

MAINE BAR RULES

with Reporter's Notes

In October 2011, the Board of Overseers of the Bar established the Committee to Review Maine's Disciplinary Enforcement Rules. The committee, comprising Board members and staff, attorney and public members of the Grievance Commission, disciplinary defense counsel, and respondent attorneys, compared the Maine Bar Rules and the ABA Model Rules for Lawyer Disciplinary Enforcement. Generally, the Model Rules are a "one size fits all" approach, whereas the Maine Rules were designed to work in a state with a smaller bar.

The committee created and revised drafts of proposed Maine Bar Rules after several presentations to the Maine State Bar Association and to the Board. In June 2014, the committee submitted the proposed rules to the Maine Supreme Judicial Court, which, in November 2014, held a public hearing on the rules and adopted them largely as presented by the committee.

The revised Maine Bar Rules incorporate many aspects of the previous edition of the Maine Bar Rules, while incorporating many practices of the ABA Model Rules in an effort to improve and modernize Maine's rules.

There are some significant changes from the former rules, including:

- 1) The new rules create a Central Intake Office, staffed by an attorney Board Clerk, who will receive and review all complaints. One of the powers vested in the Central Intake Office is the authority to dismiss complaints that do not allege a rule violation, without Bar Counsel or Grievance Commission review. In addition, the Central Intake Office will serve an important public function by offering limited assistance to the general public, something Bar Counsel is not equipped to do.
- 2) The new rules offer Bar Counsel additional tools to tailor resolutions that best fit the circumstances of each particular case. For example, following an investigation, Bar Counsel will be able to refer the respondent attorney to an Alternatives to Discipline Program (e.g.,

counseling, CLE courses, office management training, or fee arbitration) in lieu of possible discipline. The revised rules also give Bar Counsel authority to dismiss complaints without review by the Grievance Commission if Bar Counsel's investigation reveals no misconduct.

- 3) The Grievance Commission and the Court also have new disciplinary options at their disposal. For example, in addition to imposing a reprimand or admonition, both entities can impose probation on a respondent attorney, placing certain conditions on the attorney's practice.
- 4) The new rules clearly define the distinct roles of the adjudicative office (managed by the Board Clerk) and the prosecutorial office (managed by Bar Counsel). The Board's administrative role, as well as its powers and duties, are also clearly laid out and separated from the prosecutorial and adjudicative functions.
- 5) The revisions include a new overdraft notification rule, which mandates that financial institutions notify the Board when an insufficient check is presented against an IOLTA account. The overdraft notification rule serves a dual purpose. Its primary purpose is to be an early warning system for attorney trust account violations so as to allow Bar Counsel to intervene when the problem first occurs. Secondly, it will help Bar Counsel identify those attorneys who simply need training in setting up and implementing proper trust account practices.
- 6) The new rules are clearer and better organized. Rather than requiring lawyers to navigate a byzantine pathway to find the relevant rule, the revised rules are more readable, with separate rule numbers assigned for each topic. The rules largely track the formatting, but not the numbering, of the ABA Model Rules, while retaining the features of those Maine Bar Rules that have served Maine well, and preserving the experience and precedent that distinguishes the practice of law in Maine.
- 7) The new rules take a much more simplified approach to service and notice. The new Rule 15 provides that service or notice are

accomplished by sending first class mail addressed to the attorney's office and/or residence address as provided by the attorney in his or her registration materials, with service deemed complete upon mailing. Additional methods of service and notice are necessary only if the Board learns that earlier attempts at providing service have failed. Other references to service and notice that were inconsistent with Rule 15 have also been revised.

- 8) The new rules allow for matters at the court level to be heard by a Justice of the Supreme Judicial Court, or a Justice or Judge of either of Maine's trial courts, to be designated in a particular proceeding by the Chief Justice of the Supreme Judicial Court. This could include an active retired justice of any of the three courts.

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PREAMBLE AND TERMINOLOGY

There is hereby established a comprehensive system of regulation of the legal profession in the State of Maine to encourage and promote competent and ethical practice by members of the Maine Bar, and to make these standards known to members of the public, so that they may have confidence in the legal profession in Maine. These Bar Rules supplement existing statutory regulation and processes, such as those established in 4 M.R.S. §§ 851 and 858, and the inherent authority of the courts to regulate attorney conduct. Attorney regulation includes, but is not limited to, registration, fee arbitration, ethical guidance, and discipline.

Terms used in these Rules shall have the following meanings, unless the context clearly requires a different meaning:

“Action” means a civil judicial or administrative proceeding brought to enforce, redress, or protect a right.

“Active status” means an attorney duly admitted to the practice of law in Maine, currently registered and in good standing with the Board.

“Allowable reasonable fees” for IOLTA accounts are per check charges, per deposit charges, sweep fees, fees in lieu of a minimum balance, federal deposit or share insurance fees, and reasonable IOLTA account administrative or maintenance fees. All other fees are the responsibility of, and may be charged to the lawyer maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account.

“Alternatives to Discipline Program” means any program, authorized by the Court, to which an attorney may be referred in lieu of discipline, including fee arbitration, arbitration, mediation, law office management assistance, lawyer assistance programs, counseling, continuing legal education programs, or any other program authorized by the Court.

“Approved Legal Services Organization” means a pro bono publico legal services program sponsored by a court-annexed program, the Maine State Bar Association, the University of Maine School of Law; a nonprofit organization

that provides legal services to persons of limited means and that receives funding from the federal Legal Services Corporation, the Maine Justice Foundation, or the Maine Civil Legal Services Fund; or any other nonprofit legal services organization designated by the Court.

“Attorney” and **“lawyer”** are used interchangeably, and mean a person admitted to the practice of law in Maine or any other person who appears, participates or otherwise engages in the practice of law in Maine.

“Award” means the decision of the arbitrators in the fee arbitration proceeding.

“Bar Counsel” means the attorneys employed by the Board to perform the prosecutorial function in lawyer disciplinary matters, or Special Counsel retained by the Board pursuant to Rule 2(a).

“Board” means the Board of Overseers of the Bar.

“Board Clerk” means the attorney employed by the Board to perform advisory, review, and administrative functions as set forth in these Rules.

“Central Intake Office” means an office staffed by a Board Clerk that has certain administrative and review functions as set forth in these Rules.

“CLE” means continuing legal education.

“Client” means a person, public officer, corporation, association, or other organization or entity, either public or private, who receives professional legal services from an attorney.

“Client Protection Fund” means the Maine Lawyers’ Fund for Client Protection.

“Commission” means either Fee Arbitration Commission, Grievance Commission, or Professional Ethics Commission.

“Complainant” means the party filing a grievance complaint.

“Court” means the Maine Supreme Judicial Court.

“Executive Clerk of the Court” means the Clerk of the Maine Supreme Judicial Court.

“Executive Director” means the attorney employed by the Board to perform the administrative and executive functions of the Board.

“Fee Arbitration Commission” means a creation of the Maine Supreme Judicial Court, under the jurisdiction of the Board of Overseers of the Bar, that provides an efficient and less formal adjudication process for attorney-client fee disputes.

“Financial institution” includes a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by lawyers.

“Good standing” means an attorney, not currently suspended or disbarred, duly admitted to the practice of law in Maine or, if specifically referenced in the applicable rule, other jurisdictions.

“Inactive status” refers to the status of an attorney in good standing who is not engaged in the practice of law in Maine.

“Judge(s)” means Justices of the Maine Supreme Judicial Court, Justices of the Maine Superior Court, Judges of the Maine District Court, Maine Family Law Magistrates, Judges and Magistrates of the United States District Court for the District of Maine, Maine Judges of the United States Court of Appeals for the First Circuit, and Judges of the United States Bankruptcy Court for the District of Maine.

“Judicial Law Clerk” means an attorney serving in a non-administrative position who provides assistance to a judge in researching issues before the court and in writing memoranda and opinions.

“Grievance Commission” means the attorney disciplinary body appointed by and responsible to the Board.

“IOLTA” means Interest on Lawyers’ Trust Accounts.

“IOLTA account” means a pooled trust account earning interest or dividends at an eligible institution in which a lawyer or law firm holds funds on behalf of client(s), which funds are small in amount or held for a short period of time such that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income.

“Maine Assistance Program” refers to the Maine Assistance Program for Lawyers and Judges, which offers confidential assistance to help individuals identify and address problems with alcoholism, drug abuse, and mental or emotional disorders.

“Monitor” means an attorney appointed by the Grievance Commission or the Court to provide a system of accountability and support to a respondent attorney.

“Notice of dishonor” refers to the notice that a financial institution is required to give, under the laws of Maine, upon presentation of an instrument that the institution refuses to pay upon presentment.

“Panel” means three members of the Grievance Commission or the Fee Arbitration Commission assigned to adjudicate and issue a decision.

“Party” means a person or entity directly involved in a grievance or fee arbitration proceeding.

“Petition” means a written request for fee arbitration in a form approved by the Commission.

“Petitioner” means the party requesting fee arbitration, Bar Counsel prosecuting a Grievance Commission proceeding, or an attorney seeking reinstatement following suspension or disbarment.

“Probation” means a discipline imposed where certain conditions are placed on an attorney’s practice.

“Properly payable” describes an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

“Professional Ethics Commission” means a commission that renders formal and informal written advisory opinions to the Court, Board, Grievance Commission, Bar Counsel, and members of the Maine bar involving interpretation and application of the Maine Rules of Professional Conduct to lawyer conduct.

“Proxy” means an attorney named in another attorney’s registration statement who will act to protect the interests of clients and conclude the law practice of an attorney who is incapacitated, suspended, or disbarred; or who has disappeared or died.

“Public member” means a Maine resident appointed by the Court to serve on the Board or a Maine resident appointed by the Board to serve on a Commission who has not been admitted to practice law in any jurisdiction.

“Receiver” means a licensed Maine attorney in good standing who is appointed by the Court to act to protect the interests of clients and conclude the law practice of an attorney who is incapacitated, suspended, or disbarred; or who has or disappeared or died.

“Registration documents” means those documents that the Board requires each attorney to file on an annual basis, consisting of a registration statement, Continuing Legal Education Annual Report [Rule 5(e)], and IOLTA Election Form [Rule 6(b)], and such other documents as the Board may from time to time direct.

“Registration status” means registration categories established by the Board.

“Respondent” or **“respondent attorney”** means the attorney with whom petitioner has a fee dispute, or an attorney who is the subject of a grievance complaint or disciplinary proceeding.

“Single Justice” means a single justice or judge of Maine’s trial courts or of the Supreme Judicial Court, designated by the Chief Justice of the Supreme Judicial Court. This includes active retired justices of the Supreme Judicial Court and active retired justices and judges of the trial courts.

“Surrender” means withdrawal from the practice of law in the State of Maine in order to avoid disciplinary proceedings, or in lieu of any other sanction.

Advisory Note – October 2020

The Preamble and Terminology section is amended to add a definition of “Executive Director.”

Advisory Note – May 2019

This amendment references the applicable subdivision in amended Maine Bar Rule 5(e).

Advisory Note – January 2017

This amendment is necessitated to properly reference the Maine Justice Foundation which in 2015 replaced the Maine Bar Foundation as the bar’s agency that helps those individuals desperate for civil legal aid in Maine.

I. BOARD OF OVERSEERS OF THE BAR

RULE 1. STRUCTURE

(a) Board. The Board is established as the statewide agency to administer the regulation of lawyers. The Board oversees a Grievance Commission as provided in Rule 9; Bar Counsel as provided in Rule 2; a Fee Arbitration Commission as provided in Rule 7; a Professional Ethics Commission as provided in Rule 8; and staff appointed by the Board and/or the Executive Director. The Board is a unitary entity responsible for educational, prosecutorial, and adjudicative functions; however, to avoid unfairness, these functions shall be separated within the agency insofar as practicable. The prosecutorial functions shall be directed by Bar Counsel and performed, insofar as practicable, by Board employees. The adjudicative functions shall be directed by the Board Clerk and performed, insofar as practicable, by Board employees, practicing lawyers, and public members serving on the Board, the Grievance Commission, and the Fee Arbitration Commission. The Board’s administrative and executive functions shall be performed by the Executive Director, who shall report directly to the Board. The Executive Director shall not perform or direct the prosecutorial or adjudicative functions of Bar Counsel or the Board Clerk.

(b) Appointment. Nine Board members shall be appointed by the Court, three of whom shall be public members appointed on the recommendation of the Governor and six of whom shall be lawyers admitted to practice in Maine. The terms of all members shall be for three years. No member shall serve more than two consecutive three-year terms, except that members may continue to serve until a replacement has been appointed.

(c) Designation of Officers. The Court shall periodically designate one member of the Board as Chair and another as Vice Chair. The Chair, and in the Chair's absence the Vice Chair, shall perform the duties associated with that office.

(d) Board Action and Recusal.

(1) *Quorum.* Five members shall constitute a quorum for any meeting of the Board. The Board may act through the concurrence or vote of a majority of the members present at a duly constituted meeting. After reasonable notice to all members and with the consent of all participating members, a meeting may be duly constituted and action taken by means of a telephone or video conference or other communications equipment enabling all members participating in the meeting to hear one another. Meetings of the Board shall be open to the public, except those portions of the meetings wherein the Board (1) consults with counsel pertaining to contemplated or pending litigation, or proceedings pending before the Grievance Commission, the Fee Arbitration Commission, and/or the Court; (2) considers matters pertaining to the personnel of the Board and/or appointments to the Board; or (3) considers other matters made confidential or private by these Rules, court order, or law.

(2) *Recusal.* If a Grievance Commission panel finds probable cause for a public disciplinary hearing or authorizes Bar Counsel to file an Information and the respondent attorney is a member of the Board, the remaining members of the Board shall determine whether the nature of the allegations should disqualify that member from performing Board responsibilities until such time as the pending matter is concluded.

(3) *Representation Prohibition.* No member of the Board may be legal counsel for a party in any proceedings under these Rules. When a member of his or her firm serves as legal counsel for a party in any proceeding under these

Rules, the Board member shall be ineligible to perform Board responsibilities relating to that proceeding. The Board member shall remain eligible to perform Board responsibilities unrelated to that proceeding, provided that the Board member is timely screened from any participation in or relating to that proceeding, at both the Board member's firm and the Board.

(4) Board members may not testify voluntarily in any proceedings under these Rules or as an expert witness in any court proceeding in the field of ethics.

(5) Board members may not serve as probation monitors and shall be recused from participating in any matter where a member of the Board member's firm is serving as a probation monitor.

(e) Compensation. Board and Commission members shall receive no compensation for their services but may be reimbursed for travel and other expenses incidental to the performance of their duties.

(f) Expenses and Financial Policies. Board expenses shall be paid out of the funds collected under these Rules. The Board may, subject to the Court's approval, adopt financial policies and procedures that are not inconsistent with these Rules.

(g) Roster of Lawyers. The Board shall maintain current information relating to all lawyers admitted to the Maine Bar including, but not limited to, the following:

- (1) full name and all names under which the lawyer has been admitted or practiced;
- (2) date of birth;
- (3) current office address, telephone number, and email address;
- (4) current residence address, telephone number, and email address;
- (5) date of admission to the Maine Bar;
- (6) registration status and the date of any transfer to or from a status;

- (7) social security or federal identification number;
- (8) other jurisdictions in which the lawyer is admitted and date of admission;
- (9) location and account numbers in which clients' funds are held by the lawyer;
- (10) nature, date, and place of any discipline imposed and any reinstatements in any other jurisdiction;
- (11) whether the lawyer, if engaged in the private practice of law, maintains professional liability insurance (*see* Rule 4(b)(4));
- (12) if engaged in the private practice of law in Maine, the name of an active status attorney who has consented to serve as a proxy on behalf of the attorney (*see* Rule 32);
- (13) the bar number assigned to every admitted lawyer; and
- (14) an email address to be used by other parties and the courts for electronic service of documents, notices, and any other records through any electronic court systems implemented by the Maine Judicial Branch.

The information submitted pursuant to this rule shall be made available to the public with the exception of information deemed confidential by the Board.

(h) Powers and Duties. The Board shall have the following powers and duties:

- (1) to propose rules of procedure for lawyer discipline proceedings for promulgation by the Court, and to comment on the enforceability of existing and proposed Maine Rules of Professional Conduct. In furtherance hereof, the Board may establish or designate such commissions, agencies, or persons to assist its study as it shall deem advisable
- (2) to review periodically with the Court the operation of the Board;

(3) to enforce attorney compliance with these Rules, the procedures and regulations adopted thereunder, and the Maine Rules of Professional Conduct;

(4) subject to the Court's approval, to appoint, compensate, and supervise the Bar Counsel and the Executive Director;

(5) to appoint and compensate other legal, prosecutorial, and administrative staff to assist the Board in its functions;

(6) to appoint members to the Grievance Commission, Fee Arbitration Commission, and Professional Ethics Commission;

(7) to inform the public about the existence and operation of the system and the disposition of each matter in which public discipline has been imposed, or a lawyer has been reinstated or readmitted;

(8) to prepare and file with the Court for approval in May of each year its budget for the next fiscal year, with the Board's recommendation as to the amount of fees to be assessed to members of the bar and ancillary organizations;

(9) to prepare, approve, and file an Annual Report with the Court;

(10) to adopt personnel and financial policies and procedures (*see* Rule 1(f));

(11) to establish procedures for and supervise the registration of all attorneys admitted to the practice of law and compile and keep current a register for the Court of all persons admitted as members of the Maine Bar, and a record of the death, or termination or suspension of the right of any such person to practice law in Maine;

(12) to adopt and publish its own rules of procedure and such regulations as are not inconsistent with these Rules;

(13) to delegate, in its discretion, to the Chair or Vice Chair the power to act for the Board on administrative and procedural matters;

(14) to furnish to the State Tax Assessor each year the names, addresses, social security or federal identification numbers, and other identifying information of all attorneys registered with the Board as the State Tax Assessor may require;

(15) to receive and act on applications from organizations for approval to recognize, designate, or certify attorneys admitted to practice in Maine as having expertise in one or more areas of law;

(16) to perform any adjudicative and/or appellate review functions as defined by these Rules;

(17) to maintain the confidentiality of matters coming before the Board;
and

(18) any other powers and duties as are not inconsistent with these Rules.

(i) Destruction of Confidential Documents. Upon conclusion of service, members shall take reasonable steps to destroy all documents, in paper or electronic format, relating to the proceedings of the Board and subject to the confidentiality provisions of these Rules.

(j) Executive Director. The Executive Director shall be a lawyer admitted to practice in Maine.

(1) *Responsibilities.* Under the direction and supervision of the Board, the Executive Director is responsible for

(A) the administrative functions of the Board, including but not limited to, the day to day operation of the Board, the management and supervision of all Board employees, the keeping of the Board's accounts and financial reports, and the keeping of a current register of all persons admitted to the Maine Bar; and

(B) the executive functions of the Board, including, but not limited to, the execution of the Board's mission and policies to promote the competent practice of law through regulation and education, and the provision of general and legal advice to the Board.

(2) *Ethical Obligations.* The Executive Director shall maintain the confidentiality of matters coming before the Board. The Executive Director shall not engage in the private practice of law or participate in activities that would, appear, to a reasonable person, to undermine the Executive Director's integrity. The Executive Director may lecture at continuing legal education seminars on topics relating to ethics or professionalism provided that the Executive Director shall do so without compensation and may render advisory opinions, along with Bar Counsel, pursuant to Rule 2(c). The Executive Director may be reimbursed for travel and ancillary expenses.

Advisory Note – July 2022

Rule 1 is amended to add subdivision (g)(14), which requires an admitted lawyer to specify an email address to be used by other parties and the courts for electronic service of documents, notices, and any other records through the electronic court systems implemented by the Maine Judicial Branch.

Two or more lawyers may designate a common email address for electronic service, but each lawyer is independently bound by service directed to that address and each lawyer is independently responsible for compliance with the requirements of this rule. The email address required under this rule for electronic service need not be the same as other email addresses maintained by the lawyer for other purposes.

A lawyer may satisfy the requirements of subdivision (g)(14) by providing the email address as part of a timely submission of the lawyer's annual registration to the Board of Overseers of the Bar during the registration period ending on August 31, 2022, and, thereafter, by notifying the Board immediately upon any change in the lawyer's service email address. See Rule 4(a).

A lawyer who is currently rostered by the Board of Overseers as inactive is relieved of the duty to provide email service addresses as provided by with Rules 1(g)(14) and 4(a) unless and until such time as the lawyer is reinstated to active status pursuant to Rule 4(j).

Advisory Note – October 2020

Two sentences are added at the end of Rule 1(a) to clarify the responsibilities of the Board, the Executive Director, the Board Clerk, and Bar Counsel.

New Rule 1(j) is added to specify that the Executive Director must be a lawyer admitted to practice in Maine and to summarize the Executive Director's responsibilities and ethical obligations.

Reporter's Notes – June 2015

Rule 1(a) establishes the structure, and addresses generally the powers and duties, of the Board of Overseers of the Bar. It is based on Model Rule 2(A), and is in accord with former Maine Bar Rule 4(a). The rule establishes the Board as the agency charged with assisting the Court in the exercise of its inherent power to supervise the Maine Bar.

Rule 1(b) is based on Model Rule 2(B), and is consistent with former Maine Bar Rule 4(a) and (b). The rule continues Maine's practice of appointment by the Court for attorney members, and appointment by the Court on the recommendation by the Governor for the public members.

Rule 1(c) is based on Model Rule 2(C), and former Maine Bar Rule 4(a). The committee adopted the existing Maine practice as to appointment by the Court of a Chair and Vice-Chair rather than adopting the Model Rules' recommendation that the Board members elect their own Chair and Vice Chair.

Rule 1(d) is based on Model Rule 2(D), and former Maine Bar Rule 4(c). The committee adopted the language of former Maine Bar Rule 4(c) in its entirety.

Rule 1(e) is based on Model Rule 2(E). There is no direct analogue in the former Maine Bar Rules, and the committee adopted the language of Model Rule 2(E).

Rule 1(f) is based on Model Rule 5 and former Maine Bar Rules 4(d)(1), 10(e), and 10(f). The rule is substantively consistent with current Maine practice.

Rule 1(g) is based on Model Rule 7. While there is no direct equivalent in the former Maine Bar Rules, the analogous provisions are contained in Rule 6(a) and (f) of those Rules. The committee felt that, due to the aging of the Maine Bar, it was important that the registration system include information about an attorney's proxy who will be able to take over an attorney's practice in the event that the attorney dies or becomes incapacitated.

Rule 1(h) is based on Model Rule 2(G) and former Maine Bar Rule 4(d). The Rules are largely consistent. However, the committee felt the Board should not be involved in the appellate function of reviewing a panel's determination. Consequently, the committee rejected the "appellate review function" of the Board envisioned by Model Rule 2(G)(4) and its equivalent contained in former Maine Bar Rule 7.1(e)(5)(A) to (C). Otherwise, the overall Board's duties and powers remain largely the same as under former Maine Bar Rule 4(d).

RULE 2. BAR COUNSEL

(a) Appointment. The Board, subject to the Court's approval, shall appoint a lawyer admitted to practice in Maine to serve as Bar Counsel. The Board may also appoint Assistant Bar Counsel or Deputy Bar Counsel as deemed necessary. Neither Bar Counsel nor any attorney employed on a full-time basis as an Assistant or Deputy Bar Counsel shall engage in the private practice law, or participate in activities that (1) will lead to Bar Counsel's frequent disqualification or (2) would appear, to a reasonable person, to undermine Bar Counsel's integrity. As needed, the Board has the power to employ Special Counsel, who shall not be subject to the prohibition of the private practice of law.

(b) Powers and Duties. Bar Counsel shall perform all prosecutorial functions on behalf of the Court and the Board hereunder, and have the following powers and duties:

(1) to evaluate all information coming to the attention of the office of Bar Counsel to determine whether such information concerns a lawyer subject to the jurisdiction of the Board;

(2) to investigate all information coming to the attention of the office of Bar Counsel that, if true, would be grounds for discipline, and to investigate all facts pertaining to petitions for reinstatement;

(3) to make referrals to the Central Intake Office, to issue stays, dismiss complaints, recommend dismissals with a warning, refer respondent to the Alternatives to Discipline Program pursuant to Rule 13(c), or file formal charges with respect to each matter brought to the attention of the Board;

(4) to prosecute before Grievance Commission panels, the Board, and/or the Court any appropriate discipline and reinstatement proceedings;

(5) to supervise staff needed for the performance of prosecutorial functions;

(6) to notify the complainant and the respondent when Bar Counsel dismisses a complaint, including but not limited to providing to the complainant

(A) a copy of any written communication from the respondent to Bar Counsel relating to the matter except information that is subject to the privilege of one other than the complainant; and

(B) a concise written statement of the facts and reasons supporting a dismissal at the conclusion of Bar Counsel's investigation and a copy of the written guidelines for dismissal issued pursuant to Rule 3(a)(5), provided that the complainant shall be given a reasonable opportunity to rebut statements of the respondent before the complaint is dismissed;

(7) to issue written guidelines for use by the Central Intake Office and Bar Counsel to determine which matters shall be dismissed for failure to allege facts that, if true, would constitute grounds for disciplinary action;

(8) to seek reciprocal discipline when informed of any public discipline imposed in any other jurisdiction; and

(9) to encourage and promote competent and ethical practice by members of the Maine Bar by organizing, participating in, and presenting CLE programs.

(c) Advisory Opinions. Upon request by an attorney licensed to practice law in Maine, Bar Counsel may render confidential, informal, non-binding advisory opinions to such attorney concerning interpretation or applicability of these Rules or the Maine Rules of Professional Conduct, provided that (1) the facts describe and involve the conduct of the particular inquiring attorney, or another attorney at that attorney's law firm, and (2) at the time of any such informal advisory opinion, the inquiring attorney is informed by Bar Counsel that such an opinion is not binding and may be subject to eventual revision or reversal by either the Grievance Commission or the Professional Ethics Commission. Such opinions may be provided orally or in writing. Bar Counsel may also assist the Professional Ethics Commission in performing its duties under these Rules.

Should a complaint be filed involving the subject matter and the attorney who requested the advisory opinion, the Bar Counsel who rendered the opinion shall be recused from any investigation and prosecution of the complaint.

(d) Ex Parte Communication.

(1) Members of a Grievance Commission panel, the Board, the Court or Single Justices shall not communicate *ex parte* with Bar Counsel regarding a pending or impending investigation or disciplinary matter except as explicitly provided for by Rule 13(d); other law; or for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits provided that:

(A) it is reasonable to believe that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication; and

(B) all other parties are notified of the substance of the *ex parte* communication and provided an opportunity to respond.

(2) A violation of this rule shall be a ground for lawyer or judicial discipline, as appropriate, and cause for removal from the Grievance Commission panel or the Board.

(e) Successive Employment. A former Bar Counsel shall comply with Rule 1.11 of the Maine Rules of Professional Conduct regarding successive government and private employment.

(f) Recusal.

(1) Bar Counsel and staff attorneys must be sensitive to familial or close personal or professional relationships between themselves and respondents, complainants, or other related parties which may result in a conflict of interest or the appearance of a conflict of interest, or which could otherwise interfere with the proper performance of their duties.

(2) Staff attorneys who become aware of the existence of such a relationship in a particular case shall immediately report the nature and circumstances of that relationship to Bar Counsel who will review the matter, including all relevant information brought to his or her attention, to determine whether the staff attorney should be disqualified.

(3) In determining whether to make a report to Bar Counsel under this policy, a staff attorney shall consider, and be guided by, the provisions of the Maine Rules of Professional Conduct as well as the factors for judicial disqualification listed in the Maine Judicial Code of Conduct.

(4) In determining whether a staff attorney should be recused from a particular case, Bar Counsel shall likewise consider all provisions of the Maine Rules of Professional Conduct as well as the factors for judicial disqualification listed in the Maine Judicial Code of Conduct.

(5) If Bar Counsel concludes that a staff attorney should be recused from a particular case under this policy, the matter shall be reassigned to another staff attorney, or if no other staff attorney is available, to Bar Counsel personally, or to Special Counsel pursuant to Rule 14(c)(1).

