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Massachusetts Association of Criminal Defense Lawyers

March 11, 2014

By US-Mail and e-mail (barbara.berenson@sjc.state.ma.us)

The Standing Advisory Committee on the Rules of Professional Conduct
c/o Senior Attorney Barbara Berenson
John Adams Courthouse
Pemberton Sq.
Boston, MA 02108

Re: MACDL statement on proposed revisions to the Massachusetts Rules of Professional Conduct

To the Study Advisory Committee:

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") respectfully submits these comments on the July, 2013 report of the Standing Advisory Committee (hereinafter "the Report" and "the Committee") with proposed revisions to the Massachusetts Rules of Professional Conduct. We apologize for our lateness, but we have a longstanding and obvious concern about the R. Prof. C's. We submitted an amicus brief on the Rules in 1997, and brought here Prof. Monroe Freedman to orally argue before the Court on the 3.3 issues (along with one of the authors of this statement).

Rule 1.6, CONFIDENTIALITY:

As MACDL argued in 1997, especially as to Rule 3.3, we yield to nobody in seeing the need to protect confidentiality. Getting and keeping client trust is especially challenging for us-- especially court-appointed lawyers for indigents. Nonetheless, like many others we have found the astounding breadth of 1.6 ("information relating to the representation") to be unworkable -- indeed unknown to many lawyers. And, to those who do know of it, it seems *inter alia* an impediment to helpful discussion of cases with colleagues, e.g. on professional listservs, especially for solo and small-firm lawyers. We -- and many others -- find especially baffling the seeming application of 1.6 to *court pleadings*. See, e.g., on the OBC-BBO website, "*Client Secrets: Going Public with "Public" Information,*" by Kenneth W. Luke, Assistant Bar Counsel, May 2002 (*emphasis added*):

... Lawyers sometimes feel free to discuss a case once it has gone to trial or pleadings have been filed in court. They may share pleadings with other lawyers informally or in continuing education programs
Disclosure of such information may, however, be an ethical violation.

Some have asserted that Comment 5A adequately clarifies that issue, but we strongly disagree.

Instead, we suggest starting with the *New York rule*, similar to the prior DR 4-101's, "confidences" & "secrets" (*emphasis added*).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) *likely to be embarrassing or detrimental* to the client if disclosed, or (c) information that the *client has requested be kept confidential*. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

and COMMENT [4A]:

Paragraph (a) protects all factual information "gained during or relating to the representation of a client," but not information obtained before a representation begins or after it ends. See Rule 1.18, dealing with duties to prospective clients. Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. *Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process.*

While that Rule also may need some tweaking, we believe it is far more workable than our (and the ABA's) 1.6. See also *infra* as to vague rules and prosecutorial discretion.

Rule 3.5(c), BAN ON JUROR CONTACT:

For the Committee's reasons, and ours in 1997 and a recent *Mass. Lawyers Weekly* editorial, 12/9/13 ("Proposed changes to conduct rules step in right direction"), we strongly urge that this (unanimous) proposal -- in particular the (ABA's) *Recommendation 1* -- be adopted. We add to the Committee's two compelling reasons the crucial justice-related scenario of *Solis*, cited (when the Mass. 1991 rule was adopted) in the dissent by Justice Wilkins (joined by Justice Liacos) (*emphasis added*):

I decline to join in the promulgation of a rule that apparently is intended to deal with a problem that is not shown to exist. For almost twenty years we ... have never had a discipline problem with a lawyer speaking to a juror after the jury's discharge. The new rule will inhibit counsel's attempts to discover flaws in the administration of justice. In some instances, the rule may impinge on rights of free speech, . . . the effective assistance of counsel, and ... due process It will surely tend to *inhibit the appropriate disclosure of misconduct in the administration of justice*. In the recent *Solis* case, wrongdoing was discovered because of the efforts of a defense attorney. See *Commonwealth v. Solis*, 407 Mass. 398 (1990). His conduct would have been grounds for discipline if new DR 7-108(D) had been in effect... . The [BBO] and Bar Counsel have recommended that this court not adopt the proposed change The Board points out that no other State imposes such restrictions.

