

New Hampshire Bar Association Ethics Committee ADVANCING PROFESSIONALISM IN THE 21ST CENTURY

By Attorney Maureen D. Smith, Chair

I. INTRODUCTION

The New Hampshire Bar Association Ethics Committee has worked behind the scenes for more than 30 years to help establish standards of professional conduct for members of the Bar and to guide them on interpreting and complying with their professional conduct obligations. Operating completely outside of the disciplinary system,¹ the Committee's work includes recommending changes to New Hampshire's Rules of Professional Conduct (Rules) for consideration by the Supreme Court² and issuing general and personalized guidance to lawyers on how to apply Rule requirements to real life situations. The Committee's most recent initiatives focus on helping lawyers to navigate ethics in the face of rapid changes to the nature of the legal profession and encouraging direct contact with the Committee.

II. ETHICS COMMITTEE'S FORM AND FUNCTION

A. Committee Composition

The Committee is made up of more than 20 volunteer practitioners from the public and private sectors, led by a chair and vice chair. Unlike other jurisdictions, many of which employ ethics counsel associated with disciplinary bodies, Committee members are not employed by the Bar, nor are they associated with the Supreme Court's disciplinary system. The Supreme Court—appointed entities, the Complaint Screening Committee, Hearings Committee and Professional Conduct Committee and the Attorney Discipline Office professional staff, enforce and sanction ethical violations. Their operations are completely separate from the Bar Committee's work.³ The Ethics Committee does not engage in or opine upon any disciplinary matters.⁴

The Bar President appoints members to serve on the Committee, based upon volunteer practitioners' requests for appointment and expressed interest in advancing professionalism in New Hampshire.⁵ Although membership on the Committee changes every year as new volunteers seek to serve, most Committee members have served for many years and several

have served for decades.⁶ As a result, the Committee offers Bar members an unsurpassed depth of knowledge and experience on ethics issues, while new Committee members bring a fresh perspective and, often, an updated view on both recurring and new ethics dilemmas. In addition, the variety of backgrounds represented on the Committee, including academic, litigation, business, family law and criminal/civil prosecution, ensures that there is always a variety of perspectives offered on every ethics question considered and decided by the Committee as a whole.

B. Committee Activities

The Committee's activities are governed by its Procedural Rules, which set forth its two core functions.⁷ First, the Committee considers and recommends to the Bar's Board of Governors and, ultimately, to the Supreme Court's Advisory Committee on Rules, revisions to the Rules that would establish or clarify standards of professional conduct. The second core function is to provide both written and oral guidance to members of the Bar on interpretation and compliance with the Rules of Professional Conduct.

1. Rule Revisions

As our society changes and evolves, the Rules that govern lawyers' professional conduct must keep pace. As a result, the Committee's work on Rule revisions is a continuous process.⁸ The most active phase of the Committee's Rules work occurred between 2000 and 2006 when it reviewed and recommended revisions to the entire set of Rules as a result of the American Bar Association's "Ethics 2000 Report" and the ABA's subsequent revisions of its Model Rules of Professional Conduct. The Committee's role in recommending to the Board of Governors a complete overhaul of the Rules, which ultimately resulted in the Supreme Court's adoption of the Committee's recommendations in 2008, was a key ingredient in the formation of the Rules governing lawyer conduct today.⁹

Led by an experienced chair, the work on the 2008 Rule revisions spanned more than five years of Committee meetings, retreats, outside research and reporting by individual Committee members. Although the ABA's Model Rules formed the basis for the review, it is worth noting

that many of the Committee's recommendations differed from the Model Rules largely as a result of the Committee's judgment that practice in New Hampshire should be governed by Rules that reflect the core values of this Bar. The Committee's work on Rule revisions has not stopped since the 2008 Rules were adopted and it continues to recommend select Rule changes, such as the new lateral hire screening rule discussed below.

