



M A S S A C H U S E T T S B A R A S S O C I A T I O N

VIA ELECTRONIC AND US MAIL

March 7, 2014

Barbara Berenson, Esquire
Senior Attorney
Standing Advisory Committee on the Rules of Professional Conduct
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: **Comment on Proposed Rules of Professional Conduct**

Dear Attorney Berenson:

On behalf of the Massachusetts Bar Association, I write to provide comment on the draft Rules of Professional Conduct. On March 6, 2014, the MBA House of Delegates voted to endorse the report of the MBA task force, led by esteemed Past President Kathleen M. O'Donnell, solely to review the proposed changes to the Rules of Professional Conduct. Members of the task force were Roy Bourgeois, Jerry Cohen, Hon. Bonnie MacLeod-Mancuso, John McQuade Jr, Alyce Moore, Paul O'Connor, Hector Pineiro, Jeffrey Stern, Sara Trezise, Paul Weinberg and David White.

The task force examined the changes to the rules highlighted in the Executive Summary of the Standing Advisory Committee on the Rules of Professional Conduct. The thirteen areas identified in that summary were examined by the task force members, who submitted written reports to the entire task force. One task force member indentified other issues thought to be important to practicing lawyers and presented these proposed changes to the task force for review. The task force then met to discuss each report, often recommending changes or additions. Task force members then rewrote and reformatted their reports. These were then sent to the entire group to ensure that each report reflected the consensus of the entire task force. Each task force member agrees this report reflects accurately the decisions of the entire body.¹

¹ One member has filed a dissent on one issue. See Rule 1.15 (Safekeeping of Property/Trust Account Placement/Flat Fees)

While not opposing many of the proposed changes to the Rules of Professional Conduct, the MBA makes the following observations:

1. First, we commend the work of the Standing Advisory Committee. Their report was comprehensive and obviously the result of thousands of hours of diligent work.
2. We question the need for this exhaustive analysis of the Rules proposed by the ABA when the current Massachusetts Rules of Professional Conduct are comprehensive and serve our profession and the public.
3. The MBA speaks for lawyers in Massachusetts, the vast majority of whom are ethical and strive to represent their clients competently and effectively. The tenor of many of the proposed changes is that the public needs to be protected from lawyers and that lawyers need to be micromanaged. Neither premise is correct. Our members and lawyers in Massachusetts follow our current rules of professional conduct. These rules have been used to protect the public from those few lawyers who do not follow them.
4. The MBA fears that enactment of these rules sends the wrong message to the public. The bias against lawyers does not need to be reinforced by the SJC in its enactment of additional and unnecessary changes to our rules of professional conduct.

Miscellaneous Provisions

Rule 1.0 Terminology

It is unclear from the definitions of “confirmed in writing” and “informed consent” and from the comment on “confirmed in writing” whether all issues on which a client gives informed consent require either a simultaneously written acknowledgment of the informed consent or a subsequent written transmission of the informed consent.

While paragraph c seems to limit the requirement of written confirmation to those sections which specifically require informed consent in writing, the comment is not limited to those situations. While perhaps the comment is limited to the definition in paragraph c, the issue was confusing to the MBA task force members. Therefore, the task force suggests adding the following language to the definition of “informed consent” and to comment 7:

Unless stated specifically in the Rule, written informed consent is not required.

Rule 1.1, comment 8 – The MBA makes note of the following change:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology and engage in continuing study and education (Emphasis added).

Rule 1.2 (e) – The MBA makes note of the following change:

a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 1.2, comment 4:

In a case in which a client appears to be suffering from diminished capacity (changed from mental disability), a lawyer’s duty to abide by the client’s decision is to be guided by reference to Rule 1.14.

Rule 1.3 Diligence

Current: A lawyer’s work should be controlled so that each matter can be handled competently.

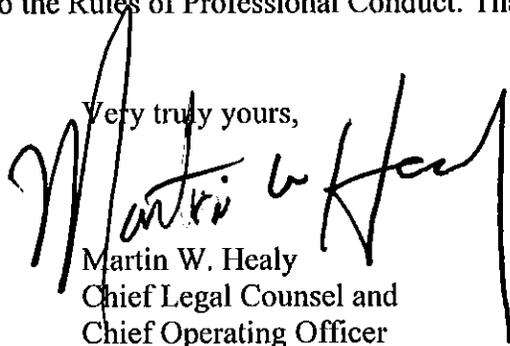
Proposed: A lawyer’s work load must be controlled so that each matter can be handled competently.

MBA Recommendation: A lawyer’s workload should be controlled so that each matter can be handled competently.

The MBA objects to the mandated nature of “must” because it may not allow those examining alleged violations to consider the individual lawyer’s circumstances.

Attached for your consideration is the full comment of the Massachusetts Bar Association on the proposed changes to the Rules of Professional Conduct. Thank you for your consideration of our views.

Very truly yours,

A handwritten signature in black ink, appearing to read "Martin W. Healy". The signature is written in a cursive style with a large initial "M".

Martin W. Healy
Chief Legal Counsel and
Chief Operating Officer

MODEL RULE 1.1-
PROPOSED COMMENTS 6 AND 7

Rule 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

PROPOSED

[Comment 6.]

Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyers own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

MBA RULES COMMITTEE COMMENTS

The MBA would support the first sentence of proposed Comment 6 to Rule 1.1.

The MBA does not support the second sentence of Comment 6 to Rule 1.1 and would propose it be stricken and not be adopted: ~~(The reasonableness of the decision to retain or contract with other lawyers outside the lawyers own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions~~

~~in which the services will be performed, particularly relating to confidential information.)~~

The MBA would propose the following sentence in its place:

When a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should perform his or her reasonable due diligence concerning the nonfirm lawyers and may rely on the nonfirm lawyers ethical obligations to comply with the professional conduct rules in the jurisdiction in which they practice, particularly relating to confidential information.

PROPOSED

[Comment 7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

MBA RULES COMMITTEE COMMENTS

The MBA would support the first sentence of proposed Comment 7 to Rule 1.1. The last sentence of this Comment however, is unclear and as it refers to matters “beyond the scope of these Rules”, the sentence is superfluous and for those reasons the MBA would recommend it be struck and not be adopted: (~~When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.~~)

Model Rule 5.3- Comments 1-4 proposed to be added.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
- (d) A law firm shall make reasonable efforts to ensure that nonlawyers who work for the firm are subject to adequate supervision that is reasonable under the circumstances.

PROPOSED

[Comment 1.]

Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment 6 to Rule 1.1 (retaining lawyers outside the firm) and Comment 1 to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority

over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

MBA RULES COMMITTEE COMMENTS

The MBA would support the first sentence of proposed Comment 1 to Rule 5.3.

Nonlawyers Within the Firm

[Comment 2.]

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must (emphasis added) give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

MBA RULES COMMITTEE COMMENTS

The MBA would support proposed Comment 2 to Rule 5.3.

Nonlawyers Outside the Firm

[Comment 3.]

A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include retaining an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of

client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyers conduct is compatible with the professional obligations of the lawyer.

MBA RULES COMMITTEE COMMENTS

The MBA would support the first three sentences of proposed Comment 3 to Rule 5.3.

The MBA cannot support the remaining sentences of proposed Comment 3 to Rule 5.3 and would propose they be stricken and not be adopted: (~~The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyers conduct is compatible with the professional obligations of the lawyer.~~)

These comments place extraordinary and untenable obligations on a lawyer for rather routine tasks such as outside document photocopying, scanning and even Internet based data storage, the monitoring or supervision of which is impossible. (See also the MBA's comments on Model Rule 1.6(c) which "would impose an obligation on lawyers to make reasonable efforts to prevent inadvertent disclosure and unauthorized access to confidential client information." Lawyers always have the obligation of competence in maintaining client confidences.

[Comment 4.]

Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the

lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

MBA RULES COMMITTEE COMMENTS

The MBA cannot support proposed Comment 4 to Rule 5.3.

This Comment is not particularly clear in its direction or purpose. It appears to direct the lawyer to accept his or her client's choice of a particular nonlawyer service provider, and then potentially allows the client to monitoring that provider. To subject a lawyer to discipline under these circumstances creates the situation where the lawyer accepts all of the risk for the client's choice when in reality the lawyer has no ability to control that risk.

This Comment adds nothing of substance to the rule as written and should be not be adopted.

2. Amendment of Rule 1.6, Confidentiality of Information

The Standing Advisory Committee has recommended that Mass. R. Prof. C. 1.6(a) regarding confidentiality be amended to substitute "gives informed consent" for the existing phrase "consent after consultation":

(a) A lawyer shall not reveal confidential information relating to representation of a client unless the client *gives informed consent* ~~consents after consultation~~, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

The Standing Advisory Committee has recommended amending Rule 1.6(b) by removing the word "financial" and redrafting the subsections, as well as adding new subsections. The Standing Advisory Committee also recommended the adoption of Rule 1.6(c) (and the renumbering of current subsection (c) to (d)). The current rule reads as follows:

(b) A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal, such information:

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interest or property of another, or to prevent the wrongful execution or incarceration of another;

(2) to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3(e);

(4) when permitted under these rules or required by law or court order.

The proposed revisions read as follows:

(b) A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to the interests or property of another;

(3) to prevent, mitigate or rectify substantial injury to the interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to the extent permitted or required under these Rules or to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client.

The MBA Committee recommends the adoption of the revised Rule 1.6.

Proposed Rule 1.6(b)(1-3) would increase the instances in which a lawyer might reveal the confidences of a client. With the word "financial" removed from Rule 1.6(b)(2) and (3), the range of interests that might be protected would extend to other rights, such as the right to privacy, to vote, to be free from discrimination, and the rights of a custodial parent. This proposal is broader than the Model Rule. The Standing Advisory Committee recommended keeping the current formulation which permits disclosure by a lawyer if crime or fraud would be committed by any person, including, but not limited to, the client, and regardless of whether the services of the lawyer were used to undertake the fraud or the crime. The Standing Advisory Committee also recommended retaining the exception currently in the

Massachusetts Rules to disclose confidential information "to prevent wrongful execution or incarceration of another."

Five Committee members dissented from removing the word "financial" from the paragraphs (b)(2) and (b)(3). The dissenters found no actual circumstance or case which would demonstrate "a strong public interest in support of such substantial erosion of a lawyer's duty of confidentiality." The dissenters believe that "clients' trust in lawyers would be eroded if they knew that their information could be used to prevent or remedy harm to some undefined legal interest."

Three Committee members also dissented from the proposed version of (b)(2), and recommended adopting the Model Rule (b)(2). This form would limit disclosures only to prevent *the client* from committing a crime or fraud; and would permit disclosure of such crimes or frauds only *in furtherance of which the client has used the lawyer's services*. The three dissenters argued that it would be useful to conform to the Model Code, as several jurisdictions have adopted it and this would be of benefit to those with multijurisdictional practices. The three dissenters also argued that revealing confidential client information should be permitted only under the most compelling circumstances, as where a client has abused the attorney-client relationship by making the lawyer an unwitting tool of the client's crime or fraud. Otherwise, the three dissenters argue, the client should have the authority to prohibit disclosure of confidential information; the client may wish to protect a third party who was the perpetrator of the crime or fraud, or may not wish to be drawn into the controversy.

Model Rule 1.6(b)(4) would make explicit what is already presumably implicit in the Rules, namely that a lawyer may disclose client confidences to the extent reasonably necessary to obtain advice about the lawyer's compliance with the rules of professional conduct.

Model Rules 1.6(b)(5) and (6), respectively, would allow disclosure of client confidences to establish a claim or defense in a dispute with the client or to defend against charges of misconduct, and would permit disclosure as required by law or court order. There are only minor changes in the wording from existing Rules 1.6(b)(2) and (3).

Model Rule 1.6(b)(7) is a rule proposed by the American Bar Association 20/20 Commission which deals with the problem of the need of a law firm to identify potential conflict of interest problems when taking on new partners or associates. Limited disclosure would be permitted if it would not compromise the attorney-client privilege or otherwise prejudice the client.

Model Rule 1.6(c) would impose an obligation on lawyers to make reasonable efforts to prevent inadvertent disclosure and unauthorized access to confidential

client information. The Standing Advisory Committee noted that this same obligation is "implicit in the general obligation of competence in maintaining client confidences."

6. Adoption of Model Rule 1.18, Duties to Prospective Client

The Standing Advisory Committee on the Rules of Professional Conduct has recommended adoption of Model Rule 1.18, which would codify the confidentiality obligations of lawyers to prospective clients. The proposed Rule reads as follows:

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
 - (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
 - (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
 - (d) When the lawyer has received disqualifying information as defined in paragraph
- (c), representation is permissible if:
- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened, as defined in Rule 1.10(e), from any participation in the matter and is apportioned no part of the fee therefrom; and

- (ii) written notice is promptly given to the prospective client.

The MBA Committee recommends the adoption of Rule 1.18, with one amendment to Rule 1.18(c). The MBA Committee recommends amending the subsection by striking the words “significantly harmful” and replacing them with the words “used to the disadvantage of” as suggested by the dissenting minority of the Standing Advisory Committee.

Although there is no current rule regarding prospective clients, a lawyer’s conduct with regard to confidentiality is generally governed by Mass. R. Prof. C. 1.6 (Confidentiality of Information) and 1.9 (Conflict of Interest: Former Client). A lawyer’s conduct is also governed by the holding in *Mailer v. Mailer*, 390 Mass. 371, 374-375 (1979) (The court did not disqualify counsel for the defendant where the contact with the prospective client, the plaintiff, had occurred five years earlier and the information disclosed was minimal and largely not truly confidential, even if given in confidence. “[I]n cases of doubt, counsel must resolve all questions against the acceptance of employment whenever such acceptance may impinge upon the interests of his present and former clients.”)

A lawyer may not use or reveal information furnished by a prospective client, even if no formal attorney-client relationship was formed. As noted by the majority of the Standing Advisory Committee, the confidentiality obligations can limit a lawyer’s ability to represent other clients and may lead to disqualification of the lawyer or the lawyer’s firm. Accordingly, the majority of the Standing Advisory Committee recommended Model Rule 1.18 to provide specific guidance about a lawyer’s obligations following contact with a prospective client.

The essence of the rule is found in 1.18(c): A lawyer and the lawyer’s firm “shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter if the lawyer received information from the prospective client that could be *significantly harmful* to that person in the matter” (with exceptions for consent and screening) (emphasis supplied).

There was a dissent from the majority on the need for the rule and on the wording of the rule. The minority recommended the adoption of the Florida iteration of Rule 1.18(c), changing the phrase “significantly harmful to” to “used to the disadvantage of.” The dissenters note that in this form, the rule “does not attempt to parse whether the information acquired from the prospective client is merely ‘harmful’ as opposed to ‘significantly harmful.’”

Either way, the proposed Rule 1.18 would not alter practice under existing rules and case law. The proposed Rule 1.18 would offer more specific guidance to practicing attorneys and appears worthy of adoption.

MEMORANDUM

TO: Kathleen M. O'Donnell, Chair
MBA Rules Committee
Marcotte Law Firm
45 Merrimack Street, Suite 410
Lowell, MA 01852

FROM: Alyce T. Moore and Roy A. Bourgeois

DATE: December 23, 2013

RE: Reformatted recommendation confirming change from "consent after consultation" to "informed consent"

The MBA Committee reviewed paragraph 3 of the Executive Summary from the Standing Advisory Committee on Rules of Professional Conduct Report to make a recommendation concerning the proposed change.

Subparagraph 3 of the Executive Summary is stated as follows:

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 implication of a lawyer's conflict of interest.

At the outset, we wish to note that in numerous instances (including specifically Rules 1.7, 1.9, 1.1, and 1.2) the change from "consent after consultation" to "informed consent" carries with it an additional change that the informed consent "be confirmed in writing." This section of our report does not include analysis of those Rule changes adopting the requirement of a "writing" and we here limit our analysis simply to the issue of the change in phraseology and the definition of "informed consent."

The origins of the language change are in the ABA Ethics 2000 Commission Report. That Commission characterized the language change as "not intended as a substantive change" but instead indicated a belief on the part of the Commission that the revised standard was preferable to denote "the agreement by a person to a proposed course of conduct after the lawyer has communicated the adequate

information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct." The Ethics 2000 Commission further noted that "informed consent," "usually requires an affirmative response by the client and that the lawyer may not assume consent from a client's silence." See ABA Model Rules Seventh Edition, page 102.

