief justice or administrative judge of the court system in which such person serves. In such instances, the chief justice or administrative judge shall send a copy of the complaint to the presiding justice of the particular court in which such person serves.

## APPENDIX M

Amend subsection 10(g) of Supreme Court Rule 40 as follows (additions are in **[bold and brackets]**; deletions are in ~~striketrough~~ format):

(g) If any witness disobeys a subpoena, either as to his or her appearance or as to the production of things specified in the subpoena, or refuses to testify or answer questions, the committee may apply to a justice of the supreme court for an order compelling compliance with the subpoena or compelling ~~him~~ **[the witness]** to testify.

## APPENDIX N

Amend Supreme Court Rule 43 as follows (additions are in **bold and brackets**]; deletions are in ~~strikethrough~~ format):

Rule 43. State-Federal Judicial Council.

In the interest of improving the administration of justice, the Supreme Court of New Hampshire, RSA 490:4 (Supp. 1977), through its chief justice, shall participate in the State-Federal Judicial Council for New Hampshire, consisting of the chief justice of the supreme court; the chief justice of the superior court or an associate justice designated by ~~him~~ **[the chief justice of the superior court]**; a judge of the United States Court of Appeals for the First Circuit, and a judge of the United States District Court for the District of New Hampshire, both designated by the chief judge of said United States Court of Appeals.

In accordance with the recommendation of the Chief Justice of the United States, Burger, *The State of the Judiciary* - 1970, 56 A.B.A.J. 929, 933 (1970), the council shall seek to analyze, improve, and harmonize the relations of the several courts represented in the council, and investigate and consider their joint problems; and in its discretion shall encourage and propose appropriate action with respect thereto, to the end that the judicial process may be expedited, simplified and improved and that the integrity of the judicial system may be maintained.

## APPENDIX O

Amend Supreme Court Rule 46 as follows (additions are in **bold and**

**brackets**]; deletions are in ~~strikethrough~~ format):

Canon 1. *A law clerk should uphold the integrity and independence of the judiciary*

An independent and honorable judiciary is indispensable to justice in our society. A law clerk should participate in establishing, maintaining and enforcing, and should ~~himself~~ observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2. *A law clerk should avoid impropriety and the appearance of impropriety in all ~~his~~ **[of the law clerk's]** activities*

A. A law clerk should respect and comply with the law and should ~~conduct himself or herself~~ **[act]** at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A law clerk should not allow ~~his or her~~ family, social, or other relationships to influence ~~his or her~~ **[the law clerk's]** judicially related conduct or judgment. A law clerk should not lend the prestige of ~~his or her~~ **[the]** office to advance the private interest of others; nor should ~~he or she~~ **[a law clerk]** convey or permit others to convey the impression that they are in a special position to influence ~~him or her~~. **[the law clerk.]**

C. Law clerks must avoid talking with attorneys about cases before the court. A law clerk must never communicate to the attorneys on a pending case the law clerk's opinion or attitude toward the issues pending before the judge. Moreover, once the decision is announced or opinion issued, the law clerk must avoid comment on it or disclosure of the extent of his or her involvement with it. However, this rule does not prevent a law clerk from providing as a writing sample to prospective employers copies of an opinion or order issued by the court in which the law clerk serves or had served, provided the law clerk performed substantial drafting and researching work in connection with the opinion or order, and provided further that the authoring judge gives his or her permission for such use. This rule also does not prevent a law clerk from providing as a writing sample to prospective employers memoranda of law addressing legal issues prepared for the judge for whom the law clerk is employed, provided the judge gives his or her permission for such use. If engaged in conversation by an attorney about a pending matter, the law clerk should strive to terminate the conversation as quickly as politely possible. The

law clerk should avoid even informal contact with attorneys with respect to a matter pending before the Court.

A law clerk must not give advice to attorneys on matter of substantive or procedural law, and must not do minor research tasks for attorneys.

Law clerks should be particularly careful to see that all attorneys are treated equally and not be tempted to provide a special favor for a law school colleague or an old friend.

Canon 3. *A law clerk should perform the duties of ~~his~~ **[the]** office impartially and diligently*

The duties of a law clerk take precedence over all ~~his~~ **[of the law clerk's]** other activities. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A law clerk should be faithful to the law and maintain professional competence in it. ~~He~~ **[A law clerk]** should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A law clerk should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom ~~he~~ **[the law clerk]** deals in ~~his~~ **[the law clerk's]** official capacity.

(3) ~~Every person who is~~ **[All persons who are]** legally interested in a proceeding, or ~~his lawyer has~~ **[their lawyers have]**, full right to be heard according to law; but, except as authorized by law, a law clerk should neither initiate nor consider ex parte or other communications with such persons concerning a pending or impending proceeding.

