

CHALLENGES OF DEALING WITH SELF-REPRESENTED PERSONS

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Representing a client who is opposed by an unrepresented party presents unique demands and potential traps for counsel and the court. The goal of this presentation is to highlight a number of standards that govern the decision-making process and to raise certain specific challenges that may arise, to assist counsel in striking the balance between zealously representing one's client and treating fairly the unrepresented person.

It is well-established that “*Pro se* litigants, however, are bound by the same procedural rules that govern parties represented by counsel.” *Appeal of Demeritt*, 142 N.H. 807, 811, 713 A.2d 378 (1998); see *Faretta v. California*, 422 U.S. 806, 834-35 n. 46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (recognizing that the right of self-representation is not a license to not comply with the relevant procedural rules).” *In re Abraham*, 154 N.H. 51, 56 (2006). Despite this, self-represented persons will demand concessions, extensions of time and relief from procedural rules. The unrepresented person may be facing the loss of important constitutional, statutory or property rights, and the appropriate response will be determined by the circumstances.

The struggle for counsel and the courts in fashioning the appropriate response is captured in the concurring opinion of Justice Johnson in *Exeter Hospital v. Hall*, 137 N.H. 397, 401 (1993), where the trial court raised a statute of limitations defense not raised by the self-represented defendant and dismissed the case:

“I recognize that ‘[t]he court's essential function to serve as an impartial referee comes into direct conflict with the concomitant necessity that the *pro se* litigant's case be fully and competently presented.’ *Austin v. Ellis*, 119 N.H. 741, 743, 408 A.2d 784, 785 (1979). But while a judge may relax the rules of evidence for *pro se* litigants and explain courtroom procedures to them, *see id.*, or even explain the relevant law to them, *see State v. Brodowski*, 135 N.H. 197, 200, 600 A.2d 925, 926-27 (1991), the judge's constitutional obligations to remain impartial, N.H. Const. pt. I, art. 35, and refrain from aiding litigants in the substance of a case are paramount. Raising an affirmative defense *sua sponte*, in my view, crosses the line from conscientiously explaining procedure to an inexperienced *pro se* litigant to intervening in the substance of a case on behalf of one of the parties. A *pro se* litigant should not receive a benefit from his or her decision not to retain the services of counsel. Accordingly, I would hold that the trial court's action in raising the statute of limitations defense *sua sponte* was error.”

I. Rules Governing the Conduct of Lawyers

Professional Conduct Rule 4.3

Rule 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

2004 ABA Model Rule Comment

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Recent Ethics Committee Opinion on Rule 4.3 (copy attached)

Question: May a lawyer respond to an unrepresented party's question regarding a deadline?

Answer: Maybe. The Committee, reflecting the difficulty of complying with Rule 4.3 in certain situations, summarized its conclusions in this way:

Returning to your question, you may have violated Rule 4.3 to the extent that you gave legal advice, i.e., a response that required you to apply the facts of your case to the procedural rules of court. Whether or not you violated the rule could depend on other considerations, such as whether or not it was contrary to the interests of your client for you to engage in such communications, and whether, given the circumstances of the case and the sophistication of the unrepresented opponent, he or she was likely to accept your response as a disinterested, definitive statement of the law.

Under the circumstances of this question, the better practice might have been simply to instruct the unrepresented opponent to retain her own counsel to obtain an answer to her question.

Professional Conduct Rule 4.1

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Professional Conduct Rule 3.3

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know if its falsity, the lawyer shall take reasonable remedial

measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Professional Conduct Rule 3.4

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Other standards applicable to lawyers

NH Bar Litigation Guidelines. Attached.

NH Bar Professionalism Creed. Attached

II. Judiciary

Code of Judicial Conduct

PREAMBLE

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and applicable decisional law

and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Definition of “Impartiality” and “Impartial”

“Impartiality” or “impartial” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. **Judicial Duties in General.** The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. **Adjudicative Responsibilities.**

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

III. Mediators

Model Standards of Conduct for Mediators. Attached.