2. Guidance for the Bar

The Committee's second core function is to provide guidance to Bar members and, in some cases, to the courts, on how the Rules apply to specific situations.¹⁰ This guidance is provided in several ways. First, the Committee provides "Ethics Committee Comments" that are published with all Rule revisions as a way to inform practitioners on the purpose and application of the Rules. The Comments usually highlight key differences between the Model Rules and the New Hampshire Rules so that practitioners do not rely entirely on ABA interpretations. In addition, the Comments often flag traps for the unwary, including references to court decisions that may reach conclusions that would not be immediately apparent from reading the Rules. While the Committee's Comments are not adopted by the Supreme Court and have no precedential value, they do provide some insight on the purpose, meaning and scope of specific Rules, taking into account relevant judicial interpretations and contrasting Model Rule requirements.

Second, the Committee issues Formal Opinions, and publishes articles and commentaries on topics of widespread interest and importance to the Bar.¹¹ Although the Committee's guidance has no precedential value and cannot be relied upon in either disciplinary or litigated matters,¹² it has historically provided essential guidance to practitioners on topics ranging from conflicts of interest to outsourcing legal services. The Committee has issued more than 200 Formal Ethics Opinions and more than 50 informal articles and commentaries since the mid-1970's to guide lawyers on professional conduct matters.¹³

Third, the Committee responds to individual inquiries submitted by letter, email or telephone on the lawyer's own, proposed conduct.¹⁴ Inquiries submitted to administrative staff in the Bar are immediately forwarded to the Chair or to assigned Committee members. The Committee's telephone "hotline," which is designed to provide immediate telephonic assistance to practitioners with pressing ethics questions, has proved to be an effective way for lawyers to learn quickly whether proposed conduct would be prohibited under the Rules or whether it would fall within the bounds of the lawyer's discretion. Comments and advice offered by Committee members do not constitute opinions of the Committee but often point lawyers in the right direction.¹⁵

Bar members should note that there are two important limitations on the Committee's role. The first is that the Committee does not respond to inquiries involving the past conduct of any lawyer or the proposed conduct of another lawyer.¹⁶ This avoids interference with the disciplinary and judicial systems and is also consistent with the Committee's purpose of providing guidance regarding a lawyer's own, prospective conduct. To the extent that lawyers have concerns about the conduct of another lawyer, the Rules allow for, and sometimes require, reporting professional misconduct to disciplinary authorities.¹⁷ The Supreme Court's disciplinary rules also provide for lawyer referrals to the Attorney Discipline Office.¹⁸

The second limitation is that the Committee does not respond to inquiries regarding lawyer conduct that may be at issue in pending litigation or disciplinary actions.¹⁹ Doing so would interfere with the authority of the courts or disciplinary authorities. However, if a majority of the Committee decides that an issue arising in pending litigation presents an issue of widespread interest and importance to the Bar, an inquiry involving pending litigation may be addressed in the form of a hypothetical.²⁰

3. Lawyer Confidentiality

To the extent that lawyers avoid any contact with the Committee on their own proposed conduct out of fear that it may expose them to disciplinary action, such fears are unfounded. Not only is the Committee separated from the disciplinary system, there are specific provisions in both the Rules and in the Committee's internal procedures to protect the confidentiality of lawyer inquiries.

First, the Rules expressly provide that there is no requirement for disclosure of information received by lawyers during the course of their work on behalf of the New Hampshire Bar Association Ethics Committee.²¹ Second, the Committee's procedural rules require that the identity of any Bar member requesting an opinion on her own behalf must remain confidential, along with any Committee deliberations, discussions, records or files that could disclose the member's identity.²² Together, these provisions protect both the Committee and an inquiring lawyer from the threat of discovery by disciplinary authorities, among other things, and generally address any concerns on whether seeking ethics guidance from the Committee could expose a lawyer to attorney discipline or embarrassment.