B. Administrative Responsibilities.

(1) A law clerk should diligently discharge ~~his~~ **[the law clerk's]** administrative responsibilities and maintain professional competence in judicial administration. Each law clerk must read and be familiar with both the N.H. Rules of Professional Conduct and the N.H. Code of Judicial Conduct.

(2) Two important duties owed by the law clerk to the judge are loyalty and confidentiality. The law clerk enjoys a unique relationship with a judge that combines the best of employer-employee, teacher-student and lawyer-lawyer. While the law clerk must be aware of the proper respect due a judge, ~~he~~ **[the law clerk]** should not fear expressing a contrary opinion when personal



opinions are asked. The law clerk is always an assistant to the judge, who has the ultimate authority and responsibility in deciding a case. Without sacrificing intellectual honesty, the law clerk must accept the decision of the judge as if it were ~~his~~ **[the law clerk's]** own.

The law clerk owes the judge the duty of confidentiality concerning everything that occurs in the process of decision-making and all statements or events that do not occur in open court or in open conference with attorneys present. This duty extends beyond the term of clerkship; and, after leaving the service of a court, the law clerk must use extreme caution in public or private comments about a judge or the court so as not to cause a loss of confidence in the judicial process or system. ~~He~~ **[The law clerk]** should not reveal the process that the court employed in arriving at a particular decision or court policy that is not readily apparent from the decision or policy itself.

### C. Disqualification.

(1) A law clerk should disclose the basis of any possible disqualification in a proceeding in which ~~his~~ **[the law clerk's]** impartiality might reasonably be questioned to the judge ~~for whom he~~ **[the law clerk]** serves. If, based on such disclosure, the judge agrees that the law clerk's impartiality cannot reasonably be questioned, the law clerk may participate in the case. Without limiting the obligation to these instances, the law clerk should make this disclosure in any instance where, with respect to a proceeding:

(a) ~~he~~ **[the law clerk]** has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) ~~he~~ **[the law clerk]** served as lawyer in the matter in controversy, or a lawyer with whom ~~he~~ **[the law clerk]** previously practiced law served during that association as a lawyer concerning the matter, or the law clerk or that lawyer has been a material witness concerning it;

(c) ~~he~~ **[the law clerk]** knows that he **[or she]**, individually or as a fiduciary, or ~~his~~ **[the law clerk's]** spouse or minor child residing in ~~his~~ **[the law clerk's]** household[,] has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) ~~he~~ **[the law clerk]** or ~~his~~ **[the law clerk's]** spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the law clerk to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the law clerk's knowledge likely to be a material witness in the proceeding.

(2) A law clerk should ~~inform himself~~ **[keep informed]** about his ~~his~~ **[the law clerk's]** personal and fiduciary financial interests, and should make a reasonable effort to ~~inform himself~~ **[keep informed]** about the personal financial interests of his ~~his~~ **[the law clerk's]** spouse and minor children residing in his ~~his~~ **[the law clerk's]** household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the law clerk participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(4) During the course of a clerkship, each law clerk will no doubt be looking for employment to follow the year with the court. To avoid

embarrassment to interested parties, as well as potential conflicts of interest, the following guidelines apply:

(a) When interviewing, the law clerk must carefully avoid even the most indirect discussion of cases pending before the court.

(b) The law clerk need not ~~recuse himself~~ **[be recused]** from participation in a case involving a law firm to which an inquiry for employment is pending. If serious or active negotiations are underway, however, the law clerk should so inform the judge, and volunteer to withdraw from the case.

(c) After the termination of the clerkship, the law clerk must maintain the confidentiality of the court. Discussions of a particular judge or case should be avoided. The former law clerk must also avoid conflicts of interest by not working on cases that ~~he~~ **[the law clerk]** participated in during the clerkship.

*Canon 4. A law clerk may engage in activities to improve the law, the legal system, and the administration of justice*

A law clerk may engage in law-related activities if in doing so he **[the law clerk]** does not cast doubt on ~~his~~ **[the law clerk's]** capacity to participate fully and impartially in performing ~~his~~ **[the law clerk's]** assigned duties.

*Canon 5. A law clerk should regulate ~~his~~ extra-judicial activities to minimize the risk of conflict with ~~his~~ law clerk duties*

#### A. Avocational Activities.

A law clerk may write, lecture, teach, and speak on legal as well as non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of ~~his~~ **[the]** office or interfere with the performance of ~~his~~ **[the law clerk's]** law clerk duties.

#### B. Civic and Charitable Activities.

A law clerk may participate in civic and charitable activities that do not reflect adversely upon ~~his~~ **[the law clerk's]** impartiality or interfere with the performance of ~~his~~ **[the law clerk's]** law clerk duties. A law clerk may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members.