IV. Specific challenges in court proceedings

Withdrawal or appearance of counsel

Assent or object

Extensions of time to obtain counsel

Referral of counsel

Discovery Issues

Initial disclosures

Objections and responses to party's requests

Depositions

Of the unrepresented party

Of third parties

30(b)(6) obligations

Motions to compel and discovery conference

Deadlines

Providing advice on deadlines

Providing information on deadlines

Agreeing to extensions

Handling defaults

Dispositive Motions

Timing of filing (early or after discovery)

Including only admissible evidence

Anticipate the opposing party will not object

Consider whether to assent to amendment

Service of papers

Use of mailing address

Return receipts

Use of email address

Settlement and Mediation

Use a standard settlement agreement and release of claims

Encourage the party to seek legal advice

Choice of mediator or other neutral

Ethics Corner: Rule 4.3 and the Difficulties of Dealing with an Unrepresented Opponent

QUESTION: *I am in private practice and occasionally encounter an opposing party who is not represented by counsel and has little knowledge of the law and procedure. I know that Rule 4.3 prohibits giving legal advice to an unrepresented opponent. Recently, an unrepresented opponent in a family matter asked me how many days she has to file an answer to my client's complaint. I responded that the rules require answers to be filed within 30 days but that I could not give her any further information because my client's interests are opposite to her own. Was this a proper response?*

ETHICS COMMITTEE: First, you are correct that Rule 4.3 applies in this situation. In pertinent part, it provides, "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." An unrepresented opposing party falls within the ambit of this rule, and therefore, a lawyer violates the rule if the lawyer provides legal advice to that party. The comments to the rule define the concern, noting that the rule protects "[a]n unrepresented person, particularly one not experienced in dealing with legal matters, [who] might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client." NHPRC 4.3, Comment [1].

Whether or not a particular communication is prohibited by Rule 4.3 depends on whether it constitutes "legal advice." Albeit in a different context than Rule 4.3, at least one ethics committee has defined legal advice as a recommendation "tailored to the facts of the consumer's particular situation." DC Bar Ethics Opinion 316 (2002).

Under this definition, legal advice is imparted when a lawyer applies a particular set of facts to the applicable law, including procedural and substantive rules, as well as statutory and case law, and advises a person of that analysis. Accordingly, informing the unrepresented opponent that she had 30 days to file an answer in the context of the facts of your case may have constituted legal advice, because you had to apply the applicable court rules to determine the deadline in the complaint you filed in the case.

On the other hand, some practitioners interpret Rule 4.3 to permit a lawyer to offer "legal information," but not legal advice. In their view, legal information is a factual statement that requires no interpretation – what a particular statute states or what a court's procedural rules require.

Legal advice, on the other hand, is an opinion or an interpretation based upon the lawyer's knowledge, experience, and training. Paula J. Frederick, "Learning to Live with Pro Se Opponents," *GPSolo Magazine* - October/November 2005. Under such an interpretation, a lawyer does not violate Rule 4.3 by informing an unrepresented opponent of the existence of the 30-day rule for answers. Moreover, it could be argued that from a standpoint of navigating a complex court system and ensuring access to justice, the lawyer's decision to provide such information is both efficient and professional.

It should be apparent that there is no bright-line rule on what constitutes impermissible legal advice. The comments to the rule provide some guidance when an attorney communicates about a matter with an unrepresented opponent.

Comment [2] states: "So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the [unrepresented opponent], the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations."

Thus, although Rule 4.3 prohibits a lawyer from dispensing legal advice to an unrepresented opponent, Comment [2] allows the lawyer to communicate with the unrepresented opponent about the positions of that lawyer's client, or the lawyer's views of the opponent's legal rights and duties. In taking advantage of this provision, a lawyer must make it clear to the unrepresented opponent that the lawyer represents a party with adverse interests, and that the lawyer is expressing his or her view of legal rights, duties or obligations, rather than offering an authoritative or disinterested statement of the law. It is also advisable that the lawyer preface and/or follow up any such view or observation with a recommendation that the unrepresented opponent retain counsel.

Ultimately, the scope and content of communications with an unrepresented party, and the risk that such

communications may be interpreted as legal advice by that party, will vary based on the sophistication, knowledge, and training of the unrepresented opponent. Put differently, because the comments to Rule 4.3 note that “one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client,” a lawyer must be mindful of whether the unrepresented opponent is likely to construe a communication as legal advice or as something other than the view or opinion of the lawyer on behalf of the lawyer’s client.