As we understand the proposed change, the language difference merely results in a slight shift of the focus of analysis from "what the lawyer said to the client" (i.e., consent after consultation) to "what the client understood from the lawyer's communication" (i.e., informed consent).

The MBA Committee sees no reason why the change should not be adopted. The change does not appear to have worked a material difference in applications of the Professional Conduct Rules in the eleven years since it was first recommended by the Ethics 2000 Commission. The Ethics 2000 Commission did not consider this Rule change to be controversial, and that opinion was shared by the SJC Standing Advisory Committee. We concur and suggest the implementation of this language change in the Rules.

RAB/gf

MEMORANDUM

TO: Kathleen O'Donnell
FROM: Jeff Stern
RE: Comments on Standing Advisory Committee's
Proposed Changes to Rules of Professional Conduct

DATE: December 18, 2013

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client;
or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the representation of one client will be directly adverse to another client;
or
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

RECOMMENDATION BY THE STANDING ADVISORY COMMITTEE

The Committee recommended that waivers of conflicts of interest, as permitted by this Rule, and others as set forth below, should be confirmed in writing.

MBA Comments:

This rule pertains to what are termed “concurrent conflicts of interest,” meaning that the representation of one client would be directly adverse to another. The rule specifies those (narrow) circumstances under which the conflict can be waived, and requires that “each affected client gives informed consent (a defined term) confirmed in writing”. A Comment by the Standing Committee notes that “the requirement of writing does not supplant the need for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives...”

The rationale advanced by the Standing Committee is two-fold: to demonstrate the importance of the matter to the client, and to also avoid later disputes or ambiguity.

The same rationale applies to the confirmation-in-writing requirement in Rules 1.9, 1.11 and 1.12, set forth below, and the MBA supports this requirement, in each case.

RULE 1.9 DUTIES TO FORMER CLIENTS

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1/6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use confidential information relating to the representation to the disadvantage of the former client, except as Rule 1.6, Rule 3.3 or Rule 4.1 would permit or require with respect to a client; or
 - (2) reveal confidential information relating to the representation except as Rule 1.6, Rule 3.3 or Rule 4.1 would permit or require with respect to a client.

MBA Comment:

Rule 1.9 – this rule applies to duties to former clients, and requires that a lawyer who formerly represented a client in a matter cannot represent someone else in the same or a “substantially related matter” where the present client’s interest is materially adverse to the interest of the former client, unless the former client gives informed consent, in writing. The MBA supports the confirmed-in-writing requirement, as set forth above.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
 - (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless;
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a

public officer or employee:

- (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
 - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator, may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (e) As used in this Rule, the term "matter" includes:
- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

MBA Comment:

These are special rules that apply to former and current government officers and employees, and they cover situations where the attorney has gone from private to public service and vice versa. Thus, for example, in a situation where an attorney goes from private practice to government service, he cannot participate in any matter in which he previously participated "personally and substantially" while in private practice, unless "the appropriate agency gives its informed consent, confirmed in writing." As above, the MBA supports the confirmed-in-writing requirement.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR THIRD-PARTY NEUTRAL.

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral, or law clerk to such a person unless all parties to the

proceeding give informed consent, confirmed in writing.

- (b) A lawyer shall not negotiate for employment with any person who is involved a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.
- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.
- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

MBA COMMENT:

This rule applies to former Judges, Arbitrators, Mediators or other third party neutrals. The rule precludes a lawyer from representing anyone in any matter in which the lawyer had previously participating “personally and substantially” as a Judge, Arbitrator, Mediator or neutral, or had been a law clerk to any such person, “unless all parties to the proceeding give informed consent, in writing. We would note that there is a slight ambiguity in Paragraph A of this rule, (“unless all parties to the proceeding give informed consent, in writing”.) We presume this means the parties to the present proceeding, not all parties to the previous proceeding (who would not necessarily be identical). We suggest that that should be clarified. The MBA, as above, supports the confirmed-in-writing requirement.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. A lawyer

employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

- (b) When a lawyer has terminated an association with a firm (“former firm”), the former firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the former firm, unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the former firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) When a lawyer becomes associated with a firm (“new firm”), the new firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the “personally disqualified lawyer”), or the former firm, had previously represented a client whose interests are materially adverse to the new firm’s client unless:
 - (1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter (“material information”); or
 - (2) the personally disqualified lawyer (i) had neither involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm’s client and (ii) is screened from any participation in the matter in accordance with paragraph (e) of this Rule and is apportioned no part of the fee therefrom.
- (e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:
 - (1) all material information possessed by the personally disqualified lawyer has been isolated from the firm;
 - (2) the personally disqualified lawyer has been isolated from all contact with

the new firm's client relating to the matter, and any witness for or against the new firm's client;

- (3) the personally disqualified lawyer and the new firm have been precluded from discussing the matter with each other;
- (4) the former client of the personally disqualified lawyer or of the former firm receives notice of the conflict and an affidavit of the personally disqualified lawyer and the new firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of the new firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and
- (5) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the new firm and its client.

In any matter in which the former client and the new firm's client are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial review on a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has offered and that effective actual compliance has been achieved.

- (f) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

RECOMMENDATION BY THE STANDING ADVISORY COMMITTEE

This Rule governs imputed disqualification, where an attorney has moved from one firm to another.

The Committee recommended against adopting ABA Model Rule 1.10, which allowed "screening" of the attorney who had moved to a new firm in many circumstances, and thus allowed the new firm to handle matters in which the migrating attorney had been involved. The Committee's majority would allow screening only under more limited circumstances, retaining (with some modification) the current Massachusetts rule, believing it "strikes the right balance" between allowing lawyer mobility and protecting client expectations.

MBA COMMENT

This rule governs imputed disqualification, and is particularly applicable where an attorney has moved from one firm to another. The proposed Model Rule (1.10) would represent a significant change to the Massachusetts Rules and a majority of the Standing Advisory Committee essentially rejected it. There were a number of dissents, and this appears to be the most contentious of the issues before the Committee. The background is as follows. In 1998, the SJC had adopted a form of Rule 1.10 which provided for a very limited form of “screening”; in other words generally the firm to which a lawyer had moved (“the new firm”) would be prohibited from representing a client in the same or substantially related matter, if the client of the new firm was adverse to the client of the former firm. The prohibition applies to the whole firm and “screening” the lawyer who had moved would not solve the issue. In 2009, the ABA passed a version of 1.10 which essentially allowed the new firm to take on “adverse representation,” provided certain screening rules were followed as to the lawyer who had migrated. The majority of the SJC Standing Advisory Committee opposed adopting the ABA approach, but did suggest some clarifying changes wording in the present Massachusetts rule. Under the current wording, screening is permitted if the “personally disqualified lawyer” had neither “substantial involvement nor substantial material information relating to the matter.” The recommended change would allow screening if that lawyer “had neither involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm’s client.” (*emphasis supplied*).

The majority on the Standing Committee noted that as of July 2012, twenty-six (26) jurisdictions did not permit screening at all, thirteen (13) permitted limited screening (similar to the current Mass. rule), and only fourteen (14) states have adopted ABA Model Rule 1.10 or something like it. In essence, the majority believes their recommendation “strikes the right balance” between the ability of lawyers to change jobs (particularly in the present environment) and the “reasonable apprehensions of client’s about the loyalty of their lawyer and the safety of their confidential information” under such circumstances. They focus, in particular, on the increasing availability of electronically stored filed information, and the ability to transfer such information, secretly, intentionally, or accidentally. They note that even such things as taking along a writing sample could be harmful to the previous client. They are also skeptical of the ability of screening to work in the context of multi-office office or global law firms. The dissenters on the Standing Committee believe that the current Mass. rule is too blunt and broad an instrument for what they view as a fairly small problem and can “cause real hardships both to lawyers and too many clients” without really doing much good. They also argue that the current rules draw certain distinctions in which non-consensual screening is permitted and those in which it is not that are “very difficult to justify”. The following comment from the dissenters is a good summary of their views:

Accordingly in our view the issue for the Court is whether to continue to protect one group of clients against harms that apparently rarely materialize by imposing the very real harms that the current rule imposes on lawyers (who have fewer options when they lose their jobs or their firms fold), on firms (who lose opportunities to bring in new lawyers), and on other clients of the new firm (who may be forced to seek new

counsel if the new firm considers bringing on the lateral to be more important than continuing the attorney-client relationship, or if the new firm is blindsided by information that the lateral did not disclose). We believe that the approach of the Model Rule 1.10 makes more sense than the current rule.

On balance, while recognizing that there are also good arguments on the majority's side in the Standing Committee, the MBA agrees with the dissenters and favors adoption of the ABA Model Rule.

RULE 1.15: SAFEKEEPING PROPERTY

(a) Definitions:

- (1) "Trust property" means property of clients or third persons that is in a lawyer's possession in connection with a representation and includes property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor, or otherwise. Trust property does not include documents or other property received by a lawyer as investigatory material or potential evidence. Trust property in the form of funds is referred to as "trust funds."**
- (2) "Trust account" means an account in a financial institution in which trust funds are deposited. Trust accounts must conform to the requirements of this Rule.**

(b) Segregation of Trust Property. A lawyer shall hold trust property separate from the lawyer's own property.

- (1) Trust funds shall be held in a trust account.**
- (2) No funds belonging to the lawyer shall be deposited or retained in a trust account except that:**
 - (i) Funds reasonably sufficient to pay bank charges may be deposited therein, and**
 - (ii) Trust funds belonging in part to a client or third person and in part currently or potentially to the lawyer shall be deposited in a trust account, but the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer's interest in that portion becomes fixed. A lawyer who knows that the right of the lawyer or law firm to receive such portion is disputed shall not withdraw the funds until the dispute is resolved. If the right of the lawyer or law firm to receive such portion is disputed within a reasonable time after notice is given that the funds have been**

withdrawn, the disputed portion must be restored to a trust account until the dispute is resolved.

- (3) A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or as expenses incurred.
 - (4) All trust property shall be appropriately safeguarded. Trust property other than funds shall be identified as such.
- (c) **Prompt Notice and Delivery of Trust Property to Client or Third Person.**
Upon receiving trust funds or other trust property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.
- (d) **Accounting.**
- (1) Upon final distribution of any trust property or upon request by the client or third person on whose behalf a lawyer holds trust property, the lawyer shall promptly render a full written accounting regarding such property.
 - (2) On or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client's funds in the trust account after the withdrawal.
- (e) **Operational Requirements for Trust Accounts.**
- (1) All trust accounts shall be maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person on whose behalf the trust property is held, except that all funds required by this Rule to be deposited in an IOLTA account shall be maintained in this Commonwealth.
 - (2) Each trust account title shall include the words "trust account," "escrow account," "client funds account," "conveyancing account," "IOLTA account," or words of similar import indicating the fiduciary nature of the account.
 - (3) For each trust account opened, the lawyer shall submit written notice to the bank or other depository in which the trust account is maintained confirming to the depository that the account will hold trust funds within

the meaning of this Rule. The lawyer shall retain a copy executed by the bank and the lawyer for the lawyer's own records. The notice shall identify the bank, account, and type of account, whether pooled, with interest paid to the IOLTA Committee (IOLTA account), or individual account with interest paid to the client or third person on whose behalf the trust property is held. For purposes of this Rule, one notice is sufficient for a master or umbrella account with individual subaccounts.

- (4) No withdrawal from a trust account shall be made by a check which is not prenumbered. No withdrawal shall be made in cash or by automatic teller machine or any similar method. No withdrawal shall be made by a check payable to "cash" or "bearer" or by any other method which does not identify the recipient of the funds.
- (5) Every withdrawal from a trust account for the purpose of paying fees to a lawyer or reimbursing a lawyer for costs and expenses shall be payable to the lawyer or the lawyer's law firm.
- (6) Each lawyer who has a law office in this Commonwealth and who holds trust funds shall deposit such funds, as appropriate, in one of two types of interest bearing accounts: either (i) a pooled account ("IOLTA account") for all trust funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held. The foregoing deposit requirements apply to funds received by lawyers in connection with real estate transactions and loan closings, provided, however, that a trust account in a lending bank in the name of a lawyer representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank's loan transactions, shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the provisions of paragraph (g) of this Rule.
- (7) Property held for no compensation as a custodian for a minor family member is not subject to the Operational Requirements for Trust Accounts set out in this paragraph (e) or to the Required Accounts and Records in paragraph (f) of this Rule. As used in this subsection, "family member" refers to those individuals specified in section (a)(3) of rule 7.3.
- (f) Required Accounts and Records: Every lawyer who is engaged in the practice of law in this Commonwealth and who holds trust property in connection with a representation shall maintain complete records of the receipt, maintenance, and disposition of that trust property, including all records required by this subsection. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained

by computer subject to the requirements of subparagraph 1G of this paragraph (f) or they may be prepared manually.

- (1) **Trust Account Records.** The following books and records must be maintained for each trust account:
 - A. **Account Documentation.** A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).
 - B. **Check Register.** A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.
 - C. **Individual Client Records.** A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or ledger for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.
 - D. **Bank Fees and Charges.** A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this Rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.
 - E. **Reconciliation Reports.** For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

- (i) The balance which appears in the check register as of the reporting date
- (ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement balance and subtracting outstanding checks and other debits from the bank statement balance.
- (iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

F. **Account Documentation.** For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:

- (i) bank statements.
- (ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.
- (iii) records of deposits separately listing each deposited item and the client or third person for whom the deposit is being made.

G. **Electronic Record Retention.** A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

- (2) **Business Accounts.** Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.
- (3) **Trust Property Other than Funds.** A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

- (4) **Dissolution of a Law Firm.** Upon dissolution of a law firm, the partners shall make reasonable efforts to ensure the maintenance of client trust account records specified in this Rule.
- (g) **Interest on Lawyers' Trust Accounts.**
- (1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State chartered institutions. At the direction of the lawyer, funds in the IOLTA account in excess of \$100,000 may be temporarily reinvested in repurchase agreements fully collateralized by U.S. Government obligations. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay.
- (2) Lawyers creating and maintaining an IOLTA account shall direct the depository institution:
- (i) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the IOLTA Committee;
 - (ii) to transmit with each remittance to the IOLTA Committee a statement showing the name of the lawyer who or law firm which deposited the funds; and
 - (iii) at the same time to transmit to the depositing lawyer a report showing the amount paid, the rate of interest applied, and the method by which the interest was computed.
- (3) Lawyers shall certify their compliance with this Rule as required by S.J.C. Rule 4:02, subsection (2).
- (4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the committee shall oversee the operation of a comprehensive IOLTA program, including:
- (i) the receipt of all IOLTA funds and their disbursement, net of actual expenses, to the designated charitable entities, as follows: sixty seven percent (67%) to the Massachusetts Legal Assistance Corporation and the remaining thirty three percent (33%) to other designated charitable entities in such proportions as the Supreme Judicial Court may order;

- (ii) the education of lawyers as to their obligation to create and maintain IOLTA accounts under this Rule;
 - (iii) the encouragement of the banking community and the public to support the IOLTA program;
 - (iv) the obtaining of tax rulings and other administrative approval for a comprehensive IOLTA program as appropriate;
 - (v) the preparation of such guidelines and rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;
 - (vi) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds which the charitable entity intends to preserve for future use; and
- (5) reporting to the court in such manner as the court may direct.
- (6) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall receive IOLTA funds from the IOLTA Committee and distribute such funds for approved purposes. The Massachusetts Legal Assistance Corporation may use IOLTA funds to further its corporate purpose and other designated charitable entities may use IOLTA funds either for (a) improving the administration of justice or (b) delivering civil legal services to those who cannot afford them.
- (7) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall submit an annual report to the court describing their IOLTA activities for the year and providing a statement of the application of IOLTA funds received pursuant to this Rule.

(h) Dishonored Check Notification.

All trust accounts shall be established in compliance with the following provisions on dishonored check notification:

- (1) A lawyer shall maintain trust accounts only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to the Board in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason.
- (2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days notice in writing to the Board.

- (3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this Rule, and shall establish rules and procedures governing amendments to the list.
- (4) The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.
- (5) Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.
- (6) The following definitions shall be applicable to this subparagraph:
 - (i) "Financial institution" includes (a) any bank, savings and loan association, credit union, or savings bank, and (b) with the written consent of the client or third person on whose behalf the trust property is held, any other business or person which accepts for deposit funds held in trust by lawyers.
 - (ii) "Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.
 - (iii) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. Separate trust accounts are warranted when administering estate monies or acting in similar fiduciary capacities.