(6) In the event that the case is reassigned under this policy, the disqualified attorney shall have no involvement in the case or any interaction with the assigned attorney regarding the case.

(7) In the event that Bar Counsel concludes that he, or she, personally has such a relationship described above, Bar Counsel shall immediately apprise

the Board Chair of the potential conflict of interest, and the investigation shall be assigned to Special Counsel pursuant to Rule 14(c)(1).

(8) Neither Bar Counsel nor staff attorneys may testify voluntarily in any proceedings under these Rules or as an expert witness in any court proceeding in the field of ethics.

(g) Continuing Legal Education Lectures. Bar Counsel may lecture at continuing legal education seminars on topics relating to ethics or professionalism provided that Bar Counsel shall do so without compensation. Bar Counsel may be reimbursed for travel and ancillary expenses.

Reporter's Notes – June 2015

Rule 2(a) is based on Model Rule 4. The committee considered former Maine Bar Rules 4(d)(1) and (2), and 5(a) and language contained in the Board's Personnel Manual. The revised rule retains the "Bar Counsel" name, rejecting the Model Rules' nomenclature of "Disciplinary Counsel." The members of the committee determined that the Maine Bar was accustomed to the "Bar Counsel" name and that the term more accurately described the functions of the office. The revised rule follows the current Maine practice. The committee also rejected the Model Rules' prohibition on former Bar Counsel from representing a respondent in any disciplinary proceeding for a period of one year following completion of the Bar Counsel's service. The committee felt that the Model Rule was too inflexible and was inappropriate for a small state like Maine.

Rule 2(b) is based upon Model Rule 4(B) and is similar to former Maine Bar Rule 7.1(b)(c)(d)(e). Rule 2(b)(3) provides Bar Counsel with duties not currently included for that position, e.g., making referrals to the Central Intake Office, issuance of stays, and use of the Alternatives to Discipline Program (*see* Rule 13(c)). While Maine Bar Rule 7.1(c) and (d) provide Bar Counsel with discretion to provide a complainant with the respondent's informal response letter, Rule 2(b)(6)(A) requires Bar Counsel to always promptly provide a complainant with "a copy of any written communication from the respondent to Bar Counsel relating to the matter (unless subject to another individual's privilege claim)." Rule 2(b)(6)(B) and (7) also requires Bar Counsel to issue and provide to complainants the "dismissal guidelines" for use by the Central

Intake Office and Bar Counsel. The former Maine Bar Rules include no such comparable guidelines.

Rule 2(c) is based upon former Board Regulation 28 and Model Rule 4(C). The committee rejected the Model Rule's prohibition of the issuance of advisory opinions by Bar Counsel. Instead, the committee retained current Maine practice which permits Bar Counsel to render advisory opinions. The members of the committee concluded that members of the bar had come to rely on informal advisory opinions rendered by Bar Counsel. The committee felt that so long as the opinions are informal and non-binding, and the requesting attorney is so advised, a complete ban on such opinions was unwarranted.

Rule 2(d) is derived from Model Rule 4(D) and Board Regulation No. 57. The revised rule is substantially in accord with the Model Rule.

Rule 2(e) is derived from Model Rule 4(E). There is no equivalent in the former Maine Bar Rules.

RULE 3. CENTRAL INTAKE.

(a) Functions. There is hereby established a Central Intake Office, staffed by the Board Clerk, which shall

(1) receive information and complaints regarding the conduct of lawyers over whom the Court has jurisdiction, provided this rule shall not be construed to limit the authority of any authorized agency to institute proceedings;

(2) provide assistance to complainants in stating their complaints;

(3) provide information to complainants about the status of their complaints;

(4) determine whether the facts stated in a complaint or other information regarding the conduct of a lawyer provide grounds for further action by Bar Counsel or referral to another agency, and

(A) dismiss the complaint; or

- (B) forward it to Bar Counsel, or to an appropriate agency or agencies;
- (5) provide to the complainant, if a complaint is dismissed:
 - (A) a copy of the written guidelines for dismissal; and
 - (B) in the event of dismissal, a notice of complainant's right of review pursuant to Rule 9(e);
- (6) record disposition of all complaints.

(b) Powers and Duties. The Board Clerk shall have the following powers and duties:

(1) to notify the complainant and the respondent of the disposition of matters;

(2) to forward a certified copy of the judgment of a lawyer's criminal conviction to the disciplinary agency in each jurisdiction in which that lawyer is admitted when the lawyer is convicted of a serious crime (as hereinafter defined) in Maine;

(3) to maintain disciplinary records, subject to the file retention requirements of Rule 18(g), and to compile statistics to aid in the administration of the system, including but not limited to a single log of all complaints received, investigative files, statistical summaries of docket processing and case dispositions, and other records as the Board or the Court may require to be maintained. Statistical summaries shall contain, at a minimum:

(A) the number of pending cases at each stage in the disciplinary process for each counsel and for the agency;

(B) the number of new cases assigned to each counsel during the year and the total for the agency;

(C) the number of cases carried over from the prior year for each counsel and the total for the agency; and

(D) the number of cases closed by each counsel during the year and the total for the agency.

(4) to provide legal and administrative support to the Fee Arbitration Commission and Grievance Commission;

(5) to appoint alternate members to the Fee Arbitration Commission and Grievance Commission panels as necessary to meet the requirements of Rules 7(d)(8)(A) and 9(a);

(6) to provide notice of public discipline, suspension, disbarment, and reinstatement to general media outlets throughout Maine, and throughout other jurisdictions in which the Board has reason to believe the attorney has been admitted to practice; and

(7) to perform any other functions authorized by these Rules.

Reporter's Notes – June 2015

Rule 3(a) is based on Model Rule 1(B) and has no equivalent in the former Maine Bar Rules. This rule establishes a Central Intake Office staffed by a Board Clerk. The committee believes that the Central Intake Office will serve a valuable function by processing inquiries from the public and potential complainants, handling complaints and communicating with component agencies of the Board. The Central Intake Office and the Board Clerk serve an important screening function, freeing Bar Counsel to investigate only potentially meritorious complaints, and they provide important assistance to complainants and members of the public.

Rule 3(b) is based on Model Rule 1(B) and has no equivalent in the former Maine Bar Rules. This rule further details the powers and duties of the Board Clerk. Important duties of the Board Clerk detailed in revised rule 3(b) include the dissemination of disciplinary information, recordkeeping, and lending legal and administrative support to Grievance and Fee Arbitration Commission panels.

II. MAINE BAR ADMINISTRATIVE RULES

RULE 4. REGISTRATION

(a) Requirement. Every lawyer admitted to active practice in Maine shall pay to the Board an annual registration fee for each fiscal year beginning July 1st. The annual **registration** fee, established by the Court on recommendation of the Board, shall be used to defray the costs of the Board and of other components of the system of lawyer regulation under other rules established by the Court, and for those other purposes the Court shall from time to time designate.

Additionally, in accordance with the Rules for the Maine Assistance Program for Lawyers Rule 1(C)(1) and the Maine Rules for the Lawyers' Fund for Client Protection Rule 3(a), every lawyer admitted to active practice and full-time and active retired judges required to register in accordance with these Rules shall pay assessments in support of the mission of these entities. The assessments shall be established by the Court.

Every lawyer admitted to active practice in Maine shall provide as part of the annual registration process required by Rule 4(b) an active, current email address for electronic service that will be used by other parties and the courts for electronic service of documents, notices, and any other records through any electronic court systems implemented by the Maine Judicial Branch and shall notify the Board immediately of any change in that address.

(b) Registration. To facilitate the collection of the annual registration fee provided for in Rule 4(a), commencing July 1st each year, every lawyer admitted to practice in Maine is required to complete, certify and file registration documents, which shall be on forms prescribed by the Board. Each lawyer shall file with the Board a supplemental statement of any change in the information previously submitted within 30 days of the change. Registration documents and payments received after August 31st will be assessed a non-waivable late fee.

All persons first becoming subject to these Rules by admission to practice in Maine after April 1st shall file the registration documents required by this rule at the time of admission, but no annual registration fee shall be payable

until the next annual registration collection. Failure to register shall result in the issuance of a notice of administrative suspension pursuant to Rule 4(h).

Unless otherwise exempted, each lawyer admitted to the active practice of law shall annually file the following:

(1) *Registration Statement.* Each lawyer admitted to the active practice of law in Maine shall file a registration statement with the Board setting forth the information stated in Rule 1(g) and such other information as the Court or the Board may direct.

(2) *IOLTA Trust Account Report.* See Rule 6(b).

(3) *Insurance Disclosure.* Each lawyer admitted to the active practice of law in Maine shall annually certify to the Board (A) whether the lawyer is engaged in the private practice of law; (B) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance; (C) whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law; and (D) whether the lawyer is exempt from the provisions of this rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is employed by an organization in a capacity in which the lawyer does not represent clients other than the employing organization. Each lawyer admitted to the active practice of law in Maine who reports being covered by professional liability insurance shall notify the Board in writing if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason. Notice must be delivered to the Board within 30 days of the lapse, cancellation, or termination, unless the policy is renewed or replaced without substantial interruption. The information submitted pursuant to this rule shall be made available to the public by such means as designated by the Board.

(c) Exemptions.

(1) *Registration.* Full-time and active retired judges who are members of the Maine or federal judiciary shall be exempt from the payment of the annual registration fee during the time they serve in office. Judges shall remain on the roll of lawyers in judicial status, and may retire in judicial status or resume active practice upon completion of their tenure in office, by filing registration documents and paying the annual registration fee required for the

year in which active practice is resumed. Additionally, lawyers who have notified the Board that they are (a) members of the armed forces of the United States who are on active duty outside of Maine, or (b) judicial law clerks, or (c) emeritus attorneys, shall be exempt from the payment of the annual registration fee. Judicial law clerks and emeritus attorneys shall remain on the roll of lawyers during the tenure of their service and annually file registration documents.

(2) *IOLTA Accounts.* See Rule 6(a)(2).

(d) Receipt Demonstrating Compliance with Registration Filing. Within 30 days of the receipt of a lawyer's completed registration documents and payment of all fees, the Board shall acknowledge compliance with the annual registration requirements.

(e) Application for Transfer to Inactive Status. Any lawyer, not under an administrative suspension or the subject of a disciplinary investigation or proceeding under these Rules, who has retired or is not engaged in practice shall advise the Board in writing of the lawyer's desire to assume inactive status and discontinue the practice of law. Upon the filing of the notice, the lawyer shall no longer be eligible to practice law in Maine. The Board shall remove a lawyer on inactive status from the list of classified active lawyers until and unless the lawyer requests and is granted reinstatement to the active rolls. The lawyer shall also comply with the provisions of Rule 4(k).

(f) Application for Emeritus Status.

(1) *Purpose.* The purpose of enacting emeritus status is to encourage and provide retiring attorneys or non-practicing attorneys who have chosen other career paths, who otherwise may choose inactive status, the opportunity to provide *pro bono publico* legal services under the auspices of an Approved Legal Service Organization.

(2) *Application.* Any lawyer who has discontinued the practice of law and who has given the notice required by Rule 4(e) but who wishes to provide *pro bono publico* legal services without compensation or expectation of compensation shall advise the Board by filing an emeritus status statement indicating he or she will limit his or her active legal practice to providing *pro bono publico* legal services under the auspices of an Approved Legal Service

Organization, as defined in these Rules. The emeritus status statement shall be signed by an authorized representative of the Approved Legal Service Organization under whose auspices the lawyer will provide such legal services. A lawyer who has assumed emeritus status shall not be relieved of his or her obligation to comply with annual registration requirements.

(g) Administrative Suspension.

(1) An administrative suspension shall not be considered a *per se* violation of the Maine Rules of Professional Conduct and shall not constitute the imposition of discipline. The Board may, however, institute separate proceedings to determine whether discipline is appropriate.

(2) *Failure to file Registration Documents.* Unless excused on grounds of financial hardship or for other good cause pursuant to procedures established by the Board, any lawyer who fails to submit completed registration documents under the provisions of Rule 4(b) or pay the annual registration fee by August 31st shall be suspended provided notice is given under the provisions in Rule 4(h). The suspended attorney shall comply with the provisions of Rule 4(k).

(3) *Failure to File State Tax Returns.* Whenever, pursuant to Section 175 of Title 36 of the Maine Revised Statutes, the State Tax Assessor notifies the Board of the Assessor's final determination to prevent renewal or reissuance of a "license or certificate of authority" for a lawyer to practice law, the lawyer shall be immediately suspended provided notice is given under the provisions in Rule 4(h). The suspended lawyer shall comply with the provisions of Rule 4(k).

(4) *Failure to Comply with a Support Order.* Whenever, pursuant to Section 2201 of Title 19-A of the Maine Revised Statutes, the Department of Health and Human Services certifies in writing to the Board that, in compliance with the statutory procedure, the Department has determined that a lawyer is in noncompliance with a support order; the lawyer has failed to appeal the Department's decision; or a final judgment has been entered against the lawyer on the lawyer's petition for judicial review, the lawyer shall be immediately suspended provided notice is given under the provisions in Rule 4(h). The suspended lawyer shall comply with the provisions of Rule 4(k).

(5) *Failure to File an Unemployment Tax Return or to Pay an Unemployment Tax Assessment.* Whenever, pursuant to Section 1232 of Title 26 of the Maine Revised Statutes, the State Commissioner of Labor or Director of Employment Security certifies in writing to the Board that the Commission has determined in compliance with the statutory procedure that a lawyer is in noncompliance with the unemployment compensation statute, and the lawyer has either failed to pursue an appeal from the Commission's decision or a judgment has been entered against the lawyer on the lawyer's petition for judicial review, the lawyer shall be immediately suspended provided notice is given under the provisions of Rule 4(h). The suspended lawyer shall comply with the provisions of Rule 4(k).

(h) Notice of Administrative Suspension. The Board shall provide notice of any administrative suspensions to the suspended attorney in accordance with the requirements of Rule 15. This notice of suspension shall not be effective until 30 days after the date of mailing. A lawyer who, after the date of the mailing of a notice of suspension but before the effective date of the suspension, files with the Board (1) registration documents and the required registration fee or (2) a certificate issued by the State agency pursuant to Rule 4(g)(2), (3), and (4) stating that the attorney is currently in good standing and has satisfied any obligations and paid all fees due, shall be deemed to be in compliance with this rule and shall not be suspended for failure to comply with the obligations that led to the notice of suspension.

(i) Reinstatement from Administrative Suspension. Any lawyer suspended under Rule 4(g)(2) shall be reinstated by administrative order if, within five years of the effective date of the suspension for nonpayment, the lawyer remits to the Board a reinstatement fee, submits all required registration documents, and makes payment of all arrears.

If an attorney is administratively suspended pursuant to Rule 4(g)(3), (4), or (5), that attorney must also submit a certificate issued by the appropriate state agency stating that the attorney is currently in good standing and has satisfied any obligations and paid any sums due.

A lawyer who has been administratively suspended must complete the continuing legal education requirements of Rule 5 for each year the attorney has been suspended, but need not complete more than 24 credit hours for that entire period of suspension, provided that (1) no more than one half of the

credits are earned through self-study; (2) at least two credit hours are primarily concerned with the issues of ethics or professionalism; and (3) at least two credit hours are primarily concerned with issues of recognition and avoidance of harassment and discriminatory communication or conduct related to the practice of law. Additionally, a lawyer who has been suspended within the previous five years for noncompliance with the continuing legal education requirements of Rule 5 shall be assessed an additional reinstatement fee, as may be set by the Board.

Any lawyer who fails to seek reinstatement within five years of the effective date of the administrative suspension shall be required to petition for reinstatement under Rule 29.

(j) Reinstatement from Inactive Status. Any lawyer on inactive status under Rule 4(e) shall be reinstated by administrative order of the Board if the lawyer seeks reinstatement within five years of the effective date of transfer to inactive status. Any lawyer who fails to seek reinstatement within five years of the effective date of transfer to inactive status may, in the discretion of the Court, be required to petition for reinstatement under Rule 29. In addition to all other requirements, an inactive lawyer seeking reinstatement shall remit to the Board a reinstatement fee and an arrearage registration payment equal to the total registration fees that the lawyer would have been obligated to pay the Board had the lawyer remained actively registered to practice in Maine during that period of inactive status, but no more than \$1,000.

(k) Notice to Clients, Adverse Parties, and Other Counsel.

(1) A lawyer who transfers to inactive status or who has been administratively suspended shall

(A) notify all clients being represented in pending matters;

(B) notify any co-counsel in pending matters; and

(C) notify any opposing counsel in pending matters, or in the absence of opposing counsel, the adverse parties, of the matter and that the lawyer is therefore disqualified to act as lawyer after the effective date of the order. The notice shall state the client's place of residence.

(2) *Special Notice.* The Board may direct the issuance of notice to such financial institutions or others as may be necessary to protect the interests of clients or other members of the public.

(3) *Duty to Maintain Records.* The attorney shall keep and maintain records of the steps taken to accomplish the requirements of Rule 4(k)(1)(A) to (C), and shall make those records available to the Board on request.

(4) *Return of Client Property.* The attorney shall deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them and any counsel representing them of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property.

(5) *Refund of Fees.* Within 10 days after entry of the order imposing disbarment or suspension, the attorney shall refund any part of any fees paid in advance that have not been earned.

(6) *Withdrawal from Representation.* In the event the client does not obtain another lawyer before the effective date of the administrative suspension, it shall be the responsibility of the attorney to move in the court, agency, or tribunal in which the proceeding is pending for leave to withdraw. The attorney shall in that event file with the court, agency, or tribunal before which the litigation is pending a copy of the notice to opposing counsel or adverse parties.

(7) *New Representation Prohibited.* Upon the effective date of the administrative suspension, the attorney shall not undertake any new legal matters. The attorney shall take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, or similar title.

(8) *Affidavit Filed with the Board.* Within 10 days after the effective date of the suspension order, the attorney shall file with the Board Clerk an affidavit showing

(A) compliance with the provisions of this rule;

(B) all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

(C) residence or other addresses where communications may thereafter be directed.

(l) Notice of Registration Status Change. The Board shall transmit, electronically or otherwise, notice of attorney status changes to all State, Federal, and Tribal Courts in Maine and such other organizations as determined by the Board.

(m) Certificate of Good Standing.

(1) *Issuance.* All certificates related to the good standing or lack thereof of members of the Maine Bar shall be issued by the Board Clerk on behalf of the Court.

(2) *Certificate Requests.* A lawyer's request for a certificate of good standing shall be made in writing to the Board Clerk and shall be accompanied by a requisite fee as established by the Board.

(3) *Form of Certificate.* The certificate shall be on a form prescribed by the Court and shall include the attorney's full name, the attorney's date of admission to the Maine Bar, the attorney's current registration status, any public disciplinary record if requested, the date of certification by the Board Clerk, signature of the Executive Clerk of the Court, and the seal of the Court.

Advisory Note – July 2022

Rule 4(a) is amended to incorporate a third paragraph requiring every lawyer admitted to active practice in Maine to provide, as part of the annual registration process, an active, current email address for electronic service that will be used by other parties and the courts for electronic service of documents, notices, and any other records through electronic court systems and to notify the Board immediately of any change in that address. See Rule 1(g)(14) and Advisory Note.

A lawyer who is currently rostered by the Board of Overseers as inactive is relieved of the duty to provide an email service address as provided by Rules 1(g)(14) and 4(a) unless and until such time as the lawyer is reinstated to active status pursuant to Rule 4(j).

Advisory Note – May 2019

The purpose of the amendments to Rule 4(b) and (c) is to remove the CLE Report filing requirement from the annual registration conducted each fiscal year beginning July 1st.

The amendment to Rule 4(i) removes unnecessary subdivision references to Rule 5, increases the maximum number of CLE credits required for reinstatement from 22 to 24, and provides guidance to members of the bar with respect to the two additional credits. The amendment also eliminates the reference to in-house courses, as revised Maine Bar Rule 5 no longer contains in-house self-study language.

Reporter’s Notes – June 2015

Rule 4(a) is based on Model Rule 8(A), and is consistent with language contained in former Maine Bar Rule 6(a).

Rule 4(b) is based on Model Rule 8(A) and (C), and is consistent with language contained in former Maine Bar Rule 6(a)(1). The committee proposed new language, incorporated into Rule 4(b)(4), requiring that attorneys annually certify whether they are currently covered by professional liability insurance. The rule is also revised to require that registration paperwork must be received by the Board no later than August 31st as opposed to being postmarked by August 31st. Lastly, the revised rule also eliminates the proration of registration fees for new admittees registering with the Board after April 1st. Instead, new admittees will be assessed a full registration fee constituting payment for the current and subsequent year.

Rule 4(c) is based on Model Rule 8(B), and is consistent with language contained in former Maine Bar Rules 6(a)(1), 10(a), and 12.

Rule 4(d) is based on Model Rule 8(F) and is consistent with language contained in former Maine Bar Rule 6(a)(1).

Rule 4(d) is based on Model Rule 8(F) and is consistent with language contained in former Maine Bar Rule 6(a)(1).

Rule 4(f) is based on former Maine Bar Rule 6(d). There is no equivalent language in the Model Rules.

Rule 4(g) is based on Model Rule 8(H) and is consistent with language contained in former Maine Bar Rule 6(b)(1) to (4). The revised rule makes clear that the failure to file registration documents or receipt of a notice described in Rule 4(G)(3) to (5) will result in an administrative suspension.

Rule 4(h) is based on Model Rule 8(G) and is analogous to language contained in former Maine Bar Rule 6(b)(1) to (5).

Rule 4(i) is based in part on Model Rule 8(G), and mirrors the provisions in former Maine Bar Rules 6(b)(2) to (5) and (7), 6(c), and 7.3(j)(1) and (5)(F). The revised rule extends the time period from 6 months to 5 years wherein an attorney may be reinstated without petitioning the Court.

Rule 4(j) is based on Model Rule 8(I) and is consistent with language contained in former Maine Bar Rule 6(c).

Rule 4(k) is based on former Maine Bar Rule 7.3(i)(2). There is no equivalent language in the Model Rules. The revised rule calls for suspended attorneys to file an affidavit with the Board within ten days attesting to compliance with the rule. The former rule called for 30 days.

Rule 4(m) is based in part on Board Regulation No. 10. The revised rule calls for the Board, on behalf of the Court, to issue Certificates of Good Standing.

RULE 5. CONTINUING LEGAL EDUCATION (“CLE”)

(a) Purpose.

To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice, attorneys must be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. The purpose of minimum continuing legal education (MCLE) requirements is to promote and sustain competence and professionalism and to ensure that attorneys remain current on the law, law practice management, and technology

in our rapidly changing society. These rules establish minimum requirements for continuing legal education, accreditation criteria, and compliance procedures.

(b) Continuing Legal Education (CLE) Committee.

(1) The Board shall establish a CLE Committee to oversee the administration of these rules. The CLE Committee shall review the effectiveness and efficiency of the MCLE requirements and recommend proposed changes or additions to these rules to the Board.

(2) The CLE Committee shall comprise three members of the Board including two attorneys and one nonattorney public member. The Vice-Chair of the Board shall serve as Chair of the Committee. The two remaining members shall be appointed by the Board Chair.

(3) In addition to administering and interpreting these rules, the CLE Committee shall have the following powers and duties:

(A) Monitor the availability and quality of programs for members of the bar;

(B) Publish policy statements and regulations regarding programs, credits, and the interpretation of the rules;

(C) Delegate course approval responsibilities and other functions under this Rule to the Board staff; and

(D) Upon request, review any decisions denying approved status, program accreditation, or computation of credits. The CLE Committee's determination on any such issue shall be final.

(c) MCLE Requirements.

(1) Every attorney with an active license to practice law in this jurisdiction shall be required to earn a minimum of 12 MCLE credit hours per calendar year. No more than five of the credit hours may be earned through self-study programs as defined in Rule 5(h)(1)(B).

(2) As part of the required credit hours referenced in Rule 5(c)(1), attorneys must earn at least one live credit hour in Ethics and Professionalism. Qualifying Ethics and Professionalism topics include professional responsibility, legal ethics, substance abuse and mental health issues, diversity awareness in the legal profession, attorney wellness, and legal malpractice and bar complaint prevention topics including client relations, law office and file management, and client trust account administration. The credit hour required by this section is separate from and in addition to the credit hour required by Rule 5(c)(3).

(3) As part of the required credit hours referenced in Rule 5(c)(1), attorneys must earn at least one in-person credit hour in the recognition and avoidance of harassment and discriminatory communication or conduct related to the practice of law as set out in the Maine Rules of Professional Conduct. Qualifying topics include harassment or discriminatory communication or conduct on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity. The credit hour required by this section is separate from and in addition to the credit hour required by Rule 5(c)(2).

(4) The credit hour required by Rule 5(c)(3) must be earned through in person attendance, unless, in the discretion of the CLE Committee, for demonstrated good cause shown, an attorney seeks and obtains prior approval to attend a live presentation through live-streaming or other electronic medium approved by the Committee. The CLE Committee's determination may include conditions mandating the CLE sponsor to ensure that participants will be monitored throughout the program for active, contemporaneous participation.

(d) Exemptions.

(1) The following individuals otherwise subject to this Rule are exempted from its requirements:

(A) Full-time judges in any state, federal, or tribal court;

(B) Active retired state court judges and senior status federal court judges;

(C) Full-time teachers in any law school approved by the American Bar Association;

(D) Members of the armed forces of the United States who are on active duty outside of this jurisdiction;

(E) Residents of another country unless they are actively practicing law in this jurisdiction;

(F) Attorneys who have practiced 40 years or more, attained the age of 65 years, and are not engaged in the full-time practice of law;

(G) Legislators and members of Congress;

(H) Attorneys with active licenses to practice law in this jurisdiction who maintain a principal office for the practice of law in another jurisdiction that requires MCLE and who can demonstrate compliance with the MCLE requirements of that jurisdiction;

(I) Nonresident attorneys who are temporarily admitted to practice in this jurisdiction under *pro hac vice* rules;

(J) Attorneys serving as judicial law clerks;

(K) *Emeritus* attorneys; and

(L) Attorneys admitted for less than three months of the calendar year.

(2) New admittees to the Maine bar who complete an accredited new attorney program that focuses on basic skills and substantive law during the year in which they are admitted are exempt for that year and the following calendar year.

(3) In the discretion of the CLE Committee, any individual may be exempted from all or part of the requirements of this Rule upon a showing of hardship or for other good cause shown pursuant to procedures to be established by the CLE Committee. An exemption may not be granted in successive years for the same or similar hardship.

(e) Reporting Period and Compliance.

(1) Attorneys subject to these rules shall complete the MCLE requirements of Rule 5(c) in each calendar year. Attorneys who fail to meet the MCLE requirement within the reporting period will be considered noncompliant.

(2) On January 1st of each year, attorneys subject to these rules shall demonstrate compliance with the requirements of these rules for the prior calendar year.

(3) Each year, attorneys subject to these rules shall certify the accuracy of their individual MCLE Annual Report Statement to the CLE Committee no later than the close of business on the last business day of February.

(f) Accumulation and Computation of Credits.

(1) Credit hours will be awarded on the basis of one credit hour for every 60 minutes spent engaged in an accredited program, unless otherwise specified.

(2) Credit hours will not be given for time spent on nonsubstantive matters such as introductory remarks, breaks, or business meetings.

(3) The number of credit hours awarded to a program is the maximum that may be earned for that program unless the attorney is a presenter. An attorney may claim partial credit (a minimum of 30 minutes) for partial attendance or completion of an accredited program.

(4) An attorney subject to these rules who makes a presentation at an accredited program not offered for academic credit by the sponsoring institution may earn two credit hours for every 30 minutes of actual presentation for the accredited program if the attorney has prepared substantial written materials—as defined by the CLE Committee—to accompany the presentation. If substantial written materials have not been prepared, the attorney will earn one credit hour for every 30 minutes of actual presentation.

(5) An attorney who teaches a regularly scheduled law-related course offered for academic credit at an accredited post-secondary educational institution may earn six credit hours under this rule for every hour of academic credit awarded by the institution for the course. An attorney who assists or participates in such a regularly scheduled course will earn one credit hour for every hour of actual participation, up to a maximum of six hours.