C. Twenty-First Century Initiatives

Although the form and function of the Committee has not changed substantially over time, its relevance to modern and increasingly complex legal practice issues has grown. This requires continuous review and revision to existing Rules and more outreach to Bar members. The Committee has increased its efforts to recommend adjustments to the Rules in a way that conforms to the realities of an evolving legal profession. It has also initiated ways to provide user-friendly guidance to practitioners and to form new bridges with Bar members through a broader range of resources designed to raise lawyers' awareness of their 21st century ethical obligations. Some examples follow.

1. Recent Rule Revision to Address Lateral Hires

In 2009, the Committee began debating whether then-existing conflicts imputation rules under Rule 1.10 failed to recognize that lawyers practicing in the 21st century were more likely to migrate between firms during the course of their careers. At the time, Rule 1.10(a) would impute to a hiring firm and all of its lawyers a migrating lawyer's own personal conflicts that could arise as a result of the lawyer's possession of confidential information from clients of the former firm.²³ The Committee spent almost two years gathering information and debating whether New Hampshire should join the ranks of the American Bar Association and 23 states that have allowed for screening of newly hired lawyers as a way to resolve conflicts that might otherwise arise due to the migrating lawyer's possession

of former client information.²⁴ The Committee considered, among other things, the interests of the migrating lawyers seeking new employment, the interests of former clients seeking to protect their confidential information and the interests of current clients whose lawyers may otherwise have to withdraw from the representation.

The Committee eventually recommended that a new lawyer screening process should be added to Rule 1.10 to avoid firm-wide disqualification in certain circumstances, with conditions geared towards protecting the interests of former clients. The recommended revisions to Rule 1.10 were adopted by the Supreme Court and became effective on January 25, 2012.²⁵

Newly adopted Rule 1.10(c) applies when a lawyer moves from one law firm to another law firm. The new Rule establishes screening procedures similar to those that now exist for former government lawyers (Rule 1.11) and prospective clients (Rule 1.18), which were previously the only situations in which the Rules allowed for “screening” of lawyers who would otherwise disqualify an entire law firm. The Committee’s decision to recommend a new Rule 1.10(c) was made in recognition of lawyer mobility trends but also in recognition of the importance of protecting client interests, especially the interest in maintaining confidential information. For that reason, the Committee recommended the adoption of significant limitations and safeguards that are not necessarily reflected in the Model Rule or in the rules of other jurisdictions.²⁶

For example, in New Hampshire, the screening process is not available in situations where the disqualified lawyer had substantial involvement in, or received substantial material information about, a matter that is ongoing at the time of the firm transfer.²⁷ Other safeguards like requirements for law firm affidavits of compliance with screening procedures submitted to former clients were also recommended.²⁸ As explained in the Committee’s Comment accompanying the Rule revision, the screening procedures are intended to strike a balance between the lawyer’s interests in professional mobility, the rights of existing clients to retain the law firm of their choice and the interests of former clients in maintaining client confidentiality.²⁹

The Committee is in the process of preparing written guidance on the Rule revision and the new screening provisions available under Rule 1.10(c). In the meantime, migrating lawyers and hiring firms can contact the Committee if they have questions about their obligations under the new Rule.

2. Review of Rules for Client Trust Accounts

The Committee is also working on possible changes to rules on client trust account records. On August 9, 2010, the American Bar Association adopted Model Rules for Client Trust Account Records to delineate the types of records that must be maintained to satisfy the “complete records” requirement of Rule 1.15 of the Model Rules of Professional Conduct. Model Rule 1.15(a) provides that lawyers must hold property of clients or third persons in connection with a representation separate from the lawyer’s own property and that “complete records” of account funds or other property must be kept and maintained for five years after the representation is terminated. New Hampshire’s Rule 1.15 does not include the “complete records” language but does require that records be kept as specified in Supreme Court Rules.³⁰ Supreme Court Rule 50(2) addresses attorney financial records but does not reflect the Model Rule requirements.

After being asked by the Supreme Court to make a recommendation on whether the Model Rule should be adopted in some form, the Supreme Court’s Advisory Committee on Rules requested the Committee to provide its views on what, if any, revisions might be appropriate. The Committee has formed a task force of experienced practitioners to assess the Model Rule and to consult with the Attorney Discipline Office, with the ultimate goal of providing a joint recommendation to the Supreme Court.