Additionally, if a lawyer has reason to believe that it would be contrary to the interests of the lawyer’s client to engage in communications with the opponent about an inquiry posed by that opponent, the lawyer should refrain from such communications, even if such communications do not constitute legal advice, and instead advise the unrepresented opponent to retain counsel.

Returning to your question, you may have violated Rule 4.3 to the extent that you gave legal advice, i.e., a response that required you to apply the facts of your case to the procedural rules of court. Whether or not you violated the rule could depend on other considerations, such as whether or not it was contrary to the interests of your client for you to engage in such communications, and whether, given the circumstances of the case and the sophistication of the unrepresented opponent, he or she was likely to accept your response as a disinterested, definitive statement of the law.

Under the circumstances of this question, the better practice might have been simply to instruct the unrepresented opponent to retain her own counsel to obtain an answer to her question.

**NEW HAMPSHIRE BAR ASSOCIATION
LITIGATION GUIDELINES**

**Adopted By
The New Hampshire Bar Association Board of Governors
December 2, 1999**

PREAMBLE:

The following is a set of Litigation Guidelines adopted by the Board of Governors of the New Hampshire Bar Association to serve as aspirational goals for its members. The guidelines represent a means of maintaining civility in New Hampshire trial practice. While certain of these Litigation Guidelines do not have the force of law or court rule, Bar members are encouraged to incorporate the spirit of the guidelines into their legal practices. These guidelines are intended to proclaim that conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive, impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct tends to delay and often to deny justice.

Those guidelines set forth herein which are aspirational only are not to be used as a basis for litigation, liability, discipline, sanctions or penalties of any type.

1. CONTINUANCES AND EXTENSIONS OF TIME

- A. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted as a matter of courtesy unless time is of the essence. A first extension should be allowed even if counsel requesting it has previously refused to grant an extension.
- B. After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.
- C. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."
- D. A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.
- E. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to extract a concession disproportionate to the relief requested.

2. SERVICE OF PAPERS

- A. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.
- B. Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.
- C. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.
- D. Service should be made personally or by facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party.

3. WRITTEN SUBMISSIONS TO A COURT, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS AND DECLARATIONS

- A. Written briefs or memoranda of points and authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic, or sociological data if such data appear in or are derived from generally available sources.
- B. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

4. COMMUNICATIONS WITH ADVERSARIES

- A. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.
- B. Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.
- C. Letters intended only to make a record should be used sparingly and only when thought to be necessary under the circumstances.
- D. Unless specifically permitted or invited by the court, letters between counsel should not be sent to judges.
- E. Counsel should not lightly seek court sanctions.

5. DEPOSITIONS

- A. Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.

- B. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.
- C. When a deposition is noticed by another party in the reasonably near future, counsel should not notice another deposition for an earlier date without the agreement of opposing counsel.
- D. Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.
- E. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.
- F. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.
- G. Counsel at deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought or to enforce a limitation on depositions or evidence directed by the court or to present a motion pursuant to Fed.R.Civ.P. 30(d).
- H. While a question is pending, counsel should not through objections or otherwise, coach the deponent or suggest answers.
- I. Counsel should not direct a client to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass. Counsel shall not direct the deposition conduct of a non-client witness.
- J. Counsel shall not make any objections or statements which might suggest an answer to a witness or which are intended to communicate caution to a witness with respect to a particular question. There should be no lengthy or narrative objections. Counsel's statements when making objections and any explanation of the objection, if any is necessary, shall be succinctly stated, without being argumentative and without attempting to suggest to the witness any particular or desired response. Further explanation of the objection should be provided only if opposing counsel requests clarification, and such further explanation should be succinctly and directly stated. Where more extensive discussion is required on the record, counsel should consider excusing the deponent during such discussion.
- K. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. Parties and their counsel are expected to act reasonably, and to cooperate with and be courteous to each other and to deponents at all times during the deposition, and in making and attempting to resolve objections.
- L. Opposing counsel shall provide to the witness' counsel a copy of all documents shown to the witness during the deposition. The copy shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and his or her counsel do not have the right to discuss documents privately before the witness answers questions about them.