(6) An attorney subject to these rules who formally takes for credit or officially audits a regularly scheduled course offered for academic credit at a law school approved by the American Bar Association will earn four credit hours under this rule for every hour of academic credit awarded by the institution for the course, provided that the attorney attends at least 75% of the classes in the course and, if enrolled for academic credit, receives a passing grade.

(7) Each calendar year, attorneys may carry over up to 10 credit hours to satisfy the requirements of the following year, provided that no more than five of the credit hours may be earned through self-study programs as defined in Rule 5(h)(1)(B). The mandatory live credit requirements of Rule 5(c)(2) must be satisfied for each reporting period.

(g) Standards for Accreditation of MCLE Programs.

(1) To be accredited, a program must meet the following standards:

(A) The program must have significant intellectual or practical content designed to promote attorney competence and must deal primarily with matters related to the practice of law, ethics and professionalism, or law practice management.

(B) Interdisciplinary programs, if pertinent to an individual attorney's practice, will be considered on a case-by-case basis.

(C) Although written materials may not be appropriate for all courses, they are expected to be utilized whenever possible. Written course materials may be provided in paper or digital format, in advance or at the time of the activity.

(D) Program presenters must be qualified with the necessary practical and/or academic experience to teach the topics covered.

(E) The program must be presented in a suitable environment conducive to learning.

(F) The program must last 30 minutes or longer.

(G) With the exception of certain self-study programs, the sponsor must monitor the program for attendance and certify such attendance to the CLE Committee.

(2) Notwithstanding the minimum requirements set forth in this Rule, the following activities are not eligible for MCLE Credit:

(A) A meeting of a bar association, committee, section, or other entity composed of attorneys, that is intended primarily to be a general business meeting or work session as opposed to an MCLE program;

(B) A program that is intended primarily to market a product or service to attorneys;

(C) A program that is intended primarily to attract clients;

(D) Discussions related to the handling of specific cases within a law firm, corporate law department, governmental agency, or similar entity;

(E) A program that teaches nonlegal skills, general communication skills such as public speaking skills, personal money management or investing, general investment principles, career building, rainmaking, or marketing or social media networking skills;

(F) Reviewing or reading legal articles, legal journals, or case summaries;

(G) A course attended in preparation for admission to practice law in any jurisdiction; or

(H) Any other course or activity deemed ineligible by the CLE Committee.

(h) Credit Categories.

(1) An accredited program is either “live” or “self-study” depending on the following criteria:

(A) *Live programs.* A program is “live” if it is a scheduled activity that an attorney may attend in-person or via electronic medium in which the presenters are available to all course attendees at the time the course is presented, and all attendees can contemporaneously hear or see other attendees’ questions as well as any responses and discussion. The following programs qualify for live credit:

(i) “In-Person” – a CLE program with attendees in the same room as at least one of the presenters;

(ii) “Satellite/Groupcast” – a CLE program broadcast to remote locations (i.e., a classroom setting or a central viewing or listening location);

(iii) “Teleseminar” – a CLE program broadcast via telephone to remote locations (i.e., a classroom setting or a central listening location) or to individual attendees via telephone lines;

(iv) “Moderated Video Replay” – a recorded CLE program, in the same room as a qualified moderator who answers questions and facilitates discussion;

(v) “Webcast/Webinar” – a CLE program broadcast via the internet to remote locations (i.e., a classroom setting or a central viewing or listening location) or to individual attendees; and

(vi) “Webcast/Webinar Replay” – a recorded CLE program broadcast via the internet to remote locations (i.e., a classroom setting or a central viewing or listening location) or to individual attendees with a qualified commentator available to answer questions and facilitate discussion.

(B) *Self-study Programs.* The following programs may qualify for self-study credit:

(i) “Independent Study” – viewing or listening to a pre-recorded CLE audio, video, digital media, or other such programs;

(ii) “Authorship” – upon written request, attorneys may be awarded ethics and professionalism credit hours each calendar year for authoring or co-authoring written material that is published in a legal periodical, journal, book, or treatise approved by the CLE Committee; and

(iii) “Volunteer Service” – upon written request, attorneys may be awarded up to three ethics and professionalism credit hours each calendar year for their volunteer service as members of a board, commission, or committee established by the Court or the Board, which is primarily concerned with ethics or professional responsibility. Credits may also be awarded to court-appointed receivers and monitors.

(2) *Accreditation Period.*

(A) Accreditation of live programs expires at the end of the calendar year of the date of accreditation.

(B) Accreditation of self-study programs is for a period of two years from the date of the accreditation.

(i) Approved Sponsor Status.

(1) The CLE Committee may extend “Approved Sponsor” status to a provider as set forth below:

(A) *Application for Approved Sponsor Status.* A sponsor may be approved by submitting an Approved Sponsor Application and requisite fee, together with evidence establishing to the satisfaction of the CLE Committee that:

(i) the sponsor has been approved or accredited by an accrediting authority established by court rule or statute in another state; or

(ii) during the immediately preceding three years, the sponsor has annually sponsored at least 10 live programs that comply with the requirements for individual program accreditation under Rule 5(g)(1).

(B) *Benefits of Approved Sponsor Status.*

(i) An Approved Sponsor may indicate in promotional materials that it is an “Approved Sponsor” by including the following statement in those promotional materials: “[Sponsor Name] is an Approved Sponsor, as recognized by the CLE Committee.”

(ii) Approved Sponsors pay a reduced application fee.

(iii) Programming presented by an Approved Sponsor is presumptively accredited.

(iv) Approved Sponsors may elect to receive a quarterly invoice for program accreditation.

(C) *Revocation of Approved Sponsor Status.* Approved Sponsor status may be revoked by the CLE Committee if the reporting requirements of these rules are not met or if, upon review of the sponsor’s performance, the CLE Committee determines that the content or quality of the program or program materials or the provider’s performance does not meet the standards set forth in these rules. In such circumstances, the CLE Committee shall mail the Approved Sponsor a 30-day notice of revocation. The Approved Sponsor may request a review of such revocation, and the CLE Committee shall act on the request within 90 days after receipt. The decision of the CLE Committee shall be final after such review.

(j) *Application Procedures for Program Accreditation.*

(1) Each sponsor seeking accreditation of a program shall submit an application, together with the requisite fee, at least 30 days prior to the program date. A late fee will be assessed for untimely submissions.

(2) If the program sponsor chooses not to submit an application for accreditation of a program, an individual attorney may submit an application, together with the requisite fee, in advance of, but no later than 60 days following the program completion date. A late fee will be assessed for untimely submissions.

(k) Reporting CLE Credit.

(1) *Sponsor Reporting.* Sponsors of accredited programs shall submit attendance rosters no later than 30 days following the program date in a manner prescribed by the CLE Committee. A late fee will be assessed for untimely submissions.

(2) *Attorney Reporting.*

(A) If an attorney has received program accreditation (see Rule 5(j)(2)), the attorney shall independently submit a certificate of attendance no later than 30 days following the program completion date in a manner prescribed by the CLE Committee. A late fee will be assessed for untimely submissions.

(B) If a program has not been accredited (see Rule 5(j)(2)), the attorney shall independently submit an application for accreditation and a certificate of attendance, together with the requisite fee, no later than 60 days following the program completion date in a manner prescribed by the CLE Committee. A late fee will be assessed for untimely submissions.

(C) *Independent Study.* Attorneys who apply to earn self-study credit through independent study shall submit a Certificate of Completion no later than 30 days following the completion date in a manner prescribed by the CLE Committee. A late fee will be assessed for untimely submissions.

(D) *Authorship.* Attorneys who author or co-author published written materials shall submit a Certificate of Completion together with a copy of the published written materials no later than 30 days following the publication date in a manner prescribed by the CLE Committee. A late fee will be assessed for untimely submissions.

(l) Enforcement of MCLE Requirements.

(1) Attorneys who are deficient in their MCLE requirements at the end of the applicable reporting period shall be considered noncompliant. Noncompliant attorneys shall be entitled to an automatic grace period until the close of business on the last business day of February of the succeeding year to make up their deficiencies. Credit hours earned during that grace period may be counted toward compliance with the previous reporting period, and hours in excess may be used to meet the subsequent reporting period's requirement.

(2) Attorneys who remain deficient on the close of business on the last business day of February shall be assessed a noncompliance fee in an amount set by the CLE Committee.

(3) Attorneys who fail to meet the MCLE requirements shall have their right to practice law suspended subject to the provisions of Maine Bar Rules 4(g) and (h).

(4) Attorneys who are suspended pursuant to Maine Bar Rule 4(g) may seek reinstatement under Maine Bar Rule 4(i).

(5) If the CLE Committee has reason to believe that an attorney has submitted a false transcript or other false information to the CLE Committee, it shall forward the attorney's name to Bar Counsel for investigation pursuant to M.R. Prof. Conduct 8.4(c).

(m) Confidentiality and Record Retention.

(1) The files, records, and proceedings of the CLE Committee, as they relate to or arise out of any failure of an attorney to satisfy the requirements of these rules, shall be deemed confidential and shall not be disclosed, except in furtherance of the duties of the CLE Committee, upon the request of the attorney affected, upon the request of Bar Counsel, or upon court order.

Nonetheless, the files and records may be introduced in evidence or otherwise produced in proceedings under these rules.

(2) The Board shall retain program and course approval documentation, certificates of attendance, and attendance rosters, for a minimum of two years in paper or digital format. Annual Report Statements shall be retained in digital format for a minimum of 10 years.

Advisory Note – May 2020

Rule 5(c)(4) is added to provide the Board’s CLE Committee the authority, for good cause shown based on an attorney’s specific circumstances, to waive the in-person attendance requirement for education on the recognition and avoidance of harassment and discrimination.

Advisory Note – May 2019

Rule 5(a) sets forth the purpose of Maine’s minimum continuing legal education (MCLE) requirement.

Rule 5(b) establishes a CLE Committee to oversee the administration of Rule 5.

Comparative language for proposed Rule 5(c), previously located in Rule 5(a), sets forth the MCLE requirements for active licensed attorneys.

Previously located in Rule 5(a), amended Rule 5(d) defines individuals who are exempt from Rule 5. New to this list are, among others, attorneys who are admitted under pro hac vice rules and new admittees to the Maine bar who complete an accredited new attorney program that focuses on basic skills and substantive law during the year in which they are admitted. (Such new admittees are exempt for that year and the following calendar year. See former Maine Bar Rule 5(a)(6).)

Amended Rule 5(e) bifurcates the annual attorney registration process and the annual attorney MCLE reporting process. This change properly aligns the CLE reporting period with the preceding calendar year compliance requirement. Like former Rule 4(b), attorneys are provided two months to

demonstrate compliance for the reporting period. Enforcement of MCLE requirements is governed by Rule 5(l).

In order to transition from a fiscal year to a calendar year reporting system, and at the Board's recommendation, attorneys will report for calendar years 2018 and 2019 on January 1, 2020. Thereafter, MCLE reporting will be conducted on January 1st for the prior calendar year reporting period.

Comparable language for amended Rule 5(f)(1), (5), (6), and (7) may be found, respectively, in former Rule 5(a)(7), (8), (9), and (2). Rules 5(f)(2), (3), and (4) have been added to formalize existing practices.

Comparable language for portions of Rule 5(g) may be found in former Rule 5(d). The amended rule contains added guidance regarding MCLE standards. The amended rule also provides a list of courses and activities that are ineligible for MCLE credit.

Rule 5(h) defines the various courses and activities that qualify for live or self-study credit, and the terms of accreditation. Taking its cue from other jurisdictions, the CLE Committee concluded that approved in-house programming falls squarely within the "live credit" definition. Under former Rule 5(d)(3), in-house programming only qualified for self-study credit. Also new to Rule 5(h): in order for video and webcast/webinar replays to qualify as "live credit," a qualified commentator must be available to answer questions and facilitate discussion among attendees.

Comparable language for Rule 5(i) may be found in former rule 5(d). The proposed rule also provides a process for the revocation of Approved Sponsor status.

Accreditation language may be found in former Rule 5(d). In order to ensure program applications are filed timely, the proposed rule imposes late fees for untimely submissions.

Rule 5(k) provides specificity with respect to how attorneys and sponsors must submit attendance rosters and certifications of attendance. In order to ensure timeliness, the proposed rule imposes late fees for untimely submissions.

Rule 5(l) defines the timeline in which attorneys must demonstrate compliance with Maine Bar Rule 5. Attorneys who fail to comply will be assessed a noncompliance fee (referred to as a late fee under current Rule 5(b)) and will be subject to the administrative suspension provisions of Rules 4(g) and (h). The rule also provides a process for the CLE Committee to advise Bar Counsel if an attorney files a false transcript or other false information.

Rule 5(m), derived from an existing Board policy, provides new language to address the confidentiality and retention of continuing legal education records.

Advisory Note– January 2019

Rule 5(a)(1) is amended to increase the required annual number of hours of CLE credits from 11 to 12 and to require that at least one live credit hour per year be primarily concerned with professionalism and one live credit hour per year be primarily concerned with the recognition and avoidance of harassment and discriminatory conduct or communication related to the practice of law as set out in the Maine Rules of Professional Conduct. This subdivision is also amended to require attorneys whose required hours are prorated or who register under emeritus status to complete the professionalism and harassment/discrimination credits.

Rule 5(a)(1)(A) is amended to specify “legal” malpractice and clarify that the list of professionalism topics is not exclusive.

Rule 5(a)(1)(B) is added to describe qualifying harassment and discrimination education topics.

Rule 5(a)(3) is amended to specify that no more than five credit hours per reporting period may be earned from in-house courses, self-study, or a combination of both.

Rule 5(a)(4) is amended to apply to an attorney who maintains a principal office for the practice of law in another jurisdiction, to eliminate the description of the CLE requirements of another jurisdiction as being “established by court rule or statute in that jurisdiction,” and to eliminate the provision that, “[i]f the other jurisdiction does not require the equivalent of one

professionalism education credit hour per year, the attorney must complete one approved professionalism education credit hour in each calendar year.”

Reporter’s Notes – June 2015

Rule 5 is based on former Maine Bar Rule 12. The equivalent ABA Model Rule for Continuing Legal Education was adopted in 1989 and last revised in 2004. The ABA Model Rule was used as the foundation for former Maine Bar Rule 12, which was adopted by the Court in 2001. Therefore, recognizing that Rule 12 worked well in Maine, the committee used Maine’s rule for its discussions.

In Rule 5(a), the committee recognized that the effective date of Maine’s continuing legal education requirement and the emeritus status requirement are no longer needed in the Rule. Consequently, the committee deleted those references. The term “disability” has been deleted, recognizing that disability requests would be fall under “hardship” requests. Lastly, the revised rule identifies the Maine State Bar Association as the organization that sponsors the annual Bridging the Gap program, which provides attendees with a two-year exemption to this rule. The revised rule omits reference to the “initial members of the Commission” because that language is no longer applicable.

Rule 5(b) is based on former Maine Bar Rule 12(b). The revised rule is consistent with the current rule and Board practice.

Rule 5(c) is based on former Maine Bar Rule 12(e). The revised rule is consistent with the current rule and Board practice.

Rule 5(d) is based on former Maine Bar Rule 12(f). The revised rule is consistent with the current rule and Board practice.

RULE 6. MAINTENANCE OF TRUST ACCOUNTS IN APPROVED INSTITUTIONS; IOLTA

(a) Clearly Identified Trust Accounts in Eligible Institutions Required. Every lawyer admitted to practice in Maine shall deposit all funds held in trust in this jurisdiction in accordance with Rule 1.15 of the Maine Rules of Professional Conduct in accounts clearly identified as IOLTA accounts in eligible institutions and shall take all steps necessary to inform the depository

institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor, or otherwise.

(b) Reporting and Certification. Every lawyer admitted to practice in Maine shall annually certify to the Board in connection with the annual renewal of the lawyer's registration that, to the lawyer's knowledge after reasonable investigation:

(1) (A) the lawyer or the lawyer's law firm maintains at least one IOLTA account, and (B) the lawyer has taken reasonable steps to ensure that all client funds are held in IOLTA accounts meeting the requirements of these Rules; or

(2) the lawyer is exempt from maintaining an IOLTA account because the lawyer:

(A) is not engaged in the private practice of law;

(B) does not have an office within Maine;

(C) is (1) a judge employed full-time by the United States Government, the State of Maine or another state government; (2) on active duty with the armed services; or (3) employed full-time as an attorney by a local, state, or federal government, and is not otherwise engaged in the private practice of law;

(D) is counsel for a corporation or non-profit organization or a teacher or professor employed by an educational institution, and is not otherwise engaged in the private practice of law;

(E) has been exempted by an order of the Court that is cited in the certification; or

(F) holds no client funds.

(c) IOLTA Account Requirements.

(1) An IOLTA account is a pooled trust account earning interest or dividends at an eligible institution in which a lawyer or law firm holds funds on behalf of clients, which funds are small in amount or held for a short period of time such that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income and the account is:

(A) an interest-bearing checking or share draft account;

(B) a money market account with or tied to check-writing;

(C) an account whose funds are invested solely in repurchase agreements; or

(D) an account whose funds are invested solely in qualified money market funds.

A “qualified money market fund” is an open-end investment company registered under the Investment Company Act of 1940 that is regulated as a money market fund under Rule 270.2a-7 thereof (or any successor regulation) and that, at the time of the investment, has total assets of at least \$250,000,000, substantially all of which are invested in U.S. Government Securities. A “repurchase agreement” is a daily overnight repurchase agreement which must be fully collateralized by U.S. Government Securities and may be established only with a bank or other depository institution that is deemed to be “well capitalized” or “adequately capitalized” under applicable regulations of the Federal Deposit Insurance Corporation and National Credit Union Share Insurance Fund. U.S. Government Securities, for the purpose of this section, include securities of Government Sponsored Entities, including but not limited to Federal National Mortgage Association Securities, Government National Mortgage Association Securities, and Federal Home Loan Mortgage Corporation Securities.

An “eligible institution” for trust accounts or IOLTA is a bank, trust company, savings bank, credit union, or savings and loan association authorized by federal or state law to do business in Maine, the deposits of which are insured by an agency of the federal government, and which has been designated by the Maine Justice Foundation as an eligible institution.

(2) The Maine Justice Foundation shall establish guidelines governing approval and termination of eligible status for financial institutions, and shall annually publish a list of eligible financial institutions.

(3) *Overdraft Notification Agreement Required.* To qualify as an eligible institution, a financial institution must file with the Maine Justice Foundation an agreement, in a form provided by the Maine Justice Foundation, to report to the Board whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. No trust account shall be maintained in any financial institution that does not agree to so report. Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon 60 days' notice in writing to the Maine Justice Foundation. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(A) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(B) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby; and

(C) *Timing of Reports.* Reports under Rule 6(c)(5)(B) shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(4) *IOLTA Requirements.* In addition to the requirements above, to qualify as an eligible institution for the maintenance of IOLTA, the institution must meet the following requirements:

(A) remit the interest and dividends on this account, net of any allowable reasonable fees, at least quarterly to the Maine Justice Foundation;

(B) transmit with each remittance a report on a form approved by the Maine Justice Foundation that shall identify each lawyer or law firm for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest and dividends applied, the amount of interest and dividends, the amount and type of account-related charges deducted, if any, and the average account balance for the period in which the report is made;

(C) transmit to the depositing lawyer or law firm a report in accordance with normal procedures for reporting to its depositors; and

(D) pay on IOLTA accounts interest or dividends no less than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers on accounts having similar minimum balances and other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividends for its non-IOLTA customers, provided that such factors do not discriminate between IOLTA accounts and other accounts and that these factors do not include the fact that the account is an IOLTA account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non-IOLTA customers. The eligible institution may choose to pay the higher interest rate or dividend on an IOLTA account in lieu of establishing it as a higher rate product. Nothing contained in this rule will be deemed to prohibit an institution from paying a higher interest rate or dividend on IOLTA accounts than required by this rule or from electing to waive any fees and service charges on an IOLTA account. Lawyers may only maintain IOLTA accounts at eligible institutions that meet this rule's requirements, as determined from time to time by the Maine Justice Foundation.

Eligible institutions may comply with the rate requirements of this rule by electing to pay an amount on funds that would otherwise qualify for the options noted above, equal to the greater of (1) a 1% interest rate or (2) 65% of the Federal Funds Target Rate in effect on July 1 of each year, which rate remains in effect for twelve months, and which amount is deemed to be already net of allowable reasonable fees.

(d) Verification of Bank Accounts.

(1) *Generally.* Whenever Bar Counsel has evidence that bank or trust accounts of a lawyer that contain, should contain, or have contained funds belonging to clients have not been properly maintained or that the funds have not been properly handled, Bar Counsel shall request the approval of the Chair of the Board to initiate an investigation for the purpose of verifying the accuracy and integrity of all bank accounts maintained by the lawyer. If approval is granted, Bar Counsel shall proceed to verify the accuracy of the bank accounts.

(2) *Confidentiality.* Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these Rules and the lawyer-client privilege.

(e) Maine Justice Foundation.

(1) *IOLTA Accounting.*

(A) Beginning in 2020, on or before April 15 of each year, the Maine Justice Foundation shall complete a financial analysis of the IOLTA funds received and distributed by the Foundation during the previous calendar year and shall prepare an Annual Financial Report that will be available to the public.

(B) The Annual Financial Report shall

(i) Be prepared according to generally accepted accounting principles;

- (ii) Include the specific allocation of IOLTA funds to the various providers, programs, and projects for the previous year;
- (iii) Include the total funds that were set aside for reserves;
- (iv) Include the total IOLTA funds that were allocated to administrative costs of the Maine Justice Foundation; and
- (v) Include categories of the rates paid by participating Banks.

(C) Copies of the Annual Financial Report of IOLTA funds shall be provided to the Supreme Judicial Court on or before April 15 each year.

(2) *Administrative Costs of the Maine Justice Foundation.* Effective in the calendar year beginning on January 1, 2021, no more than 22% of annual IOLTA funds may be allocated to the administrative costs of the Maine Justice Foundation, except that a floor of \$120,000 in administrative costs from IOLTA funds is hereby established. To allow prospective budgeting of administrative costs, the calculation of the 22% for any upcoming calendar year shall be determined by computing the average of the annual IOLTA funds received during the three calendar years preceding the calendar year before the year for which the administrative budget is being established and multiplying that number by 0.22.¹

(3) *Use of IOLTA Funds.* IOLTA funds received and distributed pursuant to this Rule are intended to provide services that maintain and enhance resources available for access to justice in Maine, including those services that achieve improvements in the administration of justice and provide legal services, education, and assistance to low-income, elderly, or needy clients.

(f) Receipt of Voluntary Contributions. As part of its notification to attorneys to file annual registration statements, the Board may invite attorneys to make a voluntary contribution to the Campaign for Justice to assist in the funding of legal services for low income individuals. The Board may also provide a means for making the voluntary contribution at the same time that

¹ For example, the 22% cap for calendar year 2021 would be calculated by averaging the total IOLTA revenues from calendar years 2017, 2018, and 2019, and multiplying that average annual revenue by 0.22.

the annual fee is paid and is authorized to utilize its administrative staff and facilities to receive these voluntary contributions and forward them to the Campaign for Justice.

(g) Consent by Lawyers. Every lawyer practicing or admitted to practice in Maine shall, as a condition thereof, be conclusively deemed to have consented to the reporting, verification, and production requirements mandated by this rule. Such consent specifically includes authorization to the disclosure by financial institutions of all bank or trust account records and information as requested of them by Bar Counsel for the purposes of verification and investigation pursuant to Rule 6(d).

(h) Costs. Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

Background to IOLTA Rule Amendment Accompanying Rule Amendment Effective July 1, 2019

We have carefully reviewed the many comments received in response to the posting of proposed changes to the IOLTA Rules, and we thank those commenters who took the time to provide thoughtful and helpful comments.

We now provide the background perspective requested by many of the commenters.

The concerns giving rise to the proposals for which the Court has sought public input did not begin with questions regarding lobbying. Instead, the concerns relate to the accounting system used by the Maine Justice Foundation, to whom the funds are entrusted for distribution, and the substantial administrative costs of the Foundation that appeared to be reducing the IOLTA funds that are available to support access to justice in Maine.

The Court takes very seriously its responsibilities to assure appropriate use of the IOLTA funding it has mandated. Several years ago, the Court raised concerns with the Foundation regarding its accounting methodology, particularly related to the rise in administrative costs. The concerns regarding the increased administrative costs to which IOLTA funds were being allocated led the Court to seek assurances that the accounting for all IOLTA funds was

being undertaken in a careful and reliable manner. Several discussions were held with Foundation leaders to address accounting practices and budgeting policies. The Foundation's initial responses regarding the actual allocation and uses of the IOLTA funds did not alleviate those concerns, and the Court sought a more detailed analysis.

In response, the Foundation provided an analysis to the Court in a report entitled, "An Examination of Maine's IOLTA Program," dated October 2018. We now understand that, in earlier years, the costs of administering the IOLTA funds often consumed less than 20% of the IOLTA funds annually. In recent years, the increased staffing at the Maine Justice Foundation has resulted in the use of an expanding proportion of IOLTA funds to support that growing staff.²

For example, the Foundation reported that, in 2016, fully 54% of IOLTA revenues were spent on staffing and operational costs for the Foundation, leaving only 46% of the funds to be distributed to the providers of various legal services for Maine's low income and elderly citizens. A similar administrative use of the funds occurred in 2017 (48% was allocated to administrative costs) and 2018 (40% was allocated to administrative costs).

Throughout this process, the Court consistently expressed its goal of maximizing the IOLTA funds available to Maine people in need of legal assistance. Conversations regarding a cap on administrative costs led the Court to draft a proposed amendment to the IOLTA Rule.

Separately, during the time that the Court was considering the administrative costs allocated to IOLTA, a member of the Bar raised a different concern, specifically questioning the use of mandatory IOLTA funds for lobbying purposes. Similar concerns had been raised by Justice Robert Clifford and Justice Donald Alexander in 2007 when the IOLTA rules were originally promulgated. *See* 2007 Separate Statements of Non-Concurrence, attached.

² We acknowledge the Foundation's representation that some of the additional paid Foundation staff, who may be able to seek out and secure funding from *other* sources, may ultimately provide further benefits to Maine people in need of help, but that broader goal should not reduce the immediate benefits of IOLTA funding as much as it has. Perhaps the time has come for a more far-ranging discussion of civil legal services funding, to include the possibility of a formal Access to Justice Commission for Maine.

To obtain further input on that issue, we included the proposal for a limitation on lobbying in the draft rule that contained the accounting and administrative cost amendments.

To be clear, the draft limitation on legislative lobbying was not, and is not, intended to include limitations on other types of systemic advocacy, such as impact litigation or administrative advocacy for individuals or groups of clients. Nor did the Court intend to prohibit organizations that do engage in legislative lobbying from receiving IOLTA funds to be used for other purposes. In addition, we unintentionally created confusion by referring to the provision of “direct legal services.” We take the opportunity to address that issue in the Amended Rule promulgated today. See M. Bar R. 6(e)(3).

Finally, we note that most of the comments received by the Court have focused on the potential limitation on legislative lobbying and voter advocacy. Many commenters did not even mention the accounting or administrative proposals, and those that did were primarily in favor of clearer accounting and reduced administrative expenses.

Accordingly, having carefully reviewed the comments sent to the Court, we have concluded that action is required regarding the more pressing concern relating to budget and administrative costs, and that further study of the potential limitation on lobbying is appropriate. We therefore bifurcate the substantive issues and take the following actions.

Accounting and Administrative Costs

The Court today officially promulgates an amended rule, clarifying the breadth of acceptable uses of IOLTA funding, setting out requirements for the Foundation’s accounting of IOLTA funds, and limiting the use of IOLTA funds for the Foundation’s administrative costs to 22% annually, with a floor of \$120,000,³ effective in the calendar year beginning on January 1, 2021.

³ The floor is intended to recognize that there are basic administrative costs that must be budgeted, and that, should the IOLTA revenues dip below \$600,000 in any applicable 3-year calculation period, \$120,000 from IOLTA funds will be available to the Foundation for its administrative costs.