#### C. Financial Activities.

(1) A law clerk should refrain from financial and business dealings that tend to reflect adversely on ~~his~~ **[the law clerk's]** impartiality, interfere with the proper performance of ~~his~~ **[the law clerk's]** duties, exploit ~~his~~ **[the law clerk's]** position, or involve ~~him~~ **[the law clerk]** in frequent transactions with lawyers or persons likely to come before the court in which ~~he~~ **[the law clerk]** serves.

(2) Subject to the requirements of subsection (1), a law clerk may hold and manage investments, including real estate, and engage in other remunerative activity subject to the approval of ~~his~~ **[the law clerk's]** judge.

(3) Neither a law clerk nor a member of ~~his~~ **[the law clerk's]** family residing in ~~his~~ **[the law clerk's]** household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a law clerk or a member of ~~his~~ **[the law clerk's]** family residing in **[the law clerk's]** ~~his~~ household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not law clerks; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(b) a law clerk or a member of ~~his~~ **[the law clerk's]** family residing in ~~his~~ **[the law clerk's]** household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the court where ~~he~~ **[the law clerk]** serves.

(4) For the purposes of this section "member of ~~his~~ **[the law clerk's]** family residing in ~~his~~ **[the law clerk's]** household" means any relative of a law clerk by blood or marriage, or a person treated by a law clerk as a member of ~~his~~ **[the law clerk's]** family, who resides in ~~his~~ **[the law clerk's]** household.

(5) A law clerk is not required by this Code to disclose ~~his~~ **[the law clerk's]** income, debts, or investments.

(6) Information acquired by a law clerk in ~~his~~ **[the law clerk's]** law clerk duties should not be used or disclosed by ~~him~~ **[the law clerk]** in financial dealings or for any other purpose not related to ~~his~~ **[the law clerk's]** duties.

#### D. Fiduciary Activities.

A law clerk should not serve as an executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of ~~his~~ **[the law clerk's]** family, and then only if such service will not interfere with the proper performance of ~~his~~ **[the law clerk's]** duties. "Member of ~~his~~ **[the law clerk's]** family" includes a spouse, child, grandchild, parent,

grandparent, or other relative or person with whom the law clerk maintains a close familial relationship. As a family fiduciary a law clerk is subject to the following restrictions:

(1) He **[A law clerk]** should not serve if it is likely that as a fiduciary he **[the law clerk]** will be engaged in proceedings that would ordinarily come before the court where he **[the law clerk]** serves, or if the estate, trust, or ward becomes involved in adversary proceedings in the court in which he **[the law clerk]** serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a law clerk is subject to the same restrictions on financial activities that apply to him **[the law clerk]** in his **[the law clerk's]** personal capacity.

#### E. Arbitration.

A law clerk should not act as an arbitrator or mediator.

#### F. Practice of Law.

A law clerk should not practice law absent advance approval from the Supreme Court of the scope and nature of such practice.

#### G. Extra-judicial Appointments.

A law clerk should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice without the approval of the Supreme Court.

Canon 6. A law clerk should refrain from inappropriate political activity

#### A. Political Conduct in General.

(1) A law clerk should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.

(2) A law clerk should resign ~~his office when he becomes~~ **[upon becoming]** a candidate either in a party primary or in a general election for a non-judicial office, except that ~~he~~ **[a law clerk]** may continue to hold ~~his~~ office while being a candidate for election to or serving as a delegate in a State constitutional convention, if ~~he~~ **[the law clerk]** is otherwise permitted to do so.

(3) A law clerk should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

#### Canon 7. *Compliance*

A person to whom this Code becomes applicable should arrange his **[or her]** affairs as soon as reasonably possible to comply with it or receive a waiver from the Supreme Court. This Code shall apply to all full- or part-time law clerks or interns in all courts. Violations shall be brought before the Committee on Judicial Conduct which shall have jurisdiction over any complaints arising under this Code. A law clerk should initially refer any ethical questions under this Code to the justice to whom ~~he~~ **[the law clerk]** is regularly assigned. In the event that in a rare instance ~~he~~ **[the law clerk]** feels dissatisfied with the decision of the ~~justice~~ **[the justice, the law clerk]** may solicit the opinion of all of the justices on the court which ~~he~~ **[the law clerk]** is serving. Such recourse to the justices shall be used with circumspection and without the divulging of such procedure to any persons except to the justices on the court which the law clerk duly is serving. ~~The words "he", "him" or "his" shall equally apply to the feminine gender.~~ Nothing in this Code shall limit any court from having any further and additional requirements for employment as a law clerk so long as they are not less restrictive than this Code. All courts or justices employing a full- or part-time law clerk or intern must file the name and address of such persons with the Clerk of the Supreme Court within two weeks of any such employment.