6. DOCUMENT DEMANDS

- A. Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.
- B. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.
- C. In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.
- D. Documents withheld on the grounds of privilege should comply with local rule and current case law requirements of a detailed privilege log.
- E. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.
- F. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

7. INTERROGATORIES

- A. Interrogatories, while an appropriate discovery tool, should never be used to harass or impose undue burden or expense on adversaries.
- B. Interrogatories should not be read by the recipient in an artificial manner designed to assure that answers are not truly responsive.
- C. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

8. MOTION PRACTICE

- A. Before filing a motion, counsel should engage in more than a mere pro forma discussion of its purpose in an effort to resolve the issue.
- B. A lawyer should not without good reason force his or her adversary to make a motion and then not oppose it.

9. DEALING WITH NON-PARTY WITNESSES

- A. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition. (RSA 516:3)
- B. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel. (RSA 517:4; RSA 516:4; RSA 516:5)

- C. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available to the adversary at the adversary's expense even if the deposition is cancelled or adjourned.

10. EX PARTE COMMUNICATIONS WITH THE COURT

- A. A lawyer should avoid ex parte communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending. (Rule 3.5 N.H. Rules of Professional Conduct)
- B. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application, except that where the rules permit an ex parte application or communication to the court in an emergency situation, a lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

11. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

- A. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.
- B. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
- C. In every case, counsel should consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

12. TRIALS AND HEARINGS

- A. Counsel should be punctual and prepared for any court appearance.
- B. Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and judicial officers with courtesy and civility.

The New Hampshire Lawyer Professionalism Creed

Adopted by the New Hampshire Board of Governors on April 4, 2001

New Hampshire lawyers are the custodians of the "rule of law," responsible for the maintenance and improvement of just and efficient legal institutions. In addition to the obligation to adhere to the Rules of Professional Conduct, they must be honest, competent, civil and ethical in providing prompt, cost-effective and independent counsel to their clients. As such, New Hampshire lawyers aspire to the following:

FIRST, a New Hampshire lawyer strives to improve the profession and promote the democratic rule of law. A New Hampshire lawyer:

- embraces the profession as a higher calling;
- promotes the integrity of the legal profession;
- is aware of his or her responsibility to the system of justice as an officer of the court and is an integral part of the administration of justice;
- works to improve and strengthen the profession through mentoring, teaching and other public service activities.

SECOND, a New Hampshire lawyer is competent in the area of his or her own practice, but is also sufficiently knowledgeable in other areas of practice to be able to assist clients in obtaining appropriate representation in those areas. A New Hampshire lawyer:

- is learned in the law;
- possesses the appropriate amount of knowledge, skill and expertise to competently represent the client;
- offers the client thoughtful, lawful and practical advice;
- is committed to providing cost-effective, efficient legal services;
- is willing to refer the client to other competent counsel, when necessary.

THIRD, a New Hampshire lawyer is civil. Civility and self-discipline prevent lawsuits from turning into combat and keep organized society from falling apart. A New Hampshire lawyer:

- behaves in a courteous, decent and disciplined manner, and counsels clients to do likewise;
- displays respect for clients, judges, court staff, opposing counsel and all participants in the process;
- behaves with humility rather than arrogance;
- understands differing viewpoints and has empathy for others.

FOURTH, a New Hampshire lawyer is reliable, responsible and committed. A New Hampshire lawyer:

- cares deeply about both the interests of the client and of the legal system;
- keeps promises, because one's word is one's bond;
- tempers zealotry on behalf of the client with his or her role and responsibility as an officer of the court.

FIFTH, a New Hampshire lawyer is honest and forthright. Lack of candor impedes justice and degrades the profession, and lying has no place in the practice of law. A New Hampshire lawyer:

- displays candor with the client, the court and all others;
- does not mislead the client, the court or others.

SIXTH, a New Hampshire lawyer exercises independent critical judgment, and is willing to accept responsibility for his or her actions, decisions or counsel. A New Hampshire lawyer:

- exercises common sense and independent judgment;
- is not a mere technician or hired gun, but a wise counselor;
- endeavors to solve problems rather than merely winning;

- knows when it is time to take a stand and when it is time to compromise;
- considers the broader societal implications of his or her actions;
- is willing to challenge the client's wishes or motives when such wishes or motives are not in the best interest of the client or are detrimental to the administration of justice.