Use of Funds for Legislative Lobbying

Further study regarding the potential limitations on the use of court mandated IOLTA funds for lobbying purposes will be undertaken before further action of the Court. A small working group will be assembled to make recommendations to the Court, and a public hearing will follow.

To clarify the scope of consideration for the working group, we again emphasize that any potential limitation would apply only to the lobbying generally understood to be legislative and candidate-based lobbying and not to the variety of systemic advocacy that includes litigation or administrative advocacy.

In addition, as noted above, in the event that any limitation is ultimately promulgated, we clarify the Court's intention to allow IOLTA funds to be allocated to a provider notwithstanding that provider's participation in lobbying services that are separately funded through other sources.

Following the receipt of input from the anticipated working group, the Court will announce a date and time for a public hearing to allow interested parties to be heard regarding any potential limitation on the use of IOLTA funds.

Access to Justice

In conclusion, we thank the many members of the Maine Bar who have been and continue to be supportive of improvement in access to justice in Maine. We are fortunate to have a provider community that is dedicated to providing a broad range of legal assistance to Mainers in need and to attempting to fill the ever-present gap between the needs and the resources available. We look forward to a robust and productive discussion regarding the delivery of civil legal services in Maine.

[Attachment: 2007 Separate Statements of Non-Concurrence]

SEPARATE STATEMENT OF NON-CONCURRENCE IN AMENDMENTS TO THE BAR RULES BY CLIFFORD, J.

Prior to the changes in the Rules promulgated today, participation in the IOLTA Program by members of Maine's bar has been voluntary. The changes

in the Rules eliminate the existing opt-out provision and make participation mandatory.

The use of funds generated from such a mandatory program should properly be limited to the provision of legal services, and I would prohibit the use of any funds generated by a mandatory IOLTA program from being used for purposes of legislative advocacy at the state, local, or federal level.

The use of any such funds generated from bank accounts of attorneys and their clients for political purposes, with which many of those attorneys or clients may disagree, is coercive and, in my view, improper. Accordingly, I cannot support any changes in the rules that make participation in the IOLTA program mandatory, unless the use of those funds is limited to the provision of legal services.

SEPARATE STATEMENT OF NON-CONCURRENCE IN AMENDMENTS TO
THE BAR RULES BY ALEXANDER, J.

The Rule amendments adopted today make participation in the IOLTA Program mandatory for those lawyers who maintain client trust accounts. The 2007 amendments also assure that banks, credit unions, and other financial institutions maintaining IOLTA accounts pay interest on those accounts at rates comparable to similar commercial accounts. These actions are a further demonstration of the Court's and the Bar's commitment to improve the quality of legal services for Maine's poor and disadvantaged populations. I support the goals of the mandatory IOLTA program, but not the Rule amendments that will undermine opportunities for innovation, compel contributions to support political and lobbying activities, and provide no assurance of openness and accountability in spending decisions.

Supporters of the mandatory program estimate that it may nearly double IOLTA funds, adding as much as \$1 million to efforts to improve access to justice for our poor and disadvantaged populations. That prospective dramatic increase in resources presented a unique opportunity to engage the courts, the bar, the legal services community and the public in a creative reexamination of what we mean by access to justice, what are our priority needs, and how best

to support those needs to assure that legal services funds are spent most productively. The opportunity for creative reexamination would be fostered by recommendations for many new initiatives that are currently being developed by the Justice Action Group. The Court's action today forfeits the opportunity for creative reexamination, because it assures that no significant pool of funds will be available to support new initiatives that the Justice Action Group or others may recommend.

Over \$11 million of IOLTA funds have already spent by the Maine Bar Foundation. These funds have been generated from voluntary contributions by the members of the Maine Bar who maintain trust accounts and choose to participate in the IOLTA Program. The six legal services groups for whom 80% of the IOLTA funds are earmarked have been selected through an ill-defined process with little or no public visibility or participation, and only limited accountability to assure that funds are spent effectively. Such a closed process may be appropriate for a private charity, but this is no longer a private, voluntary charitable venture.

The Court's action making the IOLTA Program mandatory fundamentally changes the nature of the program. Effective January 1, funding for the program will be generated as a result of a State government mandate, imposed by the Judicial Branch through this rule making.

In early July, the Maine Bar Foundation sent to the Court its proposed rules change to adopt mandatory IOLTA. The draft included no provisions to assure public participation, openness or accountability. It proposed no restriction on use of Court mandated funds for political activity and lobbying. It included no suggestion that the anticipated dramatic expansion in funding be accompanied by any innovative review to better define "access to justice," identify needs and priorities for funding, and assure that spending will be focused on serving the most urgent needs of Maine's poor and disadvantaged populations.

In letters to the Court and at the public hearing to consider its proposal to make IOLTA mandatory, the Bar Foundation confirmed its opposition to any change in practices for distributing IOLTA funds and any controls to assure openness, public participation and accountability in its spending decisions.

In effect, the Bar Foundation told the Court, mandate IOLTA, give us the money, but Court and public oversight as to how we spend that money is not welcome. Today the Court grants the Bar Foundation its wish. I do not concur. When publicly mandated funds are spent to serve important public purposes, public participation, openness and accountability should be welcomed, not scorned. Use of publicly mandated funds for political activity and lobbying to advance particular social viewpoints and oppose others should be prohibited. Innovation should be encouraged.

The Court hands the Maine Bar Foundation the \$2 to \$2.5 million that it estimates will be generated annually as a result of the court-mandated IOLTA Program. It allows the Maine Bar Foundation to spend IOLTA funds just as it has in the past, with 80% of the funds, old funds and new funds, already earmarked for current programs of the same six specially affiliated groups. In so doing, the Court ends any hope for significant IOLTA funds to start up new legal services programs that JAG or others might recommend.

A. Missed Opportunity for Innovation

In discussion of the access to justice needs of Maine's poor and disadvantaged populations, it is often suggested that current programs can serve only approximately 20% of the needs for access to justice. If only 20% of the needs are currently being met, it necessarily follows that many needs are going unmet, and that within available resources, there must be a continuing, innovative effort to identify highest priority needs and direct resources to those needs. The JAG study, to be finalized later this fall, may provide that innovative review of needs and priorities and make suggestions for change.

While many would agree that most programs supported by the Maine Bar Foundation are directed to high priority needs of Maine's poor and disadvantaged populations, there are a number of important needs that, at least in my judgment, appear largely unaddressed in the current fund distribution processes. Those needs include, in a listing that does not suggest any particular order or priority, the following:

1. Better support for children and parents separating as a result of divorce, parental rights, and protection from abuse proceedings: Family structure fractures occurring in divorce, parental rights, and protection from abuse proceedings often have significant, long-term adverse effects on

separating parents and the children caught in these proceedings. Despite these impacts, most low-income and poor parents proceed through such actions without legal assistance. Improved access to legal services in these difficult cases would have long term benefits for the parties involved and for society, limiting or avoiding problems resulting from poorly informed self-representation in family matters. A draft of the JAG report suggests that JAG may recommend an important new initiative to provide court based aid for separating families, a program that will require significant new resources.

2. Training for trial and appellate advocacy for indigent clients: Our Constitution guarantees court-appointed counsel for trial and appellate advocacy for indigent citizens facing jail as a result of criminal charges, or facing loss of children in child protective and termination of parental rights proceedings. Case specific costs and fees relating to such proceedings are paid, although not necessarily paid well, by the court system. However, the case specific payment system has no method to pay for generalized training and support for trial and appellate advocacy. The current access to justice programs provide little or no support for trial and appellate advocacy training programs to support the constitutional right to counsel in these critical areas.

3. Credit and collections counseling and advocacy: Problems with credit, debts, and financial obligations are a frequent cause for people falling into and staying in poverty. Many people respond, with over-enthusiasm, to very generous invitations to become indebted provided by banks and other financial institutions. They then become caught in a spiral of bank fees, late fees, and other problems paying their credit obligations that induce or perpetuate a cycle of poverty. Such credit difficulties are particularly problematic in a heavily rural state such as Maine where a vehicle and minimal financial resources are essential to obtain and retain a job. The current access to justice programs supported by IOLTA and other funds provide little or no support for credit counseling and, if necessary, advocacy in the courts or administrative agencies for individuals caught in the easy credit, tough repayment cycle.⁴ What credit counseling there is, is often provided by creditor supported institutions and entities that may not counsel consistent with what may be the debtor's best interest and are not available to go to court to challenge legally

⁴ This year the Maine Bar Foundation is providing a one-time grant of \$35,000 to support a program to aid homeowners victimized by predatory mortgage lending practices. It appears that past short term programs to aid victims of domestic violence were reduced to support this program. Funding was not reduced for any of the six programs that receive the bulk of Bar Foundation support.

questionable credit agreements and arrangements. *See Credit Counseling Centers, Inc. v. City of South Portland*, 2003 ME 2, 814 A.2d 458.

4. A landlord-tenant conciliation and dispute resolution program: In Maine a significant portion of the rental housing stock available to poor people is owned by individuals who, themselves, are not wealthy and do not have easy access to legal services. Many elderly people, living on fixed incomes, may own one or a few apartment buildings, living in one unit and renting out the others. They depend on the income from these units to maintain their own existence. When a tenant fails to pay the rent, causes disturbances that disrupt the lives of others, or damages the unit, the landlord may seek to evict the tenant, but may not be able to afford an attorney to assist with an eviction. As a result, in some proceedings, a tenant resisting eviction may have counsel, whereas a landlord does not. Many such matters might be resolved by proceedings short of a full court hearing and decision that could achieve resolution of a matter in a way somewhat acceptable to both the tenant and a landlord.

The Legislature recently adopted and provided basic funding for a mediation program in forcible entry and detainer matters.⁵ However, a broader conciliation and dispute resolution program, supported by access to justice funds, may be beneficial to many under-funded tenants and landlords in such situations.

Are current programs that are guaranteed funds more important than improved legal services for victims of domestic violence, support for poor families who are separating, or assistance for people caught in the easy credit trap? Perhaps yes; perhaps no. But at least we should have asked the question and given ideas for new programs a chance to receive support from mandatory IOLTA funding. I decline to join an order that forfeits our chance to consider providing significant support for new initiatives through an engaged, innovative study of needs and priorities for access to justice funding. Innovation is not promoted by handing more money to the same groups that presently receive funds so that they can expand and quickly absorb the larger amount of funds that will become available.

⁵ P.L. 2007, chap. 246, enacting the mediation program as 14 M.R.S. § 6004-A, effective January 1, 2008, and providing program support of \$11,250 in FY '08 and \$22,500 in FY '09.

B. Accountability

The decision to make the IOLTA Program mandatory fundamentally changes the nature of the program. It is now a government-mandated program with money to be accumulated and distributed in accordance with the government mandate. The Court considered and rejected several proposals to require that the Maine Bar Foundation engage in open and accountable decision-making. The rejected proposals were similar to those that the Court has recently imposed on the companion Maine Civil Legal Services Fund Commission. Among the limitations rejected were:

1. A conflict of interest provision that would have prevented board members and decision makers associated with the Maine Bar Foundation from also being board members or employees, or having immediate family members who were board members or employees, of an organization receiving or requesting IOLTA funds.

2. A requirement that the Maine Bar Foundation publish eligibility criteria and publicly solicit applications for new programs and program renewals on at least a bi-annual basis.

3. A requirement that Bar Foundation meetings to discuss and make decisions about priority setting and awards of IOLTA funds, be held in public, with adequate public notice, preceding public deliberation and selection of those entities and programs to receive IOLTA funds.

4. A requirement that needs for legal services and allocations of funds be reviewed on at least a bi-annual basis to assure that the goals of currently funded programs are being met and that funds are being utilized either in existing or new programs to meet the highest priority identified needs.

These minimal public participation, openness and accountability requirements, imposed on the companion Maine Civil Legal Services Fund Commission, should have been equally imposed upon the Maine Bar Foundation. I decline to join an order that does not impose such minimal, but necessary, openness and accountability requirements on spending of government mandated funds.

C. Political Action and Lobbying

Our rule governing the companion Maine Civil Legal Services Fund includes a prohibition on use of that fund for political action and lobbying. The Court rejected a proposal for a similar prohibition on use of mandatory IOLTA funds. That is unfortunate for three reasons. First, use of funds generated by government mandate for political action and lobbying purposes is of questionable legality. Such uses may be violative of the expressive rights of those forced to pay to support political causes they oppose. Second, the IOLTA funds are sorely needed for front line legal services programs to aid Maine citizens. These scarce funds should not be diverted to support political action and lobbying ventures in support of or opposition to particular social causes. Third, purely as a matter of policy, people who are forced by the government to contribute to a particular program should not be forced to subsidize political action and lobbying for causes with which they may disagree.

There is not much law on the legality of using forced IOLTA contributions for political purposes. What law there is suggests that a challenge to use of compulsory contributions for political purposes might succeed. In *Phillips v. Washington Legal Foundation*, the U.S. Supreme Court held that the interest income generated by funds held in IOLTA accounts is the private property of the owner of the principle. 524 U.S. 156, 172 (1998). This conclusion was reached after a Texas businessman filed suit alleging that the Texas IOLTA program violated the Fifth Amendment by taking his property without just compensation. *Id.* at 163. The Court based its holding on the premise that the Constitution merely protects, rather than creates, private property interests, and therefore property interests must be independently created. *Id.* at 171. (“The State’s having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of that interest, as the State does nothing to create value; the value is created by respondents’ funds.”)

Although *Phillips* held that the interest generated by IOLTA programs was the private property of the owner of the principle, the Court subsequently held in *Brown v. Legal Foundation of Washington*, that IOLTA funds constituted a public use, and that just compensation is “measured by the property owner’s loss rather than the government’s gain.” 538 U.S. 216, 237 (2003). Therefore, the private party “is entitled to be put in as good a position pecuniarily as if his property had not been taken.” *Id.* at 236. Nevertheless, the Court held that by the very construct of IOLTA, the owner’s opportunities to earn net interest in a

separate, individual account must be zero, and thus there is no taking in violation of the Fifth Amendment. *Id.* at 240. *Brown* involved a takings challenge. The concern here is the potential for a First Amendment challenge. Justice Kennedy, dissenting in *Brown*, warned that the Court would one day be confronted with First Amendment challenges to IOLTA programs and suggested “one constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course.” 538 U.S. 216, 253 (2003) (Kennedy, J., dissenting). Justice Kennedy stated that “the First Amendment consequences of the State’s action have not been addressed in this case, but the potential for a serious violation is there.” *Id.*

Recent jurisprudence on similar issues suggests that a First Amendment challenge would present a real risk that could seriously damage the IOLTA program. In *Locke v. Karass*, --- F.3d ---, 2007 U.S. App. LEXIS 18763 (1st Cir. 2007), the First Circuit approved the compulsory taking of deductions from public employee salaries to support legal services related to union organizing and bargaining activities. In so holding, the court distinguished what it held to be the proper use of funds for legal services related activities from what it suggested would be improper use of funds to “subsidize or financially support the political or ideological activities of the union” *Id.*, *12 (citing *Machinists v. Street*, 367 U.S. 740, 744 ((1961) (it is a violation of First Amendment to permit forcible collection of funds from employees “to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed”).⁶ It is not much of a stretch to say the same about political uses of government mandated attorney and client contributions to IOLTA.

Beyond First Amendment issues, authorizing use of IOLTA funds for political action and lobbying is bad policy because it diverts funds needed to support core legal services activities. While many needs discussed above are not being addressed more than minimally, and while some very high priority needs, such as protection for victims of domestic violence, are being addressed inadequately, IOLTA funds are being used for lobbying and political action programs about which there may be uncertainty as to their proper place in the priority structure. According to the reports provided to the Court by the Maine Bar Foundation, programs that IOLTA funds supported this past year included

⁶ See also *Davenport v. Washington Education Assoc.*, --- U.S. ---, 127 S. Ct. 2372, 2377 (2007) (“Agency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment.”)

(1) advocacy favoring citizens of foreign nations receiving in-state tuition rates at the University of Maine, while American citizens of other states would continue to be charged higher out-of-state tuition rates, (2) successful opposition to legislation to hold tenants criminally responsible for vandalism in their apartments, and (3) support for reforms in immigration practices to make it easier for citizens of foreign nations to relocate to the United States and to Maine.

To some, these efforts may be the most important initiatives that IOLTA funds support. Others may disagree. But debate over the legality and propriety of such political uses of funds may erode public support for the IOLTA program and divert attention from the important legal services work that is the justification for mandating IOLTA. I do not join an order that invites use of mandated IOLTA funds for political action and lobbying purposes.

Advisory Note – January 2017

These various amendments to Rule 6 are necessitated to properly reference the Maine Justice Foundation which in 2015 replaced the Maine Bar Foundation as the bar's agency that helps those individuals desperate for civil legal aid in Maine.

Reporter's Notes – June 2015

Rule 6 is based upon IOLTA rules embodied in former Maine Bar Rule 6(a), Maine Rule of Professional Conduct 1.15(b), and ABA Model Rules for Trust Account Overdraft Notification. The latter Rule is incorporated in substance at Rule (6)(c)(3). It requires that participating financial institutions notify the Board if any IOLTA account check issued by the institutions' customer/lawyer is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Although the overdraft notification provision is a significant departure from current Maine practice, it puts Maine in line with the overwhelming majority of U.S. jurisdictions that currently provide for overdraft notification. Another departure from current Maine practice is Rule 6(d), which allows Bar Counsel, in certain circumstances, to verify the accuracy and integrity of a lawyer's bank account(s). The committee concluded that both the verification provision and the overdraft notification provisions will serve to protect the public and the interest of the clients.

III. COMMISSIONS

RULE 7. FEE ARBITRATION COMMISSION

(a) Commission.

(1) *Appointment.* The Board shall appoint five or more Fee Arbitration Commission panels, each of which shall be assigned a geographic region of the state. Each panel shall consist of two attorneys licensed to practice law in Maine and one public member who is a Maine resident. The Board shall appoint alternate attorneys and public members to serve on the Fee Arbitration Commission as members at large. Each year the Board shall also appoint a Chair and Vice Chair of the Fee Arbitration Commission from among the Commission's attorney members. The Chair or Vice Chair shall appoint one of the attorney members of each panel to chair that panel.

(2) *Terms of Office.* Panel members shall be appointed for a term of four years. No member shall serve more than two consecutive four-year terms. A member whose term has expired may continue to serve on any case that was commenced before the expiration of the member's term. As each regular member's term of office on the Fee Arbitration Commission expires, a successor shall be appointed for no more than two consecutive full terms but a regular member appointed for less than a full term (originally or to fill a vacancy) may serve two additional full terms. A member who has served two consecutive four-year terms may not be reappointed before the expiration of at least one year. Members shall not be subject to removal by the Board during their terms of office except for cause.

(3) *Representation Prohibition.* No member of the Fee Arbitration Commission may be legal counsel for a party in any proceedings under these Rules. When a member of the Commission member's firm serves as legal counsel for a party in any proceeding under this rule, the Commission member may perform Commission responsibilities unrelated to that proceeding, provided that the Commission member is timely screened from any participation in or relating to that proceeding, at both the Commission member's firm and the Commission.

(4) Upon conclusion of service, members shall take reasonable steps to destroy all documents, in paper or electronic format, relating to the

proceedings of the Board subject to the confidentiality provisions of these Rules.

(b) Powers and Duties. The Fee Arbitration Commission shall have the following powers and duties:

- (1) to interpret this rule;
- (2) to approve forms;
- (3) to establish written procedures that afford a full and equal opportunity to all parties to present relevant evidence;
- (4) to educate the public and the bar about the Fee Arbitration Commission; and
- (5) to perform all acts necessary for the effective operation of the Fee Arbitration Commission.

(c) Board Clerk. The Board Clerk shall perform the administrative functions of the Commission. The Board Clerk shall have the following powers and duties:

- (1) to keep and maintain records of all petitioners and respondents, as well as all proceedings, determinations, and awards of the Fee Arbitration Commission;
- (2) to process Fee Arbitration cases and communicate with parties to the dispute;
- (3) to schedule Fee Arbitration hearings;
- (4) to process and disseminate Arbitration Awards to the appropriate groups and parties; and
- (5) to perform such additional duties as may be assigned by the Board or the Fee Arbitration Commission.

(d) Procedures.

(1) *Initiation of Proceedings.* Proceedings before the Fee Arbitration Commission shall be initiated upon receipt of a petition regarding legal fees and/or costs paid to or charged by an attorney providing legal services in Maine. The petitioner shall

(A) set forth the petitioner's full name and current address and the attorney with whom the petitioner has a dispute;

(B) agree to be bound by the decision of a Fee Arbitration Panel;

(C) represent that the petitioner has made a good faith effort to resolve the dispute with the attorney involved before filing the petition; and

(D) state whether the dispute is the present subject of legal action and certify that the matter has not been finally adjudicated by a court or administrative agency. If the dispute is currently the subject of other judicial or administrative proceedings, such proceedings shall be identified in the petition.

(2) *Pending Action.* If there is a pending action or proceeding before a Maine court or agency involving the disputed fees, then such matter shall, upon motion of the petitioner, be stayed by that tribunal until such dispute is resolved pursuant to this rule, and the award hereunder shall be determinative of the action so stayed.

(3) *Preliminary Review by Board Clerk.* Upon filing, a petition shall be expeditiously reviewed by the Board Clerk. If the Board Clerk determines that there are no just grounds for the dispute, or that the matter is moot, or that the arbitration was not commenced within six years from the time the bill in dispute was rendered or the fee paid in whole or part, whichever occurs first, the Board Clerk may recommend that the Chair or Vice Chair of the Fee Arbitration Commission dismiss the matter. When recommending a dismissal, the Board Clerk shall provide a concise written statement of the facts and reasons why a matter should be dismissed to the Chair or Vice Chair of the Fee Arbitration Commission. If the Chair or Vice Chair concurs with the Board Clerk's recommendations, the matter shall be closed and the petitioner so

advised. If the Chair or Vice Chair rejects the Board Clerk's recommendations, the matter shall proceed under this rule.

(4) *Petition Filed by Non-Client.* When a petition is filed by a non-client of the named respondent attorney, the Board Clerk shall provide the client with notice of the petition and request that within 10 days the client consent in writing to the filing and processing of the petition under this rule. Should the client fail to provide consent, the Board Clerk shall refer the matter to the Chair or Vice Chair for determination whether any action under this rule is appropriate for the Fee Arbitration Commission or if dismissal is required.

(5) *Notice to Respondent.* A blank form captioned "Respondent's Reply and Submission to Arbitration" shall be forwarded to the respondent. If the respondent fails, without good cause, to file a reply within 30 days after the mailing, the panel may proceed to hear the petition and make its findings and award upon the evidence produced by the petitioner. The panel may, at its discretion, refuse to consider evidence offered by the respondent that would reasonably be expected to have been disclosed in the Respondent's Reply. Upon receipt of Respondent's Reply, the Board Clerk shall forward a copy of the same to the petitioner.

(6) *Notice of Client's Right to Arbitrate Legal Fees.* At least 30 days before service or filing of a complaint in a civil action against an attorney's client or former client (hereinafter client) to recover fees for professional services previously rendered and/or costs incurred for which no judgment has previously been obtained, an attorney shall mail to the client at the client's last known address, and to the person liable for the payment of the attorney's fees if other than the client at that person's last known addresses, a written notice of the right to arbitrate, which shall include the following language:

You currently owe the sum of \$___ in legal fees [and costs] to [name of attorney or firm]. If you dispute the fact that you owe any part of the amount claimed to be due, you have the right to have the matter resolved without additional expense to you by arbitration before a panel of the Fee Arbitration Commission. Forms and instructions for filing a petition for arbitration are available from the Board of Overseers of the Bar [insert Board address, phone number and website URL].

(7) *Failure to Give Notice.* No attorney shall seek to enforce a judgment against a client for attorney fees or costs which have been entered without

having provided that client with the required notice of the right to arbitrate as set forth above.

(8) *Referral to Arbitration Panel.*

(A) *Panel Composition.* After notification of appointment to a panel, assigned panel members shall notify the Board Clerk of any conflict of interest with a party to the arbitration. Upon notification of the conflict, the Board Clerk shall appoint a replacement from the list of Fee Arbitration Commission members. Parties may object in writing to the composition of a panel, and the Fee Arbitration Commission may relieve the disqualified panel member and appoint a replacement.

(B) *Notice of Hearing.* The Board Clerk shall make a reasonable effort to assign the matter for hearing within 60 days after the date of receipt of the petition. The Board Clerk shall also provide petitioner and the respondent written notice of the date, time, and place of hearing.

(C) *Dismissal.* If not earlier resolved pursuant to Rule 7(d)(3), a petition shall later be dismissed by the Board Clerk upon the petitioner's submission of a written request for dismissal prior to the respondent's filing of a reply to the dispute. After the respondent files a reply to the dispute, the petition shall not otherwise be dismissed except by order of the chair of the assigned hearing panel or of the Chair or Vice Chair of the Fee Arbitration Commission.

(9) *Right to Counsel.* Each party to a dispute shall have the right to be represented at the party's own expense by an attorney at any stage of the arbitration. For cause shown, or on its own motion, the Chair or Vice Chair may, in its discretion, authorize the Board Clerk to obtain the volunteer services of and assign an attorney to represent either the petitioner or the respondent in any proceeding before the panel.

(10) *Communications.* Any notice or other communication required by this rule shall be sufficient if in accordance with the requirements of Rule 15. Notice to a petitioner shall be made to the address set forth by petitioner in the petition.

(e) Arbitration Hearing.

(1) If, at the time set for a hearing before a panel, three members are not present, the chair of the panel, or in the event of the chair's unavailability, the other members present, may decide either to postpone the hearing, or, with the written consent of those parties present, to proceed with the hearing with two panel members, one of whom must be a public member.

(2) If any member of a panel dies or becomes unable to continue to act while the matter is pending and before an award has been issued, the proceedings to that point shall be declared null and void and the matter assigned to a new panel for rehearing unless the parties, with the consent of the panel chair, or in the event of the chair's unavailability, the Chair or Vice Chair of the Fee Arbitration Commission, consent to proceed with the remaining panel members, one of whom must be a public member.

(3) The members of the arbitration panels shall be vested with all of the powers, and shall assume all of the relevant duties, granted and imposed upon neutral arbitrators by the Uniform Arbitration Act, 14 M.R.S. § 5927 et seq., to the extent that the same is not in conflict with this rule.

(4) On the hearing date, the arbitration panel shall meet, take testimony, receive other evidence, and otherwise conduct an impartial, fair, and expeditious hearing on the matter. The panel shall accept such evidence as is relevant and material to the dispute and request additional evidence as necessary to understand and resolve the dispute. The parties shall be entitled to be heard, to present evidence, and to cross-examine parties and witnesses. The panel shall judge the relevance and materiality of the evidence.

(5) Upon request of a party or upon its own determination, a panel or its chair may, for good cause shown, adjourn or postpone the hearing.

(6) The chair of the panel shall preside at the hearing. For purposes of admissibility, the chair shall be the judge of the relevance and materiality of the evidence offered and shall rule on questions of procedure. The chair shall exercise all powers relating to the conduct of the hearing. Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The panel may exclude irrelevant, unduly repetitious, or unduly prejudicial evidence. The Maine Rules of Evidence shall not apply at the hearing.

(7) The petitioner and the respondent, or counsel representing either of them, shall be entitled to be heard, to present evidence, and to cross-examine parties and witnesses appearing at the hearing. In addition, any panel member shall be entitled to make inquiries of any party or witness at the hearing. The testimony of witnesses shall be by oath or affirmation administered by the panel chair.

(8) Appearance by a party at a scheduled hearing shall constitute waiver by said party of any deficiency with respect to the giving of notice of hearing. If a party who has been notified of the time, date, and place of the hearing in accordance with the procedures of this rule fails to appear at the hearing, an arbitration panel or its chair may either postpone the hearing or proceed with the hearing and determine the controversy upon the petition, reply, and other evidence produced.

(9) The Board shall cause all proceedings before the panel to be stenographically or electronically recorded in a form that will readily permit transcription. A hearing transcript or partial transcript may be ordered at any time by the Fee Arbitration Commission panel, the petitioner, the respondent, or the Board. When ordering a transcript, the respondent or petitioner must provide a copy of the requested transcript to the opposing party and the Board at that party's own expense.

