

Report of the Standing Advisory Committee On the Rules of Professional Conduct

EXECUTIVE SUMMARY

The Court has asked this Committee¹ to examine the current Massachusetts Rules of Professional Conduct (Mass.R.Prof.C.) in light of changes to the American Bar Association's Model Rules of Professional Conduct in the fifteen years since the Court adopted the Massachusetts Rules. During that time, the Model Rules have undergone two major revisions. First, in 2002, the ABA adopted comprehensive amendments proposed by the ABA Ethics 2000 Commission that responded to changes in the profession since the Model Rules' adoption in 1983. Second, in 2012 and early 2013, the ABA adopted significant, but more targeted, amendments proposed by the ABA Commission on Ethics 20/20 that responded to changes in law practice resulting from globalization and the profession's increased use of technology.

The Court has already acted on the Committee's recommended changes to selected portions of the Massachusetts Rules, particularly Rules 1.5, 1.13, 1.14, 6.5, and 8.5. In this Report, we address the remaining portions of the Massachusetts Rules, summarizing and explaining the rationale for our recommendations. The Committee's recommended revisions to the rules accompany this Report, together with copies of the Committee's recommended revisions marked to show changes from the current Massachusetts rules, and to show changes from the Model Rules.

We recommend adoption of many changes proposed by the Ethics 2000 and Ethics 20/20 Commissions. Most of our recommendations are meant to clarify existing law, to improve format or style (*e.g.*, the adoption of Model Rule titles), and to promote consistency with the rules of other jurisdictions that follow the Model Rules. This Report discusses only changes of substantive importance. We do not address provisions of the current Massachusetts Rules and Comments that we propose to leave unchanged, except to explain why we rejected language of the Model Rules that would have altered the substance of our current Rules in an important fashion.

We call the Court's attention specifically to a few issues of particular importance, all of which are described in more detail in the body of this Report.

- We recommend adoption of Model Comments 6 and 7 to Model Rule 1.1 and Model Comments 1–4 to Model Rule 5.3, which give detailed guidance for

¹ The Justices of the Supreme Judicial Court appoint the members of the Standing Advisory Committee on the Rules of Professional Conduct. The Committee is chaired by John L. Whitlock, Edwards Wildman Palmer LLP. The other members are Carol Beck, Committee for Public Counsel Services; Professor R. Michael Cassidy, Boston College Law School; Timothy J. Dacey, Goulston & Storrs, P.C.; Henry C. Dinger, Goodwin Procter LLP; Erin K. Higgins, Conn Kavanaugh Rosenthal Peisch & Ford, LLP; Professor Andrew L. Kaufman, Harvard Law School; Elizabeth Mulvey, Crowe & Mulvey LLP; Professor Andrew M. Perlman, Suffolk University Law School; James B. Re, Sally & Fitch LLP; Regina E. Roman, Sugarman, Rogers, Barshak & Cohen, PC; Professor Constance Rudnick, Massachusetts School of Law; and Massachusetts Bar Counsel Constance V. Vecchione, Office of Bar Counsel. The Committee acknowledges with gratitude the assistance of Barbara Berenson, who acted as liaison to the Court.

safeguarding client interests when outsourcing work relating to client representation.

- We recommend amending Rule 1.6 concerning the obligation to safeguard confidential information to conform our Rules and Comments more closely to the ABA Model Rules. Our recommendations include the adoption of a variation of Model Rules 1.6(b)(2) and 1.6(b)(3), which relate to prevention or rectification of injuries from criminal or fraudulent conduct; Model Rule 1.6(b)(7), which establishes guidelines for discussions between a law firm and a prospective hire to identify potential conflicts of interest; and Model Rule 1.6(b)(4), which confirms that a lawyer may reveal confidential information to secure legal advice about the lawyer's own ethical obligations. Expansions of exceptions to the prohibition on disclosure of confidential information have been controversial in the past, and several members of the committee have dissented from certain aspects of the committee's recommendations. Separate statements addressing the committee's majority views and minority dissents are attached in the appendix to this report.
- We recommend adopting the term "informed consent" as the standard to be met in Rules 1.6, 1.7, 1.9 and elsewhere in the Rules instead of the current "consent after consultation" standard. The ABA reporter's notes state, and the Committee agrees, that "consultation" does not adequately convey the requirement that the client receive full disclosure of the nature and implications of a lawyer's conflict of interest.
- We recommend adopting the requirement that conflicts waivers permitted by Rules 1.7, 1.9, 1.11, and 1.12 be confirmed in writing.
- We recommend maintaining (with some clarification) the approach of current Massachusetts Rule 1.10 with respect to screening of lawyers who change firms instead of adopting the greater latitude for screening that the recently amended Model Rule would permit. On this point the Committee was divided and the arguments for and against this decision are set forth in separate majority and dissenting statements in the appendix to this report.
- We recommend adoption of Model Rule 1.18, which in substance codifies case law relating to the confidentiality obligations of lawyers to prospective clients. Currently, Massachusetts has no counterpart to Model Rule 1.18. Separate statements addressing the committee's majority views and minority dissent are attached in the appendix to this report.
- We recommend adoption of most of the changes made by the ABA to clarify and strengthen the text and Comments to Model Rule 3.3. While each of the recommended changes is small and many of them merely make explicit what was implicit in the former version, taken together they change the face of Rule 3.3 and deserve a close look.

- We highlight for the Court's attention alternate proposals for Rule 3.5 dealing with communication with jurors; the first proposal, unanimously supported by the Committee, recommends the adoption of Model Rule 3.5.
- We recommend a number of changes in Rule 3.8 regarding the obligations of a prosecutor, including a prohibition against threatening to prosecute a charge not supported by probable cause, and reformulation of prosecutors' post-conviction responsibilities with respect to newly-discovered exculpatory information. The Committee, although divided, recommends retaining our nonstandard provision requiring prior judicial approval before subpoenaing a lawyer to present evidence in a criminal proceeding about a present or past client. Separate statements of the majority and minority dissenting views are attached in the appendix to this report.
- We recommend adopting Model Rule 4.4(b) and Comment 3 to that Rule, both of which deal with material inadvertently sent to an opponent. A lawyer's obligation in dealing with such material is a new topic in our Rules. Some members of the Committee opposed the adoption of Comment 3 only; separate statements of the majority and minority dissenting view are attached in the appendix.
- In our recommendations with respect to Rules 5.1 and 5.3, we have followed the practice of New York and New Jersey to impose disciplinary responsibility on law firms as well as individual firm lawyers with respect to observance of the Mass.R.Prof.C. in particular cases.
- We recommend a number of changes in the Rules dealing with advertising and solicitation that are designed to deal with the changes in technology that have occurred since the Court last dealt with these provisions. There is also a substantial change involved in our recommendation that the Court adopt the Model Rules definition of what constitutes a claim of specialization in Rule 7.4(a). Several members of the Committee have dissented from the decision to adopt the Model Rules deletion from Rule 7.2(b) of any requirement to maintain copies of advertising materials. Their dissenting statement is attached in the appendix to this report.
- Finally, there are a few additional recommendations dealing with Rules 1.8(b), 1.9(c)(1), and 8.4(h), that have generated dissenting statements from a few individual members of the Committee that are included, along with statements in support of the majority, in the appendix to this report.