[2] In general, the phrase "in connection with a representation" includes all situations where a lawyer holds property as a fiduciary, including as an escrow agent. For example, an attorney serving as a trustee under a trust instrument or by court appointment holds property "in connection with a representation". Likewise, a lawyer serving as an escrow agent in connection with litigation or a transaction holds that property "in connection with a representation". However, a lawyer serving as a fiduciary who is not actively practicing law does not hold property "in connection with a representation."

[2A] Legal fees and expenses paid in advance that are to be applied as compensation for services subsequently rendered or for expenses subsequently incurred are trust property and are required by paragraphs (b)(1) and (b)(3) to be deposited to a trust account. These fees and expenses can be withdrawn by a lawyer only as fees are earned or expenses incurred. The Rule does not require flat fees to be deposited to a trust account, but a flat fee that is deposited to a trust account is subject to all the provisions of this Rule, including paragraphs (b)(2) and (d)(2). A flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted.

RECOMMENDATION BY THE STANDING ADVISORY COMMITTEE

The committee added Comment 2A, which makes an exception for “flat fees,” as defined in the comment, meaning that such fees need not be segregated in any way.

MBA COMMENT

The MBA believes that if there is to be such a carve-out, it should be accompanied by a specific disclosure to the client that the fee immediately becomes the property of the attorney, without restriction. While we are mindful of possible problems e.g. if the attorney dies, or becomes disabled, or simply fails to complete the agreed-on scope of work, we believe that such situations are best addressed by the tenets of contract law.

Below is a dissenting view, which addresses the practical problems of recovering funds in such situations.

4834-2207-7975, v. 1

Dissent regarding Proposed Comment to Rule 1.15 (Safekeeping of property /Trust Account Placement/Flat Fees)

Revised comment 2 /2d par. of Rule 1.15 of the ABA Model Rules as proposed for Massachusetts adoption by the SJC's Standing Advisory Committee on Ethics ("SAC") would carve out an exemption for "flat fees" as follows:

"...The Rule [1.15 (b1, b3)] does not require flat fees to be deposited to a trust account, but a flat fee that is [voluntarily] deposited to a trust account is subject to all the provisions of this Rule [1.15 as a whole] , including paragraphs (b)(2) and (d)(2) [re withdrawal for the lawyer/law firm except as to client-disputed withdrawals]. A flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal service, whether relatively simple and of short duration , or complex and protracted." (Comment 2A to Rule 1.15 in SAC draft adopting the ABA comment 2 , 2d par, as par. 2A without pro or con statement; emphases and bracketed [..] explanations added).

Thus the comment makes an exception to the entrustment obligation under Rule 1.15 for flat fees (a form of engagement of growing significance in law practice trends) that would swallow the Rule 1.15 requirement for entrustment of unearned fees and not-yet-incurred expenses. An MBA review committee has a tentative majority to approve this change. With due respect I dissent.

An agreement for fixed fees to be collected after performance of a project or in parts after meeting agreed milestones raises no ethical /client protection concerns and a lawyer taking the money in advance to assure availability of funds for later payment of fees, as earned, and reimbursement of expenses, as incurred, is a prudential step and long dealt with in Massachusetts by trust account placement requirements rigorously enforced by Massachusetts Bar Counsel and courts. But, as was explained in *Smith v. Binder*, 20 Mass. App. Ct. 21, 23 n.3 (1985) a lawyer's requiring a client to agree to non-refundable fee is unethical except possibly in a narrow area of engagement fees. In that case return of the unearned portion of excess fee prepayment was ordered under Rule 1.16. *See also, In re Robert W. Mance III*, 980 F.2d 1196 (D.C. App. 2009); *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994); and MBA Ethics Opinion 95-2, urging against a nonrefundable "retainer" citing *Cooperman*. The new SAC comment par. 2A should be deleted and comment 2 revised to allow reasonable but not blanket exceptions to trust account placement for anything denominated a "flat fee." The exceptions would include the engagement fee component -- i.e., payment for

taking the case, accepting the conflict obligations, change of position such as staffing adjustment(s) indicated in *Smith v. Binder, supra*, and also exceptions for anticipated immediate performance of the actual services or pursuant to a waiver by the client after consultation (or informed consent depending on the favored location. That would be a better balancing of interests of lawyers, clients and the bar/justice system. The engagement fee component is rarely, if ever, 100% of the consideration for the client's paid-in advanced flat fee payment, unless made with the expectation that other fees (flat or otherwise) will be paid for the actual services to be performed over a long duration (i.e. not immediately as understood in the circumstances). It also follows that payments in advance for lawyer expenses to be incurred in the future (e.g. expert witnesses, e-discovery consultants, jury consultants, graphics presentations, court and/or administrative agency filing fees) must also be protected by entrustment.

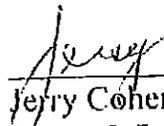
One of the purposes of the trust account placement rule is to protect a client against inability to recover unearned funds entrusted to the lawyers for expected fees that were never earned or expenses not yet incurred. There is significant modern movement away from hourly fees to flat fees in many areas of civil litigation and transactional practice and there are dangers of lawyer/ law firm financial failure by way of insolvency and/or bankruptcy in small and large firms in civil as well as criminal defense practice and recent examples showing reality of the prospect; it's not hypothetical. There may be exceptions for taking an advance payment into a lawyer's/law firm's operating account (and in turn to personal accounts) with freedom for a lawyer /law firm (or their creditors) to have immediate access and use, as indicated above, but those exceptions, should be narrowly defined and agreed with a client in true consultation pursuant to a revised comment [2].

The prospect of sudden implosion at large, medium and small firms and solo law practices is not a hypothetical; it is real. The reality includes several in Massachusetts (Herrick Smith, Powers & Hall, Gaston Snow, Hill & Barlow and Testa Hurwitz) and elsewhere (Dewey LeBoeuf, Coudert Brothers, King & Spalding, Finley Kimble, Darby & Darby, Arder & Hadden, Bogle & Gates, Donovan Leisure, Graham & James, Heller Ehrmann, Keck Mahin, Lord Day, Shea Gould, Thelen Reid, Wolf Block [which had an active Boston branch], Howery Simon and so many more). On smaller firms and solo levels, the reports of bar discipline authorities throughout the U.S. show lawyers more severely punished than otherwise when unable to make restitution to clients because of failure to make appropriate segregation of advance payments into trust accounts (setting aside Client Security Board burdens of reimbursement and depletion in some instances where fraud was involved). Most cases of lawyer or law firm

inability to complete promised performance to make restitution arise not from fraud but from common all too frequent instances of lawyers' human distress -- death, disability, divorce, drug/alcohol addiction, weakness of record-keeping practices, business and personal financial over-extension, staff theft or embezzlement from the lawyer to mention some, not all, the tragic circumstances. In some instances willful misuse of the advance payments can incur. But clients and their families who furnished the advance payment to the lawyer for fees and expenses should not be the collateral damage victims of the lawyer/law firm tragedy or the occasional willful defalcation. Entrustment rules for lawyers were created to protect clients against all such collateral damage. We protect clients, protect lawyers and protect integrity of the bar by a prudent rule of funds entrustment.

See the D.C. Bar's Ethics Opinion No. 355 (Nov. 2010) published in response to the court's invitation in *Mance, supra*, http://wwwdcbar.org/for_lawyers/ethics/opinions/opinion355.htm. A copy of that ethics opinion is attached to this Dissent as Appendix A.

I have studied carefully, understand and respect the arguments of convenience (expressed in our committee's deliberations and in ethics committee and court opinions nation-wide) for avoiding the Rule 1.15 entrustment obligation. But, I say, respectfully, that client interests and the public interest are of equal or greater weight. I therefore dissent. I do not provide here an alternate text of comment [2] but leave that to the SAC and/or SJC if they find merit in this Dissent.

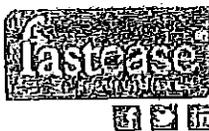


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Appendix A



- › For Lawyers
- › For the Public
- › Inside the Bar



Home > For Lawyers > Ethics > Legal Ethics > Opinions
Opinion No. 355

Flat Fees and Trust Accounts: (a) must a lawyer deposit flat fees paid in advance of the conclusion of a representation in a trust account?; and (b) when are such funds earned so that a lawyer can transfer them to an operating account?

In its decision in *In re Mance*, 980 A.2d 1196 (D.C. 2009), the District of Columbia Court of Appeals held that, absent informed consent from the client to a different arrangement, a lawyer must deposit a flat or fixed fee paid in advance of legal services in the lawyer's trust account. Under *Mance*, such funds must remain in the lawyer's trust account until earned unless the client gives informed consent to a different arrangement. This Opinion provides guidance for the Bar concerning these rulings.

The lawyer and client may agree on how and when the attorney is deemed to have earned some, or all, of the flat fee and thereby entitled to transfer trust funds into the lawyer's operating account. Such an agreement must bear a reasonable relationship to the anticipated course of the representation and must avoid excessive "front-loading." A written agreement or a writing evidencing the agreement is strongly recommended but not mandatory. In the absence of any agreement with the client regarding milestones by which the lawyer will have earned portions of the fixed fee, the lawyer will have the burden to establish that whatever funds that have been transferred to the lawyer's operating account have been earned.

Alternatively, a lawyer may place unearned funds in an operating account provided that the lawyer obtains informed consent from the client as provided in Rule 1.15(e). (1) In order to obtain such consent, the lawyer must explain to the client that the funds may also be placed and kept in a trust account until earned and that placement in an operating account does not affect a lawyer's obligation to refund unearned funds if the client terminates the representation. The lawyer should also explain the additional protection offered by a trust account. For the lawyer's and client's protection, these disclosures should be in writing, but the Rules do not mandate a writing.

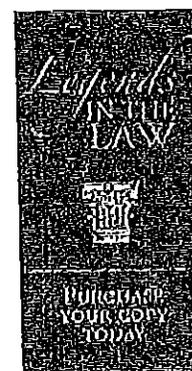
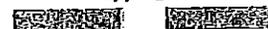
Applicable Rules:

- Rule 1.0(e) & (o)
- Rule 1.5(b)
- Rule 1.15(a) & (e)

Inquiry

The Committee has not received a specific inquiry in this case. The Court in *Mance* stated that its holding made new law in the District of Columbia. The "application [of the Rules] to flat fees is not clear on its face" and "the understanding among lawyers with respondent's type of practice [criminal defense] has been that flat fees belong to the lawyer upon receipt." 980 A.2d at 1206. Recognizing that many practitioners had long followed a contrary practice, the Court invited the D.C. Bar to "provide attorneys with helpful guidance on how to conform their practice to the rule we announce in this opinion." *Id.* Pursuant to the Court's comments, after outlining the Court's holdings in

Shopping cart



Mance, we address the issues relating to agreements between the client and the lawyer regarding transferring portions of a flat fee from a trust account to an operating account prior to the conclusion of the representation.[2] We also address a lawyer's ability to transfer funds in the absence of an agreement. Finally, we discuss those disclosures that must be made to a client in order to obtain informed consent under Rule 1.15(e) to place the entire flat fee in an operating account at the outset of an engagement.

Discussion

A. *In re Mance*.

Mance addressed whether a flat fee paid in advance of services rendered has been "earned" by the lawyer under Rule 1.15(e) at the outset of the engagement. A flat fee is a fee that "embraces work to be done, whether it be relatively simple and of short duration, or complex and protracted." [3] *Id.* at 1202 (internal quotations omitted). The respondent argued (and the Hearing Committee and Board of Professional Responsibility agreed) that such funds were earned upon receipt because a flat fee was "not an 'advance' but the agreed upon fee regardless of how much (or how little) legal work was required." *Id.* at 1200. The Court of Appeals disagreed, holding "that when an attorney receives payment of a flat fee, the payment is an "advance[] of unearned fees" and "shall be treated as property of the client...until earned unless the client consents to a different arrangement." *Id.* at 1202, quoting Rule 1.15(e).[4]

The Court further concluded, as "[a] corollary to the rule that a flat fee is an advance of unearned fees...the fee must be held as client funds in a client's trust or escrow account until they are earned by the lawyer's performance of legal services." *Id.* at 1203. In support of this conclusion, the Court cited the "preservation of the client's right to choose his or her counsel, including the right to discharge an attorney.... Since a flat fee is not owned by an attorney until it has been earned through the performance of services to the client, the client will not risk forfeiting fees for work to be performed in the future if the client chooses to discharge his attorney." *Id.* at 1203, quoting *In re Sather*, 3 P.3d 403, 410 (Colo. 2000).

Beyond stating that the fee agreement "may" address the issue, the Court did not address in detail "how and when the attorney is deemed to earn the flat fee or specified portions of the fee." *Id.* at 1204. It cited with approval the use of "milestones 'based upon passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and the client.'" [5]

After recognizing that "the default rule is that an attorney must hold flat fees in a client trust or escrow account until earned," the Court identified an alternative available under the Rules. *Id.* at 1206. Under Rule 1.15(e), an attorney may place a flat fee, even if not earned, in an operating account with the informed consent of the client. The Court set forth the requirements for such consent, relying upon the Colorado Supreme Court's decision in *Sather*:

The attorney must expressly communicate to the client verbally and in writing that the attorney will treat the advance fee as the attorney's property upon receipt; that the client must understand the attorney can keep the fee only by providing a benefit or providing a service for which the client has contracted; that the fee agreement must spell out the terms of the benefit to be conferred upon the client; and that the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client.

Id. at 1206, quoting *Sather*, 3 P.3d at 413.

The Court then reviewed the record regarding the extent to which the above considerations were discussed between the respondent and his client and noted that respondent did not mention that the client had the option of having the funds placed in an escrow account. "Where there is no discussion regarding the fee arrangement besides merely stating the overall fee, and no mention of the escrow account option, a client cannot be said to have a sufficient basis to give informed consent to waive the requirements of a rule designed to protect the client's interests," *Id.* at 1207. Even where an attorney does obtain informed consent to place a flat fee into the attorney's operating account, such consent does not alter the obligation of the lawyer to refund any portion of the fee that ultimately is not earned, even if through no fault of the lawyer. *See Id.* at 1204-05 and 1206-07 (obligation to refund exists even when representation is terminated by the client).[6]

B. Client-Lawyer Agreements Concerning When Some Flat Fees Held In Trust Have Been Earned.

Under *Mance*, lawyers remain free to wait until the representation has been completed before withdrawing any portion of the flat fee from a trust account. *Mance* states that the "fee agreement may specify how and when the attorney is deemed to earn a flat fee or specified portions of the fee." *Id.* at 1204 (emphasis added). Accordingly, a lawyer has the option of simply keeping the entire flat fee in a trust account and transferring such fee to an operating account in one lump sum at the conclusion of the representation. In theory such a practice could be seen as commingling, as in many instances the lawyer would likely have earned at least some of the fee prior to the end of the representation and yet will have kept all of the fee in a trust account. Given the Court's emphasis on an attorney's obligation to refund unearned funds, the quantum of which may often be a matter of dispute, we do not believe that the Rules as applied to the typical flat fee engagement support such a result. Nothing in the *Mance* opinion encourages the creation of a regime where lawyers are subject to discipline unless they can correctly calibrate how much they have earned at all points in a flat fee representation and then withdraw the corresponding amounts as earned.

As *Mance* recognized, however, waiting until the conclusion of the representation before getting access to any portion of the flat fee "could impose a financial hardship on solo practitioners and lawyers in small firms." *Id.* at 1204. In the event that the lawyer wishes to make interim withdrawals or transfers from the trust account, the lawyer *should* address the issue in the fee agreement. We do not read *Mance*, however, as requiring that the fee agreement be the only way that this issue can be addressed or, similarly, as holding that the matter must be the subject of an agreement reached at the outset of the representation. In the latter regard, we note that circumstances change over the course of an engagement. A matter that at the outset is viewed by the client and lawyer as likely to be simple and brief may become complex and protracted.

While there is potential for abuse whenever a lawyer seeks to modify the financial terms of a representation in mid-stream, such considerations do not absolutely prohibit a lawyer from increasing a fee.[7] If the law does not prohibit a lawyer from changing the underlying fee after the engagement has commenced, then, similarly, it should not be read to prohibit a client and lawyer from addressing the issue of when a lawyer has earned portions of a flat fee after the fee agreement has been signed and the engagement is underway. Lawyers are cautioned that such agreements are subject to scrutiny to ensure that they were not the product of overreaching by the lawyer, just as with any other modification to an existing fee arrangement.