(10) *Death or Incompetency of a Party.* In the event of death or incompetency of a party, the personal representative of the deceased party or the guardian or conservator of the incompetent may be substituted.

(11) A witness or party may be summoned by subpoena to appear before a Fee Arbitration Commission panel pursuant to the procedures set forth in Rule 16.

(12) In the event there is no written agreement or engagement letter between the parties concerning fees and expenses as to the particular matter in dispute, the respondent shall bear the burden of proof of an agreement, or other basis for recovery of fees and expenses, and of the reasonableness of the fees and expenses.

(f) Arbitration Award.

(1) The decision of the arbitration panel shall be expressed in a written award accompanied by a confidential addendum expressing the specific reasons for the award, signed by the panel chair on behalf of the panel, and thereupon filed with the Board Clerk. If there is a dissent, it shall be signed separately by the dissenting panel member. If the hearing is held before a two-member panel, both panel members must be in agreement regarding the disposition of a case. Absent such agreement, the matter will be rescheduled for a new hearing before a different panel. An award may also be entered on consent of the parties.

(2) The decision and award of the arbitrators shall contain a statement of the amount or nature of the award, if any, and the terms of payment, if applicable. Clerical mistakes arising from oversight or omission may be corrected at any time by the panel chair or the Board Clerk at the Fee Arbitration Commission's initiative or on the motion of a party.

(3) The award of the arbitration panel shall be rendered within 30 days after the close of the hearing, unless otherwise extended by the Chair or Vice Chair of the Fee Arbitration Commission.

(4) A copy of the decision containing the award and the accompanying confidential addendum shall be promptly forwarded by the Board Clerk to the petitioner and the respondent, or their respective counsel; the Chair and Vice Chair of the Fee Arbitration Commission; and the Board.

(g) Enforcement and Challenges to Award. Whenever an arbitration panel finds by its award that all or part of the fee paid by the petitioner should be refunded by the respondent, the attorney shall make the awarded refund within 30 days of receipt of the award, unless otherwise provided for in the award. If the respondent fails to make the awarded refund within the applicable timeframe, the Board Clerk shall refer the matter to Bar Counsel for action pursuant to Rule 14(b)(5). The award rendered by an arbitration panel may be enforced in accordance with the Uniform Arbitration Act, 14 M.R.S. § 5927 et seq. Section 5928 of Title 14, relating to proceedings to compel or stay arbitration is not applicable to proceedings under this rule. The award may be challenged on the limited grounds, and by the procedure, set forth in 14 M.R.S. § 5938.

(h) Confidentiality. With the exception of the award itself, the confidential addendum as well as all petitions, replies, records, documents, files, proceedings, and hearings pertaining to arbitrations of any fee dispute under this rule and these procedures shall be confidential, and, unless otherwise ordered by the Court, shall not be open to the public, press, or any person not involved in the dispute, excepting only the staff and members of the Fee Arbitration Commission, the Board, and the Committee on Judicial Responsibility and Disability in connection with any complaint within its jurisdiction. Notwithstanding this confidentiality, any person—including but not limited to members of the Board, members of the Fee Arbitration Commission, and Board staff—may notify governmental officials of actual or threatened criminal conduct by any individual. Access to relevant information may also be provided to authorized agencies.

Advisory Note – April 2018

Rule 7(e)(9) is amended to require the Board to ensure that all hearings before a panel of the Fee Arbitration Commission are recorded.

Reporter’s Notes – June 2015

Rule 7(a) is based on the Model Rules for Fee Arbitration Rule 2(A) and is consistent with former Maine Bar Rule 9(a). The committee adopted the language of former Maine Bar Rule 9(a), with the following notable changes: (1) The position of Fee Arbitration Commission Vice Chair was created, and (2) the term duration of Fee Arbitration Commission members was increased from three years to four years in order to be consistent with the terms of Grievance Commission members.

Rule 7(b) is based on the Model Rules for Fee Arbitration Rule 2(C). There is no direct analogue in the former Maine Bar Rules, and the committee substantially adopted the language of Model Rule 2(C).

Rule 7(c) is based on former Maine Bar Rule 9(d). There is no equivalent Model Rule. The revised rule’s language reflects the creation of the Board Clerk position and more specifically delineates the duties of the Board Clerk in the Fee Arbitration process.

Rule 7(d) is based on the Model Rules for Fee Arbitration Rules 4 and 5, and is consistent with former Maine Bar Rule 9(e), albeit with revisions. First,

the Commission found that the “Initial Resolution Period” discussed in former Maine Bar Rule 9(e)(2) created unnecessary delay in processing fee arbitration petitions, and thus, revised rule 7(d) eliminates this 30-day period. Second, revised rule 7(d)(5), in contrast with former Maine Bar Rule 9(e)(4)(A), no longer requires that the Respondent’s Reply form be sent to the respondent via certified mail, return receipt requested. Third, to address the issue of respondents failing to file a Reply and then submitting an excessive number of documents at hearing, Rule 7(d)(5) now contains the provision that a panel may refuse to consider evidence offered by the attorney that would reasonably be expected to have been disclosed in the Reply. Fourth, in comparison to former Maine Bar Rule 9(e)(5)(E) which only requires an attorney to mail the Notice of Right to Arbitrate Legal Fees to the client, Rule 7(d)(6) requires an attorney to mail the notice to both the client and the person liable for the payment of the attorney’s fees if other than the client.

Rule 7(e) is based on the Model Rules for Fee Arbitration Rule 5 and is consistent with former Maine Bar Rule 9(g). After some discussion, the committee decided to continue the practice of allowing a fee arbitration proceeding to go forward with a two-person panel in circumstances where one panel member is absent, but concluded that, consistent with the former Maine Bar Rule, one member of the two-person panel must be a public member. Additionally, the committee decided not to adopt the Model Rule prohibition on recording fee hearings. However, the revised rule requires that requests to schedule a court reporter to record a hearing must go through the Board Clerk.

Rule 7(f) is based on the Model Rules for Fee Arbitration Rule 6, and is consistent with former Maine Bar Rule 9(h). To increase the efficiency of issuing decisions, the revised rule allows panel chairs to sign awards on behalf of the full panel. The revised rule also grants the Board Clerk authority to correct clerical mistakes in decisions. Additionally, the revised rule extends the period in which awards must be rendered from the former Maine Bar Rule twenty-day deadline to the Model Rule thirty-day deadline.

Rule 7(g) is based on the Model Rules for Fee Arbitration Rule 7, and is consistent with former Maine Bar Rule 9(i). The committee elected not to include the Model Rules’ language regarding non-binding fee arbitration.

Rule 7(h) is based on the Model Rules for Fee Arbitration Rule 8, and is consistent with former Maine Bar Rule 9(j). The revised rule more specifically delineates who may have access to confidential documents. In contrast to the

Model Rule, the former Maine Bar Rule and the revised rule do not designate Awards as confidential.

RULE 8. PROFESSIONAL ETHICS COMMISSION

(a) Appointment. The Board shall appoint eight attorney members to the Professional Ethics Commission.

(b) Terms of Office. Members shall be appointed for a term of four years. No member shall serve for more than two consecutive four-year terms, except that members shall continue to serve until a replacement has been appointed. A member who has served two consecutive four-year terms may not be reappointed before the expiration of at least one year. The Board may not remove members during their terms of office except for cause.

(c) Quorum and Action. A quorum shall exist for the purposes of the Professional Ethics Commission's exercise of its authority and duties when a majority of its members are present. The concurrence of a majority of such members present shall be sufficient for any action taken.

(d) Powers and Duties. The Professional Ethics Commission shall have the following powers and duties:

(1) to render advisory opinions to the Court, the Board, Bar Counsel, and the Grievance Commission on matters involving the interpretation and application of the Maine Rules of Professional Conduct;

(2) to receive ethical questions posed by members of the Maine bar involving the Maine Rules of Professional Conduct and to determine whether to issue a formal advisory opinion;

(3) to make recommendations to the Board or to the Advisory Committee on the Rules of Professional Conduct regarding amendments to the Maine Rules of Professional Conduct; and

(4) to maintain an indexed compilation of its opinions.

(e) Opinions as Evidence. Opinions of the Professional Ethics Commission shall be admissible in any proceeding in which the interpretation

or application of a provision of the Maine Rules of Professional Conduct is at issue.

(f) Confidentiality. With the exception of an advisory opinion finally rendered pursuant to this rule, all inquiries, replies, records, documents, files, and proceedings pertaining to the interpretation of ethical rules and the rendering of advisory opinions with respect thereto shall be confidential, and, unless otherwise ordered by the Court, shall not be opened to the public, press, or any person not involved in the rendering of the advisory opinions, excepting only the staff and members of the Professional Ethics Commission and their professional associates actively involved in working on an advisory opinion for such member, the staff and members of the Grievance Commission, Bar Counsel, the staff and members of the Board, and the Court. No person shall publicly disclose the identity of another individual whose conduct was the subject of an advisory opinion without the consent of that individual.

(g) Destruction of Confidential Documents. Upon conclusion of service, members shall take reasonable steps to destroy all documents, in paper or electronic format, relating to the proceedings of the Board and subject to the confidentiality provisions of these rules.

Reporter's Notes – June 2015

Rule 8(a) is consistent with former Maine Bar Rule 4(d)(20) appointing eight attorney members to serve on the Professional Ethics Commission. There is no Model Rule equivalent.

Rule 8(b) is based on former Maine Bar Rule 11(a). There is no Model Rule equivalent. The revised rule omits reference to the “initial members of the Commission” because such a situation is no longer applicable. The revised rule adds that Commission members shall not be subject to removal by the Board except for cause.

Rule 8(c) is based on former Maine Bar Rule 11(b). There is no Model Rule equivalent. The committee adopted the former Maine Bar Rule in its entirety.

Rule 8(d) is based on former Maine Bar Rule 11(c). There is no Model Rule equivalent. The most significant change reflected by the revised rule is the elimination of the mandates of former Maine Bar Rule 11(c)(3), which requires

the maintenance of a library containing opinions on ethical questions. Due to widespread Internet usage, the commission viewed the dictates of former Maine Bar Rule 11(c)(3) as outdated and no longer necessary.

Rule 8(e) is based on former Maine Bar Rule 11(d). There is no Model Rule equivalent. The committee adopted the former Maine Bar Rule in its entirety.

Rule 8(f) is based on former Maine Bar Rule 11(f). There is no Model Rule equivalent. The committee adopted the former Maine Bar Rule in its entirety.

RULE 9. GRIEVANCE COMMISSION

(a) Appointment. The Board shall appoint five or more Grievance Commission panels. Each Grievance Commission panel shall consist of two attorney members and one public member. The Board shall also appoint alternate attorney members and public members to serve on the Grievance Commission. The Board shall appoint the Chair and Vice Chair of the Grievance Commission each year from among the attorney members of the Grievance Commission. The Chair or Vice Chair shall appoint a lawyer member of each panel each year as chair of that panel.

(b) Terms of Office. Panel members shall be appointed for a term of four years. No member shall serve for more than two consecutive four-year terms. A member whose term has expired may continue to serve on any case that was commenced before the expiration of the member's term. A member who has served two consecutive four-year terms may not be reappointed before the expiration of at least one year. The Board may not remove members during their terms of office except for cause. The Board may defer the reappointment of commission members who are temporarily removed pursuant to Rule 1(d)(2).

(c) Representation Prohibition. No member may be legal counsel for a party in any proceedings under Rules 10 to 32. When a member of the panel member's firm serves as legal counsel for a party in any proceeding under Rules 10 to 32, the panel member may perform Commission responsibilities unrelated to that proceeding, provided that the panel member is timely screened from any participation in or relating to that proceeding, at both the panel member's firm and the Commission.

(d) Powers and Duties. Grievance Commission panels shall have the following powers and duties:

(1) to review and approve, modify, or disapprove recommendations by Bar Counsel; and

(2) to conduct hearings in connection with public disciplinary proceedings on charges of misconduct or petitions for reinstatement, and in connection with such hearings, to make findings and issue written decisions.

(e) Review by Public Member. Upon a written request made in accordance with Rule 13(b)(3), a public member shall review dismissals by the Central Intake Office or Bar Counsel. Dismissals by Bar Counsel shall not be subject to review under this rule if a public member has previously reviewed a dismissal by the Central Intake Office in the same matter. The written request for review must be made within 21 days of receipt of the dismissal notice. The public member shall

(1) approve the dismissal by the Central Intake Office or Bar Counsel, and the Board Clerk shall notify the complainant and the respondent that the matter shall remain closed; or

(2) disapprove the dismissal by the Central Intake Office or Bar Counsel and direct that the matter be investigated further by Bar Counsel and reviewed in accordance with Rule 13(d). The Board Clerk shall notify the complainant and the respondent of the public member's action in writing.

(f) Powers and Duties of Panel Chair. Each Grievance Commission panel chair shall have the following powers and duties:

(1) to preside at hearings in accordance with Rules 13(e) and 14(a);

(2) to conduct prehearing conferences regarding formal charges of misconduct or petitions for reinstatement; and

(3) to consider and decide prehearing motions.

(g) Recusal and Disqualification of Panel Members.

(1) Panel members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. If a member is

disqualified or recused, another member shall be appointed by the Board Clerk. No peremptory challenges of a panel member are allowed.

(2) Requests to disqualify panel members shall be filed within 10 days after service of the first hearing notice containing the names of the panel members assigned to the matter. The chair of the Grievance Commission panel or the Commission Chair or Vice Chair shall rule on the motion. Failure to timely file a motion to disqualify shall be a factor in deciding whether the motion should be granted.

(3) Grounds for disqualification or recusal not reasonably discoverable within that 10-day period may be asserted within 10 days after they were discovered or in the exercise of reasonable diligence should have been discovered.

(4) A former member of a Grievance Commission panel who is a member of the bar shall comply with the provisions of Rule 1.12 of the Maine Rules of Professional Conduct with respect to participating in any proceedings under these Rules.

(5) In the event that a Grievance Commission panel finds probable cause for a public disciplinary hearing or authorizes Bar Counsel to file an Information and the respondent attorney is a member of the Grievance Commission, Fee Arbitration Commission, or Professional Ethics Commission, such member shall be disqualified from all Commission responsibilities until such time as the pending matter is concluded.

(6) Grievance Commission members may not testify voluntarily in any proceedings under these Rules or as an expert witness in the field of ethics in any court proceeding.

(7) Grievance Commission members may not serve as probation monitors. Members of the Grievance Commission shall be recused from participating in any matter where a member of the Grievance Commission member's firm is serving as a probation monitor.

(h) Destruction of Confidential Documents. Upon conclusion of service, members shall take reasonable steps to destroy all documents, in paper or electronic format, relating to the proceedings of the Board and subject to the confidentiality provisions of these rules.

(i) *Ex Parte* Communication. Except as otherwise permitted under Rule 13(f), members of a Grievance Commission panel shall refrain from *ex parte* meetings and communication with non-Commission members concerning matters affecting a particular case or pending proceeding.

Reporter's Notes – June 2015

Rule 9(a), which governs appointments to the Grievance Commission, adopts language similar to that contained in Model Rule 3(A). However, in contrast to the Model Rule, the revised rule requires the Board appoint five or more panels rather than three or more panels. In this regard, the appointment procedure is in accord with former Maine Bar Rule 7(b)(2).

Rule 9(b) sets out the terms of office for members of the Grievance Commission. The committee concluded four-year terms, as was provided in former Maine Bar Rule 7(a), worked well and decided to retain the four-year terms rather than adopting the three-year terms provided in Model Rule 3(B).

Rule 9(d) is based on Model Rule 3(D), and is consistent with former Maine Bar Rule 7(c).

Rule 9(e) is based on former Maine Bar Rule 7.1(c). The equivalent Model Rules are 4(B) and 11(A). The revised rule references the Central Intake Office's authority to dismiss complaints. In contrast to the former Maine Bar Rule that allots complainants a fourteen-day period to request public member review, the revised rule increases this timeframe to twenty-one days.

Rule 9(f) is based on Model Rule 3(E), and is consistent with former Maine Bar Rule 7.1(e)(2)(D).

Rule 9(g) is based on Model Rule 3(F). There is no direct analogue in the former Maine Bar Rules. The revised rule expands on the Model Rule in describing the process for requesting a recusal of a panel member.

IV. MAINE DISCIPLINARY RULES

RULE 10. JURISDICTION

(a) Lawyers Admitted to Practice. Any lawyer admitted to practice law in Maine is subject to the disciplinary jurisdiction of the Court and the

Board. This includes any formerly admitted lawyer with respect to acts committed prior to resignation, surrender of license, suspension, disbarment, or transfer to inactive status, or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of these Rules or of the Maine Rules of Professional Conduct or any Rules or Code subsequently adopted by the Court in lieu thereof, and any lawyer specially admitted by a Maine court for a particular proceeding, and any lawyer not admitted in Maine who practices law or renders or offers to render any legal services in Maine.

(b) Former Judges. A former justice or judge who has resumed the status of a lawyer is subject to the jurisdiction of the Board not only for conduct as a lawyer but also for misconduct that occurred while the lawyer was a judge and would have been grounds for lawyer discipline, provided that the misconduct was not the subject of a judicial disciplinary proceeding as to which there has been a final determination by the Court. Misconduct by a justice or judge that is not finally adjudicated before the justice or judge leaves office falls within the disciplinary jurisdiction of the Board. The Board shall coordinate with the Committee on Judicial Responsibility and Disability in any investigations or proceedings concerning a justice or judge arising out of the same or related conduct.

(c) Incumbent Judges. Incumbent justices or judges shall not be subject to the jurisdiction of the Board; however, if an incumbent justice or judge is to be removed from office in the course of a judicial discipline or disability proceeding, the Court shall first afford the Board and the respondent an opportunity to submit a recommendation whether lawyer discipline should be imposed, and if so, the extent thereof.

(d) Powers Not Assumed. These Rules shall not be construed to deny to any court the powers necessary to maintain control over its proceedings.

Reporter's Notes – June 2015

Rule 10(a) adopts Model Rule 6(A) in its entirety and corresponds to former Maine Bar Rule 1(a). The committee felt that the Model Rule accurately reflects current Maine practice and does not expand or diminish the jurisdiction of the Board.

Rule 10(b) adopts Model Rule 6(B) in its entirety and adds in the stipulation that the Board shall coordinate with the Committee on Judicial

Responsibility and Disability in investigations involving judges and justices. The revised rule corresponds to former Maine Bar Rule 1(a).

Rule 10(c) adopts Model Rule 6(C) in its entirety and has no equivalent in the former Maine Bar Rules. The commission believed that affording the Board an opportunity to be heard on the subject of lawyer discipline protects the right of the profession to preserve the high standards of conduct that it maintains in the public interest.

Rule 10(d) adopts Model Rule 6(D) in its entirety and has no equivalent in the former Maine Bar Rules.

RULE 11. STATUTE OF LIMITATIONS

Proceedings under these Rules shall be exempt from all statutes of limitations.

Reporter's Notes – June 2015

Rule 11 corresponds to Model Rule 32. It has no equivalent in the former Maine Bar Rules but is in accord with current Maine practice. The members of the committee thought that it was important to expressly recognize that statutes of limitation are inappropriate in disciplinary proceedings established by these Rules because misconduct by a lawyer, whenever it occurs, reflects upon the lawyer's fitness to practice. Client protection requires that grievance proceedings be exempt from statutes of limitations.

RULE 12. IMMUNITY

The Board of Overseers of the Bar is a quasi-judicial agent of the Court. The Board, members of the Board; members of Grievance Commission panels; members of Fee Arbitration Commission panels; Bar Counsel, monitors, and any person acting on their behalf; and the Board's staff shall be immune from suit or claim for conduct and communications in the course of their official duties, to the extent provided by statute and other provisions of law.

Reporter's Notes – June 2015

Rule 12 represents a change from former Maine Bar Rules 4(e), 5(g), and 7.3(a), and from Model Rule 12. The committee recommended that Rule 12

maintain similar provisions for immunity. Under the revised rule adopted by the Court, immunity is provided to agency personnel to the full extent provided by statute and other provisions of law but without an independent grant of immunity.

RULE 13. DISCIPLINARY RULES OF PROCEDURE

(a) Evaluation. The Central Intake Office shall evaluate all information coming to the attention of the Board by complaint or from other sources alleging lawyer misconduct or incapacity. If the lawyer is not subject to the jurisdiction of the Court, the Central Intake Office shall refer the matter to the appropriate entity in any jurisdiction in which the lawyer is known to be admitted. If the information, if true, would not constitute misconduct or incapacity, the Central Intake Office may refer the matter to another agency with appropriate jurisdiction, or dismiss the complaint. If the lawyer is subject to the jurisdiction of the Court and the information alleges facts that, if true, would constitute misconduct or incapacity, the Central Intake Office shall refer the matter to Bar Counsel, who shall conduct an investigation.

(b) Investigation.

(1) Bar Counsel shall conduct all investigations, except as otherwise required by these Rules. Upon the conclusion of an investigation, Bar Counsel shall

- (A) dismiss subject to review under Rules 9(e) and 13(b)(3);
- (B) issue a stay;
- (C) refer respondent to the Alternatives to Discipline Program, pursuant to Rule 13(c);
- (D) recommend dismissal, if a public member had previously disapproved dismissal under Rule 9(e);
- (E) recommend dismissal with a warning, subject to review under Rule 13(d); or

(F) issue a report to the Board Clerk recommending the filing of formal charges with a Grievance Commission panel (or a Single Justice, if authorized by these Rules).

In all cases, Bar Counsel shall briefly and generally state in writing the reasons for the recommended disposition.

(2) *Notice to Respondent.* Bar Counsel may dismiss a matter or issue a stay without providing respondent an opportunity to respond. In all other cases, Bar Counsel shall first notify the respondent in writing of the substance of the matter and afford him or her an opportunity to respond. Notice to the respondent shall be pursuant to Rule 15.

(3) *Dismissal Review.* If Bar Counsel dismisses the complaint, Bar Counsel shall notify the complainant and the respondent of the dismissal, provide the reasons for the dismissal, and inform the complainant and the respondent that any review of the dismissal must be requested within 21 days of service pursuant to Rule 15. Any further review shall be subject to Rule 9(e).

(c) Alternatives to Discipline Program.

(1) *Referral to Program.* Bar Counsel may refer respondent to the Alternatives to Discipline Program. The Alternatives to Discipline Program may include fee arbitration, Silent Partners, Maine Assistance Program for Lawyers and Judges, psychological counseling, continuing legal education, or any other program authorized by the Board or the Court.

(2) *Factors.* The following factors may be considered in determining whether to refer a respondent to the Alternatives to Discipline Program:

(A) whether the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions for the alleged misconduct is likely to be no more severe than reprimand or admonition;

(B) whether participation in the program is likely to benefit the respondent and accomplish the goals set forth by the program; and

(C) whether aggravating or mitigating factors exist.

(3) *Notice to Complainant.* Bar Counsel shall notify the complainant, if any, of the decision to refer the respondent to the Alternatives to Discipline Program. The complainant shall have a reasonable opportunity to submit a statement offering any new information regarding the respondent. This statement shall be made part of the record.

(4) *Contract.* Bar Counsel and the respondent shall negotiate a contract, the terms of which shall be tailored to the individual circumstances. In each case, the contract shall be in writing and signed by the respondent and by Bar Counsel. The contract shall set forth the terms and conditions of the plan for the respondent and, if appropriate, shall identify the use of a practice monitor and/or a recovery monitor and the responsibilities of the monitor(s). The contract shall provide for oversight of fulfillment of the contract terms. Oversight includes reporting of any alleged breach of contract to Bar Counsel. The contract shall also provide that the respondent will pay all costs incurred in connection with the contract. The contract shall include a specific acknowledgment that a material violation of a term of the contract renders voidable the respondent's participation in the program for the original charge(s) filed. The contract may be amended upon agreement of the respondent and Bar Counsel. If a recovery monitor is assigned, the contract shall include respondent's waiver of confidentiality so that the recovery monitor may make necessary disclosures in order to fulfill the monitor's duties under the contract.

(5) *Effect of Non-Participation in the Program.* The respondent has the right not to participate in the Alternatives to Discipline Program. If the respondent does not participate, the matter will proceed as though no referral to the Program had been made.

(6) *Stay.* After an agreement is reached, the disciplinary complaint may be stayed pending successful completion of the terms of the contract.

(7) *Termination.*

(A) *Fulfillment of the Contract.* Bar Counsel may terminate the contract when Bar Counsel determines that the respondent has fulfilled the terms of the contract, at which point the stay is lifted.

(B) *Material Breach.* A material breach of the contract shall be cause for termination of the respondent's participation in the program. After

such termination, disciplinary proceedings may be resumed or reinstated.

(d) Preliminary Review by Grievance Commission Panel.

(1) If a complaint is not concluded pursuant to Rules 13(b)(1)(A) to (C), at the conclusion of Bar Counsel's investigation, Bar Counsel shall file a confidential report with the Board Clerk recommending disposition pursuant to Rules 13(b)(1)(D) to (F). Bar Counsel shall also notify the parties of the proposed recommendation.

(2) At least fourteen days in advance of the preliminary review, the Board Clerk shall prepare and deliver to Bar Counsel a statement as to the existence of any sanction record, reinstatement, or surrender of license involving the respondent. Bar Counsel shall then mail the statement to the respondent. Within 10 days, the respondent may submit a reply as to the relevance of the prior sanction record to the present charge. The statement and any reply from the respondent shall be provided to the panel in accordance with Rule 13(e)(8). These procedures and filings shall not be applicable when the respondent attorney has no prior sanction record.

(3) The Board Clerk shall assign the complaint to a three-member panel of the Grievance Commission for a confidential review. However, with the consent of the review panel chair, the panel may act with the concurrence of one attorney and one public member. In the event that such a review panel is deadlocked, a new three-member panel shall be assigned to review. The confidential review is not open to the public. Only Bar Counsel and the panel shall be present for the review.

(4) The panel shall review the complaint, any response submitted by the attorney, any reply submitted by the complainant, the results of Bar Counsel's investigation, and Bar Counsel's report with recommendation to (A) file formal charges, (B) dismiss with a warning, or (C) dismiss. Within 10 days following a review, unless otherwise extended by the Chair or Vice Chair of the Grievance Commission, the panel shall decide whether it approves Bar Counsel's recommended disposition and notify the Board Clerk of its decision.

(5) The Board Clerk shall notify Bar Counsel, the respondent, and the Complainant in writing of the panel's decision to defer, dismiss, dismiss with a

warning, or file formal charges. The panel's decision is final and not subject to further review.

(6) When a respondent is the subject of a pending disciplinary proceeding pursuant to Rule 13(g), with the consent of a Grievance Commission review panel, Bar Counsel may bypass the preliminary review stage and commence a disciplinary action before a Single Justice concerning any allegations of misconduct by the same attorney that have subsequently come to the attention of Bar Counsel.

(7) Prior to a hearing, a review panel may, for good cause shown, rescind the directive to proceed to a public hearing and issue a dismissal or a dismissal with a warning.

(e) Formal Charges Hearing. If a matter is to be resolved by a formal proceeding, Bar Counsel shall prepare formal charges in writing that give fair and adequate notice of the nature of the alleged misconduct.

(1) Bar Counsel shall file the charges with the Board Clerk.

(2) Bar Counsel shall serve a copy of the formal charges upon the respondent in accordance with Rule 15.

(3) The respondent shall file a written answer with the Board Clerk and serve a copy on Bar Counsel within 21 days after service of the formal charges, unless the time is extended by the chair of the Grievance Commission panel to which the matter is assigned for review or, in the chair's absence, by the Chair or Vice Chair of the Grievance Commission. If the respondent fails to answer within the prescribed time or the time as extended, the factual allegations and the alleged misconduct shall be deemed admitted as provided in Rule 20(a). Bar Counsel may provide a copy of the respondent's answer to the complainant; provided, however, that upon a request by the respondent and submission of a redacted version of the answer, Bar Counsel may provide the complainant with only a redacted version of the answer.

