

Report of the Standing Advisory Committee On the Adoption of Revised Rules of Professional Conduct Effective July 1, 2015

The Massachusetts Supreme Judicial Court has adopted revisions to the Rules of Professional Conduct (Mass. R. Prof. C.) contained in the Court's SJC Rule 3.07. The revisions were based on recommendations of the Court's Standing Advisory Committee on the Rules of Professional Conduct. The revisions reflect changes to the American Bar Association's Model Rules of Professional Conduct in the seventeen years since the Court adopted the Massachusetts Rules, as well as comments on the committee's proposals submitted by members of the bar and others and oral arguments on certain provisions of Rules 1.6, 1.10, 3.5, 5.1, and 5.3 held on December 18, 2014. The revisions will take effect on July 1, 2015.

The Court had previously revised Mass. R. Prof. C. 1.5, 1.13, 1.14, 6.5, and 8.5. It made no changes to Rules 6.5 and 8.5 and made no substantive changes to Rules 1.5, 1.13 and 1.14. Many of the changes to the remaining rules reflect changes in the ABA Model Rules and are meant to clarify existing law, to improve format or style (*e.g.*, the adoption of Model Rule titles), and to promote consistency with the rules of other jurisdictions that follow the Model Rules. This summary discusses only changes of substantive importance. We do not address provisions of the current Massachusetts rules and comments that were unchanged, except in some cases to note the preservation of certain existing rules that diverge from the ABA Model Rules.

Key changes include the following:

- *Definitions.* The definitions section has been moved from Mass. R. Prof. C. 9.1 to Rule 1.0 and renamed "Terminology" to conform to its placement and title in the ABA Model Rules. Three new definitions, for "confirmed in writing," "informed consent," and "writing" (or "written"), have been added; other definitions have been revised and/or renumbered and the comments to the definitions have been expanded.
 - *Informed consent.* The Court adopted the ABA Model Rules 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. Under the new definition, consent is "informed" if the lawyer has communicated adequate information and explanation about the risks of and alternatives to the proposed course of conduct.
 - *Confirmation of waivers in writing.* The Court adopted the requirement that conflicts waivers permitted by Rules 1.7, 1.9, 1.11, and 1.12 be promptly confirmed in writing. For a conflicts waiver to be "confirmed in writing," a person must give the lawyer written consent or the lawyer must send the person written confirmation of the person's oral consent.
- *Outsourcing client work.* The Court adopted Model Comments 6 and 7 to ABA Model Rule 1.1 and Model Comments 1–4 to Model Rule 5.3, which give detailed

guidance for safeguarding client interests when outsourcing work relating to client representation.

- *Staying abreast of technology.* A new Comment 8 to Rule 1.1 makes it clear that the duty of competence means that a lawyer should stay abreast of the benefits and risks of technology that lawyers use in their practice.
- *Communications with client.* The Court adopted ABA Model Rule 1.4, which provides more detailed guidance than the current rule about the obligation of lawyers to communicate with their clients.
- *Definition of confidential information.* The Court adopted revised Comments 3A and 3B to Rule 1.6 to provide a definition for, instead of just examples of, the Massachusetts version of what constitutes “confidential information.” The comments define that term as consisting of any information gained during representation of a client that is protected by the attorney-client privilege, likely to be embarrassing or detrimental to the client if disclosed, or that the lawyer has agreed to keep confidential. The comments also clarify that “confidential information” does not ordinarily include a lawyer’s legal knowledge or legal research, or information that is generally known in the legal community or in the trade, field, or profession to which the information relates.
- *Disclosures of confidential information to prevent or remedy harm.* Revised Rule 1.6 now permits a lawyer to disclose confidential information relating to a client representation:
 - to prevent “reasonably certain” death, substantial bodily harm or wrongful execution or incarceration of another, whether or not the harm results from criminal or fraudulent conduct (Rule 1.6(b)(1));
 - to prevent the commission of a crime or fraud by any person that the lawyer reasonably believes likely to result in “substantial injury to property, financial, or other significant interests of another,” thus permitting disclosures to protect non-economic interests such as the right to vote or privacy rights so long as both the interest and the likely injury are substantial (Rule 1.6(b)(2)); or
 - to prevent, mitigate or rectify such “substantial injuries” that are reasonably certain to result from the client’s commission of a crime or fraud in furtherance of which the client used the lawyer’s services (Rule 1.6(b)(3)).
- *Disclosures to secure legal advice or conduct conflict checks.* Revised Rule 1.6 makes explicit that a lawyer may disclose confidential information relating to a client representation to secure legal advice about the lawyer’s own compliance with the ethics rules (Rule 1.6(b)(4)), or to perform conflict checks occasioned by prospective changes in the lawyer’s employment (Rule 1.6(b)(7)). The latter

exception applies only to the extent reasonably necessary and only if the disclosure will neither compromise the attorney-client privilege nor otherwise prejudice the client whose information is disclosed.

