NEW HAMPSHIRE BAR ASSOCIATION
LITIGATION GUIDELINES

Amended by the New Hampshire Bar Association Board of Governors March 3, 2016
Originally Adopted December 2, 1999

PREAMBLE:

The following is a revised set of the original Litigation Guidelines adopted by the Board of Governors of the New Hampshire Bar Association to serve as aspirational goals for attorneys who practice in New Hampshire. The guidelines represent a means of maintaining civility in New Hampshire trial practice and have been revised to reflect the evolution in practice and technology that has occurred since they were adopted in 1999. While certain of these Litigation Guidelines do not have the force of law or court rule, attorneys practicing in New Hampshire are encouraged to incorporate the spirit of the guidelines into their legal practices and communicate these guidelines to lawyers whom they are charged with training and mentoring so that the guidelines will be a familiar part of practice from one generation of New Hampshire lawyers to the next. The Board of Governors encourages New Hampshire judges to make these guidelines part of their expectations of attorneys' conduct in litigation in New Hampshire Courts and to commend to counsel unfamiliar with the guidelines, such as *pro hac vice* admittees, that they review and abide by them. These guidelines are intended to proclaim that conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive, impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct tends to delay and often to deny justice.

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

1. CONTINUANCES AND EXTENSIONS OF TIME

A. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, automatic disclosures, discovery, or motions, should ordinarily be assented to as a matter of courtesy unless time is of the essence. A first extension should be allowed even if counsel requesting it has previously refused to grant an extension.

B. After a first extension, any additional reasonable requests should be assented to unless the need for expedition in light of the litigation schedule would not permit such accommodation. Deference should be given to an opponent's schedule of professional and personal engagements. Consideration also should be given to the reasonableness of the length of extension requested as it applies to the task, the opponent's willingness to grant reciprocal extensions, and whether it is likely a court would grant the extension if asked to do so.

C. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."

D. A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

E. A lawyer should not attach to extensions unfair and extraneous conditions. Reasonable conditions, such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions, are permissible.

2. CASE STRUCTURING PRINCIPLES

A. Upon receipt of an appearance and answer in any litigation, counsel should confer regarding the proposed scheduling order, considering what, within reason and given the issues, will be required for length of discovery, length of trial, and discussion of alternative dispute resolution. Every effort should be made to reach agreement for submission of a proposed schedule to the Court.

B. When relevant, counsel for the parties should confer prior to the start of discovery to discuss electronically stored information ("ESI") in order to establish parameters for ESI related discovery, limit the risk of future disputes after discovery has begun, and discuss document production format. When defining parameters, consideration should be given to the significance of the issues and the proportionality between cost and the necessity and likelihood of discovering relevant information.

3. SERVICE OF PAPERS

A. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

B. Whenever practicable, parties should agree to service by electronic mail. Parties should always serve copies of papers upon one another so that they are received simultaneously and concomitant with the posting or delivery – by mail, in person or otherwise – of the papers with the court.

C. Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

D. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a holiday.

E. Service should be made personally or by electronic mail when it is likely that service by mail, even when allowed, will prejudice the opposing party.

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

A. Written briefs or memoranda of points and authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic, or sociological data if such data appear in or are derived from generally available sources.

B. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

5. COMMUNICATIONS WITH ADVERSARIES

A. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

B. Communications should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

C. Communications intended only to make a record should be used sparingly and only when thought to be necessary under the circumstances. When such confirmatory communications are used, they should be concise and accurately reflect the events/record.

D. Unless necessary to resolution of the issue, communications between counsel should not be sent to judges.

E. Counsel should not lightly seek court sanctions.

6. DEPOSITIONS

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

B. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

C. When a deposition is noticed by another party in the reasonably near future, counsel should not notice another deposition for an earlier date without the agreement of opposing counsel.

D. Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.

E. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

F. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.

G. Counsel at deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought or to enforce a limitation on depositions or evidence directed by the court or to present a motion pursuant to Fed.R.Civ.P. 30(d).

H. While a question is pending, counsel should not through objections or otherwise, coach the deponent or suggest answers.

I. Counsel should not direct a client to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass. Counsel shall not direct the deposition conduct of a non-client witness.