The next logical question is whether the agreement between the lawyer and the client regarding the treatment of flat fees

held in trust accounts *must* be in writing. Rule 1.5(b) requires a writing for clients not regularly represented by the lawyer but that writing must address only "the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible." Nothing in the Rules indicates that the requirement to set forth the "basis or rate of the fee" in writing encompasses the details of how or when a flat fee is earned. Comment [1] to Rule 1.5 states "[i]t is not necessary to recite all of the factors that underlie the basis of the fee." Comment [3] indicates that providing a fixed fee schedule for routine matters, such as uncontested divorces, is sufficient to comply with the requirement to set forth the "basis or rate of the fee" in writing.

In addition to the writing requirement of Rule 1.5, a number of Rules require the lawyer to obtain "informed consent" from the client regarding various issues in the lawyer-client relationship but do not impose any writing requirement. *See, e.g.*, Rules 1.2(c) (limitations on scope of representation); 1.6(a)(1) (disclosure of confidences and secrets); 1.7(c) (conflict waivers); 1.15(e) (treatment of unearned client funds). Under the definition of "informed consent," a writing is only required when the underlying Rule requiring informed consent so specifies. *See* Comment [3] to Rule 1.0; *see also* Rules 1.8(a)(3) and 1.8(g).

There are other important facets in the lawyer-client relationship where writings are not mandatory. For example, Rule 1.16(b)(3) allows a lawyer to withdraw from a representation of a client when the client "falls substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." There is no requirement in the Rule or the Comments that the "warning" be in writing. Rule 1.4 imposes a number of broad requirements concerning communication and consultation between a lawyer and client but does not mandate that any of those communications or consultations be in writing.

The foregoing militates against reading the Rules to *require* that an agreement between a client and a lawyer concerning the treatment of flat fees be in writing. As a matter of prudence, however, such agreements *should* be in writing or at least memorialized in writing.^[8] Writings avoid confusion and misunderstanding and can frequently prevent disputes. Writings protect both the lawyer and the client. *Cf.* Comment [28] to Rule 1.7 ("It is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent" to a conflicts waiver).

In terms of the substance of an agreement between a lawyer and a client, *Mance* explicitly permits the use of "milestones based upon the passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and the client," provided that there is no "extreme 'front loading' of payment milestones." 980 A.2d at 1204. There are many approaches that would fit within these general categories. A lawyer and client could agree on withdrawals based on the application of an hourly rate to the lawyer's efforts. Withdrawals could be tied to events in a representation, such as completion of discovery, hearings or the setting of a trial date, or to the completion of specific tasks, such as witness interviews, filing of motions, or, in a non-litigation matter, the completion of specified draft documents. The lawyer and client can agree upon alternative milestones to address uncertainties about the future course of a representation.

The agreement can also contain language reflecting that the lawyer will earn the entire fee at the conclusion of a representation even if certain specified milestones have never been reached. For example, a lawyer who persuades a prosecutor to dismiss criminal charges in advance of trial could

earn the entire fee, even if the lawyer and client had specified the trial as a milestone in their agreement. The milestones and approaches used can and should be tailored to the type of engagement. Those suitable for a criminal matter may not be appropriate to use for a real estate transaction or the drafting of a will.

C. Interim Trust Account Withdrawals In the Absence of Agreement Between the Lawyer and the Client.

Mance does not address whether a lawyer may transfer some portion of a flat fee from a trust account to an operating account prior to the conclusion of a representation where there is no agreement between the lawyer and the client. Such a course is not without peril for the lawyer but is not *per se* a violation of the Rules. Rule 1.15 allows, indeed requires, a lawyer to withdraw from a trust account funds that have been earned. A lawyer who has charged a client, for example, two thousand dollars for the preparation of an estate plan has under most circumstances earned some portion of the fee when the lawyer sends the client a set of draft documents. A lawyer in a criminal matter has likewise ordinarily earned some amount when the lawyer appears for the trial date prepared to present a defense.

In the absence of an agreement with the client, the burden will be on the lawyer to demonstrate that the amount withdrawn from trust has been earned. Under such circumstances, the lawyer's conclusion as to what portion of flat fee has been earned must be reasonable. Further, the lawyer should give notice to the client of the withdrawal so that the client will have an opportunity to review the amount of the withdrawal, question the lawyer and perhaps contest it. See Rothrock, *The Forgotten Flat Fee* at 323 (citing authority requiring "written notice of the time, amount and the purpose of the withdrawal").

D. Informed Consent Under Rule 1.15(e) to Hold Unearned Fees In an Operating Account.

Rule 1.15(e) allows a lawyer, with informed consent from the client, to deposit unearned funds in an operating account. A flat fee which otherwise must be deposited in a trust account and remain in such account until earned may be deposited at the outset of an engagement in an operating account if the client provides informed consent.

Mance addressed the disclosures necessary to secure such informed consent. "Informed consent" is a defined term in the Rules, and the definition states that the lawyer must "communicat[e] adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e). In this context, "informed consent" requires that "the client...be informed that, unless there is an agreement otherwise, the attorney must... hold the flat fee in escrow until it is earned by the lawyer's provision of legal services." 980 A.2d at 1207. The bare mention of "the escrow account option" will usually be insufficient unless accompanied by some explanation of the features that distinguish a trust account from an operating account: *i.e.*, that trust funds are generally protected from a lawyer's creditors and that trust funds cannot be spent until earned and thus are more readily available for refund to the client.[9] The lawyer must explain that, in contrast to a trust account, funds in an operating account are "lawyer's property upon receipt," with the caveat that they can be retained only by providing the agreed upon services. In addition, "the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client." *Id.* at 1207, quoting *Sather*, 3 P.3d at 413. These disclosures should, as a matter of prudence, be in writing, but a writing is not required. See Rule 1.15(e) (containing no writing requirement).[10]

Conclusion

Absent a contrary agreement, a lawyer must deposit a flat or fixed fee paid in advance of legal services in the lawyer's trust account. Such funds must remain in the lawyer's trust account until earned. The lawyer and client may agree concerning how and when the attorney is deemed to have earned some, or all, of the flat fee. Such an agreement must bear a reasonable relationship to the anticipated course of the representation and must avoid excessive "front-loading." A written agreement or a writing evidencing the agreement is strongly recommended but not mandatory. In the absence of any agreement with the client regarding milestones by which the lawyer will have earned portions of the fixed fee, the lawyer will have the burden to establish that whatever funds that have been transferred to the lawyer's operating account have been earned.

Alternatively, a lawyer may place unearned funds in an operating account if the lawyer obtains informed consent from the client as provided in Rule 1.15(e). In order to obtain such consent, the lawyer must explain to the client that the funds may also be placed and kept in a trust account until earned and that placement in an operating account does not affect a lawyer's obligation to refund unearned funds if the client terminates the representation. The lawyer should also explain the additional protection offered by a trust account. Although the Rules do not mandate a writing, these disclosures should be in writing, as a matter of prudence for both the lawyer's and client's protection.

Published: June 2010

[1] Effective August 1, 2010, the District of Columbia Court of Appeals amended Rule 1.15 and what was formerly Rule 1.15(d) is now Rule 1.15(e). The discussion in *Hance* concerning Rule 1.15(d) refers to the same provision that we reference as Rule 1.15(e) in this Opinion. The language of the former Rule 1.15(d) and the current Rule 1.15(e) are identical.

[2] For purposes of clarity, the references in this Opinion to the "conclusion of the representation" means when the lawyer has completed the entire engagement and does not include situations where the lawyer is terminated by the client before the engagement is otherwise over.

[3] The Court recognized "the benefits of a flat fee arrangement for both the client and the attorney." A flat fee "reward[s] efficiency" by the lawyer and "eliminate[s] the uncertainty, anxiety and surprise" of hourly rates for the client. *Id.* at 1204 (internal quotations omitted). The Court explicitly stated that it did not "intend by our holding to discourage attorneys from charging flat fees." *Id.*

[4] The Court of Appeals contrasted flat fees with "engagement retainers" which are fees paid "apart from any other compensation, to ensure that a lawyer will be available for the client if required." *Id.* at 1202. Engagement retainers are "earned when received," subject to refund if the lawyer withdraws or is discharged prematurely. *Id.* Engagement retainers may not be deposited in a lawyer's trust account. Doing so would constitute commingling.

[5] *Id.*, quoting Alec Rothrock, *The Forgotten Flat Fee: Whose Money Is It and Where Should It be Deposited?*, 1 Fla. Coastal L. J. 293, 323 (1999) (hereafter "Rothrock, *The Forgotten Flat Fee*").

[6] *Hance* did not discuss a lawyer's obligations with respect to funds received under pre-paid legal services plans. We similarly do not address such issues here.

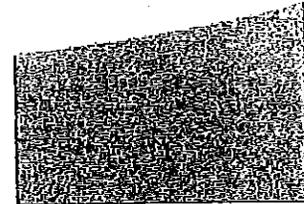
[7] See Geoffrey C. Hazard, Jr., W. William Hodges, Peter R. Jarvis, 1 *The Law of Lawyering* §8.11 (2010 Supp.) (agreements or modifications after the commencement of the attorney client relationship "have to bear an extra burden of justification"); *Restatement of the Law Governing Lawyers* §18 (ALI 2000) (modifications of terms of representation "are subject to special scrutiny"); see also D.C. Legal Ethics Op. 310 (2001) ("[a] change in a fee arrangement in an ongoing representation is subject to strict scrutiny for overreaching by the lawyer").

[8] A writing signed by the client is, of course, preferable.

Under Rule 1.0(o), a "signed" writing includes consent expressed electronically, *e.g.*, an e-mail. If a "signed" writing through "an affirmative response by the client" cannot be obtained, "consent may be inferred...from the conduct of the client...who has reasonably adequate information about the matter." Comment [3] to Rule 1.0. In practical terms, this means that if a client consents to an agreement concerning the handling of flat fee but does not "sign" a writing to that effect, the lawyer should nevertheless memorialize the terms of the agreement and the client's consent to it in writing and send such memorialization to the client.

[9] Clients who are "experienced in legal matters generally and in making decisions of the type involved" or are represented by independent legal counsel may require "less information and explanation than others." Comment [3] to Rule 1.0.

[10] Some language in *Hance* arguably could be read to impose a writing requirement. The Court quotes, with agreement, a paragraph from *Sather* outlining a number of requirements for client consent imposed by the Supreme Court of Colorado. Among the requirements set by the Colorado court is the obligation to communicate with the client "in writing." See 980 A.2d at 1206-07. However, the Court in *Hance* then goes on to analyze the disclosures made by the respondent and reviews the contents of the "conversation" between the respondent and the complainant. See *id.* at 1207. The result, in our view, is an ambiguity that does not overcome the Rules drafters' decision not to include a writing requirement in Rule 1.15(c).



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Fwd: flat fee

Kathy O'Donnell <kodonnell@marcottelawfirm.com>
To: Doug Bowles <dbowlesjd@gmail.com>

Thu, Jan 2, 2014 at 9:10 AM

Please put this with SJC material. See me re sending reminders

Sent from my iPad

Begin forwarded message:

From: Jerry Cohen <jcohen@burnslev.com>
Date: December 30, 2013 at 3:06:50 PM EST
To: 'Kathy O'Donnell' <kodonnell@marcottelawfirm.com>
Subject: FW: flat fee

Hi Kathy – Misc. item :

In Bar Discipline matter SJC BD 2013 – 062 (Att'y Kristin Brassard of Fitchburg), 42 MLW 784 (12/30/13) respondent's misdeeds included failure to return an unearned portion of a \$ 2300 "flat fee" for a bankruptcy matter...punishable under Rule 1.16(d). She did return the unearned portion after Office of Bar Counsel pushed her to do so ... For initial failure to return and several other faults she got a three month suspension –suspended if she did well for two years and complied with other conditions and to be then vacated....The MLW report does not say she put the fee payment or any portion of it into trust, likely not, and the client had fired her a year and a half after engagement and payment of the flat fee...It's likely her punishment would have been more severe if she was unable to return the unearned portion because of insolvency...All that said, we can give the bankruptcy bar members the section 7 proceedings exemption they seek because of its federal–state bind rather than complicate their position (and ours) ...The burden of course falls on clients. /Best, Jerry

Happy New Year

Jerry Cohen Partner

PROPOSED RULE

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

Proposed Rule 3.3(a)(1)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

Advisory Committee Comments

The current Massachusetts Rule prohibits a lawyer from knowingly making false statements of material fact or law to a tribunal. The Committee recommends adopting the Model Rule formulation prohibiting any knowingly false statement of fact or law. In addition, revised subparagraph (a)(1) makes it clear that a lawyer must correct false statements previously made to a tribunal if they are material.

MBA Rules Committee Comments

It is difficult to argue against a broad prohibition against making false statements, regardless of their materiality.

But the requirement of “materiality” under the present rule has been a buffer protecting counsel from disciplinary actions for misstatements or omissions in the heat of the moment which, however, could not directly or circumstantially influence a finder of fact’s determination. *Matter of Angwafo*, 453 Mass. 28, 35(2009). Now, an attorney could be held responsible for any “knowing” misstatement to a tribunal, the definition of which has been amended to include arbitrators and any other adjudicative body.

Under the definitions in Rule 1.0, “knowingly” “denotes actual knowledge of the fact in question...” which “may be inferred from circumstances.”

Again, there are no policy reasons to oppose this change.

Proposed Rule 3.3(a)(2)

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

Advisory Committee Comments

The Committee recommends eliminating the present provision regarding disclosures necessary to avoid assisting a client’s criminal or fraudulent acts in favor of a broader provision

to be incorporated in a new paragraph (b). Subparagraph (a)(3) concerning disclosure of legal authority has been renumbered (a)(2).

MBA Rules Committee Comments

This recommendation doesn't change the existing rule on disclosure of legal authority and should be supported.

Proposed Rule 3.3(a)(3)

(3) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Advisory Committee Comments

Current Massachusetts Rule 3.3(a)(4), which deals with presenting false evidence to a tribunal and the lawyer's obligation to remedy false evidence, has been renumbered (a)(3). The Committee recommends revising this subparagraph to state explicitly that remedial measures may, if necessary, include disclosure to the tribunal. We also recommend moving the permission to refuse to offer evidence that a lawyer believes but does not know is false, now contained in Rule 3.3(c), to this subparagraph.

A phrase has been added to make it clear that such permission does not apply to the testimony of a defendant in a criminal matter.

MBA Rules Committee Comments

The recommendations are sensible, especially in light of Rule 3.3(e), which is a particular Massachusetts provision. As will be discussed later, however, the comments to the rule extend this duty to a deposition.

Proposed Rule 3.3(b)

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Advisory Committee Comments

This paragraph replaces the current subparagraph (a)(2). The current subparagraph (a)(2) focuses on remedial measures necessary to avoid assisting the client in a criminal or fraudulent act. Model Rule paragraph (b) requires the lawyer to take remedial measures whenever the lawyer knows that any person is engaged, has engaged, or intends to engage in criminal or fraudulent acts relating to a proceeding in which the lawyer is representing a client. Under this subparagraph, a lawyer would be required to take remedial measures if the lawyer discovers that a person other than the lawyer's client is, for example, bribing witnesses or tampering with a jury

MBA Rules Committee Comments

Again, this is a clarification of the existing rule and should be supported.

Proposed Rule 3.3(c)

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Advisory Committee Comments

Current Rule 3.3(b), relating to the duration of the lawyer's duty to take remedial action, has been renumbered 3.3(c). The Committee recommends adding a reference to the duties imposed by new subparagraph (b).

MBA Rules Committee Comments

This recommendation should be supported.

Proposed Rule 3.3(d)

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Advisory Committee Comments

The Committee recommends one minor stylistic change to Rule 3.3(d), which deals with the lawyer's duty in ex parte proceedings.

MBA Rules Committee Comments

This recommendation should be supported.

Proposed Rule 3.3(e)

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed.

(1) If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation.

(2) If, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying.

(3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

Advisory Committee Comments

Rule 3.3(e), which deals with the duties of criminal defense attorneys, has no counterpart in the Model Rules. The Committee recommends retaining the substance of this paragraph, with minor stylistic changes intended to clarify the lawyer's obligations at different stages of a criminal proceeding.

MBA Rules Committee Comments

The recommended changes are stylistic only and should be supported.

PROPOSED COMMENTS

As part of its 2002 revisions, the ABA also extensively rewrote and reorganized the Comments to Model Rule 3.3.