(4) The Board Clerk shall assign the complaint to a three-member panel of the Grievance Commission for hearing. The panel may act with the concurrence of two members. However, one attorney and one public member may conduct a hearing with the consent of all parties. In the event that such a

two-member panel member is deadlocked, a new three-member panel shall be assigned to hear the matter.

(5) The Board Clerk shall serve a notice of hearing upon Bar Counsel, the complainant and the respondent, stating the date and place of hearing at least 25 days in advance thereof. The notice of hearing shall advise the respondent of the right to be represented by a lawyer, to cross-examine witnesses, and to present evidence.

(6) At least 14 days before the hearing, the Board Clerk shall prepare and deliver to Bar Counsel a statement as to the existence or absence of any sanction record, reinstatement, or surrender of license involving the respondent. Bar Counsel shall then mail the statement to the respondent. Within 10 days, the respondent may submit a reply as to the relevance of the prior sanction record to the present charge. The statement and any reply from the respondent shall be provided to the panel in accordance with Rule 13(e)(8).

(7) *Hearing.* The Grievance Commission panel shall hold a hearing in accordance with Rule 14(a) and the following:

(A) The panel chair shall preside at the hearing, and shall have the power to control the course of proceedings and regulate the conduct of those individuals appearing as counsel, parties, or witnesses. The failure of an attorney participating in such a hearing as a party, counsel for a party, or a witness to obey an order of the chair shall constitute a violation of Rule 8.4 of the Maine Rules of Professional Conduct, and if committed by the respondent, may be duly considered by the Grievance Commission panel in its disposition of the matter before it.

(B) The hearing shall be open to the public, except that to protect the interests of a complainant, witness, third party, or respondent attorney, the chair may, upon motion filed with the Board Clerk and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement that order. The deliberations of the Grievance Commission panel following the hearing shall not be open to the public or the parties.

(C) At the hearing, Bar Counsel and the respondent may present evidence and may cross-examine witnesses. The respondent may be

represented by counsel. The testimony of witnesses shall be by oath or affirmation administered by the panel chair.

(D) Subject to approval by the chair, hearing formalities of this rule may be waived by a signed, stipulated agreement of the parties. When such a waiver includes or incorporates the parties' submission of an agreed proposed sanction order pursuant to Rule 25, that waiver shall also contain the respondent attorney's signed waiver of the right to file a petition for review under Rule 13(f).

(8) Bar Counsel shall not divulge the statement as to the existence or absence of any sanction record to the Grievance Commission panel until after the panel has made a finding of misconduct, unless this statement is probative of issues pending in the matter before the panel.

(9) Within 30 days following the hearing, unless otherwise extended by the Chair or Vice Chair of the Grievance Commission, the Grievance Commission panel shall issue a written report containing its findings and decision on dismissal or sanction to the Board Clerk. The report shall set forth the Grievance Commission panel's findings of fact, conclusions of law, and application of any relevant factors with respect to appropriate sanctions for misconduct. The Board Clerk shall serve the report on respondent and Bar Counsel, who shall provide the report to the complainant.

(10) The Grievance Commission panel's report shall render one or more of the following:

(A) *Dismissal.* The Grievance Commission panel shall dismiss the petition if it finds, on the evidence and arguments presented, that no misconduct subject to sanction under these Rules occurred.

(B) *Admonition.* If the disciplinary panel finds that misconduct subject to sanction under these Rules has occurred, but that the misconduct is minor; that there is little or no injury to a client, the public, the legal system, or the profession; and that there is little likelihood of repetition by the attorney, the panel will issue an admonition having the effect provided in Rule 21(b)(1).

(C) *Reprimand.* If the disciplinary panel finds that misconduct subject to sanction under these Rules has occurred and that all of the conditions

set forth in Rule 13(e)(10)(B) are not present, the panel may reprimand the respondent attorney.

(D) *Probation.* If the disciplinary panel finds that misconduct subject to sanction under these Rules has occurred and that all of the conditions set forth in Rule 13(e)(10)(B) are not present, the panel may impose a period of probation on the respondent attorney as defined in Rule 21(b)(4).

(E) *Information.* Upon a finding of probable cause for suspension or disbarment, the Grievance Commission panel shall direct Bar Counsel to file an Information pursuant to Rule 13(g).

(f) Petition for Review of Dismissal, Admonition, Reprimand, or Probation.

(1) *Petition and Answer.* Within 21 days after dismissal or delivery of a reprimand, probation, or admonition, a respondent attorney or Bar Counsel may file a petition for review by a Single Justice. The petitioning party shall file the petition for review with the Executive Clerk of the Court, and shall serve the petition on the opposing party. The petition for review shall include copies of the disciplinary petition and answer filed with the Grievance Commission and of the panel's decision dismissing or imposing a reprimand, probation, or admonition, and shall contain a concise statement of the grounds upon which the petitioning party seeks relief and a demand for the specific relief sought. Within 21 days after service of the petition for review, the opposing party shall file an answer with the Executive Clerk of the Court and shall transmit a copy thereof to the petitioning party.

(2) *Preparation of Record.* Within 21 days after the answer is filed, the Board Clerk shall prepare and file the complete record of the proceedings with the Executive Clerk of the Court and provide notice thereof to the parties. If either party believes that the record filed by the Board Clerk is incomplete or over-inclusive, that party shall serve notice upon the opposing party within 10 days after the record is filed. The notice shall include specific proposals regarding additions to or deletions from the record filed by the Board Clerk. The parties shall attempt to agree upon the contents of the record. If the parties cannot agree, either party may request that the Single Justice modify the contents of the record.

(3) *Motion for Trial of the Facts.* The respondent may file a motion for a trial of the facts with the petition for review. If, on motion, the Court finds in its discretion that the respondent attorney ought to have a trial of the facts, the Single Justice may order a hearing to permit the introduction of evidence that does not appear in the record of the proceedings before the Grievance Commission panel and that has not been stipulated. Respondent's failure to file such a motion shall constitute a waiver of any right to a trial of the facts. With the motion, the respondent attorney shall also file a detailed statement, in the nature of an offer of proof, of the evidence to be introduced at the hearing. That statement must be sufficient to permit the Single Justice to make a proper determination as to whether any trial of the facts as presented in the motion and offer of proof is appropriate and, if so, to what extent. After hearing, the Single Justice shall issue an appropriate order specifying the future course of proceedings. The Single Justice may order that additional evidence be taken.

(4) *Scope of Review.* Unless otherwise provided by order of the Single Justice, review of a Grievance Commission panel's decision to dismiss or impose a reprimand, probation, or admonition shall be based upon the record of the proceedings before the panel. The judgment entered after such review may affirm, vacate, or modify the decision of the panel. Any findings of fact of the Grievance Commission panel shall not be set aside unless clearly erroneous. Either party may appeal to the Court within 21 days from entry of the judgment.

(5) *Finding of Probable Cause.* If at any stage of the proceedings on petition for review, the Single Justice determines that there is probable cause that the matter be concluded by suspension or disbarment, the Single Justice shall direct Bar Counsel to file an Information and the matter shall be conducted as an attorney discipline action in accordance with Rule 13(g).

(g) Attorney Discipline Actions before the Court.

(1) *Commencement.* An attorney discipline action authorized pursuant to this rule shall be commenced by the filing of an Information with the Executive Clerk of the Court. The Information shall allege that the respondent is an attorney subject to these Rules and has conducted herself or himself in a manner unworthy of an attorney admitted to the Maine Bar for the reasons specified in the Information. The Board shall be responsible for serving the Information, together with a summons, upon the respondent in accordance with Rule 15.

(2) *Procedure.* An attorney discipline action shall be heard by a Single Justice assigned by the Chief Justice to hear the action. The Board shall be treated as the plaintiff and the respondent attorney as the defendant; and the action shall be captioned “Board of Overseers of the Bar v. [name of respondent attorney].”

(3) *Discovery.* Bar Counsel shall furnish to the respondent attorney, within a reasonable time after the filing of the Information, copies of all exhibits presented to the Grievance Commission panel or the Board in the proceedings leading to the information. The stenographic or electronic record, as required by Rule 14(a)(6), and any other matter within Bar Counsel’s possession or control that is discoverable under Rule 26 of the Maine Rules of Civil Procedure, shall be made available to the respondent attorney at the office of Bar Counsel at any reasonable time for inspection and copying at the respondent attorney’s expense.

(4) *Judgment and Appeal.* The Single Justice may enter judgment imposing an admonition, probation, a reprimand, suspended suspension, suspension for a definite period, or disbarment, or may dismiss the Information. Either party may appeal to the Court within 21 days from the entry of the judgment.

(5) *Attorney’s Status Pending Appeal.* Pending appeal to the Court, a judgment of suspension or disbarment shall, unless stayed in whole or in part by the Single Justice or the Court, be given full force and effect.

Advisory Notes – June 2017

In Rule 13(e)(7)(D), a reference to Rule 25 is added. See the Advisory Notes – June 2017 to Rule 25 for a summary of the changes effected by the amendments to Rules 13(e)(7)(D) and 25.

Advisory Note – January 2017

The identical amendments to Rules 13(d)(2) and 13(e)(6) are issued to make the full disclosure of a respondent attorney’s complete prior sanction history consistent with the language of Rule 13(e)(8). Under that Rule, any prior sanction record of the involved respondent attorney, including both disciplinary and non-disciplinary sanctions, is provided to a hearing panel after it has made a finding of professional misconduct in a current matter(s). Such

full disclosure of that complete sanction record to review panels and hearing panels under these amendments to Rules 13(d)(2) and 13(e)(6), respectively, is also consistent with the prior practice of Grievance Commission panels under both former Bar Rule 7.1(d)(4)(B) and Board of Overseers' Regulation #31.

Reporter's Notes – June 2015

Rule 13(a) is a new rule that incorporates the Central Intake Office into the review process. That office initially evaluates the complaint, thus removing the need for Bar Counsel to review all submitted complaints.

Rule 13(b) corresponds with former Maine Bar Rules 7.1(b), (c), and (d). Bar Counsel retains substantially the same investigative powers, but the revised rule gives Bar Counsel additional options that did not exist under the former Maine Bar Rules. One of those options is to refer the respondent to the Alternatives to Discipline Program, which is described in Rule 13(c). The revised rule also requires Bar Counsel to state in writing the reasons for the recommended disposition. The committee thought this requirement was important to ensure that the respondent and the complainant have fair notice as to Bar Counsel's reason for the decision, and to ensure that all decisions are fair and supported by the provided factual information.

Rule 13(c) corresponds to Model Rule 11(G). There is no comparable provision in the former Maine Bar Rules. The committee believes that incorporation of this Rule provides Bar Counsel, in appropriate cases, with meaningful alternatives to formal proceedings.

Rule 13(d) continues Maine practice of a preliminary review by a Grievance Commission under former Maine Bar Rules 7(b), 7.1(d), and does not have a Model Rule equivalent.

Rule 13(e) corresponds to former Maine Bar Rule 7.1(e)(1) to (4) and Board Regulation #31, as well as Model Rule 13(D). The procedure for the formal disciplinary proceeding remains largely the same.

Rule 13(f) is a departure from both the former Maine Bar Rules and Model Rules 11(E) and (F). The committee felt the Board should not be involved in the appellate function of reviewing a panel's determination. Therefore, the committee rejected Model Rule 11(E), as well as former Maine Bar Rule 7.1(e)(5)(A) to (C). The committee also rejected the Model Rules'

approach that makes court review discretionary. Instead, the committee chose to continue current Maine practice of appeals to the Court, and endorsed the inclusion of Bar Counsel's much more extensive option to file an appeal consistent with Model Rule 11(F). The Maine Bar Rules allow for a very limited right of appeal by Bar Counsel.

Rule 13(g) has no Model Rule equivalent, and is generally consistent with the procedures for the Court's disciplinary proceedings under former Maine Bar Rule 7.2(b). The committee believes that the current involvement of the Court by conducting de novo testimonial hearings after a preliminary hearing by a panel of the Grievance Commission, usually to confirm whether serious sanctions such as actual suspension or disbarment, is a proper and appropriate involvement of the Court in such matters. The committee rejected the general approach of the Model Rules allowing Grievance Commission panels to impose suspensions and disbarments subject to the Court's approval without hearing. The committee agreed that such serious sanction determinations should remain as a factual determination to be made by the Court after hearing. However, the new rule departs from current practice requiring such hearings to be heard by a Single Justice of the Court by allowing a either a Single Justice or another judge designated by the Chief Justice of the Court to preside over a hearing.

RULE 14. ADDITIONAL RULES OF PROCEDURE

(a) Proceedings before a Grievance Commission Panel.

(1) *Nature of Proceedings.* Disciplinary proceedings before a Grievance Commission panel are neither civil nor criminal.

(2) *Proceedings Not Governed by Rules of Civil Procedure and Evidence.* Except as otherwise provided in these Rules, the Maine Rules of Civil Procedure and the Maine Rules of Evidence do not apply in disciplinary proceedings before a Grievance Commission panel.

(3) *Evidence.* Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The chair of the Grievance Commission panel may exclude irrelevant or unduly repetitious evidence.

(4) *Burden and Standard of Proof.* In disciplinary matters before a Grievance Commission panel, Bar Counsel shall have the burden of establishing the Board's case by a preponderance of the evidence. In proceedings seeking reinstatement, the petitioner shall have the burden of establishing his or her case by clear and convincing evidence.

(5) *Prehearing Conference.* At the discretion of the chair of the Grievance Commission panel or upon request of either party, a conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. The conference shall be held before the chair of the Grievance Commission panel or another member of the Grievance Commission panel designated by the chair.

(6) *Hearings Recorded.* The Board shall cause all proceedings before the panel to be stenographically or electronically recorded in a form that will readily permit transcription.

(7) *Hearing Transcript.* A hearing transcript or partial transcript may be ordered at any time by the Grievance Commission panel, respondent, Bar Counsel, or the Board. When ordering a transcript, respondent or Bar Counsel must provide a copy of the requested transcript to the opposing party at that party's own expense.

(8) *Related Pending Litigation.* Upon a showing of good cause, the Grievance Commission panel may stay a disciplinary matter because of substantial similarity to the material allegations of pending criminal or civil litigation or disciplinary action. The panel may weigh the following factors:

(A) whether a factual dispute exists such that weighing and balancing contending factors is peculiarly one for the tribunal;

(B) whether disciplinary action prior to conclusion of the case might have an unwarranted effect on the outcome of litigation;

(C) whether the complainant has taken the opportunity to present the dispute to the tribunal where such action would normally be expected; and

(D) whether the misconduct is so blatant as to warrant immediate discipline.

(9) *Delay Caused by Complainant.* None of the following shall independently justify abatement of the processing of any complaint:

(A) a complainant's unwillingness or neglect to sign a complaint or prosecute a charge,

(B) a settlement or compromise between a complainant and the respondent, or

(C) a complainant's acceptance of restitution from the respondent.

(10) *Effect of Time Limitations.* Except as is otherwise provided in these Rules, time is not jurisdictional. Failure to observe prescribed time intervals may result in sanctions against the party that has failed to observe such prescribed time intervals, but does not ordinarily, in itself, justify abatement of any discipline investigation or proceeding.

(b) Proceedings before a Single Justice or the Court.

(1) *Proceedings Governed by Rules of Civil Procedure and Evidence.* Except as otherwise provided, disciplinary proceedings before a Single Justice or the Court shall be governed by the Maine Rules of Civil Procedure and the Maine Rules of Evidence. Except as otherwise provided by Rule 17, Maine Rules of Civil Procedure 12(c), 13, 14, 16, 26 to 37, and 56 shall not apply.

(2) *Prehearing Conference.* A Single Justice or the Court may hold a prehearing conference with the attorneys for the parties to consider such matters as may aid in the disposition of the action and may by written order limit the issues to be tried.

(3) *De Novo.* Proceedings before a Single Justice or the Court are subject to a *de novo* standard of review.

(4) *Burden and Standard of Proof.* In disciplinary matters before a Single Justice or the Court, the Board shall have the burden of establishing its case by a preponderance of the evidence.

(5) *Failure to Comply With an Award of the Fee Arbitration Commission.* When a matter involving an award of a panel of the Fee Arbitration Commission is referred to Bar Counsel under Rule 7(g) because of the attorney's failure to

make an awarded refund to the petitioner within 30 days of receipt of the arbitration award, the Board, upon request of Bar Counsel and after affording the attorney an opportunity to respond in writing, may refer the matter to a Single Justice or the Court for appropriate disciplinary action.

(c) Complaints Against Bar Counsel, Attorney Commission and Board Members, or the Board Clerk. If a complaint is filed against Bar Counsel, the Board Clerk, or attorney Commission or Board members, the matter shall proceed in accordance with these Rules except that:

(1) If the respondent is Bar Counsel or the Board Clerk, the Chair of the Board shall appoint Special Counsel who shall exercise independent authority to investigate the complaint, and, if necessary assign an *ad hoc* panel to the case.

(2) If the respondent is a member of the Grievance Commission, Fee Arbitration Commission, or Professional Ethics Commission, the office of Bar Counsel shall investigate the complaint, and, if necessary, the Chair of the Board shall assign an *ad hoc* panel to the case.

(3) If the respondent is a member of the Board, the Chief Justice of the Court shall appoint Special Counsel who shall exercise independent authority to investigate the complaint, and if necessary, assign an *ad hoc* panel to the case.

(4) Special Counsel shall not receive compensation for services unless the Board has contracted in advance with that Special Counsel to receive compensation. Special Counsel may seek reimbursement from the Board for the payment of reasonable expenses and for investigative, administrative and legal support. The Board shall have discretion to determine the amount of financial, investigative, administrative, and legal assistance to be provided.

(d) Cameras and Audio Recordings. Cameras and audio recording devices are allowed in public disciplinary hearings, subject to the regulations and limitations contained in the Court's Cameras and Audio Recording in the Courts Administrative Order, and provided any person or organization intending to record or photograph such proceedings shall file a notice of intent to do so with the Board Clerk or the Clerk of the Court in advance of such hearing.

Reporter's Notes – June 2015

Rule 14(a) is based upon portions of Model Rule 18 and former Maine Bar Rule 7.1(e)(2). The committee rejected the script in Model Rule 18(B)(C) providing for application of either the Maine Rules of Civil Procedure or the Maine Rules of Evidence. It also rejected the application of the standard of proof by clear and convincing evidence for Bar Counsel contained in Model Rule 18(C) and agreed to retain the current practice of employing a preponderance of the evidence standard. The remainder of revised Rule 14(a) generally follows former Maine Bar Rules 7.1(e)(2) and 7.3(b)(c) as well as Board Regulation #12.

Rule 14(b) makes the same refinements to Model Rule 18 in Court proceedings concerning Rules of Procedure, Rules of Evidence and burden of proof as discussed above regarding Rule 14(a). Although the organizational format has changed, Rule 14(b) adopts the practice in existence under former Maine Bar Rules 7.2(b)(2)(4), 6(b)(6), and 9(i).

Rule 14(c) adopts current practice under former Maine Bar Rule 7.1(b) and Board Regulation #49. It has no direct equivalent in the Model Rules.

Rule 14(d) permits the presence of cameras in the courtroom, so long as the party seeking to record the proceedings complies with the requirements contained in the Court's administrative orders JB-05-15 and JB-05-16, as well as the procedural requirements of this rule.

RULE 15. SERVICE AND NOTICE

Service of a petition, or of any other papers or notices required by these Rules, shall be sufficient if made by first class mail addressed to the attorney's office and/or residence address as provided by the attorney in the registration materials as required by Rule 4. Service is complete upon mailing, except as otherwise provided by these Rules. The Board may, in its discretion, use additional methods of service and notice (e.g., e-mail or telephone communication) upon learning that previous attempts at providing service or notice in the manner required by this rule have failed.

Reporter's Notes – June 2015

Recognizing the obligation of attorneys to keep the Board apprised of their current contact information, Rule 15 limits the service of documents within these rules to the attorney's office or residence address. Service by certified or registered mail or pursuant to Rule 4 of the Maine Rules of Civil Procedure is not required.

RULE 16. SUBPOENA POWER

(a) Investigatory Subpoenas. Before formal charges have been filed, Bar Counsel may compel by subpoena the attendance of witnesses or the respondent, and the production of pertinent books, papers, and documents, in accordance with Rule 45 of the Maine Rules of Civil Procedure.

(b) Subpoenas for Hearing. After formal charges are filed, Bar Counsel or respondent may, in accordance with Rule 45 of the Maine Rules of Civil Procedure, compel by subpoena the attendance of witnesses or the respondent and the production of pertinent books, papers, and documents at a hearing under these Rules.

(c) Enforcement of Subpoenas. The Court may, upon proper application, enforce the attendance and testimony of any witnesses or the respondent and the production of any documents subpoenaed under this rule.

(d) Quashing Subpoena. Any person to whom a subpoena has been issued under this rule may object to the subpoena, or may move to quash or modify the subpoena, as set forth in Rule 45 of the Maine Rules of Civil Procedure, and may appear through legal counsel for that purpose. Any objection to a subpoena so issued, or any motion to quash or modify such a subpoena, shall be heard and determined by the chair of the Commission panel before which the matter is pending or by the court wherein enforcement of the subpoena is being sought.

(e) Witnesses and Fees. Subpoena and witness fees and mileage shall be the same as those provided for proceedings in the Court.

(f) Subpoena Pursuant to Law of Another Jurisdiction. Whenever a subpoena is sought in Maine pursuant to the law of another jurisdiction for use in lawyer discipline proceedings, and where the issuance of the subpoena

has been duly approved under the law of the other jurisdiction, the Chair (or, in the Chair's absence, the Vice Chair) of the Commission, upon good cause shown, may issue a subpoena in accordance with Rule 45 of the Maine Rules of Civil Procedure.

Reporter's Notes – June 2015

Rule 16 governing subpoenas is a slight variation of Model Rule 14 and broader in scope than former Maine Bar Rule 7.3(m)(1). This Rule gives Bar Counsel more subpoena powers if a respondent or a third party does not cooperate with Bar Counsel's investigation. In addition, the revised rule, unlike former Maine Bar Rule 7.3(m)(1), does not limit sanctions to situations where a subpoenaed witness fails to appear without reasonable excuse. The committee felt that this was a slight improvement on current practice, and adopted that language from Model Rule 14. The committee also concluded that eliminating the reference in the Maine Rule to subpoenas *duces tecum*, and replacing it instead with a specific description of subpoenas for "the production of pertinent books, papers, and documents" as set forth in the Model Rule, was clearer.

RULE 17. DISCOVERY

(a) Public Proceedings before the Grievance Commission.

(1) *Scope.* Within 21 days following the respondent's answer to Bar Counsel's formal charges, Bar Counsel and the respondent shall (A) exchange the names and addresses of all persons having knowledge of relevant facts; (B) identify which persons are reasonably anticipated to be called as witnesses; and (C) exchange all documents Bar Counsel or respondent reasonably anticipate will be introduced at trial or hearing.

(2) *Resolution of Disputes.* The chair of the Grievance Commission panel shall resolve by order all disputes concerning discovery. All discovery orders are interlocutory and may not be appealed prior to the entry of the final order.

(3) *Additional Discovery.* Upon good cause shown, the chair of the Grievance Commission panel may order additional discovery.

(b) Disciplinary Proceedings before a Single Justice.

(1) *Scope.* Within 21 days after filing of an Answer to the Board's Information with the Executive Clerk of the Court, Bar Counsel and the respondent shall (A) exchange the names and addresses of all persons having knowledge of relevant facts; (B) identify which persons are reasonably anticipated to be called as witnesses; and (C) exchange all documents Bar Counsel or respondent reasonably anticipates will be introduced at trial or hearing.

(2) *Exhibits and Transcripts.* In the event that a formal charges hearing was held before the Grievance Commission pursuant to Rule 13(e), Bar Counsel and the respondent shall make available to one another copies of all exhibits presented to the Grievance Commission hearing panel. The transcript from proceedings before the Grievance Commission hearing panel and any other matter within Bar Counsel's or the respondent's possession or control that is discoverable under Maine Rules of Civil Procedure 26, shall be made available to the other party at any reasonable time for inspection and duplication at that party's expense.

(3) *Resolution of Disputes.* A Single Justice shall resolve by order all disputes concerning discovery.

(4) *Additional Discovery.* Upon good cause shown, the Single Justice may order additional discovery pursuant to Maine Rules of Civil Procedure 26 to 37.

Advisory Note – January 2017

The July 2015 promulgation of Rule 17 formalized the past informal discovery procedures utilized by the parties during disciplinary proceedings conducted by the Court or the Grievance Commission. This change to Rule 17(b) directs that the mandates of the discovery requirements for Court proceedings mirror the same discovery requirements set forth in Rule 17(a), regardless of whether a Commission hearing occurred prior to that Court proceeding.

Reporter's Notes – June 2015

Rule 17 is generally based on Model Rule 15. There is no equivalent in the former Maine Bar Rules. The committee felt it was important to adopt a

discovery rule but concluded that the Model Rule did not offer clear guidance as to the scope of discovery. The committee also rejected the Model Rule's inclusion of depositions in the grievance process in Maine, finding that such formal additional discovery was not warranted and would significantly delay the timely processing and hearing of grievance complaints. The committee adopted two tracks of rules: one for proceedings before the Grievance Commission in Rule 17(a), and one for proceedings before a Single Justice in Rule 17(b). Although there was no clear discovery rule in the former Maine Bar Rules, the committee feels that Rule 17 accurately reflects the existing informal discovery practice of the office of Bar Counsel.

RULE 18. ACCESS TO DISCIPLINARY INFORMATION

(a) Confidentiality. Prior to service of Bar Counsel's disciplinary petition or an Information upon the respondent, the disciplinary proceeding is confidential, except that the pendency, subject matter, and status of an investigation by Bar Counsel or a Grievance Commission panel may be disclosed by Bar Counsel if

- (1) respondent has waived confidentiality;
- (2) the proceeding is based upon allegations that include the respondent's conviction of a crime;
- (3) the proceeding is based upon allegations that have become generally known to the public; or
- (4) there is a need to notify another person or entity, in order to protect the public, the administration of justice, or the legal profession.

(b) Public Information. All filings submitted to the Board Clerk or the Executive Clerk of the Court shall be available to the public after a determination that probable cause exists to believe that misconduct occurred and the filing and service of formal charges, unless the complainant or respondent obtains a protective order for specific testimony, documents, or records.

(c) Public Proceedings. Upon service of Bar Counsel's disciplinary petition or information upon the respondent, the proceeding is public except for:

- (1) deliberations of the Grievance Commission panel, or the Court; and
- (2) information with respect to which the Grievance Commission panel, or the Court has issued a protective order.

(d) Protective Orders. To protect the interests of a complainant, witness, third party, or respondent, the Grievance Commission panel, the Board, a Single Justice, or the Court may, upon motion and for good cause shown, issue a protective order prohibiting the disclosure of specific information and directing that the proceedings be conducted so as to implement the order.

(e) Disclosure of Nonpublic Information. The Court, a Single Justice, the Board, Grievance Commission panels, and Bar Counsel may not disclose any nonpublic information, other than that authorized for disclosure under Rule 18(a) and (b), unless pursuant to one of the following:

- (1) a written authorization from the respondent;
- (2) an order of a court having appropriate jurisdiction; or
- (3) other lawful authority to compel a disclosure.

(f) Release of Confidential Information to Authorized Entities. The provisions of this rule shall not be construed to deny access to relevant information to authorized entities, including members of the Grievance, Fee Arbitration or Professional Ethics Commissions, agencies investigating the qualifications of judicial candidates, jurisdictions investigating qualifications for admission to practice of law or considering reciprocal disciplinary action, law enforcement agencies investigating qualifications for government employment, the ABA National Lawyer Regulatory Data Bank, the Committee on Judicial Responsibility and Disability, the Maine Assistance Program for Lawyers and Judges, or the Lawyers' Fund for Client Protection.

(g) Release to Law Enforcement and the Maine Assistance Program. The provisions of this section shall not be construed to prevent Bar Counsel or any other person from notifying (1) the appropriate law enforcement agency of complaints that accuse the respondent attorney of conduct in violation of a criminal law, or (2) the Director of the Maine

Assistance Program for Lawyers and Judges, of the name of any lawyer whom Bar Counsel determines should be contacted concerning that program.