J. Counsel shall not make any objections or statements which might suggest an answer to a witness or which are intended to communicate caution to a witness with respect to a particular question. There should be no lengthy or narrative objections. Counsel's statements when making objections and any explanation of the objection, if any is necessary, shall be succinctly stated, without being argumentative and without attempting to suggest to the witness any particular or desired response. Further explanation of the objection should be provided only if opposing counsel requests clarification, and such further explanation should be succinctly and directly stated. Where more extensive discussion is required on the record, counsel should consider excusing the deponent during such discussion.

K. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. Parties and their counsel are expected to act reasonably, and to cooperate with and be courteous to each other and to deponents at all times during the deposition, and in making and attempting to resolve objections.

L. Opposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copy shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and his or her counsel do not have the right to discuss documents privately before the witness answers questions about them.

7. DOCUMENT REQUESTS

A. Requests for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

B. Requests for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.

C. In responding to document requests, counsel should strive to recognize New Hampshire's expansive view of discovery and to provide all materials that are or could be reasonably responsive to a request.

D. Counsel should encourage the client to act in good faith and with due diligence to locate the documents requested and to acquire them when to do so would not be overly burdensome and when the client has reasonable access to them.

E. Counsel should not interpret the requests for production in an artificially restrictive manner in order to avoid disclosure. Within reason, requests with subsections should be read as one unless the subsections clearly request documents of a different nature.

F. Documents withheld on the grounds of privilege should comply with local rule and current case law requirements of a detailed privilege log.

G. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents. Counsel are encouraged to include control numbers such as bates numbers on documents produced or some other manner of organization of responses.

H. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason. Regardless of the rule-imposed deadline, counsel should consider producing documents in a manner and at a time that allows the case to proceed efficiently and without unnecessary delay.

I. Counsel should attempt to resolve discovery disputes in the spirit of compromise. Discovery motion practice should be avoided.

8. INTERROGATORIES

A. Interrogatories should never be used to harass, embarrass, or impose undue burden or expense on adversaries.

B. Before propounding interrogatories, counsel should review discovery already received and avoid interrogatories with duplicate and redundant questions.

C. Counsel should strive to recognize New Hampshire's expansive view of discovery when assisting and counseling the client with responding to interrogatories so that the information is the product of good faith and due diligence and includes pertinent details.

D. Counsel should not interpret the interrogatories in an artificially restrictive manner in order to avoid disclosure of information. Within reason, interrogatories with subsections should be read as one unless the subsections clearly request information of a different nature.

E. Responses withheld on the grounds of privilege should comply with local rule and specify the basis for the invocation of the privilege.

F. Responses should not be delayed to prevent opposing counsel from being prepared for scheduled depositions or for any other tactical reason. Regardless of the rule-imposed deadline, counsel should consider providing answers in a manner and at a time that allows the case to proceed efficiently and without unnecessary delay.

G. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

H. Counsel should attempt to resolve discovery disputes in the spirit of compromise before engaging in motion practice. Discovery motion practice should be avoided.

9. MOTION PRACTICE

A. Before filing a motion other than concerning the merits of the case, and unless exigent circumstances prevent it, counsel should engage in a meaningful discussion of its purpose in an effort to resolve the issue.

B. A lawyer should not unreasonably withhold his or her assent so as to force his or her adversary to make a motion and then not oppose it.

10. DEALING WITH NON-PARTY WITNESSES

A. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition. (RSA 516:3)

B. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel. (RSA 517:4; RSA 516:4; RSA 516:5)

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

D. Counsel should, whenever practicable, confer with opposing counsel on all aspects of the third party deposition, including on the scope of the document requests.

11. EX PARTE COMMUNICATIONS WITH THE COURT

A. A lawyer should avoid ex parte communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending. (Rule 3.5 N.H. Rules of Professional Conduct)

B. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application, except that where the rules permit an ex parte application or communication to the court in an emergency situation, a lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there are bona fide circumstances such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

12. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

A. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

B. Counsel should not falsely hold out the possibility of settlement as a means for delaying discovery or trial.

C. In every case, counsel should consider whether the client's interest could be best served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

13. TRIALS AND HEARINGS

A. Counsel should be punctual and prepared for any court appearance.

B. Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and judicial officers with courtesy and civility.

C. Counsel should confer and cooperate on pre-marking exhibits.