The Committee recommends adoption of most of these revisions, with the exceptions noted below. Because of the extent of the 2002 revisions, the discussion below follows the number of the Committee's recommended Comments rather than the numbering of the current Comments.

Proposed Comment 1

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(p) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

Advisory Committee Comments

The Committee recommends adoption of this new Comment, which makes it explicit that the duty of candor applies not only in appearances before a tribunal but also in depositions.

MBA Rules Committee Comments

This recommendation should be supported.

Proposed Comment 2

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Advisory Committee Comments

The Committee recommends the adoption of this new Comment, which corresponds to Comment 1 in the current Massachusetts Rules. The Comment has been extensively revised for clarity.

MBA Rules Committee Comments

Given that the duty to correct false testimony would be extended to depositions, it is necessary to clarify how and when counsel should take reasonable remedial measures upon the discovery of false testimony. If the knowledge is gained during the deposition, must counsel suspend to discuss the testimony with the client or the lawyer's witness? Or can it wait until the preparation of errata sheets? Per our discussion, we should recommend a revision to the comment that "reasonable remedial measures" may include, as an initial step, urging the client or witness to make corrections via an errata sheet. See Comment 10.

Comment 2A.

Comment 2A in the current Massachusetts Rule explains what it means to assist a client in committing crime or fraud on a tribunal. Since the reference to assisting a client's crime or fraud has been eliminated from Rule 3.3 in favor of the broader provisions of Rule 3.3(b), the Committee recommends deleting Comment 2A.

Proposed Comment 3

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Advisory Committee Comments

Comment 3 is current Comment 2.

MBA Rules Committee Comments

This recommendation should be supported.

Proposed Comment 4

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Advisory Committee Comments

Comment 4 is current Comment 3, with two minor changes.

MBA Rules Committee Comments

This recommendation should be supported.

Proposed Comment 5

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes, except as provided in Rule 3.3(e). This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

Advisory Committee Comments

The Committee recommends adoption of the Model Rules version of this Comment, which expands on Comment 4 in the current Massachusetts Rule. The revised Comment makes it clear that a lawyer does not violate Rule 3.3 by offering false evidence for the purpose of demonstrating its falsity, such as when a lawyer calls the opposing party for the purpose of discrediting the opponent's testimony. The Committee has added a cross-reference to paragraph (e) regarding the duties of criminal defense lawyers

MBA Rules Committee Comments

This recommendation should be supported.

Proposed Comment 6

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Advisory Committee Comments

The Committee recommends retaining Comment 5 to the current Massachusetts Rule and renumbering it Comment 6. The Committee does not recommend adoption of Model Rules Comment 6 because in describing what a lawyer must do if the client intends to or has testified falsely, the Model Comment does not distinguish between a lawyer in a civil matter and a lawyer representing the accused in a criminal proceeding. Massachusetts Rule 3.3(e) imposes separate duties on criminal defense lawyers.

MBA Rules Committee Comments

Proposed Comment 7

[7] Reserved.

Advisory Committee Comments

The Committee recommends reserving this Comment since the duties of defense counsel in a criminal case are dealt with in Rule 3.3(e) and nonstandard Comments 11A-11E.

MBA Rules Committee Comments

Proposed Comments 8-10

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood. For issues raised by perjury by a criminal defendant, see Comments 11A-11E.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, Rule 3.3(e) separately addresses issues that arise in that context.

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, and except as provided for in Rule 3.3(e), the advocate must take further remedial action. Except as provided in Rule 3.3(e), if withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

Advisory Committee Comments

The Committee recommends adoption of these new Comments, which elaborate on the lawyer's duties with respect to evidence that the lawyer knows or reasonably believes to be false. The Committee has added cross-references to Massachusetts Rule 3.3(e) and to the Comments dealing with 3.3(e).

MBA Rules Committee Comments

Proposed Comment 11

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal

the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Advisory Committee Comments

The Committee recommends the adoption of this Model Comment, which incorporates the substance of current Comment 6

MBA Rules Committee Comments

These recommendations should be supported

Proposed Comment 11A

Perjury by a Criminal Defendant

[11A] In the defense of a criminally accused, the lawyer's duty to disclose the client's intent to commit perjury or offer of perjured testimony is complicated by state and federal constitutional provisions relating to due process, right to counsel, and privileged communications between lawyer and client. Rule 3.3(e) accommodates these special constitutional concerns in a criminal case by providing specific procedures and restrictions to be followed in the rare situations in which the client states his intention to, or does, offer testimony the lawyer knows to be perjured in a criminal trial.

Advisory Committee Comments

This Comment, dealing with obligations of criminal defense counsel under Massachusetts Rule 3.3(e), is virtually the same as Comment 7 to the current Massachusetts Rule.

MBA Rules Committee Comments

Proposed Comment 11B

[11B] Rule 3.3(e) requires that a lawyer know that the client intends to present false testimony before the lawyer proceeds under paragraph (e). This standard requires that the lawyer, before invoking the Rule, act in good faith and have a firm basis in objective fact. Conjecture or speculation that the defendant intends to testify falsely is not enough. Inconsistencies in the evidence or in the defendant's version of events are also not enough to trigger the Rule, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in the lawyer's mind that the defendant is equivocating and not an honest person. Similarly, the existence of strong physical and forensic evidence implicating the defendant would not be

sufficient. Lawyers may rely on facts made known to them, and are under no duty to conduct an independent investigation.

Advisory Committee Comments

This new Comment incorporates the discussion of the Supreme Judicial Court in *Commonwealth v. Mitchell*, 438 Mass. 535 (2003), concerning when a criminal defense lawyer knows that the accused intends to give false testimony for purposes of Rule 3.3(e).

MBA Rules Committee Comments

Proposed Comment 11C

[11C] In cases to which Rule 3.3(e) applies, it is the clear duty of the lawyer first to seek to persuade the client to refrain from testifying perjurally. That persuasion should include, at a minimum, advising the client that such a course of action is unlawful, may have substantial adverse consequences, and should not be followed. If that persuasion fails, and the lawyer has not yet accepted the case, the lawyer must not agree to the representation. If the lawyer learns of this intention after the lawyer has accepted the representation of the client, but before trial, and is unable to dissuade the client of his or her intention to commit perjury, the lawyer must seek to withdraw from the representation. The lawyer must request the required permission to withdraw from the case by making an application *ex parte* before a judge other than the judge who will preside at the trial. The lawyer must request that the hearing on this motion to withdraw be heard *in camera*, and that the record of the proceedings, except for an order granting a motion to withdraw, be impounded.

Advisory Committee Comments

This Comment contains the substance of current Comment 8.

MBA Rules Committee Comments

Proposed Comments 11D-E

[11D] Once the trial has begun, the lawyer may seek to withdraw from the representation but is not required to do so if the lawyer reasonably believes that withdrawal would prejudice the client. If the lawyer learns of the client's intention to commit perjury during the trial, and is unable to dissuade the client from testifying falsely, the lawyer may not stand in the way of the client's absolute right to take the stand and testify. If, during a trial, the lawyer knows that his or her client, while testifying, has made a perjured statement, and the lawyer reasonably believes

that any immediate action taken by the lawyer will prejudice the client, the lawyer should wait until the first appropriate moment in the trial and then attempt to persuade the client confidentially to correct the perjury.

[11E] In any of these circumstances, if the lawyer is unable to convince the client to correct the perjury, the lawyer must not assist the client in presenting the perjured testimony and must not argue the false testimony to a judge, or jury or appellate court as true or worthy of belief. Except as provided in this Rule, the lawyer may not reveal to the court that the client intends to perjure or has perjured himself or herself in a criminal trial.

Advisory Committee Comments

These Comments are virtually identical to current Comments 9 and 10.

MBA Rules Committee Comments

These recommendations should be supported.

Proposed Comment 12

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Advisory Committee Comments

The Committee recommends adoption of this new Model Comment, which explains the lawyer's obligations under the new Rule 3.3(b) when the lawyer knows that the lawyer's client or any other person is or has engaged in criminal or fraudulent conduct related to a proceeding. The Comment also gives examples of the types of conduct that require remedial action by the lawyer.

MBA Rules Committee Comments

Proposed Comment 13

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

Advisory Committee Comments

The Committee recommends incorporating the Model Rule modifications of current Comment 13 regarding when a lawyer's remedial obligations terminate. New language has been added to define when a proceeding has concluded and to recognize that obligation to take remedial action applies to false statements by the lawyer as well as false evidence.

MBA Rules Committee Comments

Proposed Comments 14-14A

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. Rule 3.3(d) does not change the rules applicable in situations covered by specific substantive law, such as presentation of evidence to grand juries, applications for search or other investigative warrants and the like.

[14A] When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit or the settlement of a suit involving a minor, the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

Advisory Committee Comments

The Committee recommends no changes in these Comments, which are identical to current Comments 15 and 16.

MBA Rules Committee Comments

Proposed Comment 15

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Advisory Committee Comments

The Committee recommends adoption of this new Model Comment, which explains the relationship between a lawyer's duty of candor to a tribunal under Rule 3.3 and a lawyer's obligation to withdraw from a representation under Rule 1.16.

MBA Rules Committee Comments

These recommendations should be supported.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

Recommendation 1 – Model Rule 3.5:

A lawyer shall not:

- (a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) Communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) Communicate with a juror or prospective juror after discharge of the jury if:
 - 1. The communication is prohibited by law or court order;
 - 2. The juror has made no to the lawyer a desire not to communicate; or
 - 3. The communication involves misrepresentation, the wording, duress or harassment; or
- (d) Engage in conduct intended to disrupt a tribunal.

Comment

- [1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in S.J.C. Rule 3:09, the code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
- [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.
- [3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the jurors not to talk with a lawyer. The lawyer may not engage in improper conduct during the communication.
- [4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(p).

Recommendation 2 –Massachusetts Alternative: (comports largely with our existing rule)

A lawyer shall not:

- (a) Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) Communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) Engage in conduct intended to disrupt a tribunal; or
- (d) Communicate with a member of the jury after discharge of the jury from a case with which the lawyer was connected, unless the lawyer receives leave of court to do so or he or she initiates the communication with the lawyer, directly or indirectly. Unless the court specifically authorizes a lawyer to initiate an inquiry of a juror concerning the jury deliberation process, a lawyer may not inquire concerning the jury's deliberation processes. In no circumstances may a lawyer communicate with a juror who has made known to the lawyer a desire not to communicate or ask questions of or make comments to the juror that are intended to harass or embarrass the juror or to influence the juror's actions in a future jury service.

Comment

- [1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in S.J.C. Rule 3:09, the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
- [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.
- [3] Reserved.
- [4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record

for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

MBA Rules Committee Comments

The standing Advisory Committee recommends (as it did in 2009) that the Massachusetts Rules be amended to conform to the ABA Model Rules. The Massachusetts rule prohibits all lawyer-initiated contact with jurors after trial absent a Court order. The Model Rules allow such communication but prohibit three types of communication. While the Committee recommends adoption of the model rule it also provides the Court with an alternative in the event the Court wished to maintain unique Massachusetts Rule.

In 2006 the MBA asked The Jury Communications Task Force to look into this issue.¹ The Report of this committee² examines the issue of attorney communications with jurors after trial. This Report was approved by the MBA House of Delegates. This Committee recommends the HOD reaffirm its position on the issue and that the MBA urge strongly that the Model Rule be adopted for the reasons stated so well in the Task Force's Report.

¹ This distinguished committee was chaired by the Honorable Herbert P. Wilkins.

² Attached as Exhibit A.

Exhibit A

REPORT TO THE HOUSE OF DELEGATES ON
THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT, RULE 3.5(d)

I. Introduction

The Jury Communications Task Force¹ has completed an initial review of Rule 3.5(d) of the Massachusetts Rules of Professional Conduct, which governs post-trial communications between counsel and jurors.² The rule seems ambiguous and poorly understood, appears unnecessarily restrictive, and may be contrary to the interests of justice. The Task Force recommends that the Massachusetts Bar Association initiate a process to join with other bar

^{1/} The members of the Jury Communications Task Force are listed in Appendix A. The Task Force was formed following the report of the MBA Committee on Professional Ethics to the Jury Contact Rule Committee regarding the propriety of counsel's request for instructions by the court on communication with counsel following the trial, which is attached as Appendix B.

^{2/} The entire text of Rule 3.5 of the Massachusetts Rules of Professional Conduct, entitled "Impartiality and Decorum of the Tribunal," states:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law;
- (c) engage in conduct intended to disrupt a tribunal;
- (d) after discharge of the jury from further consideration of a case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court granted for good cause shown. If a juror initiates a communication with such a lawyer, directly or indirectly, the lawyer may respond provided that the lawyer shall not ask questions of or make comments to a member of that jury that are intended only to harass or embarrass the juror or to influence his or her actions in future jury service. In no circumstances shall such a lawyer inquire of a juror concerning the jury's deliberation processes.

associations, District Attorneys offices, the Committee for Public Counsel Services, and the Trial Court judges, as well as any other appropriate groups, to re-examine and re-write Massachusetts Rule 3.5(d). Some members of the Task Force are in favor of recommending the adoption of ABA Model Rule 3.5 (2003), while others feel that a broad based group examining the Rule should start with a clean slate free of a specific recommendation.³

II. History of the Rule

Until 1991, DR 7-108(D), which governed post-trial attorney-juror contact, permitted attorneys to communicate with jurors so long as the communication was not calculated merely to harass or embarrass the juror or influence the juror in future jury service.⁴ We found no evidence

^{3/} ABA Model Rule 3.5 (2002) follows. The comments to that rule appear in Appendix C.

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

^{4/} S.J.C. Rule 3:07, DR 7-108(D) read:

After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

of disciplinary abuse of that rule or complaints of attorney harassment of discharged jurors during the years when this rule was in effect.

In 1979, the Supreme Judicial Court decided Commonwealth v. Fidler, 377 Mass. 192, 385 N.E. 2d 513 (1979). A juror in a criminal case contacted defense counsel following trial to report misconduct in the jury deliberations, and the juror's testimony by affidavit was submitted to impeach the jury verdict. The Court explained that a juror may testify about "the existence of an improper influence on the jury," but not about "the role which the improper influence played in the jury's deliberations." 377 Mass. at 196. The distinction the Court drew in that case was between "extraneous influences on the jury" and "part of the internal decision making process of jury deliberations." Id. at 198. The Court felt that this rule properly balanced the jurors' interest in avoiding harassment, the justice system's interest in private candid juror discussions and in finality of verdicts, and the litigants' interest in a fair trial decision. Id. at 195-198.

The Fidler court then in *dictum* set out guidelines for questioning a juror after trial: the questioning (1) must be by court order only, generally under the supervision of a judge, (2) may be initiated only upon a preliminary showing of extraneous influence, and (3) may not involve the jury's thought processes. Id. at 201-204. DR 7-108(D) was not amended at that time to reflect the Fidler guidelines.

A decade later, in Commonwealth v. Solis, 407 Mass. 398, 553 N.E.2d 938 (1990), the trial judge ordered a new trial based on a juror's testimony about statements made to the jury by court officers, which the court found had subjected the jury to extraneous influences that might have prejudiced the criminal defendant. The defense counsel had waited at the courthouse elevators and engaged the juror in conversation about the case and the jury's deliberations,

including “the jury’s reasoning processes.” 407 Mass. at 399-400. The Court noted that this information was obtained from the juror in contravention of the Fidler guidelines, but not in violation of DR 7-108(D). Id. at 399. See also Id. at 402-403 (explaining the differences). It held that no exclusionary rule should apply in this situation, and the information was admissible to impeach the verdict, which was tainted, and the defendant was properly granted a new trial. Id. at 401-402.

The Court then stated its inclination to amend the disciplinary rule which governed such matters to comport with the Fidler restrictions. It nevertheless recognized that those restrictions were “more rigorous than those generally in effect elsewhere in the country,” Id. at 403, and expressed concern that “there will be no process, within the defendant’s control, by which the defendant can seek to discover whether there were extraneous influences on the jury....” Id. at 404.

The following year, in 1991, the Supreme Judicial Court amended DR 7-108(D), to include, verbatim, the current language contained in Massachusetts Rule 3.5(d)⁵, essentially codifying the Fidler procedure.⁶

⁵/ See note 2, supra.