(h) Release to Investigators or Prosecutors. The provisions of this section shall not be construed to prohibit Bar Counsel's use of relevant information in the investigation or prosecution of complaints pursuant to Rules 2 or 13.

(i) File Retention. The Board shall retain all files. Files may be retained in a digital format.

(j) Duty of Officials and Employees of the Board. All officials and employees of the Board in a proceeding under these Rules shall conduct themselves so as to maintain the confidentiality mandated by this rule. However, any person, including but not limited to members of the Board, Grievance Commission and Board staff, may notify governmental officials of actual or threatened criminal conduct by any individual.

(k) Copying and Attestation Fees. Copying and attestation fees shall be the same as those for proceedings in the Court.

Advisory Note - January 2017

Upon being promulgated and adopted effective July 1, 2015, it had been intended that new Rule 18 would adopt and follow the earlier script contained within the confidentiality provisions of Rule 7.3(k) (see Reporter's Notes). However, the necessary provisions and "exceptions" contained within Rule 7.3(k)(4)-(6) that allowed for proper notice of complaint matters to be given to other appropriate and necessary officials and agencies, or to such individuals Bar Counsel deems necessary to contact in order to properly and completely investigate complaints, were omitted in Rule 18 as then adopted. That necessary language is now promulgated within Rule 18(g)(h)(j), as amended.

Reporter's Notes - June 2015

Rule 18(a) is partially based on Model Rule 16(B), but the committee chose to adopt a structure more similar to former Maine Bar Rule 7.3(k)(2) to

confirm the broad confidentiality of grievance filings before formal charges have been approved and filed.

Rule 18(b) is derived from Model Rule 16(C) and denotes that the filing of charges is point at which related filings are public. It is analogous to former Maine Bar Rule 7.1(e) and Regulation 29.

Rule 18(c) is more similar to former Maine Bar Rule 7.3(e) and Board Regulation #29 than to related Model Rule 18(C). The committee chose to use language in Rule 18(c) that retains the former Maine Bar Rules' provision that matters remain confidential until the charging pleading has been formally filed.

Rule 18(d) is similar to Model Rule 16(E) and is equivalent to former Maine Bar Rule 7.1(e)(2)(B) allowing for the tribunal to issue a protective order where good cause is shown for a matter to be kept confidential. The committee elected to use the more modified script of the former Maine Bar Rules than that of Model Rule 16(E).

Rule 18(e) is a modification of Model Rule 16(F) with the committee choosing language more similar to portions of former Maine Bar Rule 7.3(k) for the allowance of limited exceptions to the confidentiality of the initial investigation of grievance complaints.

Rule 18(f) has no direct Model Rule equivalent and is based upon the committee's adoption of the confidentiality exceptions contained in former Maine Bar Rule 7.3(k)(3).

Rule 18(g) has no Model Rule equivalent and is a major rewrite of the existing expungement requirements of former Maine Bar Rule 5(d). The committee found that the Board of Overseers' retention—normally in digital format—was the manner in which matters should be handled instead of the current practice of file and record destruction after a set date, depending on the matter. The committee found no appropriate basis to destroy records that may later be needed to answer or confirm subsequent related inquiries or filings.

Rule 18(h) is similar to Model Rule 16(J) and has no equivalent in the former Maine Bar Rules.

RULE 19. DISSEMINATION OF DISCIPLINARY INFORMATION

(a) Public Notice.

(1) The Board Clerk shall issue, electronically or otherwise, a news release to general media outlets throughout Maine to effect the notice of disciplinary disbarment, suspension, probation, or reinstatement decisions and orders.

(2) The Board Clerk shall publish hearing decisions and orders issued by the Court, the Single Justice, and the Grievance Commission on the Board's website.

(b) Notice to Discipline Authorities and Other Entities. The Board Clerk shall transmit, electronically or otherwise, notice of all public disciplinary and non-disciplinary sanctions, reinstatement decisions and orders, and surrenders of license to members of the Board and Grievance Commission, and to members of the following:

- (1) all State, Federal, and Tribal Courts in Maine;
- (2) the attorney disciplinary authority in any other jurisdiction known to the Board in which the attorney is licensed to practice;
- (3) the Maine State Bar Association;
- (4) the American Bar Association's National Lawyer Regulatory Data Bank; and
- (5) other such organization as determined by the Board.

Advisory Note – July 2018

Rule 19(b) is amended to clarify that all public non-disciplinary sanctions, i.e. admonitions, are transmitted to discipline authorities and other entities. Such notice has been the longstanding practice of the Board.

Reporter's Notes – June 2015

Rule 19(a) is based on Model Rule 17. Rule 19(a) is new and incorporates functions of the new Board Clerk. Although covered by Board Regulation #56, there was previously no Maine Bar Rule requiring the Board to provide a news release to general media outlets throughout Maine.

Rule 19(b) is based on Model Rule 17 but provides for certain notice functions to be performed by the Board Clerk instead of Bar Counsel. Current Maine procedure on this function was contained in former Maine Bar Rule 7.3(i)(1)(E) and (2)(D).

RULE 20. FAILURE TO ANSWER/FAILURE TO APPEAR.

(a) Failure to Answer. Failure to answer charges filed shall constitute an admission by the respondent of the factual allegations and the misconduct alleged in the formal charges.

(b) Failure to Appear. If the respondent fails, without good cause, to appear at a disciplinary proceeding, the respondent shall be deemed to have admitted the factual and misconduct allegations that were to be the subject of such appearance, and/or to have waived objection to any motion or recommendations to be considered at such appearance. The Grievance Commission panel or Board may not, absent good cause, continue or delay proceedings due to the respondent's failure to appear.

Reporter's Notes – June 2015

Rule 20(a) corresponds to Model Rule 33(A), and by adding language concerning an adoptive admission of the alleged misconduct by a respondent's failure to answer charges, it is an adoption of former Maine Bar Rule 7.1(e)(1).

Rule 20(b) is based on Model Rule 33(B) and is not specifically covered in former Maine Bar Rule 7.1(e)(1). The committee determined that a respondent's failure to appear in a disciplinary proceeding was a serious problem that should be addressed by the rules.

RULE 21. SANCTIONS

(a) Grounds for Discipline. It shall be a ground for discipline for a lawyer to:

(1) violate or attempt to violate these Rules, the Maine Rules of Professional Conduct, or any other rules of this jurisdiction regarding professional conduct of lawyers;

(2) engage in conduct violating applicable rules of professional conduct of another jurisdiction;

(3) willfully violate a valid order of the Court, a Single Justice, the Board, or a Grievance Commission panel imposing discipline; willfully fail to comply with a subpoena validly issued under these Rules; or knowingly fail to respond to a lawful demand from a disciplinary authority, except that this rule does not require disclosure of information otherwise protected by applicable rules relating to confidentiality.

(b) Types of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

(1) *Admonition*, a public non-disciplinary sanction, may be imposed by the Court, a Single Justice, or a Grievance Commission panel after hearing pursuant to Rule 13(e) and (g). Admonitions are to be imposed only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer.

(2) *Disbarment*, a public disciplinary sanction, may be imposed only by the Court or a Single Justice pursuant to Rule 13(f) and (g).

(3) *Dismissal with a warning*, a private non-disciplinary sanction, may be imposed by a Grievance Commission panel after a preliminary review pursuant to Rule 13(d). Dismissals with a warning are to be imposed only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer.

(4) *Probation*, a public disciplinary sanction, may be imposed by a Single Justice, the Court, or a Grievance Commission panel pursuant to Rule 13(e) or (g). Probation durations shall be for a period not in excess of two years; provided, however, that probation may be renewed for an additional two-year period by consent or after a hearing to determine if there is a continued need for supervision. The conditions of probation shall be stated in writing. Probation shall be used only in cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised. Probation shall be terminated upon the filing of an affidavit by respondent showing compliance with the conditions and an affidavit by the probation monitor stating that probation is no longer necessary and summarizing the basis for that statement. A Single Justice or the Court may impose other limitations on the nature or extent of the respondent's future practice.

(5) *Reprimand*, a public disciplinary sanction, may be imposed by a Single Justice, the Court, or a Grievance Commission panel pursuant to Rule 13(e) or (g).

(6) *Suspension*, a public disciplinary sanction, may be imposed only by a Single Justice or the Court pursuant to Rule 13(g). Suspension durations shall be for an appropriate fixed period of time not in excess of three years.

Sanctions issued under this rule shall be provided to tribunals in any subsequent proceedings in which the respondent has been found to have committed misconduct as evidence of prior misconduct bearing upon the issue of the proper sanction to be imposed in the subsequent proceeding.

(c) Factors to be Considered in Imposing Sanctions. In imposing a sanction after a finding of lawyer misconduct, the Single Justice, the Court, or the Grievance Commission panel shall consider the following factors, as enumerated in the ABA Standards for Imposing Lawyer Sanctions:

- (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
- (2) whether the lawyer acted intentionally, knowingly, or negligently;
- (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and

(4) the existence of any aggravating or mitigating factors.

(d) Public Nature of Sanctions. Disposition of lawyer discipline shall be public in cases before a Single Justice, the Court, or a Grievance Commission panel. The Single Justice, the Court, or the Grievance Commission panel shall issue a written opinion setting forth its justification for imposing the sanction in that particular case.

Reporter's Notes – June 2015

Rule 21(a) is based on Model Rule 9(A) and former Maine Bar Rule 2(c). Maine Rules of Professional Conduct 8.1(b) and 8.4(a) also contain similar provisions. The committee added language to Rule 21(a) such that a lawyer's violation of an order of the Board or Grievance Commission is prohibited. Model Rule 9(A) limits such conduct to orders of the Court.

Rule 21(b) is partially based on Model Rule 10(A) and lists the potential grounds of discipline. The Rule adopts an additional sanction option—dismissal with a warning—from former Maine Bar Rule 7.1(d)(4) and (e)(3)(B). Rule 21(b)(4) incorporates the sanction option of probation from Model Rule 10(A)(3), a choice not available under the former Maine Bar Rules. The committee concluded that increasing the tools available to Bar Counsel, the Grievance Commission, and the Court will allow for those entities to better tailor a sanction to an attorney's misconduct. The committee adopted the language of both Model Rule 10(A)(1)(2) and former Maine Bar Rule 7.2(b)(5) such that the serious sanctions of suspension and disbarment may be imposed only by the Court.

Rule 21(c) is based on former Maine Bar Rule 7.1(e)(3)(C) but also incorporates language from Model Rule 10(C) that specifically references the *ABA's Standards for Imposing Lawyer Sanctions*.

Rule 21(d) specifically follows the script from Model Rule 10(D) as to the public nature of all disciplinary decisions with its equivalent section being found in former Maine Bar Rules 7.1(e)(2)(B) and (4), and 7.3(k)(1).

RULE 22. REIMBURSEMENT OF COSTS

(a) Costs. Upon order of a Single Justice, the Court, or a Grievance Commission panel, or upon stipulation, the following costs may be imposed on the respondent:

(1) assessment of the costs of the proceedings, including, but not limited to, the costs of investigations, service of process, witness fees, and court reporter services, in any case where discipline is imposed; and

(2) disgorgement of all or part of the lawyer's or law firm's fee, and reimbursement to the Lawyers' Fund for Client Protection.

(b) Failure to Pay. Any lawyer who fails to pay costs and expenses when ordered to do so or who fails to comply with the terms of an agreed upon periodic payment plan may be served pursuant to Rule 15 with a notice of delinquency and imminent suspension from the practice of law. Any attorney who fails to comply with this notice within 30 days of service shall be administratively suspended by the Board. The Board shall provide notice of any administrative suspensions to the suspended attorney in accordance with the requirements of Rule 15. This notice shall not be effective until 30 days after the date of mailing. A lawyer suspended pursuant to this rule shall comply with the notice requirements in Rule 30. Upon receipt of all outstanding costs and expenses, the suspension may be cancelled by the Board.

(c) Waiver. In any case in which costs and expenses are sought pursuant to this rule, the assessment of any or all such costs and expenses may be waived by the Board or the Court when it serves the interest of justice to do so.

Reporter's Notes - June 2015

Rule 22(a), which provides for the reimbursement of costs by the respondent upon order of the Court or a Grievance Commission panel, is based on Model Rule 10(A)(6)(7). It is in accord with former Maine Bar Rule 7.2(b)(8) concerning reimbursements ordered by the Court, but Rule 22(a) now adds such authority to the Grievance Commission which is absent from the former Maine Bar Rules. Costs do not include Bar Counsel legal fees.

Rule 22(b) has no Model Rule equivalent and finds its closest equivalent in former Maine Bar Rule 7.3(i)(1)(F) concerning the consequences for a lawyer's failure to pay costs and expenses as ordered by the tribunal. Rule 22(b) allows suspension to be ordered for such misconduct.

Rule 22(c) has no specific Model Rule or former Maine Bar Rules equivalent. It allows the Board or the Court to waive the lawyer's reimbursement of costs and expenses. The committee felt such a waiver should be allowed for the tribunal to so find and order in specific circumstances where good cause is shown.

RULE 23. LAWYERS FOUND GUILTY OF A CRIME

(a) Notification. A Maine lawyer found guilty of any crime shall, within 30 days after the judgment, transmit a certified copy of the judgment of conviction to counsel for the lawyer disciplinary agency of every jurisdiction in which the lawyer is admitted to practice. The lawyer shall also submit a certified copy of the judgment of conviction with registration materials to the professional licensing agency of every jurisdiction in which the lawyer seeks admission to practice, following entry of the judgment.

(b) Determination of "Serious Crime." Upon being advised that a lawyer subject to the disciplinary jurisdiction of the Court has been found guilty of any crime, Bar Counsel shall determine whether the crime constitutes a "serious crime" warranting immediate interim suspension. If the crime is a "serious crime," Bar Counsel may prepare an order for interim suspension and forward it to the Court and the respondent with proof of the finding of guilt. Bar Counsel shall in addition file formal charges against the respondent predicated upon the finding of guilt. On or before the date established for the entry of the order of interim suspension, the lawyer may assert any jurisdictional deficiency that establishes that the suspension may not properly be ordered, such as that the crime did not constitute a "serious crime" or that the lawyer is not the individual found guilty. If the crime is not a "serious crime," Bar Counsel shall process the matter in the same manner as any other information coming to the attention of the Board.

(c) Definition of "Serious Crime." A "serious crime" is any felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law

definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a “serious crime.”

(d) Immediate Interim Suspension. The Court has exclusive power to place a lawyer on interim suspension.

(1) *Imposition.* The Court may place a lawyer on interim suspension immediately upon proof that the lawyer has been found guilty of a serious crime, regardless of the pendency of any appeal. In the interest of justice, the Court may elect not to impose an interim suspension upon a showing of extraordinary circumstances, after affording Bar Counsel notice and an opportunity to be heard.

(2) *Termination.* The Court has exclusive power to terminate an interim suspension. In the interest of justice, the Court may terminate an interim suspension at any time upon a showing of extraordinary circumstances, after affording Bar Counsel notice and an opportunity to be heard.

(e) Conviction as Conclusive Evidence. For purposes of a hearing on formal charges filed as a result of a finding of guilt, a certified copy of a conviction constitutes conclusive evidence that the lawyer committed the crime, and the sole issue in any such hearing shall be the nature and extent of the discipline to be imposed.

(f) Automatic Reinstatement from Interim Suspension upon Reversal of Finding of Guilt or Conviction. If a lawyer suspended solely under the provisions of Rule 23(d) demonstrates that the underlying finding of guilt or conviction has been reversed or vacated, the order for interim suspension shall be vacated and the lawyer placed on active status. The vacating of the interim suspension will not automatically terminate any formal proceeding then pending against the lawyer, the disposition of which shall be determined by the Grievance Commission panel and the Board on the basis of the available evidence other than the finding of guilt or conviction.

(g) Notice to Clients and Others of Interim Suspension. An interim suspension under this rule shall constitute a suspension of the lawyer for the purpose of Rule 31.

Reporter's Notes – June 2015

Rule 23(a) is similar to Model Rule 19(A) but retains the language of former Maine Bar Rule 7.3(d)(6) requiring the lawyer, not the court clerk, to properly notify Bar Counsel of that lawyer's conviction of any crime. Rule 23(a) includes the concept of Model Rule 19(A) requiring the lawyer to also so notify the lawyer disciplinary agency of every state in which the lawyer is admitted, but uses the term "jurisdiction" so that the District of Columbia, Territories of the United States, and foreign countries must also be notified of the conviction. Rule 23(a) also adds new language requiring the lawyer to inform the professional licensing agency in every jurisdiction where the lawyer seeks admission to practice. Former Maine Bar Rule 7.3(d)(6) had no such requirements.

Rule 23(b) is similar to Model Rule 19(B) and its partial equivalent is former Maine Bar Rule 7.3(d). Rule 23(b) requires certain interim suspension action by Bar Counsel concerning a lawyer's conviction of a "serious crime," a term not used in former Maine Bar Rule 7.3(d)(1), refers to such action for a lawyer's conviction of a crime that "demonstrates unfitness to practice law."

Rule 23(c) is similar to Model Rule 19(C) and the committee determined that while analogous former Maine Bar Rule 7.3(d) is somewhat more expansive than the Model Rule, it ultimately concluded the Model Rules' distinction between a serious crime and a non-serious crime is worthwhile. However, the committee was unable to reach consensus as to the definition of serious crime. As a result, two competing definitions—a broader and a narrower one—were submitted to the Court for approval. The Court adopted the broader definition in order to provide a greater level of immediate protection to the public.

Rule 23(d) is identical to Model Rule 19(D). Unlike the equivalent language from former Maine Bar Rule 7.3(d), Rule 23(d) provides that the Court shall immediately issue an interim suspension of the lawyer upon Bar Counsel's completion of the certification of the lawyer's conviction of a "serious crime."

Rule 23(e) is identical to Model Rule 19(E), with similar language contained in former Maine Bar Rule 7.3(d)(2).

Rule 23(f) is identical to Model Rule 19(F) and has no significant variation from former Maine Bar Rule 7.3(d)(5).

Rule 23(g) is identical to Model Rule 19(G). The committee felt that its specific designation of the notification requirements of Rule 31 being required for the lawyer to undertake is an improvement on the silence of former Maine Bar Rule 7.3(i) on that issue.

RULE 24. INTERIM SUSPENSION

(a) Transmittal of Evidence. Upon receipt of evidence demonstrating that a lawyer subject to the disciplinary jurisdiction of the Court (1) has committed a violation of the Maine Rules of Professional Conduct or is incapacitated; and (2) by reason of that violation or incapacity threatens imminent injury to a client, to the public, or to the administration of justice, Bar Counsel, with the approval of the Board, shall

(1) transmit the evidence to the Court together with a petition and proposed order for interim suspension;

(2) certify to the Court in accordance with M.R. Civ. P. 65(a) that Bar Counsel has contemporaneously made a reasonable attempt to provide the lawyer with notice pursuant to Rule 15 that a proposed order for immediate interim suspension has been transmitted to the Court; and

In exigent circumstances, Bar Counsel may apply for the Interim Suspension on an *ex parte* basis.

(b) Immediate Interim Suspension. Upon examination of the evidence transmitted to the Court by Bar Counsel and of rebuttal evidence, if any, which the lawyer has transmitted to the Court prior to the Court's ruling, the Court may enter an order immediately suspending the lawyer, pending final disposition of a disciplinary proceeding predicated upon the conduct causing the harm, or may order such other action as it deems appropriate. In the event the order is entered, the Court may appoint a receiver pursuant to Rule 32 to protect clients' interests.

(c) Notice to Clients. A lawyer suspended pursuant to Rule 24(b) shall comply with the notice requirements in Rule 31.

(d) Motion for Dissolution of Interim Suspension. On two days' notice to Bar Counsel, a lawyer suspended pursuant to Rule 24(b) may appear and move for dissolution or modification of the order of suspension, and in that

event the motion shall be heard and determined as expeditiously as the ends of justice require.

Reporter's Notes – June 2015

Rule 24(a) is identical to Model Rule 20(A) and allows Bar Counsel to seek Board approval to request the Court's immediate suspension of attorneys that threaten imminent injury to others. It is analogous to former Maine Bar Rule 7.2(c).

Rule 24(b) is identical to Model Rule 20(B). It improves on former Maine Bar Rule 7.2(c) by specifically referring to the Court's authority to appoint a receiver under Rule 32 to address clients' files and related issues.

Rule 24(c) is identical to Model Rule 20(B) and is an improvement of former Maine Bar Rule 7.2(c) by making it clear that the notification requirements of Rule 31 are applicable.

Rule 24(d) is identical to Model Rule 20(D) and has no direct equivalent in the former Maine Bar Rules.

RULE 25. DISCIPLINE BY CONSENT AND SURRENDER OF LICENSE

(a) Approval of Tendered Admission. A lawyer against whom formal charges have been filed may tender to Bar Counsel a conditional admission to the petition or to a particular count thereof in exchange for a stated sanction. The Grievance Commission panel may approve or reject the tendered conditional admission, subject to final approval or rejection by a Single Justice or the Court if the stated form of discipline includes disbarment, suspension, or surrender. If a Single Justice, the Court, or the Grievance Commission panel reject the stated sanction, the admission and any affidavit(s) submitted pursuant to Rule 25(b) and (d) cannot be used against the respondent in any subsequent proceedings.

(b) Affidavit of Consent. A lawyer who consents to a stated sanction shall present to the Grievance Commission panel an affidavit stating that the lawyer consents to the sanction and that

(1) the consent is freely and voluntarily rendered, the lawyer is not being subjected to coercion or duress, and the lawyer is fully aware of the implications of submitting the consent;

(2) the lawyer is aware that there is presently pending an investigation into, or proceeding involving, allegations that there exist grounds for sanction, the nature of which shall be specifically set forth;

(3) the lawyer acknowledges that the material facts so alleged are true or could be proven; and

(4) the lawyer acknowledges that sufficient evidence exists to support a finding of misconduct and the imposition of the stated sanction.

(c) Order of Discipline. If the sanction by consent is an admonition, probation, or reprimand, the Board Clerk shall enter the order. If the sanction is disbarment or suspension, review for approval of the sanction may be sought as permitted by these Rules. In all other instances in which any proposed sanction has been approved, the Board Clerk shall file the affidavit with the Court, and upon approval the Court shall enter the order sanctioning the lawyer on consent.

(d) Surrender of License.

(1) An attorney who is the subject of an investigation under these Rules may submit to the Board a letter of surrender, supported by an affidavit showing that

(A) the surrender is freely and voluntarily rendered, the attorney is not being subjected to coercion or duress, and the attorney is fully aware of the implications of surrender;

(B) the attorney is aware that there is presently pending an investigation into allegations of misconduct, the nature of which allegations the attorney shall specifically set forth; and

(C) the attorney acknowledges that the material facts, or specified material portions of them, underlying the allegations are true or could be proven.

(2) Upon receipt of such surrender, the Board shall file it, together with its recommendation thereon, with the Court, which after hearing shall enter such order as it deems appropriate.

(3) Any order accepting such surrender shall be a matter of public record unless otherwise ordered by the Court; but the supporting affidavit required under the provisions of subsection (1) shall be impounded, whether or not such surrender is accepted, and shall not be made available for use in any other proceeding unless otherwise ordered by the Court.

(4) An attorney who has surrendered his or her license under this rule may be reinstated only upon petition filed in the Court after at least 5 years from the effective date of the surrender, unless otherwise ordered by the Court.

Advisory Notes – June 2017

Rule 13(e)(7)(D) provides for the Grievance Commission's imposition of a sanction by agreement of the parties, which may include either disciplinary or non-disciplinary sanctions. Rule 21 provides for the imposition of both disciplinary sanctions as well as a non-disciplinary sanction (admonition). By making reference only to "discipline" by consent, the former language contained in Rule 25 made no provision for the acceptance and imposition of an agreed upon non-disciplinary sanction (an admonition) by the Grievance Commission. The revised language of Rule 13(e)(7)(D) and Rule 25 makes it clear that the provisions of Rule 25 apply to both disciplinary and non-disciplinary sanctions that the Grievance Commission may impose by agreement of the parties.

Reporter's Notes – June 2015

Rule 25(a) is similar to Model Rule 21(A). However, the committee elected to retain the jurisdictional approach of current practice and former Maine Bar Rule 7.1(e)(2)(E). Thus, a Grievance Commission panel, not the Board, has the authority to approve or reject the lawyer's tendered admission to formal charges. Rule 25(a) also adopts a major change to the current authority of a Grievance Commission panel in such admitted matters. The committee felt panels should have the authority to accept all such admissions of misconduct including, subject to Court approval, matters including disbarment, suspension, or surrender of license.

Rule 25(b) is identical to Model Rule 21(D) and has no direct former Maine Bar Rule equivalent.

Rule 25(c) is a slight variant of Model Rule 21(E) and although similar to existing practice concerning reprimand matters, it has no direct equivalent in the former Maine Bar Rules. Under Rule 25(c), the Board Clerk shall enter all reprimand orders.

The surrender of license provision in Rule 25(d) is not based upon any Model Rule. It is substantively similar to former Maine Bar Rule 7.3(g) (resignation). This rule changes the current language (“resignation”) to language the committee felt better reflects the circumstances.

RULE 26. RECIPROCAL DISCIPLINE

(a) Notification. Upon being disciplined or the equivalent in another jurisdiction, a lawyer admitted to practice in Maine shall promptly inform Bar Counsel of the action.

(b) Certified Order. Upon notification from any source that a lawyer within the jurisdiction of the Board has been disciplined or its equivalent in another jurisdiction, Bar Counsel shall obtain a certified copy of the order and file it with the Executive Clerk of the Law Court.

(c) Notice Served Upon Respondent. Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in Maine has been disciplined or its equivalent in another jurisdiction, the Chief Justice of the Court shall designate a Single Justice forthwith and issue a notice directed to the lawyer and to Bar Counsel containing

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

(2) an order directing that the lawyer or Bar Counsel inform the Court, within 30 days from service of the notice, of any claim by the lawyer or Bar Counsel predicated upon the grounds set forth in Rule 26(e), that the imposition of a substantially identical order in Maine would be unwarranted and the reasons for that claim.

(d) Effect of Stay in Other Jurisdiction. In the event the order in the other jurisdiction has been stayed there, any reciprocal order in Maine shall be deferred until the stay expires.

(e) Discipline to be Imposed. Upon the expiration of 30 days from service of the notice pursuant to the provisions of Rule 26(c), the Court shall impose a substantially identical order unless Bar Counsel or the lawyer demonstrates, or the Court finds that it clearly appears upon the face of the record from which the order is predicated, that

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

(2) there was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject; or

(3) the discipline imposed would result in grave injustice or be offensive to Maine public policy; or

(4) the reason for the original order no longer exists.

If the Court determines that any of those elements exists, it may enter such other order as it deems appropriate. The burden is on the party seeking different discipline in Maine to demonstrate that the imposition of the same discipline is not appropriate.

(f) Conclusiveness of Adjudication in Other Jurisdictions. In all other aspects, a final adjudication in another jurisdiction that a lawyer, whether or not admitted in that jurisdiction, has been guilty of misconduct or determined to be incapacitated shall establish conclusively the misconduct or the incapacity for purposes of a disciplinary proceeding in Maine.

Reporter's Notes – June 2015

Rule 26(a) is a modification of Model Rule 22(A) and is analogous to former Maine Bar Rule 7.3(h). Rule 26(A) requires the lawyer disciplined elsewhere to so inform Bar Counsel, but the similar duty for disability status changes included in Model Rule 22(A) was deleted by the committee.

Rule 26(b) is based upon a portion of Model Rule 22(A) and has no similar specific provision in former Maine Bar Rule 7.3(h).

Rule 26(c) is identical to Model Rule 22(B) and contains no significant change from former Maine Bar Rule 7.3(h)(1).

Rule 26(d) is identical to Model Rule 22(C). Its requirement for a mandatory deferral to occur if a stay is issued in the initial issuing jurisdiction is a variance from the discretion allowed in former Maine Bar Rule 7.3(h)(2).