Statement of Opposition to the Adoption of Revised Rule 3:07, DR 7-108(D), 8/26/91

Rule 3.8, SPECIAL RESPONSIBILITIES OF A PROSECUTOR

For mostly obvious reasons, we urge not only that Rule 3.8 should *not* be loosened; but also -- as is obvious to us and to various nationwide studies-- that it is inadequately enforced by Bar Counsel and the BBO, e.g. in many cases where courts find non-disclosure of exculpatory material. For that reason, we oppose the Committee's proposed changes to Rule 3.8 §§ (h) and (i), where they propose dropping these substantive prohibitions, on the grounds of redundancy to other rules.¹ In fact we find careless and disagree with the comment that, "the Committee was unable to perceive any principled reason why prosecutors should be held to a heightened standard of conduct in this regard." *Id.*

We strongly support retaining current 3.8(f)(2) [renumbered as 3.8(e)], the "attorney subpoena" rule. No case has been made, including by the dissent, that it has created significant problems; and we *know* from much anecdotal evidence that it has helped, including prophylactically.

Rule 8.4(h) "other conduct that adversely reflects" on a lawyer's fitness to practice law.

As criminal defense lawyers, MACDL members are especially aware of the Due Process related vices of vague laws, and of the inadequacy of relying on "prosecutorial discretion" as a solution to them. We therefor strongly support the majority's proposal to -- like the ABA -- drop this vague "catch-all" rule that is widely criticized by many mainstream experts, e.g. Hazard & Hodes, *The Law of Lawyering*. See *Bar Counsel v. Verdrager*, C1-2008-0271, 4/25/12 (emphasis added):

[R]ule 8.4(h) is a catch-all rule that can raise *due process concerns* in its application. The Court has indicated, in cases involving another catch-all rule, 8.4(d), that discipline should not be imposed unless the conduct is so "egregious" and "flagrantly violative of professional norms that an attorney would have been on notice that the conduct was prohibited." *Matter of Crossen*, 450 Mass. 533, 568-569, 24 Mass. Att'y Disc. R. 122, 165-167 (2008), citing *Matter of an Attornev*, 442 Mass. 660, 667-669, 20 Mass. Att'y Disc. R. 580, 593-596 (2004); *Matter of the Discipline of Two Attorneys*, 421 Mass. 619, 12 Mass. Att'y Disc. R. 580 (1996). Because we do not find the conduct to be either egregious or "flagrantly violative" of fully established professional norms, we believe discipline is inappropriate.

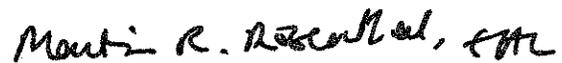
We also take issue with the dissent (including by our bar prosecutor), saying *inter alia*, "Seven other states ... have [kept 8.4(h)]" -- not exactly a resounding consensus. As mentioned *supra*, MACDL (confirmed by numerous studies) sees widely disparate discipline of defense lawyers vs. prosecutors, and our members anecdotally feel that 8.4(h) is one of the worst in this regard. See, e.g., the recent Reprimand of Belle Soloway, PR 2013-20. Similarly we filed an amicus brief in a case under another rule widely seen as vague, Rule 8.4(d), *In re Discipline of Attorney*, 442

¹ Report, p. 29: "Rule 3.8(h) and (i). The Committee recommends that the current subparagraphs of the Massachusetts rule be deleted, as assertions of personal knowledge or opinion by an attorney are already addressed by Rule 3.4. The Committee was unable to perceive any principled reason why prosecutors should be held to a heightened standard of conduct in this regard. Moreover, as mentioned above, the Committee recommends that Rule 3.4(e) should be amended to delete the words "in trial" and substitute the words "before a tribunal," to make clear that the prohibition against making statements of personal knowledge of fact or opinion as to the justness of a cause or the credibility of a witness applies at all stages of litigation."

Mass. 660 (2004) (“nearly a decade of disruptive & costly disputation with Bar Counsel”; not “prejudicial to administration of justice” to send transcript of trooper’s deposition to superiors, allegedly to intimidate; due to “obligation zealously to protect client, ... we[’re] loathe to punish ... communicat[ion] to correct a hazardous or improper situation”).

As stated in the aforementioned *Lawyers Weekly* editorial, “Lawyers are left unsure as to what conduct is allowed and what is prohibited, and there’s a real danger of inconsistent application.” Overly vague rules are especially pernicious with the misguidedly minimal BBO burden of proof, “preponderance of evidence.” Defense lawyers are often -- and often needlessly -- criticized, even by judges; and most have neither lucrative practices nor large firms to defend them, so are too often prone to accepting lesser discipline instead of spending years and much money defending against BBO cases. Vague rules of professional conduct are thus particularly problematic to the defense bar.

Respectfully submitted,



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