## APPENDIX P

Amend Supreme Court Rule 52 as follows (additions are in **bold and brackets**]; deletions are in ~~strikethrough~~ format):

Rule 52. Grand Jury Transcripts.

(1) Upon application of the Attorney General or upon the Court's own motion, a Justice of the Superior Court may authorize a stenographic record of the testimony of any witness before a grand jury to be taken by a sworn and qualified reporter. Upon the request of the Attorney General, a transcript of any recorded grand jury proceedings shall be prepared and delivered to ~~him~~ **[the Attorney General]** for use only in the enforcement of the State's criminal laws. Without further authorization from the Court, the Attorney General shall not exhibit the transcript or disclose its contents to anyone except a member of ~~his~~ **[the Attorney General's]** office or a law enforcement officer specifically assigned by ~~him~~ **[the Attorney General]** to perform duties to which the contents of the transcript are relevant.

(2) No later than five days before trial, or later for good cause shown, the Attorney General may petition the Court for authority to use at trial any transcript that has been delivered to him **[or her]** under § 1, above. The Court may grant such a petition upon a showing of particularized need for such use. The State shall not use the transcript of testimony of a witness to impeach, refresh recollection or otherwise without first providing a transcript of the entire testimony of that witness to opposing counsel at such reasonable time as the Court may order.

(3) Where any record of grand jury proceedings is authorized, the Justice authorizing the records shall make every effort to recognize and protect the rights and physical well-being of witnesses who testify before the grand jury, by issuing protective orders where necessary to prevent harm to a witness by the disclosure of ~~his~~ **[the witness's]** testimony.

(4) Upon application from a county attorney or the Attorney General, a Justice of the Superior Court may authorize bailiffs, interpreters, or other court personnel to be present while the grand jury is taking evidence, subject to the obligation to preserve the secrecy of the proceedings.

(5) Within ten days of a plea of not guilty to an indictment in support of which a grand jury has heard testimony that has been transcribed, the State shall inform defense counsel that transcription of testimony was authorized, provided that nothing in this subsection shall be deemed to require the State to reveal the identity of any witness before a grand jury.

(6) Upon application made no later than 30 days before trial, or later for good cause shown, a defendant, upon a showing of particularized need, may be authorized to examine and copy relevant parts of the stenographic record.



## APPENDIX Q

Amend Supreme Court Rule 52-A as follows (additions are in **[bold and brackets]**; deletions are in ~~strikethrough~~ format):

Rule 52-A. Multicounty Grand Juries.

1. An application for a multicounty grand jury shall be made by the attorney general or ~~his~~ **[the attorney general's]** designee. The application shall include the following:

(a) A statement by the attorney general or ~~his~~ **[the attorney general's]** designee that the convening of a multicounty grand jury is necessary, in ~~his judgment~~ **[the judgment of the attorney general or the attorney general's designee]**:

(1) Because of an alleged crime or crimes involving more than one county or judicial district thereof of the state; and

(2) The grand jury functions cannot be effectively performed by a county grand jury.

(b) A statement identifying the crime or crimes under investigation and setting forth reasons why a county grand jury cannot effectively perform the grand jury functions.

(c) A statement as to whether the multicounty grand jury will have statewide jurisdiction or, if not, a listing of the counties or judicial districts thereof over which the multicounty grand jury shall have jurisdiction.

(d) A statement identifying the counties or judicial districts thereof which shall supply jurors and number of jurors to be supplied by each county or judicial district thereof.

(e) A statement designating the location or locations for the multicounty grand jury proceedings. Such location or locations need not be restricted to the county or counties or judicial districts thereof supplying jurors.

(f) A statement that all evidence to be presented to the multicounty grand jury shall be presented by the attorney general or ~~his~~ **[the attorney general's]** designee and that all indictments returned by the multicounty grand jury shall be prosecuted by the attorney general or ~~his~~ **[the attorney general's]** designee.

2. The attorney general or ~~his~~ **[the attorney general's]** designee shall file an original and one copy of the application with the clerk of the supreme court.

The application and copy shall be upon good quality, 8 1/2 by 11 inch paper. The text of the application shall be double spaced.

3. The original and all copies of an application for a multicounty grand jury shall be sealed by the clerk of the supreme court.

4. An order granting an application for the convening of a multicounty grand jury, which shall be sealed by the clerk of the supreme court, shall, in addition to the information set forth under RSA 600-A:2:

(a) Designate the clerk of the superior court in which the multicounty grand jury proceeding is to be located as the primary clerk for the selection of grand jurors in the ratios identified by the court in its order.

(b) Include a statement that the selection of supplemental grand jurors, if necessary, shall maintain the ratio of multicounty grand jurors as identified in the court's initial order.

