

NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

PUBLIC HEARING NOTICE

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 12:30 p.m. on Friday, June 1, 2018, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before May 31, 2018 or may be submitted at the hearing on June 1, 2018. Comments may be e-mailed to the Committee on or before May 31, 2018 at:

rulescomment@courts.state.nh.us

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

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

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

Copies of the specific changes being considered by the Committee are available on request to the secretary of the Committee at the N.H. Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301 (Telephone 271-2646). In addition, the changes being considered are available

on the Internet (in the Appendix to the Public Hearing Notice) at:

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

The changes being considered concern the following rules:

I. 2017-007. Supreme Court Rule 41. Limited Liability Entities.

(This proposed amendment would delete Supreme Court Rule 41.)

1. Delete Supreme Court Rule 41, as set forth in Appendix A.

II. 2017-009. Supreme Court Rules. Identification of Crime Victims.

(This proposed amendment would protect crime victims' identities from disclosure in supreme court pleadings.)

1. Adopt as a Supreme Court Rule the proposed rule set forth in Appendix B.

III. 2017-013. Superior Court (Civ.) Rule 36. Standing Trial Orders.

(This proposed amendment would clearly establish when a party is required to notify the opposing party that he or she intends to subpoena the opposing party's lawyer as a witness.)

1. Amend Superior Court (Civ.) Rule 36(d) ("Standing Trial Orders – Procedures – Examination of Witnesses") as set forth in Appendix C.

IV. 2017-017. Superior Court (Civ.) Rules. Appeals - Municipal Actions.

(This proposed rule would require a party who submits, in an appeal to the superior court from the action of a state or municipal government body, an audio or video recording of the proceedings below, to provide the court with a transcript of the relevant portion of the proceedings.)

1. Adopt Superior Court (Civ.) Rule 55, Appeal from Municipal Actions, as set forth in Appendix D.

V. 2016-006. Superior Court (Civ.) Rules. Motions to Seal.

(These proposed rules would amend trial court rules to delineate the procedure for the filing of case records which contain confidential information or

are confidential in their entirety and to provide the procedure for seeking access to case records that have been determined to be confidential.)

1. Adopt Proposed Rule I, Access to Case Records, as set forth in Appendix E.
2. Adopt Proposed Rule II, Case Records Which Contain Confidential Information, as set forth in Appendix F.
3. Adopt Proposed Rule III, Filing a Case Record Which is Confidential in its Entirety, as set forth in Appendix G.
4. Adopt Proposed Rule IV, Motions to Seal, as set forth in Appendix H.
5. Adopt Proposed Rule V, Procedure for Seeking Access to Case Records That Have Been Determined to be Confidential, as set forth in Appendix I.
6. Adopt Proposed Rule VI, Sanctions for Disclosure of Confidential Information, as set forth in Appendix J.

VI. 2016-009. Rule of Professional Conduct 8.4 Harassment and Discrimination.

(The Committee is requesting comment on three different proposed amendments to Rule of Professional Conduct 8.4. The Committee will consider all three proposals at the public hearing on June 1, along with any other language that is suggested at the public hearing.)

1. Amend Rule of Professional Conduct 8.4, as set forth in Appendix K.
2. Amend Rule of Professional Conduct 8.4, as set forth in Appendix L.
3. Amend Rule of Professional Conduct 8.4, as set forth in Appendix M.

New Hampshire Supreme Court
Advisory Committee on Rules

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

April 3, 2018

APPENDIX K

Amend New Hampshire Rule of Professional Conduct 8.4, and update the Ethics Committee Comment as follows (new material is in **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-]; **or**
- (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 or marital status. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.]**

Ethics Committee Comment

[1. ABA] ~~S[s]~~ection (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 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. The substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of subsection (g), however, 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.

4. See ABA Comment 4 related to the intended scope of the phrase “related to the practice of law.”

5. As used in this Rule, discrimination and harassment based upon “sex” and “sexual orientation” are intended to encompass same-sex discrimination and harassment, as well as discrimination and harassment based upon gender identity.

6. This Rule is not intended to infringe on a lawyer’s rights of free speech or a lawyer’s right to advocate for a client in a manner that is consistent with these Rules.]

APPENDIX L

Amend New Hampshire Rule of Professional Conduct 8.4, and update the Ethics Committee Comment as follows (new material is in **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-~~]; or~~
- (g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination against a client on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation or marital status. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.]**

Ethics Committee Comment

[1.] ABA] ~~§[s]~~ection (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 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. The substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of subsection (g), however, 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.

4. See ABA Comment 4 related to the intended scope of the phrase “related to the practice of law.”

5. As used in this Rule, discrimination and harassment based upon “sex” and “sexual orientation” are intended to encompass same-sex discrimination and harassment, as well as discrimination and harassment based upon gender identity.

6. This Rule is not intended to infringe on a lawyer’s rights of free speech or a lawyer’s right to advocate for a client in a manner that is consistent with these Rules.]

APPENDIX M

Amend New Hampshire Rule of Professional Conduct 8.4, and update the Ethics Committee Comment 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-~~]; or~~
- (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. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.]**

Ethics Committee Comment

[1.] ABA] S[s]ection (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 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. The substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of subsection (g).

4. See ABA Comment 4 related to the intended scope of the phrase “related to the practice of law.”

5. As used in this Rule, discrimination and harassment based upon “sex” and “sexual orientation” are intended to encompass same-sex discrimination and harassment, as well as discrimination and harassment based upon gender identity.

6. This Rule is not intended to infringe on a lawyer’s rights of free speech or a lawyer’s right to advocate for a client in a manner that is consistent with these Rules.]