⁶/ Justice Wilkins, the author of the Solis opinion, joined by then Chief Justice Liacos, issued a *Statement of Opposition to the Adoption of Revised Supreme Judicial Court Rule 3:07, DR 7-108(D)*, published in *Massachusetts Lawyers Weekly*, August 26, 1991:

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...[and] 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 1996, the Supreme Judicial Court's Committee on Rules of Professional Conduct recommended, and the Court adopted, a revised set of rules of professional conduct, most modeled after the ABA's Model Rules. The Committee reported that it had preserved the unique Massachusetts post-trial juror contact limitation in the new Rule 3.5(d), rather than recommend the ABA's Rule 3.5(c), although it noted that "the committee unanimously oppose[d] it." In their commentary on the proposed rules, the MBA, the BBA, the Attorney General, and the Committee for Public Counsel Services, among others, opposed the adoption of the special Massachusetts version of Rule 3.5(d).

III. Problems with the Rule

The Task Force has identified numerous concerns that have arisen in the fifteen years the restrictive rule has been in force. First, the rule appears to be ambiguous and poorly understood. Many attorneys and judges believe it does not allow any contact between counsel and the discharged juror, or any questioning of the juror by counsel. What the language apparently prohibits, however, is for counsel to initiate contact or to inquire about the "jury's deliberation processes." The Task Force felt that the area of inquiry that was defined as "off-limits" was rather ambiguous. The phrase probably refers to the jury's "thought processes" and the effect of extraneous influences, as opposed to the existence of extraneous influences, as delineated in Fidler, but the intended line between the two is by no means apparent. Also unclear is what conduct is prohibited. In its July 25, 2005, opinion on the rule, the MBA Committee on Professional Ethics noted: "[t]he restriction read literally says that a lawyer may listen to a juror

comment about the deliberation process but may not ask anything.”⁷ Do encouraging nods count?

The rule also makes it more difficult for criminal defendants and civil parties to discover illegal extraneous influences on the verdict.⁸ If counsel must wait for a juror to come forward and volunteer such information, improprieties will remain undiscovered, and improper verdicts will go unchallenged.⁹ Some members of the Task Force feel that the Constitutional jury trial rights of criminal defendants may be implicated, as well as the right of all parties in both civil and criminal cases to a fair jury decision inherent in the Constitutional guarantees of due process of law. They feel that although Constitutional rights can be restricted, the state needs strong interests to do so, and must be careful in the restrictions it imposes. Without addressing the Constitutional issues raised by some members, the Task Force members all agree that the interests of the justice system certainly include insuring fairness in the proceedings, and the Court has decided that verdicts tainted with extraneous influence are unfair. Some mechanism is needed for facilitating the discovery of improprieties that may have tainted a verdict.

The Rule takes from jurors an opportunity to discuss their experience. There is some evidence that many jurors are willing to discuss their experience as jurors with the lawyers, but that the current practices discourage such communication. Judges frequently speak privately

⁷/ See Note 1, supra.

⁸/ The court may decide that improprieties other than extraneous influences warrant overturning a verdict using juror testimony.

⁹/ The Rule may create a difficult choice for a lawyer who has received some information from a juror that the jury used extraneous evidence in rendering its verdict, but feels that it is not enough to convince a judge to call the juror in for questioning. Assuming that the Rule does not permit the lawyer to contact the juror for clarification and the judge has or will decline to allow the juror to be approached, client loyalty, coupled with the stakes involved in litigation, may tempt the attorney to break the rule, as in Solis.

with jurors after a verdict and occasionally allow the attorneys to speak with the jury in a supervised setting, usually in the courtroom with the jury in the jurybox. Anecdotally, jurors, judges, and lawyers react quite positively to such discussions. It is unlikely, however, that juror improprieties would be revealed in such a setting.

Finally, the Rule tends to inhibit development of trial techniques designed to increase juror comprehension. Much work is being done to find new trial techniques to help the jury better understand the facts and the applicable law in a trial. Some, like jury binders for documentary evidence, juror note taking, and jurors asking questions are well known. Others, like plain English instructions, ongoing discussion of evidence, and giving instructions and mini-summations during the trial, are less known, but coming. But there is no mechanism for judges and lawyers to find out if these techniques helped. Indeed, there is no mechanism for the jury to give the lawyer feedback on the lawyer's trial technique at all. Professional development as a trial lawyer is difficult when the impact of our performance is shielded from us.

IV. Concerns, Considerations and Solutions

Good public policy reasons, as well as the potential legal considerations which may be implicated,¹⁰ counsel that any restrictions on juror contact should be supported by strong governmental interests. The interests usually advanced are three: preventing juror harassment, maintaining secrecy for deliberations to encourage candid expression, and promoting finality of verdicts. See, e.g., Commonwealth v. Fidler, 377 Mass. at 195.

¹⁰ ABA Model Rule 3.5 was apparently revised to address issues of prior restraint in an out-of-state case where the rule employed language that the federal district court found was vague and not narrowly enough tailored. See Rapp v. Disciplinary Board of the Hawaii Supreme Court, 916 F. Supp. 1525, 1535-1538 (D. HI 1996).

Concerns that counsel will “harass” jurors presume rather unprofessional conduct from litigation attorneys. And the absence of recorded complaints during the decades lawyers operated under the former Rule demonstrates that the presumption is largely unfounded. To be sure, counsel may initiate contact with jurors, but it would be both counterproductive and unexpectedly impolite to harass one after the juror makes it known that he or she does not wish to talk further. On the other hand, some lawyers may have no shame, and the belief by jurors that lawyers may harass them can discourage service as a juror. The Task Force endorses an explicit restriction on harassment, generally defined as any contact after the juror has indicated that he or she does not want contact, in order to meet this valid interest. But the complete ban on lawyer-initiated contact, no matter how professional, polite and acceptable the contact, is probably overly broad.

Secrecy of the deliberations certainly encourages candor, but the Task Force wonders whether jurors really think their deliberations will be secret. Jurors know that in many trials, the jurors are interviewed by the press, often extensively. Moreover, the interest in secrecy is arguably only in the jury’s thought processes, which are protected by the aspect of the rule regarding what evidence may be used to impeach the verdict. There appears to be no legitimate interest in keeping secret the fact that significant extraneous influences were presented to the jury. The line between the two may be blurry, but that is the line the Court says must be drawn in deciding what evidence can be used to impeach the verdict. On the other hand, an informal poll of one civil and two criminal juries seems to show that jurors are generally willing to talk to the trial lawyers on all topics in civil cases, while in criminal cases, they are quite willing to talk about the lawyer’s trial technique, less willing to talk about what evidence they found important

in their decision making process, and generally unwilling to talk to the lawyers about extraneous or improper influences that may have affected the verdict.

Finally, although there is a valid interest in stability of verdicts, it should not extend to illegal verdicts, tainted by extraneous influences. In protecting juries and verdicts, we must not lose sight of the fact that the system's overarching goal is to provide a just and accurate result in accordance with the law, and that goal is inconsistent with leaving unquestioned those verdicts that have been tainted with improper extraneous influences. In some states, such concerns are the stated reason for permitting lawyers to communicate with jurors following a trial.¹¹ The challenge here will be to find an acceptable mechanism for detecting jury improprieties, which may be through lawyer contact with the jurors, or may be something else.

The Massachusetts rule is among the most restrictive in the nation. Most states, and the American Bar Association in its Model Rules, have resolved the valid governmental concerns without essentially eliminating post-trial attorney-juror contact. The majority of the states, 32 in total, have adopted the ABA rule, some variation of it, or they have no rule whatsoever.¹²

^{11/} The comments to the New York rule, for example, state: "Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected." Note, New York Disciplinary Rule 7-108 [1200:39]. See also, Nevada Rule 176(3).

^{12/} These include: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Nebraska, Nevada, New York, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming.

V. Recommendation

The Task Force believes that the Massachusetts rule needs to be reconsidered and suggests a process for achieving that result. We recommend that the Massachusetts Bar Association initiate a coordinated effort with other bar associations, groups of lawyers, judges, and any other appropriate groups or agencies, to examine Massachusetts Rules of Professional Conduct Rule 3.5(d) for the purpose of proposing to the Supreme Judicial Court a rule change which would permit appropriate post-trial lawyer-juror contact.

Respectively submitted,

THE JURY COMMUNICATIONS TASK FORCE

Dated: May 9, 2006

JURY COMMUNICATIONS TASK FORCE

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Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights such as the right to preliminary hearing, unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel.
- (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6:
- (f) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
 - (1) The prosecutor reasonably believes:
 - (i) The information sought is not protected from disclosure by any applicable privilege;
 - (ii) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (iii) There is no other feasible alternative to obtain the information; and
 - (2) The prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;
- (g) Except for statements that are necessary to inform the public of the nature and extent of the prosecutors action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have substantial likelihood of heightening public condemnation of the accused;
- (h) Not assert personal knowledge of the facts in issue, except when testifying as a witness;
- (i) Not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein; and
- (j) Not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.

Comments

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. See also S.J.C. Rule 3:08, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systemic abuse prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Unlike the language of ABA Model Rule 3.8(c), paragraph (c) permits a prosecutor to seek a waiver of pretrial rights from an accused if the court has first obtained a knowing and intelligent written waiver of counsel from the accused. The use of the term "accused" means that paragraph (c) does not apply until the person has been charged. Paragraph (c) also does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (g) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequence for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Paragraphs (h) and (i), which do not appear in ABA Model Rules, are taken from DR 7-106(C)(3) and (4), respectively. They state limitations on a prosecutors assertion of personal knowledge of facts in issue and the assertion of a personal opinion on matters before a trier of fact, but under paragraph (i) a prosecutor may contend, based on the evidence, that the trier of fact should reach particular conclusions.

PROPOSED Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) Refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to preliminary hearing, unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel.
- (d) Make timely disclosures to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibilities by a protective order of the tribunal;
- (e) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
 - (1) The prosecutor reasonably believes:
 - (i) The information sought is not protected from disclosure by any applicable privilege;
 - (ii) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (iii) There is no other feasible alternative to obtain the information; and
 - (2) The prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;
- (f) Except for statements that are necessary to inform the public of the nature and extent of the prosecutors action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;
- (g) Not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.
- (h) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) Promptly disclose that evidence to an appropriate court or authority, and
- (2) If the conviction was obtained in the prosecutor's jurisdiction,
 - (i) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (l) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or systemic abuse prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) permits a prosecutor to seek a waiver of pretrial rights from an accused if the court has first obtained a knowing and intelligent written waiver of counsel from the accused. The use of the term "accused" means that paragraph (c) does not apply until the person has been charged. Paragraph (c) also does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of criminal prosecution, prosecutor's extrajudicial statements can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequence for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public

opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and non-lawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcements personnel and other relevant Individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (h) requires prompt disclose to the court of other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (h) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant was in fact wrongfully convicted, or make reasonable efforts to cause another appropriate authority to undertake necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendants counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointments of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (i), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendants did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (h) and (i), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

MBA Rules Committee Comments

The MBA Committee endorses the proposed changes and the ongoing requirement of judicial approval before summoning an attorney.

Memorandum

To: MBA Committee to Review Proposals of the SIC Standing Advisory Committee (SAC)
on Rules of Professional Conduct

From: Hector E. Pineiro

Subject: Proposed Rules of Professional Conduct

Assignment: Additional Recommendations dealing with Rule 1.8(b), 1.9(c)(1), and 8.4(h).
(Confidential Information and Misconduct for engaging in conduct that
adversely reflects on the fitness of a lawyer to practice law) (Item 13)

Dear Attorney O'Donnell:

You have asked me to review paragraph 13 of the Executive Summary from the Standing Advisory Committee Rules of Professional Conduct Report, regarding proposed changes to Rules 1.8(b), 1.9(c)(1), and 8.4(h), and to make recommendations to the MBA committee as to these proposals to the MBA Committee.

Subparagraph 13 of the Executive Summary states:

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 individuals members of the Committee that are included, along with statements in support of the majority, in the appendix to this report.

Rules 1.8(b) and 1.9(c)(1) deal, respectively, with a lawyer's use of a present or former client's confidential information for purposes unrelated to the representation and as such I review the proposals as to each together.

Rules 1.8(b) and 1.9(c)(1): the existing language

1.8 (b) A lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person, unless the client consents after consultation, except as Rule 1.6 or Rule 3.3 would permit or require.

. . .

1.9 (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter, unless the former client consents after consultation:

(1) use confidential information relating to the representation to the disadvantage of the former client, to the lawyer's advantage, or to the advantage of a third person, except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client.

As they now stand the rules limits the unconsented to use of a past or present client's confidential information to the disadvantage of the client or to the advantage of the lawyer or anyone else.

Rules 1.8(b) and 1.9(c)(1): the proposed language

1.8 (b) A lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

...

1.9 (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information relating to the representation to the disadvantage of the former client, except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client.

In the case of each rule, the proposed revision would retain restrictions on use of a past or present client's confidential information and would remove restriction on such use to the benefit of the lawyer or a third party. No notice to or consent of the past or present client would be needed so long as the use in question does not "disadvantage" that party. The Committee contends the changes are desirable because the duty of a lawyer regarding confidential information of clients or former clients is overly extensive if it exceeds the fiduciary duty of an agent to a principal.

Recommendation

In my opinion the proposed changes should not be supported.

The proposal to remove prohibitions on the unconsented to use of clients' confidential information for the benefit of others cabins the rights of clients to provide financial benefit to their lawyers or former lawyers. It allows use of confidential client information not only without consent but without notice, effectively denying clients the right to contest or remedy what they find to be misuse of their confidential information, except where they learns of it by

happenstance. This, along with the supposedly uncompromised protection of information whose use would disadvantage a client, plays into stereotypes of a clever, unscrupulous Bar.

The Committee's presentation is striking in its failure to demonstrate that the broader restriction presently in the rule has in practice proved to be in any way unduly onerous, impractical, or unfair. The proponents offer no concrete substantiation of their claim that "the current rule calls into question practices that most lawyers would acknowledge are proper." It presents no hard evidence to suggest that the *status quo* infringes on the ability of lawyers to benefit themselves or their clients from the general skills, knowledge and "know-how" gained by previous representation of clients.

The proposed removal of restriction on the un-consented use of confidential information, unless it meets a conveniently narrow definition of what disadvantages the client, would downgrade the standard for lawyer conduct. There is nothing creditable in the notion that a lawyers' duties are or should be solely those of an agent or other fiduciary. Using principles of agency to define the scope of attorney duty is not appropriate.

As the dissent points out, the Committee's suggestion that the restriction applies to an unreasonably broad scope of information defined as confidential ignores its clarification of that question in the recommended Comment 3A to Rule 1.6. The Committee states that other prohibitions are adequate to protect against unethical or illegal use of confidential information that does not disadvantage the client. But this begs the question. The core issue here is the expansion of attorney rights at the expense of client rights. The Committee appears to believe that the latter is not a likely consequence of the former. The rule as currently written gives clients something akin to proprietary rights in their confidential information, where the determination of what is disadvantageous or not is for the client, not for lawyers or a standard set by lawyers. The proposal would not completely extinguish these rights; it would relegate them to *ex post facto* remedies requiring further representation and proceedings and, as the Committee admits, exposing lawyers to civil or even criminal liability. In place of the simple prophylactic rule of requiring consent, the Committee would leave it to prudent lawyers reading the revised rule to recognize that they must be "quite confident" that a client would not be disadvantaged by the use of his confidential information without notice to benefit someone else. In place of the right of consent before any disadvantage occurs the client gets the right to sue after sustaining harm.

Rule 8.4(h) : the existing language

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

...

(h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

Coming at the end of an exhaustive list of specific and general prohibitions (e.g., of “conduct that is prejudicial to the administration of justice”) section h is a deliberately vague catchall provision.

Rule 8.4(h): proposed striking of the section in its entirety

As stated in the report the majority of the Advisory Committee agreed and recommended, with some dissent that Rule 8.4 (h) previously deleted by the ABA from its Model Rules, also be deleted from the Massachusetts Rules on grounds that paragraph (h) was simply too vague to serve as an independent basis for Bar discipline.¹ (Report of the Standing Advisory Committee On the Rules of Professional Conduct, 7/1/2013 at p. 43 & 95, Appendix of Special Committee Reports). In support of the Committee’s proposal, they argued that no limiting construction of this paragraph has emerged from case law and that none has been proposed by the dissenters. The Advisory Committee cited to the case of *Matter of Discipline of Two Attorneys*, 421 Mass. 619, 628-29 (1996) to compare it.² Compare, *Matter of Discipline of Paul J. Grella*, 438 Mass. 47 (2002) (disciplinary sanction appropriate for member of the bar convicted of a misdemeanor arising from a violent assault on his estranged wife violated Rule 8.4 (b) & (h) and was suspended from the practice of law for two months).³

The Dissenters advocate for keeping this provision notwithstanding the fact that it has been eliminated in the ABA’s Model Rules of Professional Misconduct because, they submit, it serves a “useful purpose when understood as limited to conduct that any reasonable lawyers would understand as constituting misconduct.”