Because the interface between trust accounting rules and modern mechanisms for tracking account records can trigger Rule violations, the Committee’s efforts in assessing the need for Rule revisions are timely and significant, from both a practical and professional conduct standpoint. As the Committee’s work on possible Rule revision continues, written guidance on the pitfalls of trust accounting is being prepared for publication in the Bar News as one way to assist lawyers in understanding their current obligations for maintaining client trust account records.

3. New Directions for Written Guidance

The Committee’s traditional approach to providing ethics guidance to the Bar has been through publication of Formal Opinions and articles.³¹ Formal Opinions are usually reserved for issues of Bar-wide interest that have not been addressed by the Committee in the past. All opinions dating from 1984 to the present appear on the Bar’s website. [All of the Ethics Committee Opinions and articles also are included in the Casemaker legal research library.] While many older opinions relate to Rules that have since been revised, most remain viable as sources of insight and analysis of core Rule requirements.

The Committee has taken steps over the past few years to target its written guidance to pressing issues challenging lawyers in modern day practice. For example, the ethics of business networking was addressed in a Formal Opinion issued in 2005.³² In 2008, in response to the increase in lawyers’ reliance on electronic communications with both clients and opposing counsel, the Committee published a Formal Opinion on the ethical obligations of sending and receiving electronic metadata.³³ Practitioners should familiarize themselves with these and other opinions issued by the Committee, as they often differ from opinions on similar topics issued by the ABA or other jurisdictions. For example, the Committee’s opinion on metadata imposes a greater burden on lawyers who receive metadata inadvertently sent by another lawyer than is suggested by opinions by either the ABA or neighboring states like Vermont.³⁴

Other examples include the Committee’s 2009 Formal Opinion addressing lawyers’ ethical obligations to prospective clients under the newly adopted Rule 1.18.³⁵ Most recently, the Committee issued a Formal Opinion in 2011 addressing the growing trend towards outsourcing both legal and non-legal support services and ethical obligations that should be considered before outsourcing occurs.³⁶

Besides Formal Opinions, the Committee has published practical ethics articles to address, in a less formal way, the practicalities that accompany the practice of law. For example, the Committee has published articles on what steps should be taken before closing a solo practice³⁷ or charging flat or minimum fees in criminal cases.³⁸

The Committee recently began publishing “Ethics Corner” articles on a monthly basis to provide more frequent and more succinct practical

guidance to Bar members. The “Ethics Corner” articles began in October 2011 and are published every month, both in the Bar News and on the Bar’s website.³⁹ To date, the Committee’s commentaries have addressed such topics as lawyer non-compete clauses, flat fees, reporting professional misconduct, spouse attorney conflicts and communicating with clients through workplace email. The commentaries are posed in question and answer format and are based upon actual inquiries received from members of the Bar or upon current ethics issues of widespread interest.

4. On the Horizon: Websites and Webinars

The Committee’s efforts to bring ethics to the forefront of the profession will soon extend to websites and webinars. The Committee’s newly formed “Website Task Force” is in the process of exploring how the Bar’s website can be improved to make the Committee’s Formal Opinions and other written guidance more accessible and more easily searchable. The Committee’s newly formed “Continuing Legal Education Task Force” is in the process of exploring opportunities for more frequent educational opportunities on ethics, including periodic meetings or webinars with Committee members to provide a forum for discussing proposed conduct. The Task Force is also exploring opportunities to increase awareness and discussion of ethics issues in Bar Section meetings.