(c) A statement that all judicial proceedings, if any, involving the proper activities of the multicounty grand jury shall be sealed and a stenographic record shall be made of all such proceedings.

5. Transcripts of multicounty grand jury proceedings shall be governed by the provisions of Supreme Court Rule 52.

6. Within 60 days of the conclusion of an investigation conducted by a multicounty grand jury which does not result in an indictment, the attorney general or his **[the attorney general's]** designee shall provide the chief justice with a report summarizing the matters under investigation and the attorney general's finding with regard to those matters. The attorney general's report to the chief justice shall be sealed.

7. Motions to extend a multicounty grand jury shall be filed with the justice of the superior court supervising the multicounty grand jury. Any such extension shall be granted only if good cause is shown. The supervising superior court justice may extend the term of a multicounty grand jury only for such period as is necessary to complete the investigation; provided, however, that any such extension shall not exceed six months. The attorney general or his **[the attorney general's]** designee may apply for more than one extension.

## APPENDIX R

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

Rule 12-D. Summary Procedures on Appeal.

(1) Selection of Cases.

(a) By order of the court, consistent with the criteria set out at paragraph (5) below, any case may be set for oral argument before a panel of three justices (3JX panel).

(b) Any party may request or consent that a case be set for oral argument before a 3JX panel. The court will consider and act upon such request, based upon criteria set out at paragraph (5) below.

(c) The court may direct that the matter be submitted on briefs, without oral argument, to a 3JX panel. See Rule 18(1).

(d) Except as noted in this rule, the procedure for cases assigned to a 3JX panel shall be the same as otherwise provided in these rules. Any motions made in a case assigned to a 3JX panel shall be acted upon by the panel. The panel may, in its discretion, refer any such motion to the full court for resolution.

(2) Disposition after Argument Before Three Justices; Additional Briefing, etc.

(a) Any case which has been heard by a 3JX panel shall be decided by unanimous order of the three justices. If the panel cannot reach a unanimous decision, it shall direct that the case be decided by the full court. The panel may order that a case be decided by the full court in such other circumstances as it deems appropriate. The panel may, prior to determining that a unanimous decision cannot be reached, require additional briefing. If decision by the full court is ordered, the court may issue an additional order setting forth matters to be reargued or rebriefed.

(b) Unless the court orders otherwise, whenever a 3JX panel directs after oral argument that a case be decided by the full court, no further oral argument shall be held and the members of the court who were not on the 3JX panel shall listen to the recording of the 3JX oral argument before deciding the case.

(3) Non-precedential Status of Orders. An order issued by a 3JX panel shall have no precedential value, but it may, nevertheless, be cited or referenced in pleadings or rulings in any court in this state, so long as it is identified as a non-precedential order. Such non-precedential orders may be cited and shall be controlling with respect to issues of claim preclusion, law of the case and similar issues involving the parties or facts of the case in which the order was issued. All citations to non-precedential orders shall identify the court, docket number and date.

(4) [Repealed.]

(5) Criteria for Selection of Cases for 3JX Panel. Cases suitable for oral argument before a 3JX panel include, but are not limited to:

(a) appeals involving claims of error in the application of settled law;

(b) appeals claiming an unsustainable exercise of discretion where the law governing that discretion is settled;

(c) appeals claiming insufficient evidence or a result against the weight of the evidence.

(6) Briefing, Argument, etc.

(a) In all cases selected for oral argument before a 3JX panel, briefs shall be limited to ~~9,500~~ **[11,250]** words, exclusive of the table of contents, tables of citations and any addendum containing pertinent texts of constitutions, statutes, rules, regulations and other such matters. Reply briefs shall be limited to 3,000 words.

(b) Oral argument will be limited to five minutes per side. In the event of multiple parties on the same side, the court may determine, either upon its own motion or upon motion of a party, an appropriate amount of time for oral argument.

(7) Motion for Rehearing or Reconsideration. Motions for rehearing or reconsideration of any order assigning a case to a three-justice panel or of any order issued by a three-justice panel shall be governed by Rule [22](#).

## APPENDIX S

Amend Supreme Court Rule 16 as follows (new material is in **bold and brackets**]; deleted material is in ~~strikethrough~~ format):

### Rule 16. Briefs.

(1) Briefs may be prepared using a printing, duplicating or copying process capable of producing a clear letter quality black image on white paper, but shall not include ordinary carbon copies. If briefs timely filed do not conform to this rule or are not clearly legible, the clerk of the supreme court may require that new copies be substituted, but the filing shall not thereby be deemed untimely.

Each brief shall be in pamphlet form upon good quality, nonclinging paper 8 ½ by 11 inches in size, with front and back covers of durable quality. Each brief shall have a minimum margin of one and one-half (1½) inch on all sides and shall be firmly bound at the left margin. Any metal or plastic spines, fasteners or staples shall be flush with the covers and shall be covered by tape. The covers shall be flush with the pages of the case. *See also* Rule 26(5).