Rule 26(e) is identical to Model Rule 22(D) concerning the discipline to be imposed. It is similar to former Maine Bar Rule 7.3(h)(3) but clarifies the process for reciprocal discipline, burden of proof and time frames to be followed by the lawyer in attempting to demonstrate that the imposition of reciprocal discipline is inappropriate.

Rule 26(f) is substantively similar to Model Rule 22, and is in accord with former Maine Bar Rule 7.3(h).

RULE 27. PROCEEDINGS IN WHICH A LAWYER IS DETERMINED INCAPACITATED

(a) Incapacity. In any instance where an attorney has been determined to be incapacitated, including any proceeding in which (1) the attorney has been judicially declared incompetent; (2) the attorney has been acquitted of a crime by reason of mental illness; (3) the attorney has been committed to a mental health hospital after a judicial hearing; (4) the attorney has admitted herself or himself to a mental health hospital for acute care; (5) the attorney has admitted herself or himself to a substance abuse facility for extended treatment and no proxy has been appointed to protect client interests; or (6) the attorney has been placed by court order under guardianship or conservatorship, the Grievance Commission, on reference from any court or on its own motion, may, in its discretion, give the attorney the opportunity to surrender or to agree to a suspension. A Single Justice, upon Bar Counsel's petition or upon its own motion, may enter an order to show cause why the attorney should not be suspended from the practice of law. A copy of such order shall be served upon the attorney, the attorney's personal representative, if any, and the director of the mental health hospital to which the attorney is committed, if any, in such manner as the Single Justice may direct.

(b) Inability to Properly Defend. If during a disciplinary proceeding the respondent claims to be incapacitated, and the respondent's incapacity makes it impossible to present an adequate defense, the Single Justice may immediately suspend the lawyer pending determination of the incapacity.

(1) If the Single Justice determines the claim of inability to defend is valid, the disciplinary proceeding shall be deferred and the respondent retained on interim suspension until the Court subsequently considers a petition to terminate the suspension. If the Single Justice determines the petition shall be granted, the Single Justice shall also determine the disposition of the interrupted disciplinary proceedings.

(2) If the Single Justice determines the claim of incapacity to defend to be invalid, the disciplinary proceeding shall resume and the respondent may immediately be placed on interim suspension pending the final disposition of the matter.

(c) Proceedings Where an Attorney Is Alleged to Be Incapacitated.

(1) Bar Counsel may, after investigation, seek a determination by a Grievance Commission panel, after hearing, that an attorney is incapacitated from continuing practice. Upon so finding, the Grievance Commission panel shall promptly petition the Court to determine whether the attorney is so incapacitated. The Chief Justice shall designate a Single Justice who, after due notice and hearing, shall issue any orders necessary or appropriate to protect the public interest, including an order suspending the attorney.

(2) The Chair of the Board, or in the absence of the Chair, the Vice Chair, upon an application by Bar Counsel alleging such incapacity of an attorney together with an allegation that the continued practice of such attorney poses a substantial threat of irreparable harm to the public, may direct that such petition seeking the suspension of the attorney be filed directly with the Court. The Chief Justice shall designate a Single Justice who shall order such action as it deems appropriate, including an expedited hearing. The Single Justice may enter an interim order suspending the attorney pending such expedited hearing. With notice to Bar Counsel, the attorney may move for dissolution or modification of the interim order of suspension.

(d) Reinstatement.

(1) *Generally.* No respondent suspended hereunder may resume active status except by order of the Court.

(2) *Petition.* Any respondent suspended hereunder shall be entitled to petition for transfer to active status once a year, or at whatever shorter intervals the Court may direct in the order of suspension or any modifications thereof.

(3) *Examination.* Upon the filing of a petition for transfer to active status, the Court may take or direct whatever action it deems necessary or proper, including a direction for an examination of the respondent by qualified medical experts designated by the Court. In its discretion, the Court may direct that the expense of the examination be paid by the respondent.

(4) *Waiver of Doctor-Patient Privilege.* With the filing of a petition for reinstatement to active status, the respondent shall disclose the name of each psychiatrist, psychologist (or other mental health professional), physician, and hospital or other institution by whom or in which the respondent has been examined or treated since the suspension. The respondent shall furnish to the Court written consent to the release of information and records relating to the incapacity if requested by the Court or court-appointed medical experts.

(5) *Learning in Law; Bar Examination.* The Court may also direct that the respondent establish proof of competence and learning in law.

(A) The Court may, before granting the petition, require that by a specific date the petitioner take and pass the modified bar examination (or its then equivalent) as administered by the Maine Board of Bar Examiners.

(B) The Court may require proof that the petitioner has met the CLE requirements of Rule 5 for each year the attorney has been inactive, withdrawn or prohibited from the practice of law in Maine, but need not complete more than 24 credit hours of approved continuing legal education for that entire period of absence from practice, provided that:

- (i) no more than one half of the credits are earned through self-study;
- (ii) at least two credit hours are primarily concerned with the issues of ethics or professional responsibility; and
- (iii) at least two credit hours are

primarily concerned with issues of recognition and avoidance of harassment and discriminatory communication or conduct related to the practice of law.

(6) *Granting Petition for Transfer to Active Status.* The Court shall grant the petition for transfer to active status upon a showing by clear and convincing evidence that the incapacity has been removed.

(7) *Judicial Declaration of Competence.* If a respondent suspended on the basis of a determination of incapacity has been judicially declared to be competent, the Court may dispense with further evidence that the lawyer's incapacity has been removed and may immediately direct the lawyer's reinstatement to active status upon terms as are deemed proper and advisable.

Advisory Note – May 2019

This amendment removes unnecessary subdivision references to Rule 5, increases the maximum number of CLE credits required for reinstatement from 22 to 24, and provides guidance to members of the bar with respect to the two additional credits. The amendment also eliminates the reference to in-house courses, as revised Maine Bar Rule 5 no longer contains in-house self-study language.

Reporter's Notes – June 2015

Rule 27(a) is based on Model Rule 23(A) but incorporates the more substantive and detailed language and procedures of former Maine Bar Rule 7.3(e)(1). While the Model Rules contemplate that some attorneys will be transferred to "disability inactive status," the committee concluded that it was unnecessary to create this new designation in Maine.

Rule 27(b) closely follows Model Rule 23(B) and former Maine Bar Rule 7.3(e)(3) concerning the lawyer's claim of incapacity issues causing an inability to defend a disciplinary matter.

Rule 27(c) is a significant variant from Model Rule 23(C) concerning a determination of the lawyer's capacity. The committee elected to include and continue the existing practice as contained in former Maine Bar Rule 7.3(e)(2)(A) and (B).

Rule 27(d) is partially based on Model Rule 23(E) but does not contain that section's "Disability Inactive Status" title heading. The committee added specific "learning in law" requirements in Rule 27(d)(5)(A) and (B) that are not included in Model Rule 23(E)(5). Rule 27(d) is generally in accord with former Maine Bar Rule 7.3(e)(4).

RULE 28. REINSTATEMENT FOLLOWING A DISCIPLINARY SUSPENSION OF SIX MONTHS OR LESS

A lawyer who has been suspended for six months or less pursuant to disciplinary proceedings may be reinstated at the end of the period of suspension by filing with the Court and serving upon the Board an affidavit stating that he or she has fully complied with the requirements of the suspension order and has paid any required fees and costs.

Reporter's Notes – June 2015

Rule 28 is based on Model Rule 24. The revised rule is substantially identical to former Maine Bar Rule 7.3(j)(2). The current rule provides if an attorney has been suspended for less than six months no petition need be filed so long as the attorney complies with registration requirements. The revised rule continues the automatic reinstatement but adds the requirement of an affidavit confirming that any requirements of the suspension have been met as well as the payment of fees and costs. The committee adopted the Model Rule language in its entirety.

RULE 29. REINSTATEMENT AFTER DISCIPLINARY SUSPENSION FOR MORE THAN SIX MONTHS

(a) Generally. A lawyer suspended for more than six months or a disbarred lawyer may be reinstated only upon order of the Court. No suspended lawyer may petition for reinstatement until six months before the period of suspension is to expire. No disbarred lawyer may petition for reinstatement until five years after the effective date of disbarment unless otherwise provided by a Single Justice or the Court in its order of disbarment. A lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for reinstatement at the expiration of five years from the time of the effective date of interim suspension unless otherwise provided by a Single Justice or the Court in its order of disbarment.

(b) Petition. A petition for reinstatement must be under oath or affirmation under penalty of perjury and shall specify with particularity the manner in which the petitioner meets each of the criteria specified in Rule 29(e) or, if not, why there is good and sufficient reason for reinstatement.

(c) Service of Petition. The petition shall be filed with the Executive Clerk of the Court and also with Bar Counsel accompanied by a filing fee made payable to the Board of Overseers of the Bar and a completed Board Reinstatement Questionnaire.

(d) Publication of Notice of Petition. Upon a petitioner's filing of a petition for reinstatement, the Board Clerk, shall publish a notice of the petition on the Board's website. The notice shall inform members of the bar and the public about the application for reinstatement, and shall request that any individuals file notice of their opposition or support of the petition with the Board within 60 days. In addition, as appropriate, Bar Counsel may notify the complainant(s) in the disciplinary proceeding that led to the petitioner's suspension or disbarment that the petitioner is applying for reinstatement, and shall inform each complainant that he or she has 60 days to file written opposition to support the petition.

(e) Criteria for Reinstatement. A petitioner may be reinstated only if the petitioner meets each of the following criteria:

(1) the petitioner has fully complied with the terms and conditions of all prior disciplinary orders issued in Maine or in any other jurisdiction except to the extent they are abated under Rule 30, unless such suspension, disbarment, or discipline is solely the result of reciprocal action resulting from disciplinary action taken by Maine authorities;

(2) the petitioner has not engaged or attempted to engage in the unauthorized practice of law during the period of suspension or disbarment;

(3) if the petitioner was suffering under a physical or mental disability or infirmity at the time of suspension or disbarment, including alcohol or other drug abuse, the disability or infirmity has been removed. Where alcohol or other drug abuse was a causative factor in the petitioner's misconduct, the petitioner shall not be reinstated unless:

(A) the petitioner has pursued appropriate rehabilitative treatment;

(B) the petitioner has abstained from the use of alcohol or other drugs for at least one year; and

(C) the petitioner is likely to continue to abstain from alcohol or other drugs;

(4) the petitioner recognizes the wrongfulness and seriousness of the misconduct for which the petitioner was suspended or disbarred;

(5) the petitioner has not engaged in any other professional misconduct since suspension or disbarment;

(6) notwithstanding the conduct for which the petitioner was disciplined, the petitioner has the requisite honesty and integrity to practice law;

(7) the petitioner has met the CLE requirements of Rule 5 for each year the attorney has been suspended or disbarred, but need not complete more than 24 hours of approved credit hours for that entire period of absence from practice, provided that (i) no more than one half of the credit hours are earned through self-study; (ii) at least two credit hours are primarily concerned with the issues of ethics or professionalism; and (iii) at least two credit hours are primarily concerned with issues of recognition and avoidance of harassment and discriminatory communication or conduct related to the practice of law; and

(8) In addition to all of the requirements in this provision, the attorney shall comply with Rule 4(a) and (b), and remit to the Board an arrearage registration payment equal to the total registration fee that the attorney would have been obligated to pay the Board under Rule 4(a) and (b) had the attorney remained actively registered to practice in Maine.

(f) Review of Petition. Within 60 days after receiving a petition for reinstatement, Bar Counsel shall either

(1) advise the petitioner, the Grievance Commission Chair, and the Court that Bar Counsel will stipulate to the petitioner's reinstatement, subject to the Court's approval; or

(2) advise the petitioner, the Grievance Commission Chair, and the Court that Bar Counsel opposes reinstatement and requests a hearing.

(g) Hearing; Report. Upon receipt of Bar Counsel's request for a hearing, the Board Clerk shall promptly refer the matter to a Grievance Commission panel. Within 90 days of the request, the Grievance Commission panel shall conduct a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that he or she has met each of the criteria in Rule 29(e) or, if not, that there is good and sufficient reason why the petitioner should nevertheless be reinstated. The Grievance Commission panel shall file a report with the Board Clerk containing its findings and recommendations. The Board Clerk shall file the report with the Executive Clerk of the Law Court and transmit a copy thereof to Bar Counsel and the petitioner.

(h) Decision as to Reinstatement. The Court shall review the report filed by the Grievance Commission panel or any stipulation agreed to by the petitioner and Bar Counsel. If the petitioner or Bar Counsel objects to the panel's report, either party may file a pleading with the Court within 21 days stating the basis for its objection. The Court shall, with or without hearing issue its decision. (*See* Rule 14(b)(1)-(3)).

If the Court reinstates the petitioner, the Court shall issue a written opinion setting forth the grounds for its decision. If the Court denies reinstatement, the Court shall issue a written opinion setting forth the ground for its decision and shall identify the period after which the petitioner may reapply for reinstatement. Unless ordered otherwise by the Court, no petitioner may reapply for reinstatement within one year following an adverse judgment upon a petition for reinstatement.

(i) Conditions of Reinstatement. The Court may impose conditions on a petitioner's reinstatement. The conditions shall be imposed in cases where the petitioner has met the burden of proof justifying reinstatement, but the Court reasonably believes that further precautions should be taken to protect the public. The Court may impose any conditions that are reasonably related to the grounds for the petitioner's original suspension or disbarment, or to evidence presented at the hearing regarding the petitioner's failure to meet the criteria for reinstatement. Passing the bar examination and the character and fitness examination shall be conditions to reinstatement following disbarment. The conditions may include, but are not limited to any of the following: (1)

limitation upon practice to one area of law or through association with an experienced supervising lawyer; (2) participation in continuing legal education courses; (3) monitoring of the petitioner's practice for compliance with trust account rules, account procedures, or office management procedures; (4) abstention from the use of drugs or alcohol; (5) active participation in an alcohol or drug rehabilitation program; (6) active participation in mental health treatment; or (7) monitoring of the petitioner's compliance with these conditions and any other orders. Should a monitor determine that the reinstated lawyer's compliance with any condition of the reinstatement is unsatisfactory and that there exists a potential for harm to the public, the monitoring lawyer shall notify the Court and, where necessary to protect the public, the reinstated lawyer may be suspended from practice under Rule 21(b).

(j) Reciprocal Reinstatement. Where a Single Justice or the Court has imposed a suspension or disbarment solely on the basis of imposition of discipline in another jurisdiction, and where the petitioner gives notice to the Court that he or she has been reinstated or readmitted in the other jurisdiction, the Court shall determine whether the petitioner should be reinstated. Unless Bar Counsel shows good cause why the petitioner should not be reinstated, the Court shall reinstate a petitioner who has been reinstated or readmitted in the jurisdiction where the misconduct occurred.

Advisory Note – May 2019

This amendment removes unnecessary subdivision references to Rule 5, increases the maximum number of credits required for reinstatement from 22 to 24, and provides guidance to members of the bar with respect to the two additional credits. The amendment also eliminates the reference to in-house courses, as revised Maine Bar Rule 5 no longer contains in-house self-study language.

Reporter's Notes – June 2015

Rule 29(a) adopts the provisions of the Model Rule 25(A) and is substantially in accord with former Maine Bar Rule 7.3(j)(1) to (4). The revised rule does, however, permit suspended attorneys to petition for reinstatement six months prior to the conclusion of the period of suspension.

Rule 29(b) adopts the provisions of the Model Rule 25(B) and is substantially in accord with language contained in former Maine Bar Rule 7.3(j)(5).

Rule 29(c) adopts the provisions of the Model Rule 25(C) and is substantially in accord with language contained in former Maine Bar Rule 7.3(j)(5).

Rule 29(d) adopts, in part, the provisions of Model Rule 25(D). Analogous language may be found in former Maine Bar Rule 7.3(j)(5). The committee rejected the publication notice practice in both the Model Rule and the former Maine Bar Rule and instead opted for posting notice of a petitioner's reinstatement petition on the Board's website.

Rule 29(e) adopts, in part, the provisions of the Model Rule 25(E). Analogous languages may be found in former Maine Bar Rule 7.3(j)(5). The committee rejected the Model Rule requirement that a disbarred attorney must pass the bar examination and the character and fitness examination. The committee also rejected the current Maine practice whereby attorneys must pay a filing fee and a reinstatement. Instead, the reinstatement fee will be included in the filing fee.

Rule 29(f) is analogous to language found in former Maine Bar Rule 7.3(j)(5) and is in accord with Model Rule 25(F). The revised rule, however, calls for Bar Counsel to provide notice of support or opposition to the petitioner's reinstatement application to the Grievance Commission and the Court rather than the Board and the Court.

Rule 29(g) is based on Model Rule 25(G) and is analogous to language found in former Maine Bar Rule 7.3(j)(5).

Rule 29(h) is based in large part on Model Rule 25(H), and similar provisions can be found in former Maine Bar Rule 7.3(j)(6).

Rule 29(i) corresponds to Model Rule (25)(I). While there is no equivalent former Maine Bar Rule, the revised rule is in accord with current Maine practice.

Rule 29(j) adopts Model Rule 25(J) in its entirety. The former Maine Bar Rules contain no equivalent provision. However, the committee concluded that

it would be advantageous to include a specific rule stating the Court's power to reciprocally reinstate attorneys who have been reinstated in another jurisdiction.

RULE 30. ABATEMENT OR MODIFICATION OF CONDITIONS OF DISCIPLINE OR REINSTATEMENT

Where a Single Justice has imposed conditions in an order of discipline or in an order of reinstatement, the lawyer may request of the Single Justice an order of abatement discharging the lawyer from the obligation to comply with the conditions, or an order modifying the conditions. The lawyer may so request either prior to or as part of the lawyer's petition for reinstatement. The Single Justice may grant the request if the lawyer shows by clear and convincing evidence that the lawyer has made a timely, good faith effort to meet the condition(s).

Reporter's Notes – June 2015

Rule 30 adopts Model Rule 26 in its entirety. The rule permits a respondent to ask the Court for an order discharging the lawyer from the obligation to comply with certain discipline conditions. The former Maine Bar Rules contain no equivalent provision, but the committee concluded that it would be advantageous to include a specific rule clarifying the Court's power to abate or modify conditions imposed on attorneys in disciplinary orders and orders for reinstatement or readmission. The committee also felt that the rule was in accord with current Maine practice, and the power to modify or discharge an attorney's discipline obligations is an inherent power of the Court.

RULE 31. NOTICE TO CLIENTS, ADVERSE PARTIES, AND OTHER COUNSEL

(a) Recipients of Notice; Contents. Unless otherwise ordered by a Single Justice, within 30 days after the date of the order imposing discipline, a respondent who has been disbarred, placed on interim suspension, or suspended shall so notify in writing all clients represented in pending matters; any co-counsel in pending matters; and any opposing counsel in pending matters, or in the absence of opposing counsel, the adverse parties, of the order of the Single Justice and that the lawyer is therefore disqualified to act as lawyer after the effective date of the order. The notice to be given to the lawyer(s) for an adverse party, or, in the absence of opposing counsel, the adverse parties, shall state the place of residence of the client of the respondent.

(b) Special Notice. The Court may direct the issuance of notice to such financial institutions or others as may be necessary to protect the interests of clients or other members of the public.

(c) Duty to Maintain Records. The respondent shall keep and maintain records of the steps taken to accomplish the requirements of Rule 31(a) and (b), and shall make those records available to Bar Counsel on request.

(d) Return of Client Property. The respondent shall deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them and any counsel representing them of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property.

(e) Refund of Fees. Within 10 days after entry of the order imposing disbarment or suspension, the respondent shall refund any part of any fees paid in advance that has not been earned.

(f) Withdrawal from Representation. Unless otherwise ordered, in the event the client does not obtain another lawyer before the effective date of the disbarment or suspension, it shall be the responsibility of the respondent to move in the court or agency in which the proceeding is pending for leave to withdraw. The respondent shall in that event file with the court, agency, or tribunal before which the litigation is pending a copy of the notice to opposing counsel or adverse parties.

(g) New Representation Prohibited. Prior to the effective date of the order, if not immediately in effect, the respondent shall not undertake any new legal matters between service of the order and the effective date of the discipline. The respondent shall take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, or similar title.

(h) Affidavit Filed with Bar Counsel. Within 10 days after the effective date of the disbarment or suspension order, the respondent shall file with Bar Counsel an affidavit showing

- (1) compliance with the provisions of the order and with this rule;

(2) all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

(3) residence or other addresses where communications may thereafter be directed.

Reporter's Notes – June 2015

Rule 31(a) is similar to Model Rule 27(A) but the committee felt that such notice was appropriate and normal to occur within 30 days, not 10 days as provided in Model Rule 27(A). Former Maine Bar Rule 7.3(i) contains similar notice requirements.

Rule 31(b) is identical to Model Rule 27(B) and has no equivalent former Maine Bar Rule.

Rule 31(c) is identical to Model Rule 27(C). It has no equivalent former Maine Bar Rule, but similar duties are required under Maine Rules of Professional Conduct 1.15(f) and 1.16(d).

Rule 31(d) is identical to Model Rule 27(D). It has no equivalent former Maine Bar Rule, but Maine Rules of Professional Conduct 1.15(f) and 1.16(d) have similar requirements.

Rule 31(e) is identical to Model Rule 27(E) with no direct equivalent former Maine Bar Rule. However, Maine Rules of Professional Conduct 1.15(f) and 1.16(d) also require the return of unearned fees.

Rule 31(f) is identical to Model Rule 27(F). It has no direct former Maine Bar Rule equivalent but similar duties are required by Maine Rule of Professional Conduct 1.16(d).

Rule 31(g) is very similar to Model Rule 27(G) and has similar requirements as contained in former Maine Bar Rule 7.3(i)(1)(A).

Rule 31(h) is similar to Model Rule 27(H) but provides for the recipient of the lawyer's affidavit to be Bar Counsel, not the Court. It has no exact equivalent in the former Maine Bar Rules.

RULE 32. RECEIVER

(a) Appointment of Receiver. Whenever an attorney is alleged to be incapacitated, or is missing, deceased, disbarred, or subject to an administrative or disciplinary suspension, the Court may appoint a Receiver to manage or conclude the attorney's law practice. The Receiver, who shall be a licensed Maine attorney in good standing, shall be appointed by the Court upon the recommendation of Bar Counsel. Bar Counsel shall consider and may recommend the proxy recommendation on the attorney's annual registration statement under Rule 4(b). A Receiver shall be authorized by Court order to take some or all of the following actions:

(1) secure the professional files, client data, law office mail, office and client property in an appropriate location and notify the board of that location;

(2) create an inventory of the open and closed client files;

(3) give priority attention to client matters that are identified as open, active, and apparently time sensitive, including notifying clients of the need to seek new counsel or to represent themselves. If necessary, the Receiver may seek protection for certain clients by giving notice to tribunals or others concerning the circumstances giving rise to the Receivership, without entering an appearance for the client;

(4) notify all clients that the law practice is being managed by the Receiver or concluding and invite clients to retrieve their client files. Such notice may be by letter, phone, email, newspaper advertisement in a newspaper in general circulation in the county where the law practice was located and/or such other method as will effect notice. Notice to clients with open matters should be made by as direct means as possible;

(5) if necessary, provide notice of appointment to all Courts and relevant state and county agencies;

(6) prudently utilize the operating accounts to effect the management or conclusion of the practice, including the temporary retention of office staff or hiring other personnel as necessary and appropriate;

(7) if necessary, establish a bank account in the Receiver's name in order to protect assets to manage or conclude the practice and/or protect the clients' interests;

(8) prudently utilize the operating accounts and client trust accounts in the appropriate distribution of client funds and property held in trust;

(9) review and audit any IOLTA accounts;

(10) submit to the Court a record of hours worked and disbursements made to allow in some cases for payment of legal fees and expenses;

(11) receive payment of legal fees under the terms negotiated with the Board and approved by the Court;

(12) continue to act as Receiver until discharged by the Court in accordance with Rule 32(c); and

(13) take any and all other appropriate action consistent with the discretion vested in the Receiver by the Court and/or as specifically ordered by the Court.

(b) Receiver's Discharge Plan. Prior to petition for discharge, the Receiver shall formulate for the approval of the Court a plan for the custody, care, appropriate release and ultimate destruction of client files. The plan will identify a file caretaker (who may be the Receiver) who will preserve client confidentiality and maintain and appropriately release the client files to clients subsequent to the discharge of the Receiver. The plan must provide for confidential destruction of all client files and data pursuant to M.R. Prof. Conduct 1.15(f). The destruction date may be earlier if so ordered by the Court. The plan must include the requirement that the file caretaker provide written notice to the Board of Overseers confirming the confidential destruction of files and data immediately after it has occurred.

(c) Term of Receiver. The Receiver shall serve until discharged by the Court. The Receiver may petition the Court for discharge from appointment upon completion of duties or sooner for other good cause. With the petition for discharge the Receiver shall file a report of services rendered. With the approval of the Court, the report or any part thereof may be filed under seal.

Without divulging confidential information, the report should include, if applicable:

- (1) an inventory of files and the status of each file as released or retained;
- (2) the plan for the security and handling of the retained client files;
- (3) an accounting of the law practice operating accounts during the period of Receivership;
- (4) an accounting of the law practice client trust fund accounts during the period of Receivership; and
- (5) any other information deemed by the Receiver or the Court to be necessary and appropriate.

(d) Client Rights. Any Receiver so appointed may not disclose any information contained in any file listed in such inventory without the consent of the client to whom such file relates except as may be necessary to carry out a court order, including any order under this rule. Any Receiver may be engaged by any former client of the deceased, missing, or incapacitated attorney, provided that the Receiver informs any such client in writing that the client is free to choose to employ any attorney, and that the Court's appointment order under section (2) of this rule does not mandate or recommend employment by the client of the Receiver. The Receiver is subject to the Maine Rules of Professional Conduct. However, the client's retention of the Receiver as successor counsel is not a *per se* conflict of interest solely by reason of the Receiver's appointment under this rule.

(e) Liability. The Receiver shall be protected from liability for professional services rendered pursuant to the Order appointing such a Receiver.

(f) Pleadings. The Receiver shall provide copies of all pleadings under this Rule to the Board.

Reporter's Notes – June 2015

Rule 32(a) is a drastic change from Model Rule 28 and is a virtual incorporation of former Maine Bar Rule 7.3(f)(1). Although Model Rule 28 provides for appointment of counsel to protect clients' interests in certain circumstances, the committee felt that former Maine Bar Rule 7.3(f)(1) to (6) was more thorough and complete. Therefore, the committee largely voted to adopt the former Maine Bar Rule, while making it somewhat more robust and detailed and retaining the structure of the model rules. The committee felt that the improvements were necessary in light of the aging of the Maine bar, and concluded that clearly enumerating the powers, duties, and obligations of receivers would help to protect clients. Although the former Maine Bar Rule refers to the person appointed by the Court as a "proxy," the committee felt that use of the word receiver, rather than proxy, was more accurate in this context. The remaining changes are largely organizational.

Rule 32(b) follows former Maine Bar Rule 7.3(f)(2) and is consistent with current Maine practice.

Rule 32(c) follows former Maine Bar Rule 7.3(f)(3).

Rule 32(d) follows former Maine Bar Rule 7.3(f)(4).

Rule 32(e) follows former Maine Bar Rule 7.3(f)(5).

Rule 32(f) follows former Maine Bar Rule 7.3(f)(6).

RULE 33. TRANSITION

These Rules shall become effective on July 1, 2015 (the "effective date"). As of the effective date, these Rules shall govern all new and pending complaints and proceedings before the Fee Arbitration Commission, Professional Ethics Commission, and Grievance Commission. Any attorney seeking reinstatement, including those suspended prior to the effective date, must comply with the requirements of these Rules.

Reporter's Notes – June 2015

To ensure fairness and consistency, the committee determined that these Rules must apply not only to new complaints brought after the rules go into

effect, but also to any complaints initiated prior to the effective date, as well as to any ongoing proceedings. In addition, Rule 33 provides that all attorneys seeking reinstatement following the effective date, including those disciplined under the former Maine Bar Rules, must comply with the reinstatement provisions of these Rules.