Recommendation

In my opinion the proposed striking of Rule 8(h) changes should be supported.

The dissenters recognize that it is a challenge to conceive of situations where the provision might be used by itself. They also recognize that when the SJC has cited the provision

¹ Rule 8.4 of the Massachusetts Rules of Professional Conduct, 426 Mass. 1429 (1998) provides, “It is professional misconduct for a lawyer to: . . . (h) engage in any other conduct that adversely reflects on his or her fitness to practice law.”

² But this opinion which involved sanctions of two attorneys who simultaneously represented both the buyer of real estate and a judgment creditor of the seller only referred to Rule 8.4 (d) of the ABA Model Rules of Professional Conduct (engaging in conduct that is prejudicial to the administration of justice) did not reference Rule 8.4(h) which prohibits conduct that adversely reflected the lawyers fitness to practice law.

³ The hearing committee that reviewed the case concluded that the lawyer’s conviction of a crime (for assault and battery) of his estranged wife violated Rule 8.4(b) and (h).

to impose discipline it has generally, but not always, done so with regards to a violation of other more specific rules. The dissenters oversimplify the challenges associated with the constitutionality and/or enforcement of Rule 8.4 (h) by providing a laundry list of examples (from Massachusetts as well as other jurisdictions). To be sure, some of the examples are troublesome. But there is real danger with paragraph (h) because it makes lawyers potentially accountable for just about everything they do. The constitutional concerns revolve around the lack of notice, privacy rights, and vague and amorphous standards involving personal behavior. Conduct that does not involve an attorney's professional activities should only be subject to discipline if it falls within the other subparagraphs of Rule 8.4.

I concur with the proposal to strike paragraph (h) from Rule 8.4 on grounds that it is too vague to serve as an independent basis for discipline. *Compare, Matter of Discipline of An Attorney*, 442 Mass. 660, 668 (2004) (vagueness and arbitrariness concerns were best answered by construing disciplinary rules "not so broad as to include all conduct which is illegal but rather activities [such as bribery, perjury, misrepresentation to a court] which undermined [] the legitimacy of the judicial process.")⁴

Respectfully submitted,

/s/ Hector E. Pineiro

Hector E. Pineiro

⁴ The dissenter's suggestion that Massachusetts keep Rule 8.4(h) because seven other states including New York and Ohio have kept it, is unavailing.

The Standing Committee purports that the adoption of changes to Rule 5.1 and 5.3 to 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.

- Rule 5.1(a) A partner in the law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in the law firm, shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
- (d) A law firm shall make reasonable efforts to ensure that:
 - (1) all lawyers in the firm conform to the Rules of Professional Conduct; and
 - (2) the lawyers in the firm are subject to adequate supervision that is reasonable under the circumstances.

5.3 With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when it consequences can be avoided or mitigated but fails to take reasonable remedial action.
- (d) a law firm shall make reasonable efforts to ensure that nonlawyers who work for the firm are subject to adequate supervision that is reasonable under the circumstances.

WRITTEN COMMENTS

- Proposed Rule 5.1 (d) A law firm shall make reasonable efforts to ensure that: (1) all lawyers in the firm conform to the Rules of Professional Conduct; and (2) the lawyers in the firm are subject to adequate supervision that is reasonable under the circumstances.

- Proposed Rule 5.3 (d) A law firm shall make reasonable efforts to ensure that: (1) all lawyers in the firm conform to the Rules of Professional Conduct; and (2) the lawyers in the firm are subject to adequate supervision that is reasonable under the circumstances.

- **The MBA Committee recommends the rejection of these proposed changes as well as the proposed changes in the Comments to reflect adoption of these changes.**

- Neither of these proposed rules is from the ABA Model Rules. The ABA Ethics 2000 Commission rejected these proposed rules concluding that providing for law firm liability creates an unreasonable risk that individual compliance incentives would in fact be compromised.

- Only NY and NJ have adopted Rules for Law Firm Responsibility.

- The outlier states, NY and NJ, have rarely disciplined law firms.

- The provision to discipline law firms presents many problems. One area of concern in discipline cases is staffing levels. Overburdened staff attorneys are not able to meet client needs. A few years ago the Attorney General of the Commonwealth was inadequately staffed for the volume of civil cases in the case load. The Attorney General was granted a moratorium for the progression of civil cases on the docket for several months until staffing levels could be raised. The Attorney General like many organizational firms does not have the ability to set funding for staffing levels. It is left to the legislature. Prosecution of the Attorney General, CPCS, or a local District Attorney office because of staffing issues seems very unlikely. Individual lawyers within those organizations, particularly at a supervisory level, recognize the case load problem, but like many organizations in government and the private sector are being asked to do more with fewer resources.

- Law Firms are not admitted to the bar. Individual lawyers are admitted. A large international law firm may have lawyers from different jurisdictions working on a

matter for a variety of reasons. The attorney admitted in MA is the one answerable to the Court for compliance with the Rules of Professional Responsibility. The ability to sanction a law firm may create an ease in a lawyers own vigilance to adhere to the Rules.

- Organization liability will ease the conviction of some offender (organization or individual) for what would otherwise be difficult to-prove- violations. One could formulate an argument grounded on individual lawyers' incentives that does make easing disciplinary authorities' evidentiary burden relevant to actually furthering disciplinary goals. The failure to hold anyone accountable for clear ethical transgressions because no one person can be reliably identified and bar authorities are reluctant to scapegoat may create incentives for individual lawyers working on teams to skate too close to the ethical line, confident that the chain of accountability is sufficiently diffuse that they will be safe from disciplinary scrutiny. The ABA Ethics 2000 Commission concluded that providing for firm liability creates an unacceptable risk that individual compliance incentives would in fact be compromised." *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, Julie R. O'Sullivan.
- The rare instances where the Court has encountered a disciplinary matter in which the law firm apparently aided and abetted an attorney's ethical violation or was aware of the ongoing criminal activity does not justify adoption of the proposed Rules. *In the Matter of Nickerson* 322 Mass. Atty. Disc. R. 367 (1996) the respondent was a non-equity partner in a firm which according to the decision was aware of ongoing false statements to a mortgage bank which requested the false statements. In Admonition 08-11 (2008) the Court expressed frustration at not being able to discipline a large international professional corporation because its conflict check system was deficient.
- Massachusetts has a fine tradition of professional self-regulation of the Bar. The Rules as now established requires partners, members of management committees and lawyers to take reasonable steps to insure that appropriate systems are in place to protect clients. The proposed rule departs from the tradition of self-regulation without the necessary indicia for its adoption. The principle of self-regulation should not be diminished by a lawyer's reliance on a law firm management system.

Proposed Changes to Mass. R. Prof. Conduct Rules 7.1-7.5: Lawyer Advertising and Solicitation

Rule 7.1: Communications Concerning A Lawyer's Services

The Standing Advisory Committee on the Rules of Professional Conduct (hereinafter SAC) has recommended three additional Comments to Rule 7.1 dealing with advertising and solicitation. Adoption of Comment [2] to Rule 7.1 clarifies the prohibition against making any misleading communications. Comment [2] provides that truthful statements can be misleading there is an omission of fact(s) needed to avoid misleading effect or leading to a [consumer] conclusion of merit of the lawyer without factual foundation. Comment [3] mandates that truthful reporting of a lawyer's achievements and/or comparison of legal costs is misleading if it leads to unjustified expectations. But an appropriate disclaimer may overcome the misleading classification. Comment [4] cross references Rule 8.4(e) prohibits any statement or implication of a lawyer's ability to influence government action.

MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT: RULES 7.1 TO 7.5	
PRESENT RULE AND COMMENTS	PROPOSED RULE AND COMMENTS
<p>RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES</p> <p>A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.</p> <p>Comment [1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. Statements that compare a lawyer's services with another lawyer's services and statements that create unjustified expectations about the results the lawyer can achieve would violate Rule 7.1 if they constitute "false or misleading" communications under the Rule. <u>Corresponding ABA Model Rule. Identical to Model Rule 7.1.</u> <u>Corresponding Former Massachusetts Rule. DR 2-101(A).</u></p>	<p>(PROPOSED) RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES</p> <p>A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.</p> <p>Comment [1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public. [4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government</p>

	agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.
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MBA Committee Position on Rule 7.1 Changes

The MBA Committee recommends against comments [2] and [3]. Existing Comment [1] and Rule 7.1 ban false or misleading comments and have been applied successfully. Proposed Comments [2] and [3], which purport to make the Rule clearer, actually serve to make it more ambiguous and, worse, create tools for unfair prosecution of lawyers using pop psychology analyses of potential client motivation. The sentiment in the two comments reflect the mindset of a former era when there was unreasonable suspicion of lawyer advertisement and is not a reflection of reality. The average member of the public is sufficiently sophisticated and worthy of more credit than this comment accords him/her. We do not need these new comments to establish that truthful but incomplete statements can mislead.

The MBA Committee has no objection to Comment [4].

Rule 7.2: Advertising

The SAC recommends revisions to 7.2. These revisions include exceptions to Rule 7.2(b) against payments to third party to recommend services (i.e. no runners, police departments, hospital admitting nurses, etc.) but allowing exceptions for: (1) advertising costs, (2) LRS charges, (3) buying a practice, (4) referral fees and (5) legal assistance organizations (e.g. NAACP Legal Defense Fund, ACLU, etc.) splits of fee shifting awards, e.g. under 42 U.S.C. § 1988 (civil rights). The proposal would also delete the existing comment [5] requirement to retain records of advertising for two years (hereinafter the "retention requirement.")

A minority of the SAC members dissented and recommended against deleting the two year records requirement and their proposed clarifying statement.

MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT: RULES 7.1 TO 7.5	
PRESENT RULE AND COMMENTS	PROPOSED RULE AND COMMENTS
<p>RULE 7.2 ADVERTISING (a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory including an electronic or computer-accessed directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication not involving solicitation prohibited in Rule 7.3.</p> <p>(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.</p>	<p>(PROPOSED) RULE 7.2 ADVERTISING (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.</p>

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization;
- (3) pay for a law practice in accordance with Rule 1.17; and
- (4) pay referral fees permitted by Rule 1.5(e);
- (5) share a statutory fee award or court-approved settlement in lieu thereof with a qualified legal assistance organization in accordance with Rule 5.4(a)(4).

(d) Any communication made pursuant to this rule shall include the name of the lawyer, group of lawyers, or firm responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising.

[2] [Reserved]

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television and other electronic media, including computer-accessed communications, are now among the most powerful media for getting information to the public. Prohibiting such advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[3A] The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a web site or home page would generally be considered advertising subject to this rule, rather than solicitation subject to Rule 7.3. For example, when a targeted e-mail solicitation of a person known to be in need of legal services contains a hot-link to a home page, the e-mail message is subject to Rule 7.3, but the home page itself need not be because the recipient must make an affirmative decision to go to the sender's home page. Depending upon the circumstances, posting of comments to a newsgroup, bulletin board or chat group may constitute targeted or direct contact with prospective clients known to be in need of legal services and may therefore be subject to Rule 7.3. Depending upon the topic or purpose of the newsgroup, bulletin board, or chat group, the posting might also constitute an association of lawyer or law firms name with a particular service, field, or area of law amounting to a claim of specialization under Rule 7.4 and would therefore be subject to the restrictions of that

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a plan or a not-for-profit or qualified lawyer referral service;
- (3) pay for a law practice in accordance with Rule 1.17;
- (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement; and
- (5) pay fees permitted by Rule 1.5(e) or Rule 5.4(a)(4). [a qualified legal assistance organization that referred the matter to the lawyer or law firm...]

(c) Any communication made pursuant to this Rule shall include the name of the lawyer, group of lawyers, or firm responsible for its content.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising.

[2] [Reserved]

[3] [Reserved] [Deleted: Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television... assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.]

[3A] The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a website or home page would generally be considered advertising subject to this Rule, rather than solicitation subject to Rule 7.3. For the distinction between advertising governed by this Rule and solicitations governed by Rule 7.3, see Comment 1 to Rule 7.3.

<p>rule. In addition, if the lawyer or law firm used an interactive forum such as a chat group to solicit for a fee professional employment that the prospective client has not requested, this conduct may constitute prohibited personal solicitation under Rule 7.3(d)</p> <p>[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.</p> <p>Record of Advertising</p> <p>[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.</p> <p>Paying Others to Recommend a Lawyer</p> <p>[6] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. However, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. Paragraph (c) also excepts from its prohibition the referral fees permitted by Rule 1.5(e).</p> <p><u>Corresponding ABA Model Rule.</u> Substantially similar to Model Rule 7.2, except minor differences in (a) and (b), sub-clauses (4) and (5) were added to paragraph (c), and paragraph (d) was modified.</p> <p><u>Corresponding Former Massachusetts Rule.</u> DR 2-101(B); see DR 2-103.</p> <p><i>Last Updated 2/28/2000</i></p>	<p>[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.</p> <p>[Deleted: Record of Advertising [5] Paragraph (b) requires that a record of the content and use of advertising be kept... and may be of doubtful constitutionality.</p> <p>Paying Others to Recommend a Lawyer</p> <p>[5] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers; Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).</p>
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MBA Committee Position on Rule 7.2 Changes

The MBA Committee recommends the change to Rule 7.2(b) which eliminates the requirement that a lawyer retain a copy of any advertisement or written communication for a period of two years.

After in-depth study and deliberation, the drafters of the American Bar Association Model Rules of Professional Responsibility recognized the need to evolve Rule 7.2 and abolish the onerous retention requirement.

This Committee supports the majority position of the SAC and accepts the SAC's observation that the retention obligation was burdensome and seldom used for disciplinary purposes.

The Internet is now part of the permissible media that lawyers use for advertising legal services. The Internet provides quantitative and qualitative distinctions from other media. There are a plethora of new and evolving mediums on the internet, from Facebook to Twitter to Instagram to Vine to Snapchat to Reddit to the next cutting edge venue about which we will

undoubtedly soon learn. Any requirement to archive multiple versions of commercial speech presented on the internet, over an extended time, will likely result in substantial cost, will discourage lawyers from making frequent updates, and will likely result in a reduction of the benefits provided to the public at large. The unreasonable burdens of retaining the ever changing content of internet advertisement make oppressive the adoption of any form of retention requirement. The U.S. Supreme court has found that commercial speech is entitled to protection under the First Amendment of the U.S. Constitution. This Committee should be sensitive to the fact that “the value of a rule requiring retention for any period is highly questionable, as is the constitutional validity of such a requirement.” See White Paper presented to the ABA: A Re-Examination of the ABA Model Rules of Professional Conduct/ Emerging Technologies found at www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/ethicswhitepaper.html

Rule 7.3: Solicitation of Clients

The SAC has proposed language that would add to and modify the ban on lawyer solicitation. The proposed changes also editorially relocate the Rule 7.3(c) exceptions to 7.3(a); ban coercion, duress or harassment in 7.3(b)(2); and delete a two year records requirement. Note 7.3(c) two year records retention requirement would be dropped but Comment [4] remarks upon the value of retaining written records of solicitation by letter, email or other writings.

MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT: RULES 7.1 TO 7.5	
PRESENT RULE AND COMMENTS	PROPOSED RULE AND COMMENTS
<p>RULE 7.3 SOLICITATION OF PROFESSIONAL EMPLOYMENT</p> <p>(a) In soliciting professional employment, a lawyer shall not coerce or harass a prospective client and shall not make a false or misleading communication.</p> <p>(b) A lawyer shall not solicit professional employment if:</p> <p>(1) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer, provided, however, that this prohibition shall not apply to solicitation not for a fee; or</p> <p>(2) the prospective client has made known to the lawyer a desire not to be solicited.</p>	<p>(PROPOSED) RULE 7.3 SOLICITATION OF CLIENTS</p> <p>(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment for a fee, unless the person contacted:</p> <p>(1) is a lawyer;</p> <p>(2) has a prior professional relationship with the lawyer;</p> <p>(3) is a grandparent of the lawyer or the lawyer’s spouse, a descendant of the grandparents of the lawyer or the lawyer’s spouse, or the spouse of any of the foregoing persons; or</p> <p>(4) is (i) a representative of an organization, including a non-profit or government entity, in connection with the activities of such organization, or (ii) a person engaged in trade or commerce as defined in G.L. c. 93A, §1(b), in connection with such person’s trade or commerce.</p> <p>(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:</p> <p>(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;</p> <p>(2) the solicitation involves coercion, duress or harassment; or</p> <p>(3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the target of the solicitation is such that the target cannot exercise reasonable judgment in employing a lawyer, provided, however, the</p>

(c) Except as provided in paragraph (e), a lawyer shall not solicit professional employment for a fee from a prospective client known to be in need of legal services in a particular matter by written communication, including audio or video cassette or other electronic communication, unless the lawyer retains a copy of such communication for two years.