III. CONCLUSION

The Committee is ramping up efforts to advance professionalism in the 21st century. In the meantime, lawyers can take advantage of a variety of resources offered by the Committee to help in determining their legal obligations as circumstances arise. Bar members can log onto the New Hampshire Bar Association website to access all written guidance. They can also contact the Bar staff in writing or by telephone with specific questions for the Committee. Help is just an email or phone call away.⁴⁰

ENDNOTES

1. The New Hampshire Supreme Court has inherent authority to regulate the legal profession. N.H. Sup. Ct. R. 37(1)(B). The structure of the lawyer discipline system is set forth in Rule 37 (“Attorney Discipline System”) and Rule 37A (“Rules and procedures of Attorney Discipline System”).
2. The Ethics Committee recommends adoption and amendments to New Hampshire’s Rules of Professional Conduct through the Supreme Court’s Advisory Committee on Rules.
3. N.H. Sup. Ct. R. 37(1)(a)(1)-(4).
4. *Id.* The Committee’s functions are set forth in “Ethics Committee Procedural Rules” (adopted February 9, 1987 and revised as of June 20, 2008) and summarized on the New Hampshire Bar Association website, <http://www.nhbar.org>. Paragraph 5 of the Procedural Rules prohibits Committee opinions on conduct at issue in a pending disciplinary action.
5. See Ethics Committee Procedural Rules, ¶12.

6. All serving members of the Committee are listed on the Bar’s website at <http://www.nhbar.org/for-members/bctf-information.asp>.
7. See Ethics Committee Procedural Rules, ¶1.
8. Ethics Committee Procedural Rules, ¶1(B) (“The Committee may, where appropriate, adopt and submit to the Board of Governors proposed amendments to the [Rules]”).
9. For a detailed review of the Committee’s work on key Rule revisions, see “New Hampshire’s Rules of Professional Conduct Undergo a Complete Overhaul,” N.H. Bar J. Spring 2006.
10. Ethics Committee Procedural Rules, ¶1.
11. *Id.*, ¶1(A).
12. Ethics Committee Procedural Rules, ¶5, 6.
13. Formal Ethics Opinions and articles issued since 1984 appear on the Bar website at <http://www.nhbar.org/legal-links/ethics1.asp>.
14. Ethics Committee Procedural Rules, ¶14.
15. See *id.*
16. *Id.*, ¶6.
17. See N.H. R. Prof. Conduct, Rule 8.3(a).
18. N.H. Sup. Ct. R. 37A.
19. Ethics Committee Procedural Rules, ¶5.
20. *Id.*
21. See N.H. R. Prof. Conduct, Rule 8.3(c).
22. See Ethics Committee Procedural Rules, ¶7.
23. N.H. R. Prof. Conduct 1.10 (2011).
24. See American Bar Association Model Rule 1.10.
25. See N.H. Supreme Court Order dated January 10, 2012 available at: <http://www.courts.state.nh.us/supreme/order/1-25-12-order.pdf>
26. See N.H. R. Prof. Conduct, Rule 1.10(c).
27. See N.H. R. Prof. Conduct, Rule 1.10(c)(3).
28. See N.H. R. Prof. Conduct, Rule 1.10(c)(1) and (2).
29. See Ethics Committee Comment to Rule 1.10.
30. See N.H. R. Prof. Conduct, Rule 1.15(a)-(b).
31. See Ethics Committee Procedural Rules, ¶1A.
32. Ethics Committee Opinion #2005-0616, “Ethics Regarding Business Networking”.
33. Ethics Committee Opinion #2008-9/4, “Disclosure, Review and Use of Metadata in Electronic Materials.”
34. See *id.*
35. Ethics Committee Opinion #2009-10/1, “Duties to Prospective Clients.”
36. Ethics Committee Opinion #2011-12/5, “Outsourcing Legal and Non-Legal Support Services”.
37. Ethics Committee Practical Ethics Article, “Closing a Solo Practice in New Hampshire,” May 2007.
38. Ethics Committee Practical Ethics Article, “Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases,” January, 2008.
39. All New Hampshire Bar News “Ethics Corner” commentaries can be accessed from the Bar website at: <http://www.nhbar.org/legal-links/ethics1.asp/>
40. Bar members can request assistance by contacting the Ethics Committee’s administrative support staff contact, Rose Anocibar at ranocibar@nhbar.org or call (603) 224-6942.



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