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appealing party should be blue; that of the opposing party, red; that of an intervenor or amicus curiae, green; and that of any reply brief, including the answering brief in accordance with Rule 16(8), gray. The cover of the appendix, if separately printed, should be white.

The court will not accept any other method of binding unless prior approval has been obtained from the clerk of the supreme court.

(2) The front covers of the briefs and of appendices, if the appendices are separately produced, shall contain: (a) the name of this court and the docket number of the case; (b) the title of the case; (c) the nature of the proceeding in this court, *e.g.*, appeal by petition pursuant to RSA 541: 6, and the name of the court or agency below; (d) the title of the document, *e.g.*, brief for plaintiff; (e) the names, addresses and New Hampshire Bar identification numbers of counsel representing the party on whose behalf the document is filed; and (f) the name of counsel who is to argue the case. *See form in appendix.*

(3) So far as possible, the brief of the moving party on the merits shall contain in the order here indicated:

(a) A table of contents, with page references, and a table of cases listed alphabetically, a table of statutes and other authorities, with references to the pages of the briefs where they are cited.

(b) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. While the statement of a question need not be worded exactly as it was in the appeal document, the question presented shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in his brief any question of law not listed in his appeal document, but only if the supreme court has granted a motion to add such question, and he has presented a record that is sufficient for the supreme court to decide the questions presented. Motions to add a question may be filed only by a party who filed an appeal document (including a party who filed a cross-appeal), and shall be filed at least 20 days prior to the due date of the moving party's brief.

After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule.

(c) The constitutional provisions, statutes, ordinances, rules, or regulations involved in the case, setting them out verbatim, and giving their citation. If the provisions involved are lengthy, their citation alone will suffice at that point, and their pertinent text shall be set forth in an appendix.

(d) A concise statement of the case and a statement of facts material to the consideration of the questions presented, with appropriate references to the appendix or to the record.

(e) A summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(f) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon.

(g) A conclusion, specifying the relief to which the party believes himself entitled.

(h) A statement that the party waives oral argument or that the party requests oral argument. A party requesting oral argument may designate

whether the party requests oral argument before a 3JX panel or the full court, and may set forth reasons why the party believes oral argument is necessary or will be helpful to the court in deciding the case. If a party requests oral argument before the full court, and if the party believes that more than 15 minutes to a side will be necessary for oral argument, the party may set forth why the party believes that good cause exists for granting additional time. The party shall designate the lawyer to be heard if there are two or more lawyers on the party's side.

(i) A copy of the decision(s) below that are being appealed or reviewed. If the appealed decision is in writing, a copy of that decision shall be included with the brief, and shall not be included in a separate appendix. The appealing party shall, immediately before the signature line on the brief, certify either that the appealed decision is in writing and is appended to the brief, or that the appealed decision was not in writing and therefore is not appended to the brief. Any brief not conforming with this rule may be rejected.

(4)(a) The brief of the opposing party shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and except that subsections (b), (c), and (h) of subsection (3) need not be included unless the opposing party is dissatisfied with their presentation by the other side.

(b) Instead of a brief, the opposing party in a mandatory appeal may file a memorandum of law not to exceed 4,000 words in length. A memorandum of law need not comply with the requirements for a brief set forth in this rule, including the requirements that briefs be bound in pamphlet form and have covers. A memorandum of law, however, shall contain: (i) the argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon; and (ii) a conclusion, specifying the relief to which the party believes himself entitled. A party who files a memorandum of law shall be deemed to have consented to the waiver of oral argument.

(5) Reply briefs shall conform to such parts of this rule as are applicable to the briefs of an opposing party, but need not contain a summary of argument, regardless of their length, if appropriately divided by topical headings.

(6) Briefs and memoranda of law must be compact, logically arranged with proper headings, concise and free from burdensome, irrelevant, and immaterial matter. Briefs and memoranda of law not complying with this section may be disregarded and stricken by the supreme court.

(7) Unless specially ordered otherwise, the original and 8 copies of the opening brief shall be filed with the clerk of the supreme court, in addition, 2 copies with counsel for each party separately represented, 2 copies with each

self-represented party, and like distribution shall be made of the opposing brief, opposing memorandum of law, or any other brief, all within the times specified in the applicable scheduling order.

The party filing the opening brief may similarly file, and make like distribution of, a reply brief, which shall be filed by the earlier of 20 days following the submission of the opposing brief or opposing memorandum of law, or 10 days before the date of oral argument. A reply brief may be filed after the expiration of the applicable time period only by leave of court. Responses to a reply brief shall not ordinarily be allowed. No response to a reply brief may be filed except by permission of the court received in advance.

Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief, he may similarly file, and make like distribution of, such new matters up to and including the day of oral argument, or by leave of the supreme court thereafter.

The court shall not consider any brief or memorandum of law after a case has been argued or submitted, unless the court has granted to the party offering to file the brief or memorandum of law special leave to do so in advance.

(8) If a cross-appeal is filed, the clerk shall determine which party shall be deemed the moving party for the purposes of this rule, unless the parties agree and so notify the court. The brief of the opposing party shall contain the issues and argument involved in his appeal as well as the answer to the brief of the moving party. The moving party may file an answering brief within the time specified in the scheduling order.

(9) All references in a brief or memorandum of law to the appendix or to the record must be accompanied by the appropriate page number. *See* Rule 17.

(10) The party filing a brief or memorandum of law shall conclude the pleading with a certification that the party has hand-delivered or has sent by first class mail two copies of the pleading to the other counsel in the case.

The name of the party filing the brief or memorandum of law and the name of the lawyer representing the party shall appear in type at the conclusion of the pleading, and the lawyer shall sign the pleading. Names of persons not members of the bar or not parties shall not appear on the notice of appeal, the brief, the memorandum of law, or in the appendix unless they have complied with Rule 33 and received prior written approval of the court. *See* Rule 33(2).

If an attorney provided limited representation to an otherwise unrepresented party by drafting a brief or memorandum of law to be filed by such party in a



proceeding in which the attorney is not entering any appearance or otherwise appearing in the case in the supreme court, the attorney is not required to disclose the attorney's name on such pleading to be used by that party; any pleading drafted by such limited representation attorney, however, must conspicuously contain the statement **"This pleading was prepared with the assistance of a New Hampshire attorney."** The unrepresented party must comply with this required disclosure.

(11) Each brief and memorandum of law shall consist of standard sized typewriter characters or size 13 font produced on one side of each leaf only. The lines of text shall be spaced at a setting of 1.5. The text shall be left-aligned only. The pages of the brief shall be sequentially numbered, beginning with the cover page as page 1 and using only Arabic numerals for page numbers (*e.g.* 1, 2, 3), including for the table of contents and table of authorities. The page number may be suppressed and need not appear on the cover page.

Except by permission of the court received in advance, no reply brief (or response thereto) shall exceed 3,000 words, and, except in a case with a cross-appeal, no other brief shall exceed ~~9,500~~ **[11,250]** words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters. If a cross-appeal is filed, the opening brief and answering brief of the moving party shall not exceed ~~9,500~~ **[11,250]** words, and the opposing brief of the cross-appellant shall not exceed 14,000 words, exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters. The cross-appellant may file a reply brief, which shall not exceed 3,000 words.

(12) Failure of the appealing party to file a brief shall constitute a waiver of the appeal and the case shall be dismissed.

## APPENDIX T

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

Rule 36. Appearances in Courts By Eligible Law Students and Graduates.

(1) Notwithstanding the provisions of any superior court rule concerning persons who are not lawyers, of any superior court rule and district court rule concerning lawyers who are not members of the bar of this State, and of any other such court rules, an eligible law student or law graduate acting under a supervising attorney may appear in any court in this State as herein provided, in behalf of any indigent person, the State of New Hampshire, a State agency, or a State subdivision.

(2) The supervising attorney shall be a member of the bar of this State and, with respect to the law student or graduate's proposed appearances in any court, shall file with the clerk of this court the attorney's written consent to:

(a) supervise the student or graduate;

(b) assume personal professional responsibility for the student's or graduate's work and consider purchasing professional liability insurance coverage to include such law student or graduate;

(c) assist the student or graduate to the extent necessary;

(d) appear with the student or graduate in courts in this State when, in the supervising attorney's judgment, the nature of the case requires the supervising attorney's presence; and

(e) participate with the student or graduate in all settlement or plea negotiations and remain available at all times for consultation with opposing counsel without the participation of the student or graduate.

The supervising attorney shall waive the right to the confidentiality of proceedings resulting from complaints to the Committee on Professional Conduct, for the limited purpose of permitting disclosure of such proceedings by said committee to this court in connection with the court's review of a filing under this rule.

The presence of the supervising attorney in the superior court shall be required in all contested civil cases and in all criminal cases, and in district and municipal courts at probable cause hearings. Practicing members in good

standing of the bar of another State for at least two years may on application to this court be exempt from the provisions of this rule relating to appearances in superior court and at probable cause hearings in district and municipal courts, provided that they prepare to take and do take the next bar examination in this State for which they are eligible or, having taken that examination, they are awaiting publication of the results of, or admission to the bar after passing, that examination. The presence of the supervising attorney shall be required in all cases in this court provided, however, that a student or graduate may appear in this court only in cases heard under Rule 12-D and with prior approval of this court.

The attorney shall file his written consent immediately upon his consenting to supervise a law student or graduate. Following such initial written consent, in every instance in which an attorney consents to continue his supervision of the law students and graduates under this rule, the attorney shall annually refile his written consent with the clerk of the supreme court in the month of October. The attorney shall file a withdrawal of his written consent immediately upon the termination of his supervision of any such student or graduate.

(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) **[be of good moral character and fitness and shall]** have completed legal studies amounting to at least four full-time semesters, or the equivalent, or have completed two full-time 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~~**[. Second year Daniel Webster Scholar students enrolled at the University of New Hampshire Law School who have completed the nine hour DOVE project training program shall be deemed to have met the requirement that students “be enrolled in a law school clinical course with a classroom component geared to training the students for the work.”]**

(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;

(b) the law graduate shall:

(1) have graduated from a law school approved by the American Bar Association and be of good moral character and fitness. The graduate shall be deemed to continue to meet this requirement as long as he or she is preparing to take and does take the next bar examination in this State for which he or she is eligible or, having taken that examination, he or she is awaiting publication of the results of, or admission to the bar after passing, that examination.

(c) the law student or law graduate shall:

(1) neither ask for nor receive any compensation or remuneration of any kind for his or her services from the party on whose behalf he or she renders services, but this shall not prevent an attorney, an approved legal aid society, federally funded legal services program, law school, public defender program, the State, a State agency, or a subdivision of the State, from paying compensation to the eligible law student or graduate nor shall it prevent any agency from making proper charges for its services;

(2) certify in writing that he or she is familiar, and will comply, with the Rules of Professional Conduct approved by this court;

(3) certify in writing that he or she is familiar with the rules of this court and of other courts in this State, and any other rules relevant to the cases in which he or she is appearing and that he or she will agree to be bound by the Rules of Professional Conduct, and by the Guidelines for the Utilization by Lawyers of the Services of Legal Assistants Under the New Hampshire Rules of Professional Conduct not inconsistent with this rule;

(4) certify in writing that he or she acknowledges that his or her appearance under this rule may be suspended for cause on order of any justice of any court of this State, subject to reinstatement shown to the supreme court;

(5) file a sworn affidavit certifying that except as otherwise stated he or she has not ever been a party to any criminal proceedings.

(4) A law student or graduate seeking to appear pursuant to this rule shall complete the Form Designating Compliance with Student/Graduate Practice Rule, approved by the court. Upon filing this form with the clerk of this court, an eligible law student or graduate supervised in accordance with this rule may appear before any court as herein provided with respect to any case for which the student or graduate has met the requirements of this rule; provided that the requirements of this rule shall not be deemed to have been met by any person who has been a party to any criminal proceeding until the court shall have notified such person in writing that he or she has met the requirements of the rule.

(5) The clerk of the supreme court shall maintain a record of the name of each law student and law graduate and the name of the law student's and law graduate's supervising attorney who comply with the provisions of this rule.

(6) This rule shall not apply to any person who has taken and failed to pass the New Hampshire bar examination or the latest bar examination in any other state.

## APPENDIX U

Adopt on a permanent basis the comment following Rule of Professional Conduct 6.5 that was adopted on a temporary basis by Supreme Court order dated July 13, 2018, as follows:

### Rule 6.5. Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by the New Hampshire Bar Association, a nonprofit organization or court, provides one-time consultation with a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) Rules 1.6 and 1.9(c) are applicable to a representation governed by this Rule.

### New Hampshire Supreme Court Comment

For purposes of participation by New Hampshire lawyers in the ABA Free Legal Answers website (to increase access to advice and information to clients who cannot afford an attorney), “one time consultation with a client” will include reasonably contemporaneous communication with a client, such as through an email exchange, online chat session, or other online messaging service, directly related to the matter initially discussed.

## APPENDIX V

Amend Rule of Professional Conduct 8.4 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

### Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official;

(e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

**[(g) engage in conduct while acting as a lawyer in any context that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity. Statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.]**

### **Ethics Committee Comment[s]**

**[(1)]** Section (d) of the ABA Model Rule is deleted. A lawyer's individual right of free speech and assembly should not be infringed by the New

Hampshire Rules of Professional Conduct when the lawyer is not representing a client. The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or prejudice the administration of justice, no matter how well intentioned nor how noble the purpose may be for the unruly behavior.

**[(2) ABA]** Model Rule section (e) is split into New Hampshire sections (d) and (e).

**[(3) As used in this Rule, discrimination and harassment based upon “sex” and “sexual orientation” are intended to encompass same-sex discrimination and harassment.]**