(d) Except as provided in paragraph (e), a lawyer shall not solicit professional employment for a fee from a prospective client in person or by personal communication by telephone, electronic device, or otherwise.

(e) The following communications shall be exempt from the provisions of paragraphs (c) and (d) above:

(1) communications to members of the bar of any state or jurisdiction;

(2) communications to individuals who are
(A) the grandparents of the lawyer or the lawyer's spouse,
(B) descendants of the grandparents of the lawyer or the lawyer's spouse, or

(C) the spouse of any of the foregoing persons;

(3) communications to prospective clients with whom the lawyer had a prior attorney-client relationship; and

(4) communications with (i) organizations, including non-profit and government entities, in connection with the activities of such organizations, and (ii) with persons engaged in trade or commerce as defined in G.L. c. 93A, §1(b), in connection with such persons' trade or commerce.

(f) A lawyer shall not give anything of value to any person or organization to solicit professional employment for the lawyer from a prospective client. However, this rule does not prohibit a lawyer or a partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from requesting referrals from a lawyer referral service operated, sponsored, or approved by a bar association or from cooperating with any other qualified legal assistance organization. Such requests for referrals or cooperation may include a sharing of fee awards as provided in Rule 5.4(a)(4).

Comment

[1] This rule applies to solicitation, the obtaining of business through letter, e-mail, telephone, in-person or other communications directed to particular prospective clients. It does not apply to non-targeted advertising, the obtaining of business through communications circulated more generally and more indirectly than that, such as through web sites, newspapers or placards in mass transit vehicles. This rule allows lawyers to conduct some form of solicitation of employment from all prospective clients, except in a small number of very special circumstances, and hence permits prospective clients to receive information about legal services that may be useful to them. At the same time it recognizes the possibility of undue influence, intimidation, and overreaching presented by personal solicitation in the circumstances prohibited by this rule and seeks to limit them by regulating the form and manner of solicitation by rules that reach no further than the danger that is perceived.

[2] Paragraphs (a) and (b) apply whenever a lawyer is engaging in solicitation that is not prohibited under another paragraph of this Rule. In determining whether a contact is permissible under Rule 7.3(b)(1), it is relevant to consider the times and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for

prohibition in this clause (3) only applies to solicitations for a fee.

(c) [Reserved]

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association, and cooperate with any other qualified legal assistance organization.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] This Rule allows lawyers to conduct some form of solicitation of employment, except in a small number of very special circumstances, and hence permits the public to receive information about legal services that may be useful to them. At the same time it recognizes the possibility of undue influence, intimidation, and overreaching presented by personal

traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. The reference to the "physical, mental, or emotional state of the prospective client" is intended to be all-inclusive of the condition of such person and includes a prospective client who for any reason lack sufficient sophistication to be able to select a lawyer. A proviso in subparagraph (b)(1) makes clear that it is not intended to reduce the ability possessed by nonprofit organizations to contact the elderly and the mentally disturbed or disabled. Abuse of the right to solicit such persons by non-profit organizations would probably constitute a violation of paragraph (a) of the rule or Rule 8.4(c), (d), or (h). The references in paragraph (b)(1), (c), and (d) of the rule to solicitation "for a fee" are intended to carry forward the exemption in DR 2-103 for non-profit organizations. Where such an organization is involved, the fact that there may be a statutory entitlement to a fee is not intended by itself to bring the solicitation within the scope of the rule. There is no blanket exemption from regulation for all solicitation that is not done "for a fee." Non-profit organizations are subject to the general prohibitions of paragraphs (a) and (e) and subparagraph (b)(2).

[3] Paragraph (c) imposes minimum regulations on solicitation by written and other communication that is not interactive. Paragraph (c) applies only in situations where the person is known to be in need of services in a particular matter. For purposes of paragraph (c) a prospective client is "known to be in need of legal services in a particular matter" in circumstances including, but not limited to, all instance in which the communication by the lawyer concerns an event specific to the person solicited that is pending or has already occurred, such as a personal injury, a criminal charge, or a real estate purchase or foreclosure.

[4] While paragraph (c) permits written and other nondirect solicitation of any prospective client, except under the special circumstances set forth in paragraphs (a) and (b), paragraph (d) prohibits solicitation in person or by personal communication, except in the situations described in paragraph (e). See also Comment 3A to Rule 7.2, discussing prohibited personal solicitation through chat groups or other interactive computer-accessed or similar types of communications. The prohibitions of paragraph (d) do not of course apply to in-person

solicitation in the circumstances prohibited by this Rule and seeks to limit them by regulating the form and manner of solicitation by rules that reach no further than the danger that is perceived. Lawyers are also required to comply with other applicable laws that govern solicitations.

[3] Paragraph (a) applies to in-person, live telephone, and real-time electronic contact by a lawyer. Paragraph (b) applies to all forms of solicitation, including both the real-time solicitation covered by paragraph (a) and solicitation by written, recorded or other forms of electronic communication such as email. In determining whether a contact is permissible under Rule 7.3(b)(3), it is relevant to consider the times and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. The reference to the "physical, mental, or emotional state of the target of the solicitation" is intended to be all-inclusive of the condition of such person and includes anyone who for any reason lacks sufficient sophistication to be able to select a lawyer. A proviso in subparagraph (b)(3) makes clear that it is not intended to reduce the ability possessed by nonprofit organizations to contact the elderly and the mentally disturbed or disabled. Abuse of the right to solicit such persons by non-profit organizations may constitute a violation of paragraph (b)(2) of the Rule or Rule 8.4(c) or (d). The references in paragraph (a) and (b)(3) of the Rule to solicitation "for a fee" are intended to exempt solicitations by non-profit organizations. Where such an organization is involved, the fact that there may be a statutory entitlement to a fee is not intended by itself to bring the solicitation within the scope of the Rule. There is no blanket exemption from regulation for all solicitation that is not done "for a fee." Non-profit organizations are subject to the general prohibitions of subparagraphs (b)(1) and (b)(2).

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to

solicitation after contact has been initiated by the prospective client.

[4A] Paragraph (e) acknowledges that there are certain situations and relationships in which concerns about overreaching and undue influence do not have sufficient force to justify banning all in-person solicitation. The risk of overreaching and undue influence is diminished where the prospective client is a former client or a member of the lawyer's immediate family. The word "descendant" is intended to include adopted and step-members of the family. Similarly, other lawyers and those who manage commercial, nonprofit, and governmental entities generally have the experience and judgment to make reasonable decisions with respect to the importunings of trained advocates soliciting legal business. Subparagraph (e)(4) permits in-person solicitation of organizations, whether the organization is a non-profit or governmental organization, in connection with the activities of such organization, and of individuals engaged in trade or commerce, in connection with the trade or commerce of such individuals.

[5] Paragraph (f) prohibits lawyers paying a person or organization to solicit on their behalf. The provision should be read together with Rule 8.4(a), which prohibits a lawyer from violating these rules through the acts of another. The rule contains an exception for requests for referrals from described organizations.

Corresponding ABA Model Rule. Different from Model Rule 7.3.

Corresponding Former Massachusetts Rule. DR 2-103.

Last Updated 7/12/2000

help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in person, live telephone or real-time electronic contact can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] While paragraph (b) permits written and other nondirect solicitation of any person, except under the special circumstances set forth in subparagraphs (1) through (3), paragraph (a) prohibits solicitation in person or by live telephone or real-time electronic communication, except in the situations described in subparagraphs (1) through (4). See also Comment 3A to Rule 7.2, discussing prohibited personal solicitation through computer-accessed or similar types of communications. The prohibitions of paragraph (a) do not of course apply to in-person solicitation after contact has been initiated by a person seeking legal services.

[6] Subparagraphs (1) through (4) of paragraph (a) acknowledge that there are certain situations and relationships in which concerns about overreaching and undue influence do not have sufficient force to justify banning all in-person solicitation. The risk of overreaching and undue influence is diminished where the target of the solicitation is a former client or a member of the lawyer's immediate family. The word "descendant" is intended to include adopted and step-members of the family. Similarly, other lawyers and those who manage commercial, nonprofit, and governmental entities generally have the experience and judgment to make reasonable decisions with respect to the importunings of trained advocates soliciting legal business. Subparagraph (a)(4) permits in-person solicitation of organizations, whether the organization is a non-profit or governmental organization, in connection with the activities of such organization, and of individuals engaged in trade or commerce, in connection with the trade or commerce of such individuals.

[7] Paragraph (d) permits a lawyer to request referrals from described organizations.

MBA Committee Position on Rule 7.3 Changes

The MBA Committee recommends the editorial relocation of the Rule 7.3(c) exceptions to 7.3(a); the ban on coercion, duress or harassment in 7.3(b)(2); and the deletion a two year records requirement

Based upon the reasoning stated above regarding the Rule 7.2 deletion of the 2 year retention requirement and, for the sake of consistency, the MBA Committee recommend against Comment [4] to the extent that it requires the retention of written records of solicitation. Retention requirements are burdensome to lawyers. Retained records are rarely, if ever, used for enforcement of Rule 7. In reality, most or all solicitation attempts would be written or electronically communicated to the offended party who would, in turn, keep the document or message for presentation to the appropriate enforcement authority.

Rule 7.4: Communication of Fields of Practice

The SAC's proposed changes would streamline Rule 7.4 and add the American Bar Association to the list of qualified state certifying authorities.

MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT: RULES 7.1 TO 7.5	
PRESENT RULE AND COMMENTS	PROPOSED RULE AND COMMENTS
<p>RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE</p> <p>(a) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the holding out does not include a false or misleading communication. Such holding out includes</p> <p>(1) a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law,</p> <p>(2) directory listings, including electronic, computer-accessed or other similar types of directory listings, by particular service, field, or area of law, and</p> <p>(3) any other association of the lawyer's name with a particular service, field, or area of law.</p> <p>(b) Lawyers who hold themselves out as "certified" in a particular service, field, or area of law must name the certifying organization and must state that the certifying organization is "a private organization, whose standards for certification are not regulated by the Commonwealth of Massachusetts," if that is the case, or, if the certifying organization is a governmental body, must name the governmental body.</p> <p>(c) Except as provided in this paragraph, lawyers who associate their names with a particular service, field, or area of law imply an expertise and shall be held to the standard of performance of specialists in that particular service, field, or area. Lawyers may limit responsibility with respect to a particular service, field, or area of law to the standard of an ordinary lawyer by holding themselves out in a fashion that does not imply expertise, such as by advertising that they</p>	<p>(PROPOSED) RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE</p> <p>(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of the law.</p> <p>(b) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the communication is not false or misleading. Such holding out includes a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law. Lawyers who hold themselves out as specialists shall be held to the standard of performance of specialists in that particular service, field, or area.</p> <p>(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law unless the name of the certifying organization is clearly identified in the communication and:</p> <p>(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or accredited by the American Bar Association, or</p> <p>(2) the communication states that the certifying organization is</p>

"handle" or "welcome" cases, "but are not specialists in" a specific service, field, or area of law.

Comment

[1] This Rule is substantially similar to DR 2-105 which replaced a rule prohibiting lawyers, except for patent, trademark, and admiralty lawyers, from holding themselves out as recognized or certified specialists. The Rule removes prohibitions against holding oneself out as a specialist or expert in a particular field or area of law so long as such holding out does not include any false or misleading communication but provides a broad definition of what is included in the term "holding out." See also Comment 3A to Rule 7.2, discussing computer-accessed or other similar types of newsgroups, bulletin boards, and chat groups. The phrase "false or misleading communication," defined in Rule 7.1, replaces the phrase "deceptive statement or claim" in DR2-105 to conform to the terminology of Rules 7.1 and 7.3. The Rule merely expands to all claims of expertise the language of the former rule, which permitted nondeceptive statements about limiting practice to, or concentrating in, specified fields or areas of law. There is no longer any need to deal specifically with patent, trademark, or admiralty specialization. To the extent that such practices have fallen within federal jurisdiction, they will continue to do so.

[2] The Rule deals with the problem that the public might perceive that the Commonwealth is involved in certification of lawyers as specialists. It therefore requires lawyers holding themselves out as certified to identify the certifying organization with specifically prescribed language when it is a private organization and to name the certifying governmental organization when that is the case. Nothing in the Rule prevents lawyers from adding truthful language to the prescribed language.

[3] The Rule also specifies that lawyers who imply expertise in a particular field or area of law should be held to the standard of practice of a recognized expert in the field or area. It gives specific examples of commonly used forms of advertising that fall within that description. The Rule also recognizes that there may be good reasons for lawyers to wish to associate their names with a particular field or area of law without wishing to imply expertise or to accept the responsibility of a higher standard of conduct. Such a situation might describe, for example, a lawyer who wishes to develop expertise in a particular or field area without yet having it. The Rule identifies specific language that might be used to avoid any implication of expertise that would trigger the imposition of a higher standard of conduct.

Corresponding ABA Model Rule. Different from Model Rule 7.4.

Corresponding Former Massachusetts Rule. DR 2-105.

"a private organization, whose standards for certification are not regulated by a state authority or the American Bar Association."

Comment

[1] Paragraphs (a) and (b) of this Rule permit a lawyer to indicate areas of practice in communications about the lawyer's services. Lawyers are generally permitted to hold themselves out as specialists in a particular service, field or area of law but the definition of what is included in the term "holding out" is broad and the examples in paragraph (b) are not intended to be exclusive. Any such claims of specialization are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (c) identifies the circumstances under which lawyers may state that they are certified as specialists in a field or area of law. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

MBA Committee Position on Rule 7.4 Changes

The MBA Committee recommends the proposed changes to Rule 7.4.

Rule 7.5: Firm Names and Letterheads

The major changes, proposed by the SAC in Rule 7.5 are: (i) modification of its Comment [1] to allow a lawyer or law firm to self-designate as a distinctive website address, as an unacceptable trade name; and (ii) to forbid use of a firm name of the name of a non-lawyer.

MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT: RULES 7.1 TO 7.5	
PRESENT RULE AND COMMENTS	PROPOSED RULE AND COMMENTS
<p>RULE 7.5 FIRM NAMES AND LETTERHEADS</p> <p>(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.</p> <p>(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.</p> <p>(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.</p> <p>(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.</p> <p>Comment</p> <p>[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.</p> <p>[2] With regard to paragraph (d), lawyers who are not in fact</p>	<p>(PROPOSED) RULE 7.5 FIRM NAMES AND LETTERHEADS</p> <p>(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.</p> <p>(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.</p> <p>(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.</p> <p>(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.</p> <p>Comment</p> <p>[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Use of such names, including trade names, in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.</p> <p>[2] With regard to paragraph (d), lawyers who are not in fact</p>

partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association," for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law. Likewise, the use of the term "associates" by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.

[3] S.J.C. Rule 3:06 imposes further restrictions on trade names for firms that are professional corporations, limited liability companies or limited liability partnerships. Corresponding ABA Model Rule. Identical to Model Rule 7.5. Corresponding Former Massachusetts Rule. DR 2-102.

partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association," for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law or that they are practicing law together in a firm. Likewise, the use of the term "associates" by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.

[3] S.J.C. Rule 3:06 imposes further restrictions on trade names for firms that are professional corporations, limited liability companies or limited liability partnerships.

MBA Committee Position on Rule 7.5 Changes

The MBA Committee recommends as follows: (i) As to the use of an Internet identifier, we recommend and agree with the proposed comment. (ii) The Committee further recommends and has no problem with banning use of a non-lawyer's name in a law firm name. This can be reconsidered one future day if and when the idea of multi-service firms (e.g. combined lawyer-accounting, lawyers-investment brokers/advisors, lawyers-computer services, etc.) proves its worth (so far that has not been accomplished). If and when we reach that point of consideration the Rule 5.4 ban on sharing fees with non-lawyers would also need reconsideration.