- *Safeguarding confidential information.* A new subsection (c) has been added to Rule 1.6 requiring lawyers to make reasonable efforts to prevent inadvertent or unauthorized access to confidential information relating to a client representation.
- *Reaffirmation of limitations on use of client confidential information.* The Court retained the prohibitions in Rule 1.8(b) and Rule 1.9(c)(1) against using confidential information relating to client representation for the benefit of a third party or for the lawyer's own benefit. The corresponding ABA Model Rules have deleted these restrictions.
- *Soliciting gifts from clients.* Rule 1.8(c) was revised to prohibit the solicitation of a substantial gift from a client, including a testamentary gift, unless the lawyer or the other recipient of the gift is closely related to the client. This prior rule only prohibited the lawyer from preparing an instrument giving the lawyer or a closely related person a substantial gift unless the client is related to the donee.
- *Lateral lawyer screening.* The Court maintained with some clarification the approach of current Massachusetts Rule 1.10 with respect to screening of lawyers who change firms instead of adopting the greater latitude for screening that ABA Model Rule 1.10 would permit.
- *Revisions relating to handling client funds.*
 - *Deposit of advances for expenses as well as fees in trust accounts.* Rule 1.15(b) was revised to direct that advances for expenses must now be held in a trust account and withdrawn only as the expenses are incurred. The prior rule contained an exception, now repealed, permitting advances for costs or expenses to be deposited to business accounts. The revised rule also makes express the longstanding requirement that advances for legal fees must be deposited to a trust account and withdrawn only as earned. A new Comment 2A states that flat fees are not required to be deposited to trust accounts and clarifies what constitutes a flat fee.
 - *Bills when acting as fiduciaries.* A new Comment 6A to Rule 1.15(d)(2) clarifies that, consistent with the requirements of the rule, lawyers who represent themselves as fiduciaries (such as personal representatives, executors, administrators, guardians, or trustees) must create a bill or accounting to justify payment prior to or contemporaneous with any withdrawal of fees from funds held on their own behalf as fiduciaries.
 - *Notices to banks holding client funds.* Rule 1.15(e) was revised to add a requirement that attorneys provide a written notice to a bank or other depository when opening any account that is a trust account as defined in

Rule 1.15, regardless of whether the account is an IOLTA account or an individual trust account. Forms for opening an IOLTA account may be found on the IOLTA Committee website or obtained by contacting the IOLTA Committee directly. Forms for notice to a bank when opening an individual (*i.e.*, non-IOLTA) trust account will be available online from the website of the Board of Bar Overseers on or before the effective date of the amendments. The use of these forms does not prevent the use of other forms consistent with this rule.

- *Confidentiality obligations to prospective clients.* The Court adopted ABA Model Rule 1.18, which in substance codifies case law relating to the confidentiality obligations of lawyers to prospective clients. The new rule provides that lawyers are obliged not to use or disclose any confidential information received from a prospective client, but if the prospective client does not retain the lawyers, their firm is not disqualified from representing the prospective client's adversary so long as any lawyers who received the confidential information of the prospective client are screened, and both the prospective client and its adversary are notified in writing. Previously, Massachusetts had no counterpart to Model Rule 1.18.
- *Candor toward the tribunal.* The Court adopted most of ABA Model Rule 3.3, which clarifies and strengthens a lawyer's duty of candor in presenting evidence and legal argument to a court or other tribunal. Under revised Rule 3.3:
 - A lawyer is prohibited from knowingly making any false statement to a tribunal, not just material false statements (Rule 3.3(a)(1)).
 - A lawyer representing a client in an adjudicative proceeding must take steps to remedy any criminal or fraudulent conduct relating to the proceeding that is known to the lawyer, not just wrongdoing by the lawyer's client (Rule 3.3(b)).
 - A lawyer's obligation to remedy false testimony and false statements to the tribunal now expressly includes, if necessary, disclosure to the tribunal (Rules 3.3(a)(3) and 3.3(b)).
 - Comment 13 to the amended Rule clarifies that a lawyer's obligation to rectify false evidence and false statements to the tribunal extends until a final judgment in a proceeding has been affirmed or the time for appeal has expired.
 - The Court retained Rule 3.3(e), which deals with the duties of criminal defense attorneys and has no counterpart in the ABA Model Rules.
- *Post-trial communications with jurors.* Revised Rule 3.5 now generally follows ABA Model Rule 3.5 in permitting lawyers to contact jurors after their discharge without first securing leave of court (as currently required) so long as (i) the communication is not otherwise prohibited by law or court order, (ii)

the juror has not made known to the lawyer (directly or otherwise) a desire not to communicate with the lawyer, and (iii) the communication involves no misrepresentation, coercion, duress or harassment.

- *Inadvertent disclosure of confidential information.* The Court adopted ABA Model Rule 4.4(b), which deals with material inadvertently sent to an opponent. A lawyer's obligation in dealing with such material is a new topic in our rules. New Rule 4.4(b) requires a lawyer receiving documents (including electronic documents) inadvertently sent to promptly notify the sender, and Comment 3 to that rule recognizes a lawyer's professional discretion to return or delete such documents unread where the law does not require other action.
- *Supervisory responsibilities.* The Court considered but rejected proposals to impose discipline on law firms in addition to individual lawyers. Revised Rules 5.1 and 5.3 clarified that discipline for failure to supervise associates and non-lawyer employees may be imposed on non-partners with managerial responsibilities within their firms as well as on partners.
- *Advertising and solicitation rules.* The rules on information about legal services, Rules 7.1 to 7.5, and the comments to these rules, have been updated to reflect technological and other changes since these rules were last revised in 1999. Rules 7.2 and 7.3 were also amended to eliminate the requirement that advertisements, letters of solicitation and other written or electronic communications be retained for two years. In addition, the definition of what constitutes a claim of specialization under Rule 7.4 has also been revised to permit lawyers who are not specialists to indicate their areas of practice in communications concerning their services if they do not hold themselves out as specialists.
- *Conduct that adversely reflects on fitness to practice.* Rule 8.4(h), prohibiting lawyers from engaging in any conduct that adversely reflects on fitness to practice law, was retained. The ABA Model Rules no longer include this provision.

For detailed discussion of the changes recommended by the Standing Advisory Committee, see the Report of the Standing Advisory Committee to the Supreme Judicial Court dated July 1, 2013, and the Supplemental Report filed by the Committee on May 14, 2014 after reviewing comments on the proposed rules, both of which can be found on the Supreme Judicial Court website. While those reports provide guidance on the rationale for many of the changes, the Court did not adopt all of the Standing Advisory Committee's recommendations.