SEVENTH, a New Hampshire lawyer has a social conscience and is dedicated to serve the public and society. A New Hampshire lawyer is willing to take up an unpopular cause or to engage in pro bono work, even when it is unpleasant or costly. A New Hampshire lawyer:

- serves his or her community as a volunteer leader;
- sees the practice of law first and foremost as a profession, and secondarily as a business;
- recognizes and resists business pressures which interfere with sound professional judgment;
- provides or supports legal services to those in need, at no cost or reduced cost.

**Model Standards of Conduct for Mediators
In the United States District Court for the District of New Hampshire
Mediation Program**

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self-determination.
- B. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- C. A mediator shall not undermine party self-determination by any party.
- D. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and the outcome.
- E. Although party self-determination for process design is a fundamental principle of the mediation, a mediator may need to balance such party self-determination with the mediator's duty to conduct a quality process in accordance with these Standards.
- F. While a mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, where appropriate, a mediator should make the parties aware of the importance of consulting professionals and others, if necessary, to help them make informed choices.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct all aspects of the mediation in an impartial manner.
- B. Impartiality means freedom from favoritism, bias, or prejudice.
- C. A mediator shall conduct all aspects of the mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
- D. A mediator shall not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
- E. A mediator shall not give or accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
- F. A mediator may accept or give *de minimis* gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to the mediator's actual or perceived impartiality.
- G. If at any time a mediator is unable to conduct all aspects of the mediation in an impartial manner, the mediator should notify the parties and shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after the mediation.
- B. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between the mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of the mediator's impartiality.
- C. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create potential or actual conflict of interest for the mediator.
- D. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- F. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall withdraw from or decline to proceed with the mediation, unless the parties and their counsel are fully informed of all relevant circumstances, and expressly agree in writing to the contrary.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
- B. Any person from the Court's Mediation Panel may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence.
- C. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
- D. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
- E. A mediator should have available for the parties' information relevant to the mediator's training, education, experience, and approach to conducting a mediation.
- F. If a mediator, during the course of a mediation, determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- G. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication, or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties, or required by applicable law.
- B. If the parties to a mediation agree that a mediator may disclose information obtained during the mediation, the mediator may do so.
- C. A mediator shall not communicate to any non-participant information about how the parties acted in the mediation.
- D. A mediator may report only the following information, and no more, to the Court at the conclusion of the mediation:
 - 1. whether parties (and/or appropriate representatives) appeared at a scheduled mediation;
 - 2. whether the parties submitted mediation statements; and
 - 3. whether or not the parties reached a resolution.
- E. If a mediator participates in teaching, research or evaluation of mediation, the mediator shall protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- F. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session, without the consent of the disclosing person.
- G. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain during the mediation process.
- H. Depending on the circumstance of the mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may agree make their own rules with respect to confidentiality.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall conduct all aspects of the mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
- B. A mediator shall agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
- C. A mediator shall only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of the mediation.
- D. The presence or absence of necessary persons at the mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that other persons may be excluded or included from particular sessions or from all sessions of the mediation.
- E. A mediator should promote honesty and candor between and among, all participants.
- F. A mediator shall not knowingly misrepresent any material fact or circumstance in the course of the mediation.
- F. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, the mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
- G. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
- H. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
- I. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, the mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
- J. If a mediation is being used to further criminal conduct, a mediator should take

appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

- K. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, a mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- L. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- M. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. COMMUNICATIONS BY THE MEDIATOR

- A. A mediator shall be truthful and not misleading when communicating with others about the mediator's qualifications, experience, services, and fees.
- B. A mediator shall not include any promises as to outcome in communications.
- C. A mediator shall not communicate in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- D. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served, without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
- B. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required, and the rates customary for such mediation services.
- C. A mediator's fee arrangement and statement for services rendered should be in writing unless the parties agree otherwise.
- D. A mediator shall not charge fees in a manner that impairs the mediator's impartiality.
- E. A mediator shall not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
- F. While a mediator may accept unequal fee payments from the parties, the mediator shall not allow such a fee arrangement to adversely impact the mediator's ability to conduct the mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A. A mediator should act in a manner that advances the practice of mediation, such as:
1. Foster diversity within the field of mediation.
 2. Strive to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis, as appropriate.
 3. Participate in research when given the opportunity, including obtaining participant feedback when appropriate.
 4. Participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
 5. Assist newer mediators through